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THE
LAWYERS REPORTS
ANNOTATED

NEW SERIES
BOOK 40

BURDETT A. RICH, HENRY P. FARNHAM,
EDITORS

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f. Failure to refer bill to committee, 13.

president of the senate, respectively, in the presence of those bodies, immediately after the bill has been read publicly at length, and the same has been approved by the governor and deposited in the office of the secretary of state, it is not competent to show from the journals of the house that the act so authenticated, approved, and deposited did not pass in the form in which it was signed by the presiding officers and approved by the governor.

School tax — legislative imposition — validity.

2. That portion of § 2, art. 7, chap. 38,

III.—continued.

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2. Suspension of such requirement, 14.

3. Reading bill before signing by legislative officers, 16.

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j. Adoption of substitute for enrolled bill, 17.

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(b) To pass bill over governor's veto, 19.

(c) To give bill immediate effect, 19.

l. Failure to record vote as Constitution directs.

1. In general, 19.

2. As required by statute in North Carolina on bills raising revenue or pledging credit of state or municipality, 21.

Sess. Laws 1909, being part of an act entitled, "An Act for Raising and Collecting Revenues," approved March 10, 1909, which levies annually $\frac{1}{4}$ of 1 mill ad valorem tax for common school purposes, does not violate § 20, art. 10, of the Constitution.

(January 24, 1911.)

ERROR to the District Court for Logan County to review a judgment in favor of the state upon the submission of a controversy in which the railway company seeks to prevent the state from collecting a tax levied against its property for common school purposes under a provision of the revenue act. Affirmed.

The facts are stated in the opinion.

Messrs. Cottingham & Bledsoe for plaintiff in error.

Messrs. Charles West, Attorney General, and C. J. Davenport, for defendant in error:

The educational system in this state is a matter left to the legislature alone, it being required to establish and maintain the "system" of schools. The education of the children of the state is of state-wide interest and importance, and not a municipal affair.

Board of Education v. State, 26 Okla. 366, 109 Pac. 563; Gray, Limitations of Taxing Power and Public Indebtedness, § 630, p. 312; State ex rel. Clark v. Haworth, 122 Ind. 462, 7 L.R.A. 240, 23 N. E. 946; People ex rel. McCagg v. Chicago, 61 Ill.

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 - r. Bill passed at special session of legislature.
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18, 2 Am. Rep. 278; Revell v. Annapolis, 81 Md. 8, 31 Atl. 695; Schultes v. Eberly, 82 Ala. 242, 2 So. 345; Southern R. Co. v. St. Clair County, 124 Ala. 491, 27 So. 23.

When a bill has been signed by the presiding officers of each house, and approved by the governor and filed with the secretary of state, it is conclusive, and the courts will not look further to determine its validity.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Harwood v. Wentworth, 162 U. S. 558, 40 L. ed. 1072, 16 Sup. Ct. Rep. 890, 4 Ariz. 378, 42 Pac. 1025; People v. Dunn, 80 Cal. 211, 13 Am. St. Rep. 118, 22 Pac. 140; Weill v. Kenfield, 54 Cal. 111; Yolo County

v. Colgan, 132 Cal. 265, 84 Am. St. Rep. 41, 64 Pac. 403; People v. Harlan, 133 Cal. 16, 65 Pac. 9; Sacramento Paving Co. v. Anderson, 1 Cal. App. 672, 82 Pac. 1069; Sacramento Paving Co. v. Martyr, — Cal. App. —, 82 Pac. 1071; Edger v. Randolph County, 70 Ind. 331; Taylor v. Beckham, 108 Ky. 278, 49 L.R.A. 258, 94 Am. St. Rep. 357, 56 S. W. 177; Com. v. Hardin County Ct. 99 Ky. 188, 35 S. W. 275; Waller v. Murray, 21 Ky. L. Rep. 783, 53 S. W. 25; Swann v. Buck, 40 Miss. 268; Greer v. State, 54 Miss. 378; Hunt v. Wright, 70 Miss. 298, 11 So. 608; State ex rel. Chase v. Rogers, 10 Nev. 250, 21 Am. Rep. 738; State ex rel. Cardwell v. Glenn, 18 Nev. 34, 1 Pac. 186; State ex rel. Sutherland v. Nye,

This note is supplemental to that appended to the case of State ex rel. Reed v. Jones, 23 L.R.A. 340, where the earlier cases are collated.

I. Introduction.

The question covered by this note is how far a law, hereinafter designated as "an enrolled bill," which has been duly certified by the officers of the legislature, approved by the governor and deposited with the secretary of state, is conclusive as to the regularity of its passage in accordance with all constitutional requirements.

Cases passing upon the regular enactment of joint resolutions, or proposed amendments to the Constitution, which are not ordinarily enrolled in the same manner as other laws, are expressly excluded from this note.

Courts have taken various views of the conclusiveness of an enrolled bill. On fact discussed in determining the question is the purpose of a legislative journal. By some it is viewed as a record kept merely for the convenience of the legislature, and is considered with the adjournment thereof, leaving the enrolled bill as the final word of the legislature, and, this being a co-ordinate branch of government with the judiciary, any investigation other than of the enrolled bill is precluded; and other courts,—and this is more especially true in those jurisdictions in which the legislature is by Constitution required to keep a journal,—have regarded the journal as a public record which is the final authority as to the proceedings of the legislature, and held that it is to be looked to, to determine whether or not the legislature has complied with constitutional requirements in the enactment of the law.

Again, the enrolled bill is by some courts treated in the nature of a judgment, and, the legislature being a co-ordinate branch of government, the judiciary cannot question the validity of such judgment. Other courts treat the failure to comply with the constitutional requirements in the nature of jurisdictional defects, which render the enrolled bill void.
40 L.R.A. (N.S.)

It is apparent that when a court does look to the journal for any purpose, it does not treat the enrolled bill as conclusive, at least, not for all purposes. This has often led to a division of the cases into two groups, one in which the enrolled bill is treated as conclusive, and the other in which it is not. Investigation reveals, however, that such a classification does not fairly represent the cases, for it will be seen that even the courts that look to the journal do in some instances give a certain degree of conclusiveness to the enrolled bill; and on the other hand, some of the courts that have used expressions to the effect that the journal is conclusive have been speaking with reference to a particular set of facts. For instance, the case of Marshall Field & Co. v. Clark, *infra*, uses such expressions, and is frequently cited as a case holding an enrolled bill conclusive. Yet the court in Marshall Field & Co. v. Clark expressly reserved deciding as to the conclusiveness of an enrolled bill where the point of attack is as to a matter required to be shown on the journal. Manifestly, therefore, where the point of attack on an enrolled bill is as to a matter required to be shown on the journal, the case of Marshall Field & Co. v. Clark is not direct authority against the contention that the enrolled bill is not conclusive, although it is to be conceded that it is not an affirmative in support of that contention.

As will be seen by reference to subdivision IV., the journals are in some jurisdictions held to be the only competent evidence to impeach the enrolled bill; while in others, other evidence has been admitted. A reference in subdivision II. hereof to an "affirmative showing" includes an affirmative showing on the journal or whatever other records are held competent in the particular jurisdiction, and a reference to the "silence of the journal" not only includes the silence of the journal, but also the silence of whatever other sources of evidence are held competent to impeach the enrolled bill in the particular jurisdiction.

The Federal courts, in passing upon the validity of a statute of a state, will apply the rule of absolute conclusiveness, unless

23 Nev. 99, 42 Pac. 866; *State ex rel. Osburn v. Beck*, 25 Nev. 68, 56 Pac. 1008; *Opinion of Justices*, 35 N. H. 579; *Re Soldiers' Voting Bill*, 45 N. H. 607; *Opinion of Justices*, 52 N. H. 622; *Passaic County v. Stevenson*, 46 N. J. L. 184; *Bloomfield v. Middlesex County*, 74 N. J. L. 261, 65 Atl. 890; *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733; *Lyons v. Woods*, 153 U. S. 649, 38 L. ed. 854, 14 Sup. Ct. Rep. 959; *Carr v. Coke*, 116 N. C. 236, 28 L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16; *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737; *Kilgore v. Magee*, 85 Pa. 412; *Perkins v. Philadelphia*, 156 Pa. 554, 27 Atl. 356; *Southwark Bank v. Com.* 26 Pa. 446; *Blessing v. Galveston*, 42 Tex.

641; *Houston & T. C. R. Co. v. Odum*, 53 Tex. 343; *McLane v. Paschal*, 8 Tex. Civ. App. 398, 28 S. W. 711; *Presidio County v. City Nat. Bank*, 20 Tex. Civ. App. 514, 44 S. W. 1069; *El Paso & S. W. R. Co. v. Foth*, 45 Tex. Civ. App. 275, 100 S. W. 171; *Usener v. State*, 8 Tex. App. 177; *Ex parte Tipton*, 28 Tex. App. 438, 8 L.R.A. 328, 13 S. W. 610.

Hayes, J., delivered the opinion of the court:

For convenience, plaintiff in error will be referred to as the railway company and defendant in error as the state.

This cause arose in the district court of Logan county upon a submitted controversy in lieu of an action. The railway company

the contrary rule has been established by the courts of such state. *Ames v. Union P. R. Co.* 64 Fed. 165, affirmed on other points in 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Portland Gold Min. Co. v. Duke*, 90 C. C. A. 166, 164 Fed. 180; *Chicago, B. & Q. R. Co. v. Smyth*, 103 Fed. 376.

In subdivision II., of the note, the general rules which have been applied by the courts in passing upon the conclusiveness of the enrolled bill have been formulated, so that the reader may obtain a general survey of the conflicting rules which have been adopted by the various courts. In subdivision III. the particular points of attack are taken up in detail, and the state of the authorities shown. It is important, however, in considering the cases dealing with a particular ground of attack, to allow for the general doctrines that may obtain in the respective jurisdictions.

II. Conflicting rules.

a. Doctrine of absolute conclusiveness.

In certain jurisdictions the enrolled bill is held conclusive as to all matters, so as to preclude any investigation as to the method of its enactment. *Yolo County v. Colgan*, 132 Cal. 265, 84 Am. St. Rep. 41, 64 Pac. 403; *People v. Harlan*, 133 Cal. 16, 65 Pac. 9; *Parkinson v. Johnson*, 160 Cal. 756, 117 Pac. 1057; *Sacramento Paving Co. v. Anderson*, 1 Cal. App. 672, 82 Pac. 1069; *Sacramento Paving Co. v. Martyr*, — Cal. —, 82 Pac. 1071; *Hovey v. State*, 119 Ind. 395, 21 N. E. 21; *State ex rel. Benton County v. Boice*, 140 Ind. 506, 39 N. E. 64, rehearing denied in 140 Ind. 512, 40 N. E. 113; *Western U. Teleg. Co. v. Taggart*, 141 Ind. 281, 60 L.R.A. 671, 40 N. E. 1051; *State ex rel. Colbert v. Wheeler*, 172 Ind. 578, 89 N. E. 1, 19 Ann. Cas. 834; *Lewis v. State*, 148 Ind. 346, 47 N. E. 675; *Lafferty v. Huffman*, 99 Ky. 80, 32 L.R.A. 203, 35 S. W. 123; *Com. v. Shelton*, 99 Ky. 120, 35 S. W. 128; *Com. v. Harden County Ct.* 99 Ky. 188, 35 S. W. 275; *Owensboro & N. R. Co. v. Barclay*, 102 40 L.R.A.(N.S.)

Ky. 16, 43 S. W. 177; *Stone v. Dispatch Pub. Co.* 21 Ky. L. Rep. 1473, 55 S. W. 725; *Duncan v. Combs*, 131 Ky. 330, 115 S. W. 222; *Waller v. Murray*, 21 Ky. L. Rep. 783, 53 S. W. 25; *Bloomfield v. Middlesex County*, 74 N. J. L. 261, 65 Atl. 890. See *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737, *infra*; *Narregang v. Brown County*, 14 S. D. 357, 85 N. W. 602; *State ex rel. Lavin v. Bacon*, 14 S. D. 394, 85 N. W. 605; *Usener v. State*, 8 Tex. App. 177; *McLane v. Paschal*, 8 Tex. Civ. App. 398, 28 S. W. 711.

The court in *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737, follows the decision of the South Dakota court in *Narregang v. Brown County*, 14 S. D. 357, 85 N. W. 602, and apparently treats the bill as conclusive, although the journals of the two houses are looked to and found to be conflicting; and in *Woolfolk v. Albrecht*, — N. D. —, 133 N. W. 310, the court expressly reserves passing upon the conclusiveness of the enrolled bill, and states that the presumption that the enrolled bill was constitutionally passed is very strong, and, "applying this rule to the case at bar, necessitates a holding that such presumption, even if rebuttable, is not overcome by the journal entries; and this is the effect of the decision of this court on this precise question, in *Power v. Kitching*, *supra*," thus apparently limiting the decision in *Power v. Kitching*.

Where the Constitution makes the signing of the enrolled bill by the secretary of the senate and the clerk of the assembly conclusive evidence of its passage by the legislature, the bill is conclusive. *State ex rel. Sutherland v. Nye*, 23 Nev. 99, 42 Pac. 866; *State ex rel. Osburn v. Beck*, 25 Nev. 68, 56 Pac. 1008.

No constitutional provisions are referred to in *Helm v. Day*, 134 N. Y. Supp. 770, but it is there held that the enrolled bill is conclusive, under a statute making the certificate of the presiding officer of each house conclusive evidence that the bill was properly passed.

As will be seen by a reference to the earlier note, the courts of California have

seeks to prevent the state from collecting a tax levied against its property for common school purposes under a provision of an act of the legislature approved March 10, 1909, Sess. Laws 1909, p. 600. Section 2, art. 7, of that act, provides in part as follows: "There is hereby levied annually an ad-valorem tax upon all property in this state which may be subject to taxation upon such basis, a tax sufficient, in addition to the income from all other sources, to pay the expenses of the state government for each fiscal year ending on the 30th day of June, . . . including $\frac{1}{2}$ of 1 mill, for common school purposes, to be levied, collected, and distributed as other school money. . . ." (Italics are ours.)

The judgment of the trial court was in

not been consistent in their holdings on this question, but the later cases have clearly adhered to the doctrine of the absolute conclusiveness of the enrolled bill.

In *Hale v. McGettigan*, 114 Cal. 112, 45 Pac. 1049, the court refrained from holding the bill absolutely conclusive, because the facts presented did not require such a decision, and held that where the journals are silent as to compliance with a constitutional requirement, it will be presumed that the requirement was complied with, and the bill held conclusive.

The Texas cases are also confused on this question. In the Texas cases cited above, it clearly appears that the court regarded the enrolled bill as conclusive for all purposes. In the Texas cases cited below, the court was passing on facts that were not required by the Constitution to be shown on the journal, and in view of the very clear statement of the court in the recent Texas case of *Parshall v. State*, infra, it is doubtful if they can be regarded as authority for more than the proposition that the bill is conclusive as to compliance with constitutional requirements that are not required to be shown on the journal.

In New Jersey, a jurisdiction that is committed to the doctrine of the absolute conclusiveness of the bill, the rule has been suspended in a matter concerning notice of the passage of special acts. Thus, in *State, Ewing Twp., Prosecutor, v. Trenton*, 57 N. J. L. 318, 31 Atl. 223, and *Atty. Gen. v. Tuckerton*, 67 N. J. L. 120, 50 Atl. 602, it was held that the court might inquire as to whether a notice of intention to apply for the passage of a private, local, or special act had been given. These cases follow the earlier case of *Passaic County v. Stevenson*, 46 N. J. L. 173, cited in the earlier note.

In *De Loach v. Newton*, 134 Ga. 739, 68 S. E. 708, 20 Ann. Cas. 342, where the journal failed to show that a senate amendment had been concurred in by a constitutional majority in the house, the bill was held conclusive, notwithstanding a constitutional provision that "no bill shall become a law unless it shall receive a ma-

majority of the votes of all the members elected to each house of the general assembly, and it shall in every instance so appear on the journal." The court in this case takes the view that the constitutional provision is not that the bill shall not become a law unless the journal shall show that it has received the requisite majority, but that it becomes a law in any event, and that the provision that this matter shall appear on the journal is independent and directory. The same holding appears in *Whitley v. State*, 134 Ga. 758, 68 S. E. 716.

In *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 32 L.R.A. (N.S.) 20, 60 S. E. 725, it affirmatively appeared from the journal that the constitutional requirement had not been complied with, but the enrolled bill was held conclusive.

For specific application of the general doctrine of absolute conclusiveness to particular grounds of attack, see various subdivisions of III.

—as to matters not required by the Constitution to be shown on the journal.

Some courts, in passing on this question, have limited the decision as to the conclusiveness of the enrolled bill to matters not required to be shown on the journal, or at least have declined to extend it beyond that point; but within this limit have held the enrolled bill conclusive. *Miller v. Oelwein*, — Iowa, —, 136 N. W. 1045; *State ex rel. Gregg v. Erickson*, 39 Mont. 280, 102 Pac. 336; *ATCHISON, T. & S. F. R. Co. v. STATE*; *Coyle v. Smith*, 28 Okla. 121, 113 Pac. 944; *McNeal v. Ritterbusch*, 29 Okla. 223, 116 Pac. 778; *Perkins v. Philadelphia*, 156 Pa. 554, 27 Atl. 356; *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865; *Parshall v. State*, — Tex. Crim. Rep. —, 138 S. W. 759; *Knox v. State*, — Tex. Crim. Rep. —, 138 S. W. 787; *Houston & T. C. R. Co. v. Stuart*, — Tex. Civ. App. —, 48 S. W. 799; *El Paso & S. W. R. Co. v. Foth*, 45 Tex. Civ. App. 275, 100 S. W. 171; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *Gibson v. Anderson*, 65 C. C. A.

thorizing the levy for common school purposes; that that provision never received the sanction of the members of the legislature; and that such facts are disclosed by the journals of the house and senate. Whether a court can look to the journals of either branch of the legislature, or of both, to impeach the enrolled bill, in determining whether or not it was passed in conformity with constitutional provisions, and in determining whether all the provisions contained in the enrolled bill signed by the presiding officers of the two branches of the legislature and approved by the governor were contained in the bill as adopted by the legislature, is a question upon which the decided cases from the various states of the Union are in hopeless conflict, and there

are many cases supporting respectively the affirmative and negative of the proposition. Among those cases holding that the journal may be looked to for the purpose of impeaching the enrolled bill are the following: *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Burr v. Ross*, 19 Ark. 250; *Vinsant v. Knox*, 27 Ark. 266; *Webster v. Little Rock*, 44 Ark. 536; *State ex rel. Markens v. Brown*, 20 Fla. 407; *State ex rel. Boyd v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204, 4 So. 899; *Butler v. State*, 89 Ga. 821, 15 S. E. 763; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *People ex rel. Barnes v. Starne*, 35 Ill. 121, 85 Am. Dec. 348; *Cohn v. Kingsley*, 6 Idaho, 416, 38 L.R.A. 74, 49 Pac. 985; *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738,

277, 131 Fed. 39; *United States v. Billings*, 190 Fed. 359.

And this rule of conclusiveness has been adhered to notwithstanding it affirmatively appears on the journal that some constitutional requirements as to which the legislative journals were not required to make a showing, were not complied with in the enactment thereof. *Carr v. Coke*, 116 N. C. 223, 28 L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16; *Cox v. Pitt County*, 146 N. C. 584, 16 L.R.A.(N.S.) 253, 60 S. E. 516. See *New Hanover County v. De Rosset and Black v. Duncombe County*, II. b, *infra*. See *ATCHISON, T. & S. F. R. Co. v. STATE*; *Williams v. Taylor*, 83 Tex. 667, 19 S. W. 156; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Harwood v. Wentworth*, 162 U. S. 547, 40 L. ed. 1069, 16 Sup. Ct. Rep. 890.

In *Chavez v. Luna*, 5 N. M. 183, 21 Pac. 344, the facts of which are similar to those in *Lyons v. Woods*, 5 N. M. 327, 21 Pac. 346, and on the authority of which the latter case was decided, the court, while approving of the doctrine that an enrolled bill is not conclusive, but that courts have power to inquire into the facts attending the passage of the bill, where the Constitution of the state prescribes the mode to be observed by the legislature in passing bills, holds that the court cannot go behind an enrolled bill of the territorial legislature, and hold it void on the ground that certain members of the quorum of the legislative assembly were seated without having a certificate of election, since the determination of the election, qualifications, and returns of its members is a judicial function of the legislature; and whether it was intended to give the territorial legislature full power in this regard, it was not necessary to decide, since the organic act required legislative bills to be submitted to Congress and approved; and since there was nothing in this case to show that Congress had disapproved of the act, it was assumed that it had been approved. The decision in the latter case was affirmed by the United States Supreme Court in 153 U. S. 649, 38 L. ed. 854, 14 Sup. Ct. Rep. 959. 40 L.R.A.(N.S.)

But in *Missouri, K. & T. R. Co. v. McGlamory*, 92 Tex. 150, 41 S. W. 466, the court, without discussion, went back of an enrolled bill which declared that it was an emergency measure and that it should take effect from and after its passage, and decided that it had not received such a majority as is requisite to the passage of such bill.

In *Day Land & Cattle Co. v. State*; 68 Tex. 526, 4 S. W. 865, the court had under consideration the validity of an emergency measure, but the question there being considered was as to the sufficiency of the facts on which the emergency measure was passed.

The decision in the McGlamory Case is in conflict with the decision in *Parshall v. State*, — Tex. Crim. Rep. —, 138 S. W. 759, and in view of the very clear statement of the law contained in *Parshall v. State*, it is doubtful whether the conclusiveness of the enrolled bill was directly considered in the McGlamory Case.

For specific applications to various grounds of attack, see *infra*, III.

b. Doctrine of prima facie conclusiveness.

1. Where the journals are silent as to compliance with constitutional requirements.

As to specific applications of the doctrine to particular grounds of attack, see *infra*, III.

The discussion under this subdivision is limited to matters not required by the Constitution to be shown on the journals. As to matters required to be shown, see subdivision c, below.

Other courts make the enrolled bill only prima facie conclusive of compliance with statutory requirements, and hold as to matters not required by the Constitution to be entered on the journal, that, in the absence of an affirmative showing to the contrary, the bill is conclusive that all such constitutional requirements have been complied with. *Walker v. Griffith*, 60 Ala.

15 N. W. 609; State ex rel. Godard v. Andrews, 64 Kan. 474, 67 Pac. 870; State ex rel. Bradford v. Robertson, 41 Kan. 200, 21 Pac. 382; State ex rel. Atty. Gen. v. Francis, 26 Kan. 724; Haynes v. Heller, 12 Kan. 382; Mynning v. Detroit, L. & N. R. Co. 59 Mich. 257. 26 N. W. 514; People ex rel. Hart v. McElroy, 72 Mich. 446, 2 L.R.A. 609, 40 N. W. 750; Ramsey County v. Heenan, 2 Minn. 330, Gil. 281; State ex rel. Minnesota R. Constr. Co. v. Hastings, 24 Minn. 78; Miesen v. Canfield, 64 Minn. 513, 67 N. W. 632; Hull v. Miller, 4 Neb. 503; State ex rel. Huff v. McClelland, 18 Neb. 236, 53 Am. Rep. 814, 25 N. W. 77; State ex rel. Casper v. Moore, 37 Neb. 13, 55 N. W. 299; State ex rel. Wahoo Waterworks Co. v. Wahoo, 62 Neb. 40, 86 N. W.

923; Opinion of Justices, 35 N. H. 579; Opinion of Justices, 52 N. H. 622; State ex rel. Loomis v. Moffitt, 5 Ohio, 359; Fordyce v. Godman, 20 Ohio St. 1; Mumford v. Sewall, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585; State v. Rogers, 22 Or. 349, 30 Pac. 74; State v. McConnell, 3 Lea, 332; Gaines v. Horrigan, 4 Lea, 608; Brewer v. Huntingdon, 86 Tenn. 732, 9 S. W. 166; Ritchie v. Richards, 14 Utah, 345, 47 Pac. 670; Wise v. Bigger, 79 Va. 269; Meracle v. Down, 64 Wis. 323, 25 N. W. 412; Brown v. Nash, 1 Wyo. 85; Osburn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640.

At common law the rule prevailed that the enrolled bill is conclusive and may not be impeached by resort to the legislative journal. *Rex v. Arundel*, Hobart, 109;

361; Clarke v. Jack, 60 Ala. 272; McKemie v. Gorman, 68 Ala. 442; Hall v. Steele, 82 Ala. 562, 2 So. 650; State ex rel. Atty. Gen. v. Buckley, 54 Ala. 599; Ex parte Howard-Harrison Iron Co. 119 Ala. 484, 72 Am. St. Rep. 928, 24 So. 516; Harrison v. Gordy, 57 Ala. 49; Jennings v. Russell, 92 Ala. 603, 9 So. 421; Keene v. Jefferson County, 135 Ala. 465, 33 So. 435; Jackson v. State, 131 Ala. 21, 31 So. 380; Vinsant v. Knox, 27 Ark. 268; English v. Oliver, 28 Ark. 317; Glidewell v. Martin, 51 Ark. 559, 11 S. W. 882; Waterman v. Hawkins, 75 Ark. 120, 86 S. W. 844 (*dictum*); Pelt v. Payne, 90 Ark. 600, 134 Am. St. Rep. 45, 30 S. W. 426; Worthen v. Badgett, 32 Ark. 496; Chicot County v. Davies, 40 Ark. 200; Price v. Dowdy, 34 Ark. 285; Webster v. Little Rock, 44 Ark. 536; Massachusetts Mut. L. Ins. Co. v. Colorado Loan & T. Co. 20 Colo. 1, 36 Pac. 793; Andrews v. People, 33 Colo. 193, 108 Am. St. Rep. 76, 79 Pac. 1031; State ex rel. Turner v. Hocker, 36 Fla. 358, 18 So. 767; West v. State, 50 Fla. 154, 39 So. 412; Potter v. Lainhart, 44 Fla. 647, 33 So. 251; State ex rel. Cheyney v. Sammons, — Fla. —, 57 So. 196; Speer v. Athens, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802; Peed v. McCrary, 94 Ga. 437, 21 S. E. 232; Fullington v. Williams, 98 Ga. 807, 27 S. E. 183; Cutcher v. Crawford, 105 Ga. 180, 31 S. E. 139; Lee v. Tucker, 130 Ga. 43, 60 S. E. 164; Burge v. Mangum, 134 Ga. 307, 67 S. E. 857; Clark v. Eve, 134 Ga. 788, 68 S. E. 598; White v. Atlanta, 134 Ga. 532, 68 S. E. 103; Butler v. State, 89 Ga. 821, 15 S. E. 763; Weyand v. Stover, 35 Kan. 545, 11 Pac. 355; Re Taylor, 60 Kan. 87, 55 Pac. 340; Chesney v. McClintock, 61 Kan. 94, 58 Pac. 993; Weis v. Stubblefield, 85 Kan. 199, 116 Pac. 205; Belleville v. Wells, 74 Kan. 823, 88 Pac. 47; State ex rel. Godard v. Andrews, 64 Kan. 474, 67 Pac. 870; State ex rel. Bradford v. Robertson, 41 Kan. 200, 21 Pac. 382; Hollingsworth v. Thompson, 45 La. Ann. 222, 40 Am. St. Rep. 220, 12 So. 1; Atty. Gen. v. Rice, 64 Mich. 385, 31 N. W. 203; People ex rel. Hart v. McElroy, 72 Mich. 446, 2 L.R.A. 609, 40 N. W. 750; Re Ellis, 55 Minn. 401, 23 L.R.A. 287, 43 Am. St. Rep. 40 L.R.A. (N.S.)

514, 56 N. W. 1056; Miesen v. Canfield, 64 Minn. 513, 67 N. W. 632; State ex rel. Minnesota R. Constr. Co. v. Hastings, 24 Minn. 78; State ex rel. Atty. Gen. v. Mead, 71 Mo. 266; State ex rel. Aull v. Field, 119 Mo. 593, 24 S. W. 752; State v. Wray, 109 Mo. 594, 19 S. W. 86; State ex rel. Wahoo Waterworks Co. v. Wahoo, 62 Neb. 40, 86 N. W. 923; Colburn v. McDonald, 72 Neb. 431, 100 N. W. 961; Stetter v. State, 77 Neb. 777, 110 N. W. 761; Stratton v. State, 79 Neb. 118, 112 N. W. 361; State ex rel. Oldham v. Dean, 84 Neb. 344, 121 N. W. 719; State v. Abbott, 59 Neb. 106, 80 N. W. 499; State ex rel. Douglas County v. Frank, 60 Neb. 327, 83 N. W. 74; Hull v. Miller, 4 Neb. 503; State ex rel. Herron v. Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; Mumford v. Sewall, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585; State v. Rogers, 22 Or. 348, 30 Pac. 74; McKinnon v. Cotner, 30 Or. 588, 49 Pac. 956; Jackson v. Weis & L. Mfg. Co. 124 Tenn. 421, 137 S. W. 757; State v. McConnell, 3 Lea, 332; Williams v. State, 6 Lea, 549; State ex rel. Whitson v. Algood, 87 Tenn. 163, 10 S. W. 310; Richardson v. Young, 122 Tenn. 471, 125 S. W. 664; Nelson v. Haywood County, 91 Tenn. 596, 20 S. W. 1; Price v. Moundsville, 43 W. Va. 523, 64 Am. St. Rep. 878, 27 S. E. 218; School Dist. No. 11 v. Chapman, 82 C. C. 35, 152 Fed. 887, writ of certiorari denied in 205 U. S. 545, 51 L. ed. 923, 27 Sup. Ct. Rep. 792.

No distinction is made in the conclusiveness of the enrolled bill by the courts of Kansas, between matters not required to be entered on the journal and those so required to be entered. See Kansas cases below.

In *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743, 8 Am. Rep. 602, it was held that the enrolled bill is conclusive, if the law had been regularly promulgated; and in *Whited v. Lewis*, 25 La. Ann. 568, it was held that the court might inquire as to the due and regular promulgation of the law.

In *Stockton v. Powell*, 29 Fla. 1, 15 L.R.A. 42, 10 So. 688, *Rushton v. State*, 58 Fla. 94, 50 So. 486, the enrolled bill was

Edinburgh & D. R. Co. v. Wauchope, 8 Clark & F. 710, 3 Eng. Ry. & C. Cas. 233; Lonon & C. Loan & Agency Co. v. Rural Municipality, 7 Manitoba L. Rep. 128. And the same rule is adopted in the following state cases: Graves v. Alsap, 1 Ariz. 274, 25 Pac. 836; Sherman v. Story, 30 Cal. 253, 89 Am. Dec. 93; People v. Burt, 43 Cal. 560; Eld v. Gorham, 20 Conn. 8; State v. Savings Bank, 79 Conn. 141, 64 Atl. 5; Territory ex rel. McMahon v. O'Connor, 5 Dak. 397, 3 L.R.A. 355, 41 N. W. 746; State ex rel. McVey v. Burris, 4 Penn. (Del.) 3, 49 Atl. 930; Evans v. Browne, 30 Ind. 514, 95 Am. Dec. 710; State ex rel. Benton County v. Boice, 140 Ind. 506, 39 N. E. 64, 40 N. E. 113; Lewis v. State, 148 Ind. 346, 47 N. E. 675; Lafferty v. Huffman, 99 Ky. 80, 32 L.R.A.

203, 35 S. W. 123; Owensboro & N. R. Co. v. Barclay, 102 Ky. 16, 43 S. W. 177; Norman v. Kentucky Bd. of Managers, 93 Ky. 537, 18 L.R.A. 556, 20 S. W. 901; Louisiana State Lottery Co. v. Richoux, 23 La. Ann. 743, 8 Am. Rep. 602; Weeks v. Smith, 81 Me. 538, 18 Atl. 325; Green v. Weller, 32 Miss. 650; Ex parte Wren, 63 Miss. 512, 56 Am. Rep. 825; Pacific R. Co. v. The Governor, 23 Mo. 363, 66 Am. Dec. 673; State ex rel. George v. Swift, 10 Nev. 186, 21 Am. Rep. 721; State ex rel. Coffin v. Howell, 26 Nev. 93, 64 Pac. 466; State ex rel. Pangborn v. Young, 32 N. J. L. 29; State, Ewing Twp., Prosecutor, v. Trenton, 57 N. J. L. 318, 31 Atl. 223; People v. Devlin, 33 N. Y. 269, 88 Am. Dec. 377; People ex rel. Purdy v. Highway Comrs.

held conclusive as to notice being given and proof of the same made, as required in passing local laws.

In State v. Murray, 47 La. Ann. 1424, 17 So. 832, the enrolled bill was held conclusive as to the sufficiency of a notice required for the passage of a local law.

But in Webster v. Hastings, 56 Neb. 669, 77 N. W. 127, a Code provision was referred to, that the proceedings of the legislature shall be proved by the journal; and under this provision it was held that the enrolled bill was not conclusive.

It does not appear how the showing was made, in State ex rel. Medical College v. Sowell, 143 Ala. 494, 39 So. 246, that the act had not been passed as required by the Constitution, but the court inquired into the method of passage, thereby treating the enrolled bill as not conclusive.

In Stein v. Leeper, 78 Ala. 517; Mathis v. State, 31 Fla. 291, 12 So. 681; and State ex rel. Eastland v. Gould, 31 Minn. 189, 17 N. W. 276, the court went behind the enrolled bill to the journals, but decided that the act had been validly passed; and in King Lumber Co. v. Crow, 155 Ala. 504, 130 Am. St. Rep. 65, 46 So. 646, the court looked to the journals, but no question seems to have been raised as to the power to do so.

For specific application of the doctrine here considered, to particular grounds of attack, see *infra*, III.

Exception.

In certain of the states a constitutional provision that before the bill shall become a law certain requirements shall be complied with has been construed to be mandatory, and in the absence of an affirmative showing that such requirements have been complied with, the enrolled bill is not even *prima facie* conclusive, and may be impeached. These cases, by construction, require that compliance with such mandatory requirements of the Constitution shall appear on the journal. Spangler v. Jacoby, 14 Ill. 297, 58 Am. Dec. 571; Prescott v. 40 L.R.A. (N.S.)

Illinois & M. Canal, 19 Ill. 324; Ryan v. Lynch, 68 Ill. 160; People ex rel. Oliver v. Knopf, 198 Ill. 340, 64 N. E. 842, 1127; Union Bank v. Oxford, 119 N. C. 214, 34 L.R.A. 487, 25 S. E. 966; Charlotte v. Shepard, 122 N. C. 602, 29 S. E. 842; Buncombe County v. Payne, 123 N. C. 432, 31 S. E. 711; Wilkes County v. Call, 123 N. C. 308, 44 L.R.A. 252, 31 S. E. 481; Smathers v. Madison County, 125 N. C. 480, 34 S. E. 554; Post v. Kendal County, 105 U. S. 667, 26 L. ed. 1204.

These cases are not altogether clear on this point. In the Illinois cases, matters that are not required to be entered on the journal are so mingled with matters that are required to be entered that it is not clear in all cases that the court would have held the bill inconclusive where the journals were silent. However, in People ex rel. Oliver v. Knopf, 198 Ill. 340, 64 N. E. 843, the argument that the bill is conclusive as to compliance with matters not required to be entered on the journal, in the absence of an affirmative showing that such requirements were not met, was disapproved, and the court states that the presumption is as to such matters, in the absence of an affirmative showing on the journal, that the requirements were not met.

The North Carolina cases are also unsatisfactory on this point. It appears from these cases that there was either an affirmative showing or an admission that some constitutional requirements had not been met, and thus the decision might have been arrived at under the general rule as laid down in subdivision 2, *infra*. The court, however, regards the constitutional requirement as mandatory, and in Union Bank v. Oxford, 119 N. C. 214, 34 L.R.A. 487, 25 S. E. 966, speaks of one such requirement, that is not expressly required by the Constitution to be shown on the journal, as a matter that must appear on the journal.

The North Carolina cases that adhere to this doctrine are those in which the bill is one concerning the raising of revenue, in which case a special constitutional requirement applies. As to the general doctrine in North Carolina, see Carr v. Coke, 116 N. C.

54 N. Y. 276, 13 Am. Rep. 581; Brodnax v. Groom, 64 N. C. 244; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737; Speer v. Allegheny & M. Pl. Road Co. 22 Pa. 376; State ex rel. Hoover v. Chester, 39 S. C. 307, 17 S. E. 752; Narregang v. Brown County, 14 S. D. 357, 85 N. W. 602; State ex rel. Lavin v. Bacon, 14 S. D. 394, 85 N. W. 605; Central R. Co. v. Hearne, 32 Tex. 547; Williams v. Taylor, 83 Tex. 607, 19 S. W. 156; Re Welman, 20 Vt. 653, Fed. Cas. No. 17,407; State ex rel. Reed v. Jones, 6 Wash. 452, 23 L.R.A. 340, 34 Pac. 201.

We have not cited above all the cases that support either of the rules, but have attempted to give only a sufficient number to indicate the extent to which both rules are supported by respectable authority. It has

been asserted by some of the text writers, as well as by some courts in the decided cases, that the weight of authority, numerically speaking, supports the rule that, where the journal contains matters affirmatively impeaching the enrolled bill, it must prevail. Black, *Interpretation of Laws*, p. 225. A similar declaration is found in the first edition of Sutherland on *Statutory Construction*. However correct these statements may have been at the time they were written, it must now be doubted whether they speak correctly the conclusion of the authorities upon this question at this time; and in the last edition of Sutherland on *Statutory Construction*, at page 72, it is said: "It is no longer true that 'in a large majority of the states' the courts have held that the en-

223, 28 L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16.

In Idaho a requirement in the Constitution that each house shall keep a journal of its proceedings is construed to mean that the journal shall show all the proceedings of the house; hence when the journal does not affirmatively show that all constitutional requirements were complied with, the bill may be impeached. *Cohn v. Kingsley*, 5 Idaho, 416, 38 L.R.A. 74, 49 Pac. 985. On the rehearing of this case, Sullivan, Chief Justice, renders a vigorous dissenting opinion on the point that compliance with all constitutional requirements must affirmatively appear on the journal, and takes the position that, in the absence of an affirmative showing that the constitutional requirements were not complied with, the bill may not be impeached.

It will be noted by reference to subdivision c, *infra*, that in Illinois the same rule is applied as to matters required to be entered on the journal.

The early Illinois case of *Schuyler County v. People*, 25 Ill. 181, takes the position that, in the absence of an affirmative showing that the constitutional requirements were not complied with, the bill is unimpeachable.

In *State v. Wendler*, 94 Wis. 369, 68 N. W. 759, where there was apparently a mistake in the numbering of the bills, it was held that the silence of the legislative journal as to the passage of a particular bill would defeat it.

In *Wrought Iron Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352; *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167; *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023; *Brown v. Stewart*, 134 N. C. 357, 46 S. E. 741; *New Hanover County v. Armour Packing Co.* 135 N. C. 62, 47 S. E. 411; *Bray v. Williams*, 137 N. C. 387, 49 S. E. 887, and *Raleigh Sav. Bank v. Lacy*, 151 N. C. 3, 65 S. E. 441, the court looked to the journals, but decided that there had been a sufficient compliance with constitutional requirements in the enactment of the bill in question.

No question was raised in *Rodman v. 40 L.R.A. (N.S.)*

Washington, 122 N. C. 39, 30 S. E. 118, and *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 293, 41 S. E. 488, as to the conclusiveness of the bill; but the court looked to the journals and held a bill invalid for failure to comply with constitutional requirements.

On the contrary, in *New Hanover County v. De Rosset*, 129 N. C. 275, 40 S. E. 43, the enrolled bill was held conclusive as to the first reading, although the journals were silent; and in *Black v. Duncombe County*, 129 N. C. 121, 39 S. E. 818, the bill was held conclusive as to a reading on three several days. See *Cox v. Pitt County*, II. a, *supra*.

So, in *Lumberton Improv. Co. v. Robeson County*, 146 N. C. 353, 59 S. E. 1014, where the discrepancy was a mere clerical error, the bill was held conclusive.

The legislature may correct its journal to speak the truth. *Richmond County v. Farmers' Bank*, 152 N. C. 387, 67 S. E. 964, 21 Ann. Cas. 812.

2. Where it affirmatively appears that a constitutional requirement was not complied with.

As to specific applications to particular grounds of attack, see *infra*, III.

Where there is an affirmative showing that some constitutional requirement has not been complied with in the enactment of the law, this *prima facie* conclusiveness is rebutted, and the bill may be impeached. *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Perry County v. Selma M. & M. R. Co.* 58 Ala. 546; *Robertson v. State*, 130 Ala. 164, 30 So. 494; *Yancy v. Waddell*, 139 Ala. 524, 36 So. 733; *Board of Revenue v. Crow*, 141 Ala. 126, 37 So. 469; *West End v. Simmons*, 165 Ala. 359, 51 So. 638; *Burr v. Ross*, 19 Ark. 250; *Rogers v. State*, 72 Ark. 565, 82 S. W. 169; *State ex rel. Boyd v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204, 4 So. 899; *Wade v. Atlantic Lumber Co.* 51 Fla. 628, 41 So. 72; *Brown v. Collister*, 5 Idaho, 589, 51 Pac. 417; *State ex rel. Atty. Gen. v. Francis*, 26 Kan. 724; *State ex rel. Caillouet*

rolled act may be impeached by a resort to the journals. A comparison will show that the courts are now about equally divided on the question. The current of judicial decision in the last ten years has been strongly against the right of the courts to go back of the enrolled act. Undoubtedly, the decision of the Supreme Court of the United States in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, has had much to do in creating and augmenting this current, but it may also be due to the greater simplicity, certainty, and reasonableness of the doctrine which holds the enrolled act to be conclusive. Many courts and judges, while feeling compelled to follow former decisions holding that the enrolled act may be impeached by

the journals, have done so reluctantly, and have expressed doubts as to the validity of the doctrine, and in many cases, as will appear in the following sections, have qualified and restricted it in important particulars."

As stated in the foregoing excerpt, the courts of some of the states that have felt the rule too long established to be overturned have, nevertheless, been constrained to question its wisdom. After the rule had been established in *Burr v. Ross*, 19 Ark. 250, and followed in several subsequent cases, the justices, in delivering the opinion in *Webster v. Little Rock*, said: "The legislative department of the government is equal in dignity with the judicial,—co-ordinate and not subordinate. Its officers take the same oath to support the Constitution.

v. Laiche, 105 La. 84, 29 So. 700; *Berry v. Baltimore & D. P. R. Co.* 41 Md. 446, 20 Am. Rep. 69; *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165; *Rode v. Phelps*, 80 Mich. 598, 45 N. W. 493; *Atty. Gen. v. Detroit & S. Pl. Road Co.* 97 Mich. 589, 56 N. W. 943; *Fillmore v. Van Horn*, 129 Mich. 52, 88 N. W. 69; *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380; *State ex rel. Huff v. McLelland*, 18 Neb. 236, 53 Am. Rep. 814, 25 N. W. 77; *State ex rel. Poole v. Robinson*, 20 Neb. 96, 29 N. W. 246; *State ex rel. Casper v. Moore*, 37 Neb. 13, 55 N. W. 299; *Webster v. Hastings*, 59 Neb. 563, 81 N. W. 510; *State v. Burlington & M. River R. Co.* 60 Neb. 741, 84 N. W. 254; *State ex rel. Blessing v. Davis*, 66 Neb. 333, 92 N. W. 740; *Moore v. Neece*, 80 Neb. 600, 114 N. W. 767; *State ex rel. Loomis v. Moffitt*, 5 Ohio. 359; *Fordeyce v. Godman*, 20 Ohio St. 1; *State ex rel. Rogers v. Price*, 8 Ohio C. C. 25, 4 Ohio C. D. 296; *Currie v. Southern P. Co.* 21 Or. 566, 28 Pac. 884; *Brewer v. Huntingdon*, 86 Tenn. 732, 9 S. W. 166; *Erwin v. State*, 116 Tenn. 71, 93 S. W. 73; *Meracle v. Down*, 64 Wis. 323, 25 N. W. 412; *State ex rel. Cheyenne v. Swan*, 7 Wyo. 166, 40 L.R.A. 195, 75 Am. St. Rep. 889, 51 Pac. 209; *Brown v. Nash*, 1 Wyo. 85; *Chicago, B. & Q. R. Co. v. Smyth*, 103 Fed. 376; *Simpson v. Union Stockyards Co.* 110 Fed. 799; *Opinion of Justices*, 35 N. H. 570, 52 N. H. 622, — N. H. —, 81 Atl. 170.

In *State v. Bowman*, 90 Ark. 174, 118 S. W. 711; *Robertson v. People*, 20 Colo. 279, 38 Pac. 326, 9 Am. Crim. Rep. 284; *Pueblo County v. Strait*, 36 Colo. 137, 85 Pac. 178; *State ex rel. Atty. Gen. v. Green*, 36 Fla. 154, 18 So. 334; *People ex rel. Kent County v. Loomis*, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751; *Gaines v. Horrigan*, 4 Lea, 608; and *Ames v. Union P. R. Co.* 64 Fed. 165, affirmed in 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418 (construing Nebraska statute), the courts looked to the journals, but decided that there had been a sufficient compliance with constitutional requirements.

In *Walker v. Montgomery*, 139 Ala. 468, 36 So. 23; *Kelley v. Secretary of State*, 40 L.R.A.(N.S.)

149 Mich. 343, 112 N. W. 978; *Weis v. Ashley*, 59 Neb. 494, 80 Am. St. Rep. 704, 81 N. W. 318; and *Capito v. Topping*, 65 W. Va. 587, 22 L.R.A.(N.S.) 1089, 64 S. E. 845, the court treated the enrolled bill as not conclusive; but there is no discussion, and no question seems to have been raised on this point.

In *Haney v. State*, 34 Ark. 263, the court not only held the enrolled bill not conclusive, but, the error being apparent on the face of the bill, corrected it.

See North Carolina and Illinois cases in next subdivision.

c. Doctrine as to matters required by the Constitution to be shown on the journal.

As to specific application to particular grounds of attack, see *infra*, III.

By reference to the first proposition in subdivision a, above, it will be seen that in some jurisdictions the bill is held conclusive as to all matters. Courts which adhere strictly to this doctrine, of course, make no distinction between matters required by the Constitution to be shown on the journal, and those that are not, and none such cases are included in this subdivision, even though it appears that the objection was as to a matter required to be entered on the journal, as did appear in the Georgia cases cited therein.

It will also be noted that some of the courts which do not make the enrolled bill absolutely conclusive make no distinction between matters required to be entered on the journal and those that are not, notably the courts of Kansas and Illinois. The decisions of all courts which stop short of making the enrolled bill absolutely conclusive as to matters required to be entered on the journal are shown in this subdivision.

Here, also, there is a difference of opinion as to the conclusiveness to which the enrolled bill is entitled. In some jurisdictions the direction that certain matters shall be entered on the journal is treated as mandatory, and where the journals are silent in regard thereto, it is presumed that

The constitutional provisions regarding the manner in which bills are to be passed are addressed directly to them, and they are responsible to the people for an abuse of powers. No human government can be devised in which powers must not be somewhere reposed which may be abused. It is not irrational to hold that, when a legislative body has put forth a bill meaning to do so, and that bill has been duly authenticated in the prescribed manner, then the common safety of law-abiding citizens requires that the court should respect it as law, without inquiring into the modes of its passage. It is this consideration which lies at the foundation of the rule everywhere recognized, that no law can be impeached for fraudulent motives actuating the legislators, nor on ac-

count of corrupt influences brought to bear upon them. . . . In other words, the power is a dangerous one, and should never be exercised in the face of a reasonable doubt. Conforming to the practice of the court, I desire at the same time to express my preference for the English doctrine, with which I do not consider our case of *Burr v. Ross* in conflict. That is to say, that an act, actually and bona fide assented to in both houses, authenticated and deposited with the secretary of state, should be conclusive of the law, in the breasts of the judges." Other cases in which courts have made similar criticism of this rule, which they felt bound by precedent to follow, are: *People ex rel. Barnes v. Starne*, 35 Ill. 121, 85 Am. Dec. 348; *State ex rel. Godard v.*

the act thus required to be evidenced did not take place. It is apparent where the journals are silent as to the performance of an act the doing of which is required to be entered on the journal, that in a sense the journal may be said affirmatively to show that the performance of such act was not entered thereon. Such a statement, however, means nothing more than that nothing appears on the journal. The courts which take this view hold that where the journals are silent as to compliance with a constitutional requirement which is required to be evidenced by an entry on the journal, or where it thus appears that no entry was made, the bill is inconclusive and may be impeached. *Lambert v. Smith*, 98 Va. 263, 38 S. E. 938; *Stanly County v. Coler*, 37 C. C. A. 484, 96 Fed. 284, reversed on rehearing on other grounds in 51 C. C. A. 379, 113 Fed. 705, which latter decision is affirmed in 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811; *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 599; *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425, 51 L.R.A. 396, 85 Am. St. Rep. 42, 28 So. 497; *Tyler v. State*, 159 Ala. 126, 48 So. 672; *State ex rel. McKinley v. Martin*, 160 Ala. 181, 48 So. 846; *Graves v. State*, 166 Ala. 671, 52 So. 34; *Crain v. State*, 166 Ala. 1, 52 So. 31; *Pope v. State*, 165 Ala. 68, 51 So. 321; *State v. Smith*, 162 Ala. 1, 50 So. 364; *Smithee v. Garth*, 33 Ark. 17; *State v. Corbett*, 61 Ark. 226, 32 S. W. 686; *Rio Grande Sampling Co. v. Catlin*, 40 Colo. 450, 94 Pac. 323; *Rash v. Allen*, — Del. —, 76 Atl. 370; *Cohn v. Kingsley*, 5 Idaho, 416, 38 L.R.A. 74, 49 Pac. 985; *Ryan v. Lynch*, 68 Ill. 160; *People ex rel. Barnes v. Starne*, 35 Ill. 121, 85 Am. Dec. 348; *Wabash R. Co. v. Hughes*, 38 Ill. 174; *Prescott v. Illinois & M. Canal*, 19 Ill. 324; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Palatine Ins. Co. v. Northern P. R. Co.* 34 Mont. 268, 85 Pac. 1032, 9 Ann. Cas. 579; *Opinions of Justices*, 35 N. H. 579, 52 N. H. 622; *Union Bank v. Oxford*, 119 N. C. 214, 34 L.R.A. 487, 25 S. E. 966; *Stanly County v. Snuggs*, 121 N. C. 394, 39 L.R.A. 439, 28 S. E. 539; *Charlotte v. Shepard*, 122 N. C. 602, 29 S. E. 842; 40 L.R.A. (N.S.)

Wilkes County v. Call, 123 N. C. 308, 44 L.R.A. 252, 31 S. E. 481; *Buncombe County v. Payne*, 123 N. C. 432, 31 S. E. 711; *New Hanover County v. De Rosset*, 129 N. C. 275, 40 S. E. 43; *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 293, 41 S. E. 488; *Hooker v. Greenville*, 130 N. C. 472, 42 S. E. 141; *Lambert v. Smith*, 98 Va. 263, 38 S. E. 938.

Merely introducing excerpts from the journal does not make a sufficient showing as to the silence of the journal, to impeach the bill. *Denver v. Rubidge*, 51 Colo. 224, 116 Pac. 1130.

If the journal is defective, mutilated, or incomplete, its silence will not impeach the bill. *State ex rel. Douglas County v. Frank*, 60 Neb. 327, 83 N. W. 74, s. c. on rehearing, 61 Neb. 679, 85 N. W. 956.

And under a constitutional provision requiring notice of the introduction of bills for local laws to be given to the section affected, and proof of such notice to be made to the legislature, and the proof spread upon the journal, and requiring the courts to pronounce such a law void unless the journal affirmatively shows that the law had been passed in accordance with the constitutional provision, the court in *Wallace v. Board of Revenue*, 140 Ala. 491, 37 So. 321, inquired into the sufficiency of notice appearing on the journal.

Where a notice of protest is required to be entered on the journal, in the absence of such an entry, it will be presumed that there was none. *State ex rel. Atty. Gen. v. Mead*, 71 Mo. 266.

But where the journal shows a protest made by a member of the legislature, and entered on the journal in accordance with a constitutional provision, the court will inquire into the validity of such protest. *State ex rel. McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636, affirmed in 179 U. S. 328, 45 L. ed. 214, 21 Sup. Ct. Rep. 125.

The failure to enter the "nays" on the journal was at first treated as a silence of the journal sufficient to impeach the bill. *Smithee v. Garth*, 33 Ark. 17; *Smathers v. Madison County*, 125 N. C. 480, 34 S. E. 554; *New Hanover County v. De Rosset*, 129

Andrews, 64 Kan. 474, 67 Pac. 870, and State ex rel. Casper v. Moore, 37 Neb. 13, 55 N. W. 299. In State ex rel. Hoover v. Chester, 39 S. C. 307, 17 S. E. 752, the court reversed the rule, notwithstanding it had been twice declared and followed in that jurisdiction in the cases of State ex rel. Atty. Gen. v. Platt, 2 S. C. 150, 16 Am. Rep. 647, and State ex rel. Atty. Gen. v. Hagood, 13 S. C. 46; and in doing so the court used the following language: "Therefore, however unpleasant it may be to reverse previous decisions of this court, still, after full and mature consideration, we feel it to be a duty we owe the state that the case of State ex rel. Atty. Gen. v. Platt, supra, should be and is hereby overruled, and, as the case of State ex rel. Atty. Gen.

v. Hagood, supra, was really decided upon the authority of Platt's Case, it follows necessarily that the case of Hagood must fall when the foundation upon which it rests is taken away. We announce that the true rule is that, when an act has been duly signed by the presiding officers of the general assembly, in open session in the senate house, approved by the governor of the state, and duly deposited in the office of the secretary of state, it is sufficient evidence, nothing to the contrary appearing upon its face, that it passed the general assembly, and that it is not competent either by the journals of the two houses, or either of them, or by any other evidence, to impeach such an act."

The provisions of the Constitution of this

N. C. 275, 40 S. E. 43; Debnam v. Chitty, 131 N. C. 657, 43 S. E. 3. The North Carolina cases, at least, were overruled on this question in Salem v. Wachovia Loan & T. Co. 143 N. C. 110, 118 Am. St. Rep. 791, 55 S. E. 442, and this latter decision agrees with the decision in Onslow County v. Tollman, 76 C. C. A. 317, 145 Fed. 753, and also that in People ex rel. Wies v. Bowman, 247 Ill. 276, 93 N. E. 244. The reasoning of the courts which take the latter view is well set forth in the Illinois case, where it is stated that the silence of the journal as to the "nay" vote is evidence that there was no "nay" vote, and the bill cannot be impeached.

Other courts treat the act which is to be evidenced by the journal entry as the important fact, and a direction that the doing thereof shall be entered on the journal as directory merely; and where there is a failure to comply with this direction, in the absence of a clear affirmative showing that the act did not take place, the enrolled bill is held conclusive that the constitutional requirements were complied with. Homrighausen v. Knoche, 58 Kan. 646, 50 Pac. 879; Missouri, K. & T. R. Co. v. Simons, 75 Kan. 130, 88 Pac. 551; State ex rel. Atty. Gen. v. Mead, 71 Mo. 266; State ex rel. Bray v. Long, 21 Mont. 27, 52 Pac. 645. See Johnson v. Great Falls, infra; State ex rel. Gregg v. Erickson, 39 Mont. 280, 102 Pac. 336; Palatine Ins. Co. v. Northern P. R. Co. 34 Mont. 268, 85 Pac. 1032, 9 Ann. Cas. 579; Home Tele. Co. v. Nashville, 118 Tenn. 1, 101 S. W. 770, 11 Ann. Cas. 824.

The court also looked to the journals in Norvell v. State, 143 Ala. 561, 39 So. 357, and State ex rel. Frederick v. Brodie, 148 Ala. 381, 41 So. 180. And also in Ex parte Kelly, 153 Ala. 668, 45 So. 290; Robertson v. People, 20 Colo. 279, 38 Pac. 326, 9 Am. Crim. Rep. 284; Mathis v. State, 31 Fla. 291, 12 So. 681; Miesen v. Canfield, 64 Minn. 513, 67 N. W. 632; Johnson v. Great Falls, 38 Mont. 309, 99 Pac. 1059, 16 Ann. Cas. 974; Cox v. Pitt County, 146 N. C. 584, 16 L.R.A.(N.S.) 253, 60 S. E. 516; State ex rel. Hynds v. Cahill, 12 Wyo. 225, 75 Pac. 433; and Younger v. Hehn, 12 40 L.R.A.(N.S.)

Wyo. 289, 109 Am. St. Rep. 986, 75 Pac. 443, the court looked to the journals, but decided that there had been a sufficient compliance with the constitutional requirements.

III. Particular grounds of attack.

a. Necessity of considering in light of general principles.

In the following subdivision of the note, particular grounds of attack upon the enrolled bill are noticed. It is necessary, however, to keep constantly in mind the general principles above discussed in order to understand the decisions as to these various grounds of attack, for it is apparent that the decision on any one of them will be determined largely by the general view of the court in the particular jurisdiction, as to the conclusiveness of the enrolled bill. If the court adheres strictly to the doctrine of the absolute conclusiveness of the enrolled bill, it is apparent that no ground of attack would serve to render it void, while in jurisdictions which do not adhere to the rule of absolute conclusiveness, the same ground of attack may serve to render the bill void according to the view taken of the particular ground of attack. It is therefore necessary, as stated above, to keep constantly in mind the general principles.

b. Legality of legislative session.

In Butler v. State, 89 Ga. 821, 15 S. E. 763, an enrolled bill was upheld where the journals did not affirmatively sustain the objection that the legislature was not in legal session when the bill was passed.

c. Introduction of bill after time limited by Constitution.

Under the doctrine that an enrolled bill imparts absolute verity, it has been held that it cannot be shown that it was not introduced into the legislature within the time limited therefor (Hale v. McGettigan, 114 Cal. 112, 45 Pac. 1049); or within ten days of final adjournment, in defiance of a

state relative to the journals of each house of the legislature are as follows: By § 30, art. 5, it is provided that "each house shall keep a journal of its proceedings, and from time to time publish the same. The yeas and nays of the members of either house on any question, at the desire of one fifteenth of those present, shall be entered upon its journal." Section 31 of the same article requires that in all elections made by the legislature, except for officers and employees thereof, the members thereof shall vote yea or nay, and each vote shall be entered upon the journal. And § 34 provides that "every bill shall be read on three different days in each house, and no bill shall become a law unless, on its final passage, it be read at length, and no law

shall be passed unless upon a vote of a majority of all the members elected to each house in favor of such law, and the question, upon final passage, shall be taken upon its last reading, and the yeas and nays shall be entered upon the journal."

It will be observed from the foregoing provisions that the only specific requirements as to what shall be entered upon the journal are that each vote shall be entered in elections other than for officers and employees of either house, and the yeas and nays shall be taken upon the final passage of all measures and shall be entered upon the journal. This latter requirement is made essential to the passage of the act; and likewise the yea and nay vote must be entered upon the journal, if it be voted to dispense with the read-

constitutional prohibition (State ex rel. Reed v. Jones, 6 Wash. 452, 23 L.R.A. 340, 34 Pac. 201).

As to the competency of parol evidence to show that a bill was introduced into the legislature after the expiration of the session by operation of law, see *White v. Hinton*, *infra*, IV. b.

d. Improper origin of revenue bills.

An enrolled bill for raising revenue will be void if the journals disclose that it originated in the senate, in violation of a constitutional requirement that such bills should originate in the house. *Perry County v. Selma M. & M. R. Co.* 58 Ala. 546; *Thierman Co. v. Com.* 123 Ky. 740, 97 S. W. 366.

And the same doctrine has been applied where it was conceded that such a bill improperly originated in the senate. *Sala's Succession*, 50 La. Ann. 1009, 24 So. 674; *Givanovich's Succession*, 50 La. Ann. 625, 24 So. 679.

But it was held in *United States v. Billings*, 190 Fed. 356, that the court could not determine whether a Senate amendment to an enrolled revenue bill was within the scope of the original bill as originated in the House of Representatives.

As to determining the validity of a revenue bill upon stipulations of litigants to the effect that it originated in the wrong branch of the legislature, see *infra*, IV. c.

e. Change of original purpose of bill.

1. In general.

The journals may be examined to ascertain whether the original purpose of an enrolled bill was changed during its passage, in violation of a constitutional prohibition. *Stein v. Leeper*, 78 Ala. 517; *Harrison v. Gordy*, 57 Ala. 49; *Southern R. Co. v. Mitchell*, 139 Ala. 629, 37 So. 85; *Loftin v. Watson*, 32 Ark. 414; *Re Amendments of Legislative Bills*, 19 Colo. 356, 35 Pac. 917; *Massachusetts Mut. L. Ins. Co. v. Colorado Loan & T. Co.* 20 Colo. 1, 36 Pac. 793; *Airy v. People*, 21 Colo. 144, 40 Pac. 362, 40 L.R.A. (N.S.)

And if they show that the original purpose of the bill was changed during its passage, the enrolled bill will be void. *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 612; *Re House Bill No. 231*, 9 Colo. 624, 21 Pac. 472.

But in Texas it has been held that an enrolled bill cannot be impeached by a showing from the journals that, in violation of the Constitution, its original purpose was changed during passage, since that instrument did not require the journals to show that such mandate was observed. *Parshall v. State*, — Tex. Crim. Rep. —, 138 S. W. 759; *Knox v. State*, — Tex. Crim. Rep. —, 138 S. W. 787; *Houston & T. C. R. Co. v. Stuart*, — Tex. Civ. App. —, 48 S. W. 709.

An enrolled bill after it has been signed by the presiding officers of the legislature without a protest being made and entered on the journals, to the effect that its original purpose has been changed, cannot be impeached on that ground, where the Constitution declares that a bill shall be signed by the presiding officers of the two houses of the legislature after all business has been suspended for that purpose, and the bill has been read, unless there is an objection thereto, which shall be entered on the journals. *State ex rel. McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636.

As to the competency of the original bill as it was introduced into the legislature to show that its purpose was changed during passage, in defiance of the Constitution, see *infra*, IV. a, 2.

2. After time limited for introduction of bills.

In Michigan it is held that the legislative journals and records may be examined to determine whether the original purpose of a bill was changed after the time limited by Constitution for the introduction of bills, so as to make it in effect a new bill. *Pack v. Barton*, 47 Mich. 520, 11 N. W. 367; *Powell v. Jackson*, 51 Mich. 129, 16 N. W. 369; *Atty. Gen. ex rel. Crane v. Ames*, 60 Mich. 372, 27 N. W. 571; *People ex rel. Hart v. McElroy*, 72 Mich. 453,

ing at length of any act before the signing of same by the presiding officer of either house, in the presence of the house, as required by § 35. It is the duty of each house to keep a record of its proceedings, and from time to time publish the same; but, except as just mentioned, what proceedings shall be recorded in the journal, the manner of recording same, and the extent of their fullness, is left by the Constitution to the discretion of the legislative bodies, to be controlled by rule respectively of those bodies, or by statute. It is not required by any provision of the Constitution, that the contents of any bill, proposed, rejected, or adopted, shall be set out in the journal, or that the contents of any amendment of any bill shall be stated in full or

in substance in the journal; and a record of any such bill or amendment thereto may be kept by reference in the journal to the title of such bill or amendment or to its number.

The question now under consideration was first directly presented to the Supreme Court of the United States for determination in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 204, 12 Sup. Ct. Rep. 495. In that case the validity of an act of Congress was questioned, upon the ground that there had been omitted from the engrossed act, as attested by the Vice President and the Speaker of the House, as approved by the President and as deposited with the Secretary of State, a section that was contained in the act when it passed the two Houses of Congress, and it was sought

2 L.R.A. 609, 40 N. W. 750; *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165; *Atty. Gen. v. Detroit & S. Pl. Road Co.* 97 Mich. 589, 56 N. W. 943; *Toll v. Jerome*, 101 Mich. 468, 59 N. W. 816; *Davock v. Moore*, 105 Mich. 120, 28 L.R.A. 783, 63 N. W. 424; *Detroit v. Schmid*, 128 Mich. 379, 92 Am. St. Rep. 468, 87 N. W. 383; *People ex rel. Kent County v. Loomis*, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751; *Atty. Gen. ex rel. Burbank v. Stryker*, 141 Mich. 437, 104 N. W. 737.

And when a violation of such constitutional prohibition appears, it will vitiate an enrolled bill. *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165; *Atty. Gen. v. Detroit & S. Pl. Road Co.* 97 Mich. 589, 56 N. W. 943; *People ex rel. Kent County v. Loomis*, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751.

As to the competency of parol evidence to impeach a recital of the journals that a bill was introduced within the time limited for that purpose, see *Atty. Gen. v. Rice*, *infra*, IV. b.

f. Failure to refer bill to committee.

Where the Constitution requires the legislative journals to show that all bills were referred to and reported upon by a standing committee of the legislature, an enrolled bill will be void if the journals disclose a reference thereof to one committee and a report back to the legislature by a different one, without showing the action taken by the former. *Tyler v. State*, 169 Ala. 126, 48 So. 672; *State v. Smith*, 162 Ala. 1, 50 So. 364; *Pope v. State*, 165 Ala. 68, 51 So. 521; *Crain v. State*, 166 Ala. 1, 52 So. 31; *Graves v. State*, 166 Ala. 671, 52 So. 34. See also *Walker v. Montgomery*, 139 Ala. 468, 36 So. 23.

But in Kentucky and Texas the rule of conclusiveness of an enrolled bill has been applied where it was sought to impeach such a bill because it was not referred to and reported upon by a committee of the legislature before its passage, as the Constitution required. *Stone v. Dispatch Pub. Co.* 21 Ky. L. Rep. 1473, 55 S. W. 725; *Day* 40 L.R.A. (N.S.)

Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865; *Williams v. Taylor*, 83 Tex. 667, 19 S. W. 156.

And the silence of the journals as to the reference of a bill to and a report thereon from a committee, as the Constitution requires, will not invalidate an enrolled bill, where the fundamental law does not require the journals to show that such mandate was complied with. *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 599.

g. Failure to print bill before passage.

An enrolled bill will be void if it affirmatively appears from the journals that it was not printed before its passage, as the Constitution requires. *Andrews v. People*, 33 Colo. 193, 108 Am. St. Rep. 76, 79 Pac. 1031; *State ex rel. Aull v. Field*, 119 Mo. 593, 24 S. W. 752.

And it was held in *Neiberger v. McCullough*, 253 Ill. 312, 97 N. E. 660, that an enrolled bill was void where the journals were silent as to whether the bill and its amendment were printed, as the Constitution required, before it was placed on its final passage, notwithstanding such instrument did not require compliance with such mandate to be shown by the journals.

In *Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319, the legislative journals were examined in order to determine whether a bill was printed before passage as the Constitution required.

But it was held in *Stone v. Dispatch Pub. Co.* 21 Ky. L. Rep. 1473, 55 S. W. 725, that an enrolled bill could not be invalidated on the ground that it was not printed before passage, since the rule adopted by that court was that of absolute conclusiveness of an enrolled bill.

h. Nonobservance of constitutional requirement as to reading bill.

1. In general.

There is a conflict of authority as to whether an enrolled bill may be impeached by evidence from the journals showing that

to establish this fact by reference to the journals of the two Houses of Congress; but it was held that the act could not be impeached in this way. Section 5, art. 1, of the Federal Constitution provides that "each House shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgments require secrecy, and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal." The court, speaking through Mr. Justice Harlan of the relative weight that shall be given to the journal thus required to be kept by the Houses, and to the engrossed act, said: "The signing by the Speaker of the House of Representatives, and by the

President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officers, to the President, that a bill thus attested has received in due form the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill thus attested receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the

it was not read before passage in the manner required by the Constitution.

Thus, some courts hold, on the ground of absolute conclusiveness of an enrolled bill, that it cannot be impeached by a showing that it was not read in the manner required by the Constitution. *Lewis v. State*, 148 Ind. 346, 47 N. E. 675; *State ex rel. Sutherland v. Nye*, 23 Nev. 99, 42 Pac. 866; *State ex rel. Osburn v. Beck*, 25 Nev. 68, 56 Pac. 1008; *Narregang v. Brown County*, 14 S. D. 357, 85 N. W. 602; *State ex rel. Lavin v. Bacon*, 14 S. D. 394, 85 N. W. 605; *Usener v. State*, 8 Tex. App. 177; *El Paso & S. W. R. Co. v. Foth*, 45 Tex. Civ. App. 275, 100 S. W. 171, reversed on other points in 101 Tex. 133, 105 S. W. 322.

While others hold that the failure of the journals to show that a bill was read in the manner prescribed by Constitution will not render an enrolled bill void, unless the fundamental law requires the journals to show that a bill was properly read. *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 599; *Walker v. Griffith*, 60 Ala. 361; *Glidewell v. Martin*, 51 Ark. 559, 11 S. W. 882; *State ex rel. Turner v. Hocker*, 36 Fla. 358, 18 So. 767; *Butler v. State*, 89 Ga. 821, 15 S. E. 763; *Schuyler County v. People*, 25 Ill. 182; *Weyand v. Stover*, 35 Kan. 545, 11 Pac. 355; *Re Ellis*, 55 Minn. 401, 23 L.R.A. 287, 43 Am. St. Rep. 514, 56 N. W. 1056; *Miesen v. Canfield*, 64 Minn. 513, 67 N. W. 632; *Coyle v. Smith*, 28 Okla. 121, 113 Pac. 944; *Jackson v. Weis & L. Mfg. Co.* 124 Tenn. 421, 137 S. W. 757; *Parshall v. State*, — Tex. Crim. Rep. —, 138 S. W. 759; *Knox v. State*, — Tex. Crim. Rep. —, 138 S. W. 787.

But, on the other hand, it is held in some cases that the journals may be resorted to in order to ascertain whether an enrolled bill was read in the manner prescribed by the Constitution. *State v. Crawford*, 35 Ark. 237; *Andrews v. People*, 33 Colo. 193, 108 Am. St. Rep. 76, 79 Pac. 1031; *Potter v. Lainhart*, 44 Fla. 647, 33 So. 251; *State ex rel. Turner v. Hocker*, 36 Fla. 358, 18 So. 767; *Butler v. State*, 89 Ga. 821, 15 S. E. 763; *Tarr v. Western Loan & Sav. Co.* 15 Idaho, 751, 21 L.R.A. 40 L.R.A. (N.S.)

(N.S.) 707, 99 Pac. 1049; *Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319; *State ex rel. Applegate v. Taylor*, 224 Mo. 393, 123 S. W. 892; *Southern R. Co. v. Memphis*, — Tenn. —, — L.R.A. (N.S.) —, 148 S. W. 662; *Price v. Moundsville*, 43 W. Va. 523, 64 Am. St. Rep. 878, 27 S. E. 218; *Smith v. Mitchell*, 69 W. Va. 481, 72 S. E. 755.

And an enrolled bill will be declared void if the legislative journals affirmatively show that it was not read in the manner prescribed by the Constitution, although it does not expressly require that such records show compliance therewith. *State ex rel. Turner v. Hocker*, 36 Fla. 358, 18 So. 767; *Butler v. State*, 89 Ga. 821, 15 S. E. 763; *Schuyler County v. People*, 25 Ill. 182; *Ryan v. Lynch*, 68 Ill. 160; *Weyand v. Stover*, 35 Kan. 545, 11 Pac. 355; *Re Ellis*, 55 Minn. 401, 23 L.R.A. 287, 43 Am. St. Rep. 514, 56 N. W. 1056; *Miesen v. Canfield*, 64 Minn. 513, 67 N. W. 632.

And such a bill will be void where the journals show that it was not read section by section as the Constitution requires. *Brown v. Collister*, 5 Idaho, 589, 51 Pac. 417.

So, an enrolled bill will be declared void where the journals of the house do not show that it was read on three several days, notwithstanding the speaker of the house certified that the bill was read three times, since a sufficient compliance with such constitutional requirement was not thus shown. *Union Bank v. Oxford*, 119 N. C. 214, 34 L.R.A. 487, 25 S. E. 966; *Smathers v. Madison County*, 125 N. C. 480, 34 S. E. 554; *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 293, 41 S. E. 488.

An enrolled bill has been held void where the journals showed that neither house properly passed an amendment to the title of the bill, which in effect created a new bill, by reading it three times as the Constitution directed. *Erwin v. State*, 116 Tenn. 71, 93 S. W. 73.

But where the Constitution does not require the journals to show that a bill was read three times, an enrolled bill cannot be impeached by evidence from such records

custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to co-equal and independent departments requires the judicial department to act upon that assurance, and to accept as having passed Congress all bills authenticated in the manner stated, leaving the courts to determine, when the question properly arises, whether the act so authenticated is in conformity with the Constitution." The doctrine of the

foregoing cases has been either approved or followed in the following cases from the Supreme Court: *United States v. Ballin*, 144 U. S. 3, 36 L. ed. 321, 12 Sup. Ct. Rep. 507; *Lyons v. Woods*, 153 U. S. 662, 38 L. ed. 858, 14 Sup. Ct. Rep. 959; *Harwood v. Wentworth*, 162 U. S. 558, 40 L. ed. 1069, 16 Sup. Ct. Rep. 890.

Referring to the dangers which may attend the application of this rule, and the abuses to which it might be subjected, the court, in *Marshall Field & Co. v. Clark*, said: "It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed Congress. But the contention is that it cannot be regarded as a law of the United States if the

showing that it was not read a first or second time, where the third reading was affirmatively shown by the journals, since under such circumstances the other readings will be presumed. *Worthen v. Badgett*, 32 Ark. 496; *English v. Oliver*, 28 Ark. 317; *Massachusetts Mut. L. Ins. Co. v. Colorado Loan & T. Co.* 20 Colo. 1, 36 Pac. 793; *Potter v. Lainhart*, 44 Fla. 647, 33 So. 257; *Weyand v. Stover*, 35 Kan. 545, 11 Pac. 355; *State v. McConnell*, 3 Lea, 332; *Price v. Moundsville*, 43 W. Va. 523, 64 Am. St. Rep. 878, 27 S. E. 218; *Henderson County v. Travelers' Ins. Co.* 63 C. C. A. 467, 128 Fed. 817.

And a bill will be sustained where the journals show that it was read a second and third time, the first reading being presumed. *Henderson County v. Travelers' Ins. Co.* 63 C. C. A. 467, 128 Fed. 817; *New Hanover County v. De Rosset*, 129 N. C. 275, 40 S. E. 43; *Black v. Buncombe County*, 129 N. C. 121, 39 S. E. 818.

So, where the legislative journals show that a bill was passed, their silence as to whether it was read a second and third time, as the Constitution requires, will not invalidate the enrolled bill, where the fundamental law does not require the journals to show whether a bill is read. *Glidewell v. Martin*, 51 Ark. 559, 11 S. W. 883.

And, in the absence of such constitutional requirement, an enrolled bill will be sustained where the senate journal, as well as indorsements on the engrossed bill, show that it was read three times, notwithstanding the journal of the house is silent as to the readings of the bill therein. *State ex rel. Applegate v. Taylor*, 224 Mo. 393, 123 S. W. 893.

So, an enrolled bill will be sustained, in the absence of such constitutional requirement, where the legislative journals show that it was read by title only, without showing a proper suspension of the constitutional requirement that a bill should be read three times. *Burks v. Jefferson County*, 40 Ark. 200.

As to the competency of the calendar of the house to show whether a bill was read as the Constitution directed, see *Black v.* 40 L.R.A. (N.S.)

Buncombe County, 129 N. C. 121, 39 S. E. 818, *infra*, IV. a, 7.

As to the competency of a bill as originally introduced into the legislature, together with indorsements thereon, to show that it was read as the Constitution directed, see *New Hanover County v. De Rosset*, *infra*, IV. a, 2.

As to showing by parol that a bill was not read as the Constitution required, see *Carr v. Coke*, *infra*, IV. b.

2. Suspension of such requirement.

The journals may be examined to ascertain whether three readings of a bill at length were dispensed with in the manner prescribed by the Constitution. *Weill v. Kenfield*, 54 Cal. 111; *Tarr v. Western Loan & Sav. Co.* 15 Idaho, 751, 99 Pac. 1049; *Frellsen v. Mahan*, 21 La. Ann. 79.

And, an enrolled bill will be void where the journals do not show that three readings thereof at length were dispensed with by an aye and nay vote of two thirds of the members present, as the Constitution requires. *Weill v. Kenfield*, *supra*.

But it was held in *Burks v. Jefferson County*, *supra*, that the silence of the journals as to the suspension of the constitutional requirement of reading a bill at length would not be sufficient to defeat an enrolled bill, where such record showed that it was read by title only, since the suspension of the rules would be presumed.

And where the journals showed that a motion to dispense with the reading at length of a bill before it was signed by the legislative officers was carried by 21 ayes, "nays, 0," and gave the names of those voting in the affirmative, it will be presumed, in the absence of an affirmative contrary showing on the journals, that only twenty-one members were present when the bill was signed. *Uniontown v. State*, 145 Ala. 471, 39 So. 814, 8 Ann. Cas. 320.

3. Reading bill before signing by legislative officers.

Compliance with a constitutional requirement that a bill shall be read in open ses-

journal of either House fails to show that it passed in the precise form in which it was signed by the presiding officers of the two Houses, and approved by the President. It is said that, under any other view, it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy, to which the presiding officers, the committees on enrolled bills, and the clerks of the two Houses, must necessarily be parties; all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Ju-

dicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two Houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective Houses are kept by the subordinate officers charged with the duty of keeping them." And to the same

sion of the legislature before being signed by the presiding officers thereof will be presumed where the journals do not show it, the Constitution requiring the fact only of signing to be noted on such record. *Adams v. Clark*, 36 Colo. 65, 86 Pac. 642, 10 Ann. Cas. 774; *Re Roberts*, 5 Colo. 525; *State ex rel. Atty. Gen. v. Mead*, 71 Mo. 272; and *State ex rel. McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636.

And an enrolled bill will be sustained as against the objection that the journals did not show that its title was read, as the Constitution requires, before the bill was signed by the presiding officer of the house, where the signing was shown, but the reading did not clearly appear, as the bill will be sustained on the theory that such officer did his duty. *Arbuckle v. Pflaeging*, — Wyo. —, 123 Pac. 918.

As to the effect of the failure of the journals to show the carrying of a motion to dispense with the reading of a bill before it is signed by the presiding officers of the legislature, see *Uniontown v. State*, supra, III. h. 2.

4. Indefinite suspension of action on bill.

The doctrine of conclusiveness of an enrolled bill has been applied where the journal, which was not required to show such fact, was silent as to the disposition of a pending motion to indefinitely postpone action on the bill. *McNeal v. Ritterbusch*, 29 Okla. 223, 116 Pac. 778; *Miesen v. Canfield*, 64 Minn. 513, 67 N. W. 632.

And enrolled bill cannot be impeached by the minutes of the stenographer of the house, which show that action thereon was indefinitely postponed, and never resumed. *McNeal v. Ritterbusch*, supra.

5. Adoption of substitute for enrolled bill.

In *Clendaniel v. Conrad*, — Del. —, 83 Atl. 1036, the journals were consulted in order to determine whether a substitute for an enrolled bill was adopted.

But the silence of the journals as to the adoption of a substitute for an enrolled bill 40 L.R.A. (N.S.)

will not affect its validity where the Constitution does not require the journals to show the disposition of such matter. *Chesney v. McClintock*, 61 Kan. 94, 58 Pac. 993.

k. Sufficiency of vote by which bill was passed.

1. Passage with aid of votes of members illegally elected or seated.

An enrolled bill cannot be impeached by showing that it was passed by the aid of votes of members of the legislature who were illegally elected or seated, since the legislature is the sole judge of the qualifications of its members; *Hughes v. Felton*, 11 Colo. 489, 19 Pac. 444 (members elected from a county omitted from an act apportioning the state); *People ex rel. Drake v. Mahaney*, 13 Mich. 481; *Auditor General v. Menominee County*, 89 Mich. 552, 51 N. W. 483 (members illegally seated); *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829 (members seated by less than a quorum in an election contest); *Lyons v. Woods*, 153 U. S. 649, 38 L. ed. 854, 14 Sup. Ct. Rep. 959, affirming 5 N. M. 327, 21 Pac. 346; *Chavez v. Luna*, 5 N. M. 183, 21 Pac. 344 (members of the quorum that passed bill seated without certificate of election).

But it was held in *State ex rel. Atty. Gen. v. Francis*, 26 Kan. 737, that an enrolled bill was void where the journals disclosed that it was passed by the aid of votes of members of the legislature in excess of the number provided for by the Constitution.

As to the competency of parol evidence to show that a bill was passed by the aid of members of the legislature who were illegally seated, see *State ex rel. Herron v. Smith*, infra, IV. b.

2. Lack of constitutional majority.

(a) In general.

The legislative journals will be consulted in order to determine whether an enrolled

point Mr. Justice Sawyer, in *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, said: "Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should at any and all times be liable to be put in issue and impeached by the journals, loose papers of the legislature, and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable."

We do not attempt to set out all the reasoning of the courts that has been given in support of the rule in *Marshall Field & Co. v. Clark*, nor of those courts that adhere to the opposite rule; for no useful purpose could be subserved thereby, and we can add

nothing to the force of the argument that has been adduced to support either of the rules, or to show their respective weaknesses. The entire field on both sides has been thoroughly covered by the authorities cited above. To our minds the reasoning offered in support of the rule in *Marshall Field & Co. v. Clark*, is satisfactory, and the rule adopted in that case appears to us to be the sounder and better rule. In that case, however, the court specifically reserved from consideration and decision what the effect of matters expressly required by the Constitution to be entered on the journal, where the same are in conflict with the enrolled act, would have upon the validity of the act. The conflict between the journal and the authenticated act here complained

bill was passed by a constitutional majority. *Missouri, K. & T. R. Co. v. Simons*, 75 Kan. 130, 88 Pac. 551; *Re Stickney*, 185 N. Y. 107, 77 N. E. 993, affirming 110 App. Div. 204, 97 N. Y. Supp. 336, 209 U. S. 419, 52 L. ed. 863, 28 Sup. Ct. Rep. 508; *Re Weeks*, 109 App. Div. 859, 96 N. Y. Supp. 876, affirmed without opinion in 185 N. Y. 541, 77 N. E. 1187; *New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, 42 N. E. 1088; *People v. Coney Island Jockey Club*, 68 Misc. 302, 123 N. Y. Supp. 669. But see *contra*, *Com. v. Hardin County Ct.* 99 Ky. 188, 35 S. W. 275.

And an enrolled bill will be declared void if the journals affirmatively show that it did not, upon its final passage, receive a constitutional majority. *State ex rel. Medical College v. Sowell*, 143 Ala. 494, 39 So. 246; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Kelley v. Secretary of State*, 149 Mich. 343, 112 N. W. 978; *Allen v. State Auditors*, 122 Mich. 324, 47 L.R.A. 117, 80 Am. St. Rep. 573, 81 N. W. 113; *Green v. Graves*, 1 Dougl. (Mich.) 357; *Hurlbut v. Britain*, 2 Dougl. (Mich.) 191; *Southworth v. Palmyra & J. R. Co.* 2 Mich. 287; *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380; *State ex rel. Eastland v. Gould*, 31 Minn. 189, 17 N. W. 276; *McCormick v. State*, 66 Neb. 337, 92 N. W. 606; *State ex rel. Blessing v. Davis*, 66 Neb. 333, 92 N. W. 740; *People ex rel. Adsit v. Allen*, 42 N. Y. 378; *Purdy v. People*, 4 Hill, 384, reversing 2 Hill, 31; *Commercial Bank v. Sparrow*, 2 Denio, 97; *Fordyce v. Godman*, 20 Ohio St. 1; *McKinnon v. Cotner*, 30 Or. 588, 49 Pac. 955; *Currie v. Southern P. Co.* 21 Or. 566, 28 Pac. 884; *Missouri, K. & T. R. Co. v. McGlamory*, 92 Tex. 150, 41 S. W. 466; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *Brown v. Nash*, 1 Wyo. 85; *Union P. R. Co. v. Carr*, 1 Wyo. 96; *Ames v. Union P. R. Co.* 64 Fed. 165, affirmed on other points in 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

So, it was held in *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670, that the court might resort to the legislative journals in order to determine whether an enrolled bill

received a necessary majority, notwithstanding the Constitution did not require that the aye and nay vote should be entered thereon, except upon the request of any five members of the legislature.

But an enrolled bill by which the boundaries of a county were changed will not be declared void because the journal of the house does not show concurrence in an amendment thereto by a two-thirds majority, which the Constitution requires for enacting a bill for such purpose, since it will be presumed that such amendment modified the bill in some respect not affecting such boundaries. *Jackson v. State*, 131 Ala. 21, 31 So. 380.

Where the journal entries as to whether a bill was passed by a constitutional majority are so conflicting as to leave the question in doubt, the bill will be sustained on the presumption of regular enactment, where the contrary does not appear clearly, conclusively, and beyond all doubt. *Homrighausen v. Knoche*, 58 Kan. 646, 50 Pac. 879.

And in *Missouri, K. & T. R. Co. v. Simons*, 75 Kan. 130, 88 Pac. 551, a bill was sustained, notwithstanding the journals showed that a constitutional majority did not vote for it, where a later entry, which would control, declared that it received a necessary majority, the presumption of regular enactment being applied.

So, it was held in *Lincoln v. Haugan*, 45 Minn. 451, 48 N. W. 196, that an enrolled bill would be sustained, notwithstanding the written copy of the senate journal, although it stated that there were twenty-seven affirmative votes on the bill, failed to give the names of the members who cast them, while it gave the names of seven members who voted in the negative, and the printed journal, which the court held must control, gave the names of those voting for and against the bill, and showed that it received a constitutional majority.

As to the impeachment of an enrolled bill on a stipulation to the effect that it was not passed by a constitutional majority, see *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380, *infra*, IV. c.

of is not as to matters which, by the Constitution of this state, are expressly required to be entered on the journal. It is not contended upon the final passage of House Bill No. 168 the yeas and nays were not taken or not entered upon the journal. The journal shows that such was done. It is contended only that the journal shows that the enrolled act contains a provision that was not contained in the act when it was voted upon by both Houses. As before stated, there is no constitutional provision specifically requiring that the journal shall show the contents of an act when it is passed; and it is not contended in the instant case that the journal shows the entire contents of House Bill No. 168, but that sufficient is shown to establish that it does

not contain the provision involved. What is the effect of failure to enter the names of those voting upon the final passage of a bill, where such record is required by constitutional provision to be made, was considered in *State ex rel. Gregg v. Erickson*, 39 Mont. 280, 102 Pac. 336, where the doctrine of *Marshall Field & Co. v. Clark* was approved; but, by reason of the specific requirement of the Constitution of Montana, directing that the yeas and nays upon the final passage of a bill shall be taken and entered upon the journal, it was held that failure to enter the vote as directed by the Constitution invalidated the act. This question is not involved in the instant case, and we now make no decision upon it. Section 35, art. 5, of the Constitution, supra, not

And as to sustaining bills by aid of the journals, in order to show that they were adopted by a constitutional majority, see *infra*, V. b.

(b) To pass bill over governor's veto.

An enrolled bill is void where the journals do not show that it was passed over the governor's veto by a necessary two-thirds majority. *Brown v. Nash*, 1 Wyo. 85; *Union P. R. Co. v. Carr*, 1 Wyo. 96.

(c) To give bill immediate effect.

The journals may be consulted to ascertain whether a bill was given immediate effect by a necessary majority. *Missouri, K. & T. R. Co. v. McGlamory*, 92 Tex. 150, 41 S. W. 466; *Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1000.

I. Failure to record vote as Constitution directs.

1. In general.

In California, Georgia, and Kentucky, the doctrine of the absolute conclusiveness of an enrolled bill is held to apply, notwithstanding the journals do not show that, on the final passage of a bill, an aye and nay vote was taken, which, together with the names of those voting for and against it, was entered on the journals as the Constitution requires. *Yolo County v. Colgan*, 132 Cal. 265, 84 Am. St. Rep. 41, 64 Pac. 403; *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 32 L.R.A. (N.S.) 20, 69 S. E. 725; *Lafferty v. Huffman*, 99 Ky. 80, 32 L.R.A. 203, 35 S. W. 123; *Owensboro & N. R. Co. v. Barclay*, 102 Ky. 16, 43 S. W. 177.

But the weight of authority sustains the rule that an enrolled bill will be declared void where the journals fail to show that, upon the final passage thereof, an aye and nay vote was taken, which, together with the names of those voting for and against the measure, was spread on the journals as the Constitution requires. *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 599; *State* 40 L.R.A. (N.S.)

ex rel. McKinley v. Martin, 160 Ala. 181, 48 So. 846; *Glidewell v. Martin*, 51 Ark. 559, 11 S. W. 882; *State v. Corbett*, 61 Ark. 226, 32 S. W. 686; *Rogers v. State*, 72 Ark. 565, 82 S. W. 169; *State v. Bowman*, 90 Ark. 174, 118 S. W. 711; *Butler v. Fourche Drainage Dist.* — Ark. —, 146 S. W. 120; *Pueblo County v. Strait*, 36 Colo. 137, 85 Pac. 178; *Rio Grande Sampling Co. v. Catlin*, 40 Colo. 450, 94 Pac. 323; *Denver v. Rubidge*, 51 Colo. 224, 116 Pac. 1130; *Mathis v. State*, 31 Fla. 291, 12 So. 681; *Cohn v. Kingsley*, 5 Idaho, 416, 38 L.R.A. 74, 49 Pac. 985; *Rash v. Allen*, — Del. —, 76 Atl. 370; *Browning v. Powers*, — Mo. —, 38 S. W. 943; *Palatine Ins. Co. v. Northern P. R. Co.* 34 Mont. 268, 85 Pac. 1032, 9 Ann. Cas. 579; *Johnson v. Great Falls*, 38 Mont. 369, 99 Pac. 1059; 16 Ann. Cas. 974; *Currie v. Southern P. Co.* 21 Or. 566, 28 Pac. 884; *Lambert v. Smith*, 98 Va. 268, 38 S. E. 938; *State ex rel. Cheyenne v. Swan*, 7 Wyo. 166, 40 L.R.A. 195, 75 Am. St. Rep. 889, 51 Pac. 209; *Portland Gold Min. Co. v. Duke*, 90 C. C. A. 166, 164 Fed. 180, a. c. on second appeal, 113 C. C. A. 316, 191 Fed. 692; *Ames v. Union P. R. Co.* 64 Fed. 165, affirmed on other grounds in 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Stanly County v. Coler*, 37 C. C. A. 484, 96 Fed. 284, reversing 89 Fed. 257, affirmed on rehearing in 51 C. C. A. 379, 113 Fed. 705, affirmed in 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811.

And in *State ex rel. Brown v. Porter*, 145 Ala. 541, 40 So. 144; *Brandon v. Askew*, — Ala. —, 54 So. 605; *Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319, and *O'Hara v. State*, 121 Ala. 28, 25 So. 622, the legislative journals were examined in order to ascertain whether there had been a compliance with such constitutional mandate.

An enrolled bill may be impeached where the journals do not show that an amendment was adopted by an aye and nay vote which, together with the names of those voting for and against it, was entered on the journals as the Constitution requires. *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425, 51 L.R.A. 396, 85 Am. St. Rep. 42,

only requires that the presiding officer of each House shall sign all bills passed by the legislature, but that he shall perform such act in the presence of the House, and only after the act shall have been read publicly at length, and the fact of reading and signing shall be entered upon the journal, unless dispensed with by two-thirds vote of the quorum present. The journals of both houses disclose that House Bill No. 168 was read by the presiding officers of the respective houses, and signed in the presence of those respective bodies. The correctness of that enrolled bill, therefore, is not alone attested by the signatures of the presiding officers, but by the acquiescence of the entire membership of the legislative bodies in the signing and attesting thereof by the presid-

ing officers. This is the last official record upon the journals of the proceeding in the passage of this bill. That record, unless the integrity of the entire legislative bodies is to be impeached, is one that attests that the bill signed by the presiding officers is the one that was duly and regularly enacted by the respective houses. This provision of the Constitution requiring the signatures of the presiding officers to be made to the bill in the presence of the legislative bodies, after the act has been publicly read at length, makes the authenticated bill as much a record of constitutional requirement as any part of the journal, and is an additional reason why the rule announced in *Marshall Field & Co. v. Clark*, should be adopted in this state; and we therefore hold that

28 So. 497; *Board of Revenue v. Crow*, 141 Ala. 126, 37 So. 469; *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 599; *Rogers v. State*, 72 Ark. 565, 82 S. W. 169; *Cohn v. Kingsley*, 5 Idaho, 416, 38 L.R.A. 74, 49 Pac. 985.

Where the journals are silent as to whether an aye and nay vote was taken upon an amendment to a bill, it will be presumed that the bill was properly passed, unless the Constitution requires that the vote upon amendments should be noted upon such records. *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 599.

The failure to record on the journal the names of the members who voted in the negative will invalidate an enrolled bill, where the Constitution requires the names of those voting for and against a measure to be recorded on the journals. *State ex rel. McKinley v. Martin*, 160 Ala. 181, 48 So. 846.

But in *People ex rel. Wies v. Bowman*, 247 Ill. 276, 93 N. E. 244, it was held that the failure to enter the negative vote on the journals would not defeat an enrolled bill, since it would be presumed that there were no such votes cast.

As the legislative journals import absolute verity, their failure to disclose compliance with a constitutional mandate that the aye and nay votes upon the final passage of a bill shall be entered thereon cannot be supplied by intentment or other evidence. *State ex rel. Atty. Gen. v. Buckley*, supra.

Where the journals do not show compliance with a constitutional mandate as to an aye and nay vote, and the entry of the names thereon of those voting for and against a bill, such defect cannot be remedied by a marginal notation on the journal, made some months after the vote was taken, showing compliance with such mandate. *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425, 51 L.R.A. 306, 85 Am. St. Rep. 42, 28 So. 497.

But it was held in *State ex rel. Douglas County v. Frank*, 60 Neb. 327, 83 N. W. 76, same case on rehearing in 61 Neb. 679, 85 N. W. 956, that where the pages relat-

ing to the passage of a bill were missing from the journals, and such records were so badly mutilated and incomplete that they did not disclose observance of a constitutional mandate that the ayes and nays, together with the names of those voting for and against a bill, should be recorded on the journals, the silence of such records would not be sufficient to defeat an enrolled bill, where it was shown by other evidence that it was regularly passed and the vote properly recorded.

And an enrolled bill will be sustained where, from all the journal entries, it sufficiently appears that an aye and nay vote was actually taken and, was together with the names of those voting for and against the bill entered on the journals, as the Constitution requires. *Arbuckle v. Pflaeving*, — Wyo. —, 123 Pac. 918.

It was held in *Butler v. Fourche Drainage Dist.* — Ark. —, 146 S. W. 120, that where, in recording the vote on a bill, the journal, as the result of an error, referred to the bill by a wrong number, the bill would be sustained, where the various journal entries, together with the bill as introduced into the legislature, and the various indorsements thereon, which were made by the officers of the legislature, identified the enrolled bill as the one actually passed. But the court expressly stated that it did not intend to hold that the journals could be contradicted by such evidence, but that it was resorted to, with other records, for the purpose of identification only.

In *Uniontown v. State*, 145 Ala. 471, 39 So. 814, 8 Ann. Cas. 320, it was held that an enrolled bill could not be impeached on the ground that a motion to dispense with the reading thereof at length was not properly adopted, because the journals stated that there were twenty-one ayes, nays 0, and gave the names of those voting in the affirmative, since it would be presumed, in the absence of a contrary affirmative showing from the journals, that those voting in the affirmative constituted a necessary two thirds of the quorum present.

See *Rio Grande Sampling Co. v. Catlin*, infra, IV. a. 9, as to the competency of a

when an enrolled bill has been signed by the speaker of the house and by the president of the senate in the presence of those respective bodies, immediately after the bill has been read publicly in full, and the same has been approved by the governor and deposited in the office of the secretary of state, it is not competent to show from the journals of the house that the act so authenticated, approved, and deposited did not pass in the form in which it was signed by the presiding officers and approved by the governor.

Section 20, art. 10, of the Constitution provides that "the legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may, by general laws, confer on the

proper authorities thereof, respectively, the power to assess and collect such taxes." It is urged by able counsel for the railway company that the levy of $\frac{1}{4}$ of 1 mill tax for common school purposes, authorized by House Bill No. 168, is a tax for the purpose of a municipal corporation; and that the foregoing section of the Constitution prohibits the levy of such tax by the legislature. Whether this contention can be sustained depends upon whether a levy of a tax for the purpose of supporting the public schools of the state is a levy for a municipal purpose. Although this question has not been directly presented to this court heretofore in a tax case, it was, in effect, presented in the case of *Board of Education v. State*, 26 Okla. 366, 109 Pac. 563.

report of a legislative committee to show that a bill was passed by a necessary aye and nay vote, where the legislative journals did not disclose it.

2. As required by statute in North Carolina on bills raising revenue or pledging credit of state or municipality.

In North Carolina an enrolled bill to raise money on the credit of the state, to impose a tax, or to allow counties, cities, or towns to do likewise, may be impeached by the failure of the journals to show that an aye and nay vote was taken upon the second and third reading of the bill, and entered together with the names of those voting for and against it, on the journals, as the Constitution commands. *Union Bank v. Oxford*, 119 N. C. 214, 34 L.R.A. 487, 25 S. E. 966; *Stanly County v. Snuggs*, 121 N. C. 394, 39 L.R.A. 439, 28 S. E. 539; *Rodman v. Washington*, 122 N. C. 39, 30 S. E. 118; *Charlotte v. Shepard*, 122 N. C. 602, 29 S. E. 842; *Wilkes County v. Call*, 123 N. C. 308, 44 L.R.A. 252, 31 S. E. 481; *Smathers v. Madison County*, 125 N. C. 480, 34 S. E. 554; *Slocumb v. Fayetteville*, 125 N. C. 362, 34 S. E. 436; *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167; *New Hanover County v. De Rosset*, 129 N. C. 275, 40 S. E. 43; *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 293, 41 S. E. 488; *Hooker v. Greenville*, 130 N. C. 472, 42 S. E. 141; *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023; *Brown v. Stewart*, 134 N. C. 357, 46 S. E. 741; *New Hanover County v. Armour Packing Co.* 135 N. C. 62, 47 S. E. 411; *Salem v. Wachovia Loan & T. Co.* 143 N. C. 110, 118 Am. St. Rep. 791, 55 S. E. 442; *Lumberton Improv. Co. v. Robeson County*, 146 N. C. 353, 59 S. E. 1014; *Wittkowsky v. Jackson County*, 150 N. C. 90, 63 S. E. 275; *Raleigh Sav. Bank v. Lacy*, 151 N. C. 3, 65 S. E. 444; *Richmond County v. Farmers' Bank*, 152 N. C. 387, 67 S. E. 969, 21 Ann. Cas. 812; *Stanly County v. Coler*, 37 C. C. A. 484, 96 Fed. 284, reversing 89 Fed. 257, affirmed on re-40 L.R.A. (N.S.)

hearing in 51 C. C. A. 379, 113 Fed. 705, and affirmed in 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811; *Henderson County v. Travelers' Ins. Co.* 63 C. C. A. 467, 128 Fed. 817.

If either house makes a material amendment to such a bill, it will be void unless the other house concurs therein by an aye and nay vote, which shall be entered on the journals in the same manner as upon the passage of the original bill. *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167.

But if such amendment does not increase the tax imposed by the bill, it may be adopted by concurrence of both houses in the ordinary manner. *Chatham County v. Stafford*, 138 N. C. 453, 50 S. E. 862.

Where a legislative clerk fails to enter the aye and nay vote and the names of those voting for and against a bill of such character, a subsequent correction of the journal in this respect, at a special session of the same legislature, will cure the defect. *Richmond County v. Farmers' Bank*, 162 N. C. 387, 67 S. E. 969, 21 Ann. Cas. 812.

But an enrolled bill of such character will not be declared void because the journals do not show the names of those voting in the negative, where they recite the number of affirmative votes only, as it will be presumed that a unanimous vote was cast and recorded. *Onslow County v. Tollman*, 76 C. C. A. 317, 145 Fed. 753, affirming 140 Fed. 89; *Salem v. Wachovia Loan & T. Co.* 143 N. C. 110, 118 Am. St. Rep. 791, 55 S. E. 442, overruling *Debnam v. Chitty*, 131 N. C. 657, 43 S. E. 3. See also *Smathers v. Madison County*, 125 N. C. 480, 34 S. E. 554, in effect overruled by the last case.

But see also *New Hanover County v. De Rosset*, 129 N. C. 275, 40 S. E. 43, holding such a bill void where the journal did not show the names of those voting in the negative, but gave the number of affirmative and negative votes.

Where the journals show a compliance with such constitutional requirement, no evidence, such as entries on original bill, will be received to contradict it. *New Hanover County v. Armour Packing Co.* 135 N. C. 62, 47 S. E. 411.

In the first paragraph of the syllabus to that case, it is said: "The free public system, which the legislature is directed to establish by article 13 of the Constitution, is a matter of general state concern, and not a municipal affair."

In support of this conclusion, Mr. Justice Kane, who delivered the opinion of the court, offered, among others, the following reasons: "That it was not the intention of the framers of the Constitution to intrust this important function of government to a minor political subdivision of the state is quite apparent from the casual examination of the provisions of that instrument pertaining to this subject. Section 1 of article 13, entitled 'Education,' provides that 'the legislature shall establish and

maintain a system of free public schools,' etc. Section 3 provides that 'separate schools for white and colored children, with like accommodation, shall be provided by the legislature, and impartially maintained,' etc. Section 4 provides that 'the legislature shall provide for the compulsory attendance at some public school, unless other means of education,' etc. Section 6 provides that 'the legislature shall provide for a uniform system of text-books for the common schools of the state.' And section 7 provides that 'the legislature shall provide for the teaching of the elements of agriculture, horticulture, stock feeding, and domestic science in the common schools of the state.' All of these commands are directed to the legislature. The word 'sys-

m. Passage of bill after time limited by Constitution.

On the theory of the absolute conclusiveness of an enrolled bill, it has been held that it cannot be impeached by showing that it was passed, in violation of the Constitution, within two days of adjournment of the legislature. *Western U. Teleg. Co. v. Taggart*, 141 Ind. 281, 60 L.R.A. 671, 40 N. E. 1051.

n. Bill not signed by presiding officers of legislature in manner directed by Constitution.

There is much conflict as to whether an enrolled bill may be impeached because not signed by the legislative officers in the manner directed by the Constitution.

Thus, in the absence of a constitutional requirement that the signing of a bill by the presiding officers of the legislature in the presence of the respective houses shall be shown by the journals, unless the contrary appears, it will be presumed that an enrolled bill which the journals show was passed was enacted in compliance with all the requirements of law. *Pelt v. Payne*, 60 Ark. 637, 30 S. W. 426; *Narregang v. Brown Country*, 14 S. D. 357, 85 N. W. 602; *Wrought Iron Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352.

So, in *State ex rel. Bray v. Long*, 21 Mont. 26, 52 Pac. 645, the failure of the journals to show the signing of the bill was held not to defeat the enrolled bill, although the constitutional provision in this respect was mandatory, at least in form, as it required that "the fact of signing shall be at once entered upon the journals." But the value of the case as a precedent is impaired, if not absolutely destroyed, by *Palatine Ins. Co. v. Northern P. R. Co.* 34 Mont. 268, 85 Pac. 1032, 9 Ann. Cas. 579.

And it was held in *Home Teleg. Co. v. Nashville*, 118 Tenn. 1, 101 S. W. 770, 11 Ann. Cas. 824, that the failure of the journals to show the signing of the bill, as required by a constitutional provision that no bill shall become a law until it has been 40 L.R.A. (N.S.)

signed by the respective speakers in open session, "the fact of such signing to be noted on the journals," does not defeat an enrolled bill, as the provision as to the showing on the journals is directory.

So an enrolled bill cannot be impeached on the ground that the journals do not show that it was signed by the presiding officers of the legislature, as required by a rule thereof. *Miller v. Oelwein*, — Iowa, —, 136 N. W. 1045; *Gray v. Taylor*, 15 N. M. 742, 113 Pac. 588.

An enrolled bill that the journals show was regularly passed cannot be impeached on the ground that the entry showing the signing thereof by the legislative officers preceded that showing the passage of the bill. *Goff v. Rickerson*, 61 Fla. 29, 54 So. 264.

But an enrolled bill may be impeached by the silence of the journals as to the signing of a bill by the presiding officers of the legislature in open session, where the Constitution declares that such fact shall be noted on the journals. *Lynch v. Hutchinson*, 219 Ill. 193, 76 N. E. 370, 4 Ann. Cas. 904; *State ex rel. McClay v. Mickey*, 73 Neb. 281, 119 Am. St. Rep. 894, 102 N. W. 679; *State ex rel. Coffin v. Howell*, 26 Nev. 93, 64 Pac. 466; *Hunt v. State*, 22 Tex. App. 396, 3 S. W. 233; *George Bolln Co. v. North Platte Valley Irrig. Co.* — Wyo. —, 39 L.R.A. (N.S.) 868, 121 Pac. 22.

And the journals were examined in the following cases, in order to ascertain whether there had been a compliance with such a constitutional mandate: *O'Hara v. State*, 121 Ala. 28, 25 So. 622; *Mitchell v. Gadsden*, 145 Ala. 132, 40 So. 350; *Lee v. Gadsden*, 146 Ala. 689, 40 So. 351; *State ex rel. Woodward v. Skeggs*, 154 Ala. 249, 46 So. 268; *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642, 10 Ann. Cas. 774; *Re Roberts*, 5 Colo. 525; *State ex rel. Atty. Gen. v. Mead*, 71 Mo. 266; *State ex rel. McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636; *State ex rel. Hynds v. Cahill*, 12 Wyo. 225, 75 Pac. 433; *Young v. Hehn*, 12 Wyo. 289, 109 Am. St. Rep. 986, 75 Pac. 443.

An enrolled bill will be declared void where the journals do not show that it was

tem' itself imports a unity of purpose, as well as an entirety of operation, and the direction to the legislature to 'establish and maintain a system of free public schools' means one system, which shall be applicable to all the public schools within the state. Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558. And the idea of unity of purpose and entirety of operation is emphasized and made more apparent by the other excerpts from the Constitution above quoted."

No good cause has been shown to us in this case why the views in the foregoing case should be changed. The mandate of the Constitution to establish and maintain public schools throughout the state is directed to the legislature of the entire state, and not to any of the political sub-

divisions of the state. The establishment and maintenance of the free public schools is a state function; and the legislature is not only authorized to levy a tax to defray all expenses of the state in the administration of its affairs, but by § 2, art. 10, it is made the duty of the legislature to provide by law for an annual tax sufficient, with other resources, to defray the ordinary expenses of the state for each fiscal year.

Section 3, art. 11, of the Constitution, reads as follows: "The interest and income of the permanent school fund, the net income from the leasing of public lands which have been or may be granted by the United States to the state for the use and benefit of the common schools, *together with any*

signed by the presiding officers of each house in the presence thereof, immediately after the title of the bill had been publicly read, notwithstanding the indorsements on the bill showed that such constitutional requirement had been complied with. George Bolln Co. v. North Platte Valley Irrig. Co. — Wyo. —, 39 L.R.A.(N.S.) 868, 121 Pac. 22.

But it was held in State ex rel. Woodward v. Skeggs, 154 Ala. 249, 46 So. 268, and Re Roberts, 5 Colo. 525, that all the journals need show was the fact of signing the bill by the presiding officers of the legislature, and not that it was done in the presence of the legislative body.

As to showing by the indorsements on a bill as originally introduced into the legislature, whether it was signed by the presiding officers of the legislature, as the Constitution directed, see George Bolln Co. v. North Platte Valley Irrig. Co. *infra*, IV. a, 2.

As to showing by parol that the signing of a bill by the presiding officers of the legislature was fraudulently obtained, see Carr v. Coke, *infra*, IV.

o. Nonpresentation of bill to governor within time prescribed by Constitution.

It was held in State ex rel. Atty. Gen. v. Mead, 71 Mo. 271, on the ground that a constitutional requirement that the legislative journals should show that a bill was presented by the secretary of the house to the governor for his approval on the day the bill was passed was directory merely, since it did not relate to the passage thereof,—that the rule as to the silence of the journals as to compliance with such a requirement was not applicable.

p. Nonapproval of bill by governor.

An enrolled bill cannot be impeached by showing that it did not receive the approval of the governor within the time prescribed by the Constitution. State ex rel. Crenshaw v. Joseph, — Ala. —, 57 So. 942; Morris v. Newark, 73 N. J. L. 268, 67 Atl. 1005; 40 L.R.A.(N.S.)

Bloomfield v. Middlesex County, 74 N. J. L. 261, 65 Atl. 890; People ex rel. Haller v. Clayton, 5 Utah, 598, 18 Pac. 628; Capito v. Topping, 65 W. Va. 587, 22 L.R.A.(N.S.) 1089, 64 S. E. 845; Gibson v. Anderson, 65 C. C. A. 277, 131 Fed. 39.

Nor can an enrolled bill be impeached by evidence that the executive approved it on a day different from the date it bore. Gibson v. Anderson, 65 C. C. A. 277, 131 Fed. 39.

It was held in People ex rel. Haller v. Clayton, 5 Utah, 598, 18 Pac. 628, that the records of the secretary of state's office showing the date the legislature adjourned cannot be contradicted by the legislative journals, in order to show that an enrolled bill was not approved by the governor, after the adjournment of the legislature, within the time limited by the Constitution.

But in Powell v. Hays, 83 Ark. 448, 104 S. W. 177, 13 Ann. Cas. 220, it was held that in determining whether an enrolled bill was vetoed by the governor, the court might consider his proclamation to the effect that he found such bill when he assumed office, and that he erased his predecessor's approval therefrom, and vetoed the bill.

As to competency of records and proclamations of governor to show nonapproval of a bill, see *infra*, IV. a, 4.

As to the competency of parol evidence to show nonapproval of a bill by the governor, see *infra*, IV. b.

As to showing the nonapproval of a bill by a governor, by stipulations of litigants, see Morris v. Newark, *infra*, IV. c.

q. Enrolled bill different from that passed.

1. Different title.

In order to ascertain whether the title of an enrolled bill is the same as that adopted by the legislature, the journals may be examined. Stein v. Leeper, 78 Ala. 517; Abernathy v. State, 78 Ala. 411; State v. Bethea, 61 Fla. 60, 55 So. 550; State ex rel. Atty. Gen. v. Green, 36 Fla. 154, 18 So. 334; State ex rel. Turner v. Hocker, 36

revenues derived from taxes authorized to be levied for such purposes, and any other sums which may be added thereto by law, shall be used and applied each year for the benefit of the common schools of the state, and shall be, for this purpose, apportioned among and between all the several common school districts of the state in proportion to the school population of the several districts, and no part of the fund shall ever be diverted from this purpose, or used for any other purpose than the support and maintenance of common schools for the equal benefit of all the people of the state." The language of the foregoing section, italicized by us, indicates that the framers of the Constitution contemplated that there would be funds derived from

taxes for school purposes to be distributed; and said section prescribed how the same, together with other funds available to the state for the support of its public schools, shall be distributed. The railway company, in opposition to this inference, suggests that this language refers only to taxes "authorized;" and that by reason of § 20, art. 10, of the Constitution, no inference in support of the power of the legislature to levy a state tax for school purposes can follow from the foregoing section. If the railway company's contention be correct, then the language italicized is without any meaning whatever; but provisions in a Constitution that are usually drafted after careful and deliberate consideration by the framers, and are subsequently examined

Fla. 358, 18 So. 767; State ex rel. Godard v. Andrews, 64 Kan. 474, 67 Pac. 870; Belleville v. Wells, 74 Kan. 823, 88 Pac. 47; Stephens v. Labette County, 79 Kan. 153, 98 Pac. 790; Union P. R. Co. v. Sprague, 69 Neb. 48, 95 N. W. 46; Price v. Moundsville, 43 W. Va. 523, 64 Am. St. Rep. 878, 27 S. E. 218; Milwaukee County v. Isenring, 109 Wis. 9, 53 L.R.A. 635, 85 N. W. 131.

And where the title is a material part of a bill, an enrolled bill may be impeached by an affirmative showing from the journals to the effect that its title differs from that adopted by the legislature. Stein v. Lepper, 78 Ala. 517; Wade v. Atlantic Lumber Co. 51 Fla. 628, 41 So. 72; Fillmore v. Van Horn, 129 Mich. 52, 88 N. W. 69; Weis v. Ashley, 59 Neb. 494, 80 Am. St. Rep. 704, 81 N. W. 318; State v. Burlington & M. River R. Co. 60 Neb. 741, 84 N. W. 254; Erwin v. State, 116 Tenn. 71, 93 S. W. 73; Simpson v. Union Stock Yards Co. 110 Fed. 799; Chicago, B. & Q. R. Co. v. Smyth, 103 Fed. 376.

Thus, this doctrine has been applied where the journals disclosed that different titles were adopted by the house and senate. Fillmore v. Van Horn, 129 Mich. 52, 88 N. W. 69; State v. Burlington & M. River R. Co. 60 Neb. 741, 84 N. W. 254; and Erwin v. State, 116 Tenn. 71, 93 S. W. 73.

But an enrolled bill will not be declared void in the absence of an affirmative showing from the legislative journals that its title as approved was not the same as that adopted by the legislature. State ex rel. Turner v. Hocker, 36 Fla. 358, 18 So. 767.

So, an enrolled bill is not rendered void by an immaterial alteration of its title after passage and before approval. Stein v. Lepper, 78 Ala. 517; State ex rel. Atty. Gen. v. Green, 36 Fla. 154, 18 So. 334; People ex rel. Gale v. Onondaga, 16 Mich. 254; State v. Doherty, 3 Idaho, 384, 29 Pac. 855; Union P. R. Co. v. Sprague, 69 Neb. 48, 95 N. W. 46.

And where the journals leave it in doubt whether the title of an enrolled bill was altered before approval, the presumption of regular enactment will prevail, and the bill 40 L.R.A. (N.S.)

will be sustained. State ex rel. Turner v. Hocker, 36 Fla. 358, 18 S. W. 767; State ex rel. Godard v. Andrews, 64 Kan. 474, 67 Pac. 870; Stephens v. Labette County, 79 Kan. 153, 98 Pac. 790; Belleville v. Wells, 74 Kan. 823, 88 Pac. 47.

So, where the journals show that the title borne by an enrolled bill is not the same as that adopted by the legislature, the journal recitals cannot be impeached. Chicago, B. & Q. R. Co. v. Smyth, 103 Fed. 376.

As to the effect of an affirmative showing from the journals of nonconcurrence by one house of the legislature in an amendment to the title of a bill, see Erwin v. State, *infra*, III. q. 3.

As to showing by a bill as originally introduced into the legislature, that the title of the enrolled bill differed from the title of the bill as adopted by the legislature, see Com. v. Martin, *infra*, IV. a. 2.

2. Difference in substance.

Some courts hold that, in the absence of a constitutional requirement that the journals shall show the contents of bills, an enrolled bill cannot be impeached by a showing from the journals that it is not in the same form as that in which it was passed. Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; State ex rel. Gregg v. Erickson, 39 Mont. 280, 102 Pac. 336; ATCHISON, T. & S. F. R. Co. v. STATE; McNeal v. Ritterbusch, 29 Okla. 223, 116 Pac. 778.

And in State ex rel. Reed v. Jones, 6 Wash. 452, 23 L.R.A. 340, 34 Pac. 201, and Duncan v. Combs, 131 Ky. 330, 115 S. W. 222, it was held that the rule of absolute conclusiveness applied, and that an enrolled bill could not be impeached by evidence of the journals showing that it differed from the bill as passed.

But, on the other hand, the weight of authority sustains the rule that an enrolled bill may be impeached by an affirmative showing from the journals to the effect that the bill, as enrolled and approved by the

and considered by the people before they are adopted, are not presumed to have been added for no purpose whatever; and a construction of them that renders them meaningless will be avoided, where they are susceptible of a construction that will give them force and effect, without rendering them clearly in conflict with other provisions of the Constitution. Section 9, art. 10, of the Constitution, places a limitation upon the amount of ad valorem taxes that may be levied for all purposes by the state, county, township, city or town, and school district for any one year. The limitations prescribed by said section are as follows: "State levy, not more than $3\frac{1}{2}$ mills; county levy, not more than 8 mills; provided, that any county may levy not exceeding 2 mills

additional for county high school and aid to the common schools of the county, not over 1 mill of which shall be for such high school, and the aid to said common schools shall be apportioned as provided by law; township levy, not more than 5 mills; city or town levy, not more than 10 mills; school district levy, not more than 5 mills on the dollar for school district purposes, for support of common school; provided, that the aforesaid annual rate for school purposes may be increased by any school district by an amount not to exceed 10 mills on the dollar valuation, on condition that a majority of the voters thereof voting at an election vote for said increase."

The foregoing provision of the Constitution in no way limits the purposes for

governor, materially differed from that passed. *Jones v. Hutchinson*, 43 Ala. 721; *Abernathy v. State*, 78 Ala. 411; *Robertson v. State*, 130 Ala. 164, 30 So. 494; *Yancy v. Waddell*, 139 Ala. 524, 36 So. 733; *Board of Revenue v. Crow*, 141 Ala. 126, 37 So. 469; *King Lumber Co. v. Crow*, 155 Ala. 504, 130 Am. St. Rep. 65, 46 So. 646; *West End v. Simmons*, 165 Ala. 359, 51 So. 638; *Burr v. Ross*, 19 Ark. 250; *Scott v. Clark County*, 34 Ark. 283; *Rogers v. State*, 72 Ark. 565, 82 S. W. 169; *Robertson v. People*, 20 Colo. 279, 38 Pac. 326, 9 Am. Crim. Rep. 284; *West v. State*, 50 Fla. 154, 39 So. 412; *State ex rel. Cheyney v. Sammons*, — Fla. —, 57 So. 196; *State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17; *People ex rel. Oliver v. Knopf*, 198 Ill. 340, 64 N. E. 843, 1127; *Berry v. Baltimore & D. P. R. Co.* 41 Md. 446, 20 Am. Rep. 69; *Opinion of Justices*, — N. H. —, 81 Atl. 170; *State ex rel. Casper v. Moore*, 37 Neb. 13, 55 N. W. 299; *State v. Abbott*, 59 Neb. 106, 80 N. W. 499; *Territory ex rel. McMahon v. O'Connor*, 5 Dak. 397, 3 L.R.A. 355, 41 N. W. 746; *Burke v. Cincinnati*, 10 Ohio S. & C. P. Dec. 542, 8 Ohio N. P. 108; *State v. Rogers*, 22 Or. 348, 30 Pac. 74; *Jackson v. Weis & L. Mfg. Co.* 124 Tenn. 421, 137 S. W. 757; *State v. Wendler*, 94 Wis. 369, 68 N. W. 759; *Milwaukee County v. Isenring*, 109 Wis. 9, 53 L.R.A. 635, 85 N. W. 131.

So, enrolled bills have been held void where the journals showed that several sections were omitted from a bill as approved by the governor (*West End v. Simmons*, 165 Ala. 359, 51 So. 638; *King Lumber Co. v. Crow*, 155 Ala. 504, 130 Am. St. Rep. 65, 46 So. 646); or that an enrolled bill contained matter that was stricken from the bill before its passage (*State v. Wendler*, 94 Wis. 369, 68 N. W. 759, and *Opinion of Justices*, — N. H. —, 81 Atl. 170).

In Nebraska it is conceded that the enrolled bill may be impeached by an affirmative showing from the journals that it was not passed in the same form; but it is held that it cannot be impeached by the mere silence of the journals as to matters that ought to be recorded therein. *Colburn v. McDonald*, 72 Neb. 431, 100 N. W. 40 L.R.A. (N.S.)

961; *Stratton v. State*, 79 Neb. 118, 112 N. W. 361.

The fact that the journals show the adoption of an amendment which was not in the enrolled bill is not a sufficient affirmative showing to defeat it on the ground that it did not pass in the form in which it was enrolled, since, for all that appeared, the amendment might have been reconsidered and defeated. *McKinnon v. Cotner*, 30 Or. 588, 49 Pac. 956.

So, since the Constitution of Florida does not require the nature of amendments to bills to be disclosed by the journals of the legislature, an enrolled bill cannot be impeached by a showing from such records to the effect that an amendment that was in an enrolled bill was rejected by the legislature, since such evidence was not sufficient affirmatively to show that the amendment was not adopted at a subsequent time, without appearing on the journals. *West v. State*, 50 Fla. 154, 39 So. 412; *State ex rel. Cheyney v. Sammons*, — Fla. —, 57 So. 196.

In *State ex rel. Casper v. Moore*, 37 Neb. 13, 55 N. W. 299, an appropriation bill was sustained as to the amount named in the bill as passed, notwithstanding an engrossing clerk added the sum of \$10,000 thereto before the bill was enrolled.

But the failure of the journals to show the disposition of a motion to reconsider the rejection of an amendment that appeared in the enrolled bill will not be sufficient to defeat the bill, unless the Constitution requires such disposition to be shown by the journals, since it will be presumed that such motion prevailed, and that the amendment was subsequently adopted. *State ex rel. Whitson v. Algood*, 87 Tenn. 163, 10 S. W. 310.

As to the competency of parol evidence to show that an enrolled bill differs from the bill passed, see *Annapolis v. Harwood*, *infra*, IV. b.

As to the competency of the bill as originally introduced, to show that the enrolled bill differs from that actually passed, see *infra*, IV. a, 2.

As to the competency of a certificate

which the state may levy a tax, but only fixes a limitation upon the amount it may levy for all purposes. Nor can it be inferred, because this section places a limitation upon the amount of tax that may be levied for school purposes by a school district, that it was intended thereby to prohibit the state from levying any tax for school purposes. It is quite common for the states, in maintaining a system of public schools, not only to levy a state tax to aid in the support of such schools, but to provide school districts with a system of government invested with power to levy tax for school district purposes, to supplement the funds and efforts of the state to maintain a public school system; and the various school districts may thereby in-

crease their public school facilities, subject to the limitations upon their power to tax, as the inhabitants of such districts may feel disposed to do. Section 9, *supra*, does nothing further than place two limitations upon the power of any such school district to levy a tax. The first limitation applies when the levy is made by proper authorities, without a vote of the people. The other limitation is upon the increase over the first levy, that may be made by a vote of the people of the district. To hold that the Constitution has made it the mandatory duty of the legislature, as it clearly has, to establish and maintain a system of free schools; to establish separate schools for white and colored children; to provide for compulsory attendance at

of the chief clerks of the two houses of the legislature, to show that the contents of an enrolled bill differ from the bill as passed, see *Annapolis v. Harwood*, *infra*, IV. a. 6.

As to showing by the stipulations of litigants that an enrolled bill differed from the bill passed, see *Re Granger*, *infra*, IV. c.

3. Nonconcurrence in amendments.

Some courts hold that, unless the Constitution declares that the journals shall show the concurrence of one branch of the legislature in an amendment to a bill made by the other branch, the silence of the journals as to such concurrence in an amendment that appears in an enrolled bill is not sufficient to defeat it. *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 599; *Weis v. Stubblefield*, 85 Kan. 199, 116 Pac. 205; *Re Taylor*, 60 Kan. 87, 55 Pac. 340; *Chesney v. McClintock*, 61 Kan. 94, 58 Pac. 993; *State ex rel. Oldham v. Dean*, 84 Neb. 344, 121 N. W. 719; *State ex rel. Wahoo Waterworks Co. v. Wahoo*, 62 Neb. 40, 86 N. W. 923; *Jackson v. Weis & L. Mfg. Co.* 124 Tenn. 421, 137 S. W. 757; *State ex rel. Whitson v. Algood*, 87 Tenn. 163, 10 S. W. 310; *School Dist. No. 11 v. Chapman*, 82 C. C. A. 35, 152 Fed. 887, certiorari denied in 205 U. S. 545, 51 L. ed. 923, 27 Sup. Ct. Rep. 792.

And, in the absence of a constitutional mandate that the journals shall show amendments to bills, the fact that an enrolled bill did not contain an amendment which the journals show was passed will not render the bill void, since it will be presumed that such amendment was reconsidered and receded from. *Burks v. Jefferson County*, 40 Ark. 200.

So, an enrolled bill cannot be impeached on the ground that the journal of one house shows that of four amendments which appeared in an enrolled bill, such house concurred in but two of them. *Conley v. Dilley*, — Iowa, —, 133 N. W. 730.

Where such a degree of carelessness is disclosed in the preparation of the legislative journals as would justify the court 40 L.R.A. (N.S.)

in refusing to accept their silence as against the affirmative showing of an enrolled bill, it will not be declared void because the concurrence of both houses of the legislature in an amendment contained in the enrolled bill is not shown by the journals. *State ex rel. Wahoo Waterworks Co. v. Wahoo*, 62 Neb. 40, 86 N. W. 923; *State ex rel. Oldham v. Dean*, 84 Neb. 344, 121 N. W. 719.

And where the journal entries relating to the adoption of an amendment that appears in an enrolled bill are contradictory, the bill will be sustained upon the presumption of regular enactment. *Re Taylor*, 60 Kan. 87, 55 Pac. 340.

But, on the other hand, other courts hold that they may go back of an enrolled bill to the legislative journals, to ascertain whether an amendment was duly concurred in. *Scott v. Clark County*, 34 Ark. 283; *Rogers v. State*, 72 Ark. 565, 82 S. W. 169; *Jackson v. Weis & L. Mfg. Co.* 124 Tenn. 421, 137 S. W. 757; *Pueblo County v. Strait*, 36 Colo. 137, 85 Pac. 178; *State ex rel. Cheyney v. Sammons*, — Fla. —, 57 So. 196; *Callison v. Brake*, 63 C. C. A. 354, 129 Fed. 196, affirming 122 Fed. 722.

And where the journals affirmatively show that one branch of the legislature did not concur in an amendment adopted by the other, an enrolled bill containing such amendment will be void. *Rogers v. State*, 72 Ark. 565, 82 S. W. 169; *State v. Savings Bank*, 79 Conn. 141, 64 Atl. 5; *State ex rel. Cheyney v. Sammons*, — Fla. —, 57 So. 196; *People ex rel. Oliver v. Knopf*, 198 Ill. 340, 64 N. E. 843, 1127; *State ex rel. Caillouet v. Laiche*, 105 La. 84, 29 So. 700; *Rode v. Phelps*, 80 Mich. 598, 45 N. W. 493; *Moore v. Neece*, 80 Neb. 600, 114 N. W. 767; *Territory ex rel. McMahon v. O'Connor*, 5 Dak. 397, 3 L.R.A. 355, 44 N. W. 746; *State ex rel. Rogers v. Price*, 8 Ohio C. C. 25, 4 Ohio C. D. 296; *State ex rel. Cheyenne v. Swan*, 7 Wyo. 166, 40 L.R.A. 195, 71 Am. St. Rep. 889, 51 Pac. 209.

But the contrary, however, was held in *De Loach v. Newton*, 134 Ga. 739, 68 S. E. 708, 20 Ann. Cas. 342; and *State ex rel.*

such schools; to provide for a uniform system of text-books; and to require certain subjects to be taught in the schools, and yet had denied to the legislature the power to levy taxes to raise funds with which to accomplish these purposes,—is to hold that the Constitution has provided a means to defeat its own purposes; that it has imposed a duty without conferring the power to execute it. The tax levied by House Bill No. 168 is not levied upon any special district or districts in the state, but is levied uniformly upon the property of the entire state. It is not levied for the benefit of any certain school district or districts of the state, but is levied for the benefit of all the schools of the state. The only

feature about the tax whatever, that in any way connects it with the school districts of the state, is that in the distribution thereof it is apportioned to the districts, to be expended in the maintenance of the public schools of the state. This feature of the bill only makes the districts the disbursing agents of the state for the carrying out of the purposes of the Constitution, to wit, maintaining the public schools of the state.

It follows from the foregoing conclusion that it is our judgment that the portion of House Bill No. 168, attacked in this proceeding, is valid.

All the justices concur.

Reed v. Jones, 6 Wash. 452, 23 L.R.A. 340, 34 Pac. 201.

So, notwithstanding the Constitution does not require amendments to bills to be spread upon the journals, an enrolled bill may be impeached by the evidence of such records, where they show that an amendment was adopted which was not in the enrolled bill. State ex rel. Cheyenne v. Swan, 7 Wyo. 166, 40 L.R.A. 195, 75 Am. St. Rep. 889, 51 Pac. 209.

So, an enrolled bill may be impeached by records of the secretary of state, which the law declares to be competent evidence, that show the nonconcurrence of one house in an amendment which the enrolled bill contained. Rogers v. State, 72 Ark. 565, 82 S. W. 169.

And an enrolled bill has been held void where the journals showed that an amendment which in effect created a new bill was not read three times as the Constitution directed. Erwin v. State, 116 Tenn. 71, 93 S. W. 73.

As to the competency of a bill as originally introduced into the legislature, to show nonconcurrence in an amendment, see State v. Savings Bank, *infra*, IV. a, 2.

As to records kept by the secretary of state as evidence to show nonconcurrence in an amendment, see Rogers v. State, *infra*, IV. a, 5.

As to the competency of an engrossed bill to show that an amendment was adopted which was not in the enrolled bill, see State v. Abbott, *infra*, IV. a, 3.

r. Bill passed at special session of legislature.

1. Not within scope of proclamation of governor convening it.

The proclamation of the governor convening the legislature in extraordinary session may be consulted in order to determine whether an enrolled bill is within the scope of the purpose outlined in such proclamation, where the Constitution prohibits the enactment of any legislation foreign to such purpose. Parsons v. People, 32 Colo. 40 L.R.A. (N.S.)

221, 76 Pac. 666; People ex rel. McGaffey v. District Ct. 23 Colo. 150, 46 Pac. 681; Denver & R. G. R. Co. v. Moss, 50 Colo. 282, 115 Pac. 696; Carroll v. Wright, 131 Ga. 728, 63 S. E. 260; Ross v. Chicago, B. & Q. R. Co. 77 Ill. 127; State ex rel. School Directors v. Romero, 122 La. 885, 48 So. 312; State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 Mont. 529, 77 Pac. 312; State v. Rawlings, 232 Mo. 544, 134 S. W. 530; Wells v. Missouri P. R. Co. 110 Mo. 286, 15 L.R.A. 847, 19 S. W. 530; Chicago, B. & Q. R. Co. v. Wolfe, 61 Neb. 502, 86 N. W. 441; Jones v. Theall, 3 Nev. 233; Likins's Petition, 223 Pa. 456, 468, 72 Atl. 858, 862 (two cases), affirming 37 Pa. Super. Ct. 625, 636; Pittsburgh's Petition, 217 Pa. 227, 120 Am. St. Rep. 845, 66 Atl. 348, affirming 32 Pa. Super. Ct. 210; Mitchell v. Franklin & C. Turnp. Co. 3 Humph. 456; Davidson v. Moorman, 2 Heisk. 575; Brown v. State, 32 Tex. Crim. Rep. 119, 22 S. W. 596; Long v. State, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405; Stockard v. Reid, 57 Tex. Civ. App. 126, 121 S. W. 1144; Manor Casino v. State, — Tex. Civ. App. —, 34 S. W. 769; State v. Spores, 31 W. Va. 491, 13 Am. St. Rep. 875, 7 S. E. 413; Devereaux v. Brownsville, 29 Fed. 742; Baker v. Kaiser, 61 C. C. A. 303, 126 Fed. 317; Nielsen v. Chicago, B. & Q. R. Co. 109 C. C. A. 225, 187 Fed. 393; see also Re Governor's Proclamation, 19 Colo. 333, 35 Pac. 530.

And the journals will be examined to determine whether a bill that was not within the scope of the proclamation convening the legislature in special session was adopted by a two-thirds majority essential to the passage of measures not within the purview of such proclamation. Farmers' Union Warehouse Co. v. McIntosh, 1 Ala. App. 407, 56 So. 102; State ex rel. Woodward v. Skeggs, 154 Ala. 249, 46 So. 268.

So, where it appears from the governor's proclamation to the legislature, that an enrolled bill is not germane to the purposes therein specified, it will be void. Denver & R. G. R. Co. v. Moss, 50 Colo. 282, 115 Pac. 696; Wells v. Missouri P. R. Co. 110

Mo. 286, 15 L.R.A. 847, 19 S. W. 530; Jones v. Theall, 3 Nev. 233; Davidson v. Moorman, 2 Heisk. 275; Manor Casino v. State, — Tex. Civ. App. —, 34 S. W. 769; Nielsen v. Chicago, B. & Q. R. Co. 109 C. C. A. 225, 187 Fed. 393.

While the doctrine that a bill is void if not within the scope of the governor's proclamation convening the legislature in extraordinary session, was adopted in Brown v. State, 32 Tex. Crim. Rep. 119, 22 S. W. 596; Long v. State, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405; Stockard v. Reid, 57 Tex. Civ. App. 126, 121 S. W. 1144; and Manor Casino v. State, — Tex. Civ. App. —, 34 S. W. 769, the contrary was held in Presidio County v. City Nat. Bank, 20 Tex. Civ. App. 511, 44 S. W. 1069; Ball v. Presidio County, — Tex. Civ. App. —, 27 S. W. 702; Baldwin v. State, 21 Tex. App. 591, 3 S. W. 109.

2. Not within scope of governor's proclamation or message.

Where the Constitution requires the legislation enacted at a special session to be confined to subjects designated in the proclamation convening such session, or to those recommended by special message of the governor, after the legislature has convened such message may be consulted in order to ascertain whether an enrolled bill is within its scope. State v. Rawlings, 232 Mo. 544, 134 S. W. 530. So, under a constitutional provision confining such legislation to business specially named in the proclamation, the message may be looked to, to determine the construction put by the governor on the scope of the proclamation. Parsons v. People, 32 Colo. 221, 76 Pac. 666.

And if not within the scope of such message, such bill is void. Jones v. Theall, 3 Nev. 233; Manor Casino v. State, — Tex. Civ. App. —, 34 S. W. 769.

But in Ball v. Presidio County, — Tex. Civ. App. —, 27 S. W. 702, the court refused to hold void an act passed at a special session because it was not within the scope of the governor's proclamation, where the only evidence was such proclamation and the senate journal, which did not show a message from the governor upon the subject of such enactment, and the court said it would not undertake to hold an act void on such evidence, which was not conclusive as to the absence of a sufficient message.

3. Failure to give notice of application for passage of local or special act.

In the absence of a constitutional requirement that the legislative journals shall show that notice was given of intention to apply for the passage of a local or special act, an enrolled bill of that character cannot be impeached for failure to give such notice, or for the insufficiency of the notice actually given. Hall v. Steele, 82 Ala. 562, 2 So. 650; Harrison v. Gordy, 57 Ala. 49; Clarke v. Jack, 60 Ala. 271; Walker v. Griffith, 60 Ala. 361; McKemie v. Gorman, 68 Ala. 442; Jennings v. Russell, 92 Ala. 603, 9 So. 40 L.R.A. (N.S.)

421; Keene v. Jefferson County, 135 Ala. 465, 33 So. 435; Robinson v. State, — Ala. App. —, 58 So. 121; Waterman v. Hawkins, 75 Ark. 120, 86 S. W. 844; Caton v. Western Clay Drainage Dist. 87 Ark. 8, 112 S. W. 145; Rushton v. State, 58 Fla. 94, 50 So. 486; Peed v. McCrary, 94 Ga. 487, 21 S. E. 232; Fullington v. Williams, 98 Ga. 807, 27 S. E. 183; Cutcher v. Crawford, 105 Ga. 180, 31 S. E. 139; Lee v. Tucker, 130 Ga. 43, 60 S. E. 164; White v. Atlanta, 134 Ga. 532, 68 S. E. 103; Clark v. Eve, 134 Ga. 788, 68 S. E. 598; Burge v. Mangum, 134 Ga. 307, 67 S. E. 857; State v. Murray, 47 La. Ann. 1424, 17 So. 832; Cox v. Pitt County, 146 N. C. 584, 16 L.R.A. (N.S.) 253, 60 S. E. 516; Bray v. Williams, 137 N. C. 387, 49 S. E. 887; Brodnax v. Groom, 64 N. C. 244; Smith v. Helmer, 7 Barb. 416; Rakowski v. Wagoner, 24 Okla. 282, 103 Pac. 632; Perkins v. Philadelphia, 156 Pa. 554, 27 Atl. 356; Edinburgh & D. R. Co. v. Wauchope, 8 Clark & F. 710.

Nor can a special or local bill providing for the removal of a county seat be impeached by showing that the legislature, in adopting it, acted without having before it, as required by law, evidence of an election for its removal having been held, where the journals do not affirmatively show lack of notice of such election. Cutcher v. Crawford, 105 Ga. 180, 31 S. E. 139; Lee v. Tucker, 130 Ga. 43, 60 S. E. 164.

And it was held in McClinch v. Sturgis, 72 Me. 288, and Day v. Stetson, 8 Me. 365, that a statutory requirement that notice of the pendency of an application for the passage of a special act of incorporation should be given to those interested therein was directory merely, and the failure to comply therewith would not invalidate an enrolled bill.

And it has been held in Texas that, in the absence of pleading and proof to the contrary, it will be presumed that proper notice of application for the passage of a local or special act was given, as the Constitution required. Thompson v. State, 23 Tex. Civ. App. 370, 56 S. W. 603; Moller v. Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116; Cravens v. State, 57 Tex. Crim. Rep. 135, 136 Am. St. Rep. 977, 122 S. W. 29.

But if the Constitution requires the legislative journals to show that such notice was given, they may be examined in order to ascertain whether notice was actually given, or to test the sufficiency of the notice given. Wallace v. Board of Revenue, 140 Ala. 491, 37 So. 321; State ex rel. Atty. Gen. v. Sayre, 142 Ala. 641, 39 So. 240, 4 Ann. Cas. 656; Childers v. Shepherd, 142 Ala. 385, 39 So. 235; Law v. State, 142 Ala. 62, 38 So. 798; Dudley v. Fitzpatrick, 143 Ala. 162, 39 So. 384; Green v. State, 143 Ala. 2, 39 So. 362; State ex rel. Van Deusen v. Williams, 143 Ala. 501, 39 So. 276; Norvell v. State, 143 Ala. 561, 39 So. 357; Ex parte Black, 144 Ala. 1, 40 So. 133; Jacobs v. State, 144 Ala. 98, 40 So. 572; Uniontown v. State, 145 Ala. 471, 39 So. 814, 8 Ann. Cas. 320; State ex rel. Hanna v. Tunstall, 145 Ala. 477, 40 So. 135; State ex rel. Perdue v. Ab-

ernathy, 146 Ala. 689, 40 So. 353; State ex rel. Frederick v. Brodie, 148 Ala. 381, 41 So. 180; Brame v. State, 148 Ala. 629, 38 So. 1031; State ex rel. Saltzman v. Weakley, 153 Ala. 648, 45 So. 175; Ex parte Kelly, 153 Ala. 668, 45 So. 290; Ex parte O'Neal, 154 Ala. 237, 45 So. 712; Ham v. State, 156 Ala. 645, 47 So. 126; Barnett v. State, 165 Ala. 59, 51 So. 299; Ensley v. Simpson, 166 Ala. 366, 52 So. 61; Miller v. Griffith, 171 Ala. 337, 54 So. 650; State ex rel. Clark v. Carter, — Ala. —, 56 So. 974; Robinson v. State, — Ala. —, 58 So. 121; Lower v. State, 3 Ala. App. 122, 57 So. 500.

And if the journals disclose the insufficiency of the notice given, it will render an enrolled bill void. Wallace v. Board of Revenue, 140 Ala. 491, 37 So. 321; State ex rel. Atty. Gen. v. Sayre, 142 Ala. 641, 39 So. 240, 4 Ann. Cas. 656; State ex rel. Frederick v. Brodie, 148 Ala. 381, 41 So. 180; Ex parte Kelly, 153 Ala. 668, 45 So. 290; State ex rel. Saltzman v. Weakley, 153 Ala. 648, 45 So. 175; Norvell v. State, 143 Ala. 561, 39 So. 357; State, Ewing Twp. Prosecutor, v. Trenton, 57 N. J. L. 318, 31 Atl. 223; Atty. Gen. v. Tuckerton, 67 N. J. L. 120, 50 Atl. 602.

So, a local or special enrolled bill will be void if the journals show that its purpose was not germane to that stated in the notice of intention to apply for its passage. Brame v. State, 148 Ala. 629, 38 So. 1031; State ex rel. Atty. Gen. v. Speake, 144 Ala. 509, 39 So. 224; Goodwyn v. Sherer, 145 Ala. 501, 40 So. 279; Larkin v. Simmons, 155 Ala. 273, 46 So. 451; State ex rel. Thomas v. Gunter, 170 Ala. 165, 54 So. 283; Christian v. State, 171 Ala. 52, 54 So. 1001.

And such an enrolled bill will be void if the journals disclose that such notice did not set forth the substance of the proposed local or special act, as the Constitution requires. Lancaster v. Gafford, 139 Ala. 372, 37 So. 108; Wallace v. Board of Revenue, 140 Ala. 491, 37 So. 321; Hooton v. Mellon, 142 Ala. 245, 37 So. 937; Tillman v. Porter, 142 Ala. 372, 38 So. 647; Elba v. Rhodes, 142 Ala. 689, 38 So. 807; Norvell v. State, 143 Ala. 561, 39 So. 357.

And an enrolled local or special bill is void where the purpose thereof, as stated in such notice, showed that the bill would be unconstitutional. Alford v. Hicks, 142 Ala. 355, 38 So. 752.

So, such an enrolled bill will be void if the journals affirmatively show the insufficiency of the proof of giving such notice (Kumpe v. Irwin, 140 Ala. 460, 36 So. 1024); or where the affidavit of publication without the notice is spread on the journals (State ex rel. Frederick v. Brodie, 148 Ala. 381, 41 So. 180); or where such proof omitted the name of the notary public before whom it was acknowledged (Sellers v. State, 162 Ala. 35, 50 So. 340).

As to the effect of a protest or committee report entered on the journals showing want of such notice, see *infra*, IV. a, 9 and 10.

As to showing by stipulations of litigants that notice of intention to apply for the 40 L.R.A.(N.S.)

passage of a local or special act was not given, see *infra*, IV. c.

t. Violation of statutory or legislative rules of procedure in passing bill.

An enrolled bill is not open to attack on the ground that a statutory rule of legislative procedure was not observed in passing it. McClinch v. Sturgis, 72 Me. 288; Day v. Stetson, 8 Me. 365; Sweitzer v. Territory, 5 Okla. 297, 47 Pac. 1094; Jones v. Territory, 5 Okla. 536, 49 S. W. 934; State v. Septon, 3 R. I. 119; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127, affirming 123 Fed. 707.

Nor will an enrolled bill be declared void because of the failure of the legislature to observe, in passing it, its own rules of procedure. St. Louis & S. F. R. Co. v. Gill, 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18; Simon v. State, 86 Ark. 527, 111 S. W. 991; Miller v. Oelwein, — Iowa, —, 136 N. W. 1045; Gray v. Taylor, 15 N. M. 742, 113 Pac. 588; McDonald v. State, 80 Wis. 407, 50 N. W. 185.

u. Fraud or improper motive of legislature in passing bill.

An enrolled bill is not open to attack on the ground that its passage was obtained by fraudulent means, or that improper motives actuated the legislature in passing it. Little Rock v. North Little Rock, 72 Ark. 195, 79 S. W. 785; Kirst v. Street Improv. Dist. No. 120, 86 Ark. 1, 109 S. W. 526; People ex rel. Searer v. Glenn County, 100 Cal. 419, 38 Am. St. Rep. 305, 35 Pac. 302; State ex rel. McVey v. Burris, 4 Penn. (Del.) 3, 49 Atl. 930; Blaine County v. Heard, 5 Idaho, 6, 45 Pac. 890; Wright v. Kelley, 4 Idaho, 624, 43 Pac. 565; State ex rel. Kitcham v. Terre Haute & I. R. Co. 166 Ind. 580, 77 N. E. 1077; Wichita v. Burleigh, 36 Kan. 34, 12 Pac. 332; State ex rel. Belden v. Fagan, 22 La. Ann. 545; Jewell v. Weed, 18 Minn. 272, Gil. 247; State ex rel. Blakeman v. Hays, 40 Mo. 604; People ex rel. McMullen v. Shepard, 36 N. Y. 285; Carr v. Coke, 116 N. C. 223, 28 L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16; Sunbury & E. R. Co. v. Cooper, 33 Pa. 278.

And this is true notwithstanding the journals show that a bill was passed by fraudulent or illegal means. Blaine County v. Heard, 5 Idaho, 6, 45 Pac. 890; Wright v. Kelley, 4 Idaho, 624, 43 Pac. 565; Carr v. Coke, 116 N. C. 223, 28 L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16.

So, where the Constitution does not prescribe what shall be spread on the journals, they cannot be used to impeach an enrolled bill by showing that the enrolment thereof, as well as the signature of the presiding officers of the legislature thereto, was obtained by fraud. Carr v. Coke, 116 N. C. 223, 28 L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16.

Nor will an enrolled bill be declared void because of the alleged bribery of some mem-

bers of the legislature. *Lynn v. Polk*, 8 Lea, 293.

Or because its passage was obtained by fraudulent and fictitious votes. *London & C. Loan & Agency Co. v. Rural Municipality*, 7 Manitoba L. Rep. 128.

But it was said in *State ex rel. Morris v. Mason*, 43 La. Ann. 590, 9 So. 776, that evidence was admissible to show fraud, error, or improper exercise of judgment on the part of the agents of the state or its representatives in the enactment of a law.

As to the admissibility of parol evidence to show that the enrolment of a bill was obtained by fraud, see *Carr v. Coke*, *infra*, IV. b.

v. Bill passed without enacting clause.

A bill that was passed without an enacting clause, which was required by Constitution, is void where one was added to the bill by a legislative clerk before its approval by the governor. *People v. Dettenthaler*, 118 Mich. 595, 44 L.R.A. 164, 77 N. W. 450.

As to the competency of parol evidence to show that such enacting clause was added at the direction of the house, see *People v. Dettenthaler*, *infra*, IV. b.

IV. Impeachment of bills by evidence other than legislative journals.

a. Records and documents.

1. In general.

The legislative journals are the only evidence competent to impeach an enrolled bill. *Ex parte Howard-Harrison Iron Co.* 119 Ala. 484, 72 Am. St. Rep. 928, 24 So. 516; *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 599; *State ex rel. Crenshaw v. Joseph*, — Ala. —, 57 Mo. 942; *Missouri, K. & T. R. Co. v. Simons*, 75 Kan. 130, 88 Pac. 551; *Re Howard County*, 15 Kan. 194; *Rash v. Allen*, — Del. —, 76 Atl. 370; *State v. Abbott*, 59 Neb. 106, 80 N. W. 499; *State v. Burlington & M. River R. Co.* 60 Neb. 741, 84 N. W. 254.

But it was said in *State v. Bowman*, 90 Ark. 174, 118 S. W. 711, that the court may resort to any source of information in order to arrive at a correct determination as to the validity of an enrolled bill.

Extrinsic evidence is incompetent to show that an enrolled bill was not approved by the governor within the time limited by the Constitution therefor, after the adjournment of the legislature. *State ex rel. Crenshaw v. Joseph*, — Ala. —, 57 So. 942; *Bloomfield v. Middlesex County*, 74 N. J. L. 261, 65 Atl. 890; *People ex rel. Haller v. Clayton*, 5 Utah, 598, 18 Pac. 628; *Capito v. Topping*, 65 W. Va. 587, 22 L.R.A. (N.S.) 1089, 64 S. E. 845; *Gibson v. Anderson*, 65 C. C. A. 277, 131 Fed. 39.

And in *People ex rel. Haller v. Clayton*, 5 Utah, 598, 18 Pac. 628, it was held that the journals were not competent to contradict the records of the secretary of state, 40 L.R.A. (N.S.)

by showing that an enrolled bill was not approved by the governor within the time limited by the Constitution.

2. Bill as originally introduced.

A bill as originally introduced into the legislature has been resorted to in a number of cases in order to ascertain the legality of its adoption. *Loftin v. Watson*, 32 Ark. 414; *Haney v. State*, 34 Ark. 263; *Burks v. Jefferson County*, 40 Ark. 200; *State v. Savings Bank*, 79 Conn. 141, 64 Atl. 5; *Berry v. Baltimore & D. P. R. Co.* 41 Md. 446, 20 Am. Rep. 69; *Dunn v. Brager*, 116 Md. 242, 81 Atl. 517; *State v. Rawlings*, 232 Mo. 544, 134 S. W. 530; *New Hanover County v. De Rosset*, 129 N. C. 275, 40 S. E. 43; *Com. v. Martin*, 107 Pa. 185; *Milwaukee County v. Isenring*, 109 Wis. 9, 53 L.R.A. 635, 85 N. W. 131.

Thus, such an original bill has been consulted to ascertain whether an enrolled bill differed from the bill as actually adopted. *Haney v. State*, 34 Ark. 263; *Burks v. Jefferson County*, 40 Ark. 200; *State v. Savings Bank*, 79 Conn. 141, 64 Atl. 5; *Dunn v. Brager*, 116 Md. 242, 81 Atl. 517; *State v. Rawlings*, 232 Mo. 544, 134 S. W. 530. See also *Milwaukee County v. Isenring*, 109 Wis. 9, 53 L.R.A. 635, 85 N. W. 131.

And such a bill has been resorted to in order to determine whether the enrolled bill bore the same title as that adopted by the legislature. *Com. v. Martin*, 107 Pa. 185.

So a bill as introduced into the legislature may be examined to ascertain whether its purpose was changed during passage, in violation of a constitutional prohibition. *Loftin v. Watson*, 32 Ark. 414.

And in *New Hanover County v. De Rosset*, 129 N. C. 275, 40 S. E. 43, such a bill, together with the indorsements thereon relating to its passage, were examined in order to ascertain whether it was read on three several days as the Constitution required.

And in *State v. Savings Bank*, 79 Conn. 141, 64 Atl. 5, the court resorted to the original file of a bill upon which was indorsed the action taken by the legislature in passing it, and held the enrolled bill void, as it did not appear that both houses concurred in an amendment which was in the bill.

But in *George Bolln Co. v. North Platte Valley Irrig. Co.* — Wyo. —, 39 L.R.A. (N.S.) 868, 121 Pac. 22, it was held that the journals, and not the indorsements on the bill as introduced, would control in determining whether a bill was signed by the presiding officers of the legislature in the manner directed by the Constitution.

And it was held in *State v. Abbott*, 59 Neb. 106, 80 N. W. 499; *New Hanover County v. Armour Packing Co.* 135 N. C. 62, 47 S. E. 411; *State ex rel. Walbridge v. Jones*, 11 Ohio C. D. 496, that an enrolled bill cannot be impeached by showing defects in the passage thereof by comparison with the bill as originally introduced into

the legislature, and by the indorsements thereon.

So it was held in *Rash v. Allen*, — Del. —, 76 Atl. 370, that such original bill, together with the indorsements thereon, cannot be considered in determining whether a constitutional requirement that certain facts should be entered on the legislative journals was complied with.

Nor can the recitals of the journals be contradicted by such original bill. *New Hanover County v. Armour Packing Co.* 135 N. C. 62, 47 S. E. 411.

3. Engrossed bill.

A bill as engrossed after passage, together with several slips of paper attached thereto, is incompetent to impeach the enrolled bill, by showing that amendments were adopted which were not in such bill. *State v. Abbott*, 59 Neb. 106, 80 N. W. 499.

Nor is a bill as engrossed by one house competent to show the omission of words from the enrolled bill. *State ex rel. Walbridge v. Jones*, 11 Ohio C. D. 496.

4. Records and papers of governor.

It was held in *State ex rel. Crocker v. Junkin*, 79 Neb. 532, 113 N. W. 256, that where the recitals of the journals as to the time of adjournment of the legislature were ambiguous and conflicting, records of the governor's office might be consulted to disclose the date of adjournment, in order to show the invalidity of an enrolled bill because it was not approved by the governor after the adjournment of the legislature, within the time limited by the Constitution.

And the governor's proclamation that a bill was found by him when he assumed office, and that he erased the approval of his predecessor and vetoed the bill, may be considered in order to determine whether an enrolled bill was in fact vetoed. *Powell v. Hays*, 83 Ark. 448, 104 S. W. 177, 13 Ann. Cas. 220.

It was held in *Lankford v. Somerset County*, 73 Md. 105, 11 L.R.A. 491, 20 Atl. 1017, rehearing in 73 Md. 125, 22 Atl. 412, that, in order to show that a bill was not vetoed by the governor after the adjournment of the legislature, within the time limited by the Constitution, a record kept by the secretary of state, as required by the Constitution, might be resorted to in order to show that the legislature adjourned on a different day from that certified by the officers of the legislature.

But it was held in *State ex rel. Crenshaw v. Joseph*, — Ala. —, 57 So. 942, that the nonapproval of a bill by the governor and its return to the legislature within the time limited by the Constitution, so that it became a law without his approval, could not be established by the indorsement on the bill by the governor's secretary of the date on which it was received by the governor. 40 L.R.A. (N.S.)

5. Records of secretary of state.

An enrolled bill may be impeached by records of the secretary of state, kept pursuant to law and declared to be competent evidence, by showing non-concurrence of one house in an amendment contained in the enrolled bill, where the journals did not show its contents. *Rogers v. State*, 72 Ark. 565, 82 S. W. 169.

And an enrolled bill published in a compilation of the laws will be declared void where the records of the secretary of state show that it was not re-enacted after being declared void by the supreme court for defects in its passage. *Bowen v. Missouri P. R. Co.* 118 Mo. 541, 24 S. W. 436; *Bran-nock v. St. Louis, M. & S. E. R. Co.* 200 Mo. 561, 118 Am. St. Rep. 695, 98 S. W. 604.

6. Certificates of legislative officers.

An enrolled bill cannot be impeached by a certificate of the chief clerks of the two houses of the legislature, showing that its contents differed from the bill as passed. *Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161.

7. Records and memoranda of legislative officers and clerks.

The recitals of the legislative journals cannot, in order to impeach an enrolled bill, be contradicted or altered by memoranda made by legislative officers. *State ex rel. McKinley v. Martin*, 160 Ala. 181, 48 So. 848; *Ex parte Howard-Harrison Iron Co.* 119 Ala. 484, 72 Am. St. Rep. 928, 24 So. 516; *Massachusetts Mut. L. Ins. Co. v. Colorado Loan & T. Co.* 20 Colo. 1, 36 Pac. 793; *State ex rel. Markens v. Brown*, 20 Fla. 407.

And it was held in *Rash v. Allen*, — Del. —, 76 Atl. 370, that records and dockets of the speaker, clerks, and other legislative officers, are incompetent to show compliance with a constitutional mandate in the passage of a bill, which that instrument declared should be disclosed by the journals.

But in *Black v. Buncombe County*, 129 N. C. 121, 39 S. E. 818, the calender of the house was examined to determine whether a bill was read on three several days as the Constitution required.

The fact that the President of the United States did not veto a bill within the time limited by the Constitution, so that it became a law without approval may be shown by a memorandum in the minute book kept by the journal clerk of the House of Representatives, to the effect that the President's veto was received on a different day from that stated in the journal. *United States v. Allen*, 36 Fed. 174.

But the value of this decision is destroyed by *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, which establishes the rule of absolute conclusiveness of an enrolled bill.

8. *Stenographer's minutes.*

The notes of the stenographer of the house cannot be used to impeach a bill, by showing that action on it was indefinitely postponed and never taken up. *McNeal v. Ritterbusch*, 29 Okla. 223, 116 Pac. 778.

9. *Committee reports.*

An enrolled bill of a local or special character cannot be impeached by a minority report of a legislative committee, which showed that notice of intention to apply for its passage had not been given. *Cutcher v. Crawford*, 105 Ga. 180, 31 S. E. 139.

Nor is a report of a legislative committee as recorded on the journals competent to show the passage of a bill by a necessary aye and nay vote, where the journals did not disclose such fact. *Rio Grande Sampling Co. v. Catlin*, 40 Colo. 450, 94 Pac. 323.

10. *Protests of members of legislature.*

Notwithstanding the Constitution requires that the protest of any member of the legislature shall be entered on the journals, such a protest cannot be invoked in order to impeach an enrolled bill. *Ensley v. Simpson*, 166 Ala. 366, 52 So. 61; *Auditor General v. Menominee County*, 89 Mich. 552, 51 N. W. 483.

The rule has been applied where it was sought to contradict a recital of the journal that a quorum was present when a bill was passed, by such a protest, which, together with affidavits accompanying it, was entered on the journal. *Auditor General v. Menominee County*, 89 Mich. 552, 51 N. W. 483.

Nor can the recital of the journals that notice of application for the passage of a local or special act was given be contradicted by such a constitutional protest and affidavits entered on the journals. *Ensley v. Simpson*, 166 Ala. 366, 52 So. 61.

But under the Constitution of Missouri, in order that an enrolled bill may be impeached for nonobservance of some constitutional mandate during its passage, a protest showing such irregularity must be noted on the journals before the bill is signed by the presiding officers of the legislature. *State ex rel. Atty. Gen. v. Mead*, 71 Mo. 266; *State ex rel. McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636.

b. *Parol evidence.*

Parol evidence is incompetent to impeach an enrolled bill by showing the disregard of a constitutional mandate in its passage. *Jackson v. State*, 131 Ala. 21, 31 So. 380; *Andrews v. People*, 33 Colo. 193, 108 Am. St. Rep. 76, 79 Pac. 1031; *Koehler v. Hill*, 60 Iowa, 552, 14 N. W. 738, rehearing in 60 Iowa, 603, 15 N. W. 609; *Berry v. Baltimore & D. P. R. Co.* 41 Md. 446, 20 Am. Rep. 69; *Auditor General v. Menominee County*, 89 Mich. 552, 51 N. W. 483; *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023; *Carr v. Coke*, 116 N. C. 223, 28 40 L.R.A.(N.S.)

L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16; *State ex rel. Walbridge v. Jones*, 11 Ohio C. D. 496.

And parol evidence is incompetent to contradict or alter the recitals of the journals, in order to show defects in the passage of a bill. *State ex rel. McKinley v. Martin*, 160 Ala. 181, 48 So. 846; *Jackson v. State*, 131 Ala. 21, 31 So. 380; *Weeks v. Smith*, 81 Me. 538, 18 Atl. 325; *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *Auditor General v. Menominee County*, 89 Mich. 552, 51 N. W. 483; *Carr v. Coke*, 116 N. C. 223, 28 L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16; *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023; *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *State ex rel. Walbridge v. Jones*, 11 Ohio C. D. 496; *State ex rel. Eckhardt v. Hoff*, — Tex. Civ. App. —, 29 S. W. 672; *White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953; *Portland Gold Min. Co. v. Duke*, 113 C. C. A. 316; 191 Fed. 692.

Thus, where the legislative journals show that an enrolled bill was regularly passed, it cannot be impeached by parol evidence showing that it was not introduced into the legislature within the time limited by the Constitution therefor (*Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203); or that it was not read as the Constitution requires (*Carr v. Coke*, 116 N. C. 223, 28 L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16); or that it was introduced, passed, and approved by the governor after the expiration of the legislative session by operation of law (*White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953); or that it was adopted by aid of votes of members not legally seated (*State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829).

So, parol evidence is inadmissible to show that an enrolled bill differs from that passed by the legislature (*Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161); or to show slight alterations therein before it was approved by the governor (*Ames v. Union P. R. Co.* 64 Fed. 165, affirmed on other points in 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418); or that the enrolment of a bill and the signatures thereto of the presiding officers of the legislature were obtained by fraud (*Carr v. Coke*, 116 N. C. 223, 28 L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16); or to show the intent of the legislature in enacting a bill (*Garland County v. Hot Springs County*, 68 Ark. 83, 56 N. W. 636); or to show that a bill was passed without an enacting clause (*People v. Dettenthaler*, 118 Mich. 595, 44 L.R.A. 164, 77 N. W. 450); or to show when an enrolled bill became effective (*Re Wellman*, 20 Vt. 653, Fed. Cas. No. 17,407).

Nor is parol evidence admissible to show that the purpose of a bill was changed, in defiance of the Constitution, after the expiration of the time for introduction of bills, so as to make it a new bill. *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165.

And the records of the secretary of state

cannot be impeached by parol evidence showing that an enrolled bill was not approved by the governor. *People ex rel. Partello v. McCullough*, 210 Ill. 488, 71 N. E. 602.

Nor can such records be impeached by parol evidence showing that an enrolled bill was not approved by the governor within the time limited by the Constitution. *People ex rel. Haller v. Clayton*, 5 Utah, 598, 18 Pac. 628.

So, it cannot be shown by parol that the governor vetoed an enrolled bill, where the Constitution requires such fact to be shown by the journals. *State ex rel. Colbert v. Wheeler*, 172 Ind. 587, 89 N. E. 1, 19 Ann. Cas. 834.

Nor can it be shown by parol that, because of the governor's continued absence from his office, he could not have approved a bill within the time limited by the Constitution. *Wrede v. Richardson*, 77 Ohio St. 182, 122 Am. St. Rep. 498, 82 N. E. 1072.

But, on the other hand, parol evidence has been admitted in some cases to impeach an enrolled bill.

Thus, in *Allegany County v. Warfield*, 100 Md. 516, 108 Am. St. Rep. 446, 60 Atl. 599, parol evidence was admitted tending to show that a bill was not actually approved by the governor, although he had, without intending to approve it, affixed his signature thereto, where he immediately erased it upon discovering his error.

So, parol evidence bearing on the question whether or not an enrolled bill was actually vetoed by the governor was admitted in *Powell v. Hays*, 83 Ark. 448, 104 S. W. 177, 13 Ann. Cas. 220, and *State ex rel. Colbert v. Wheeler*, 172 Ind. 578, 89 N. E. 1, 19 Ann. Cas. 834.

And in *State ex rel. Crocker v. Junkin*, 79 Neb. 532, 113 N. W. 256, parol evidence of the clerk of the house and secretary of the senate was received, together with the records of the governor's office, in order to show that an enrolled bill was void on the ground that it was not approved by the governor after the adjournment of the legislature, within the time limited by the Constitution, where the recitals of the journals as to the day of adjournment of the legislature were ambiguous and conflicting.

c. Stipulations and admissions as to invalidity of bill.

Stipulations or admissions of litigants that a bill was not constitutionally enacted are incompetent to impeach an enrolled bill. *Graves v. Alsap*, 1 Ariz. 274, 25 Pac. 836; *Peckham v. People*, 32 Colo. 140, 75 Pac. 422; *Anderson v. Grand Valley Irrig. Dist.* 35 Colo. 525, 85 Pac. 313; *Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70; *Fullington v. Williams*, 98 Ga. 807, 27 S. E. 183; *Cutcher v. Crawford*, 105 Ga. 180, 31 S. E. 139; *Re Granger*, 56 Neb. 260, 76 N. W. 588; *Morris v. Newark*, 73 N. J. L. 268, 62 Atl. 1005; *Gatlin v. Tarboro*, 78 N. C. 119.

Thus, it cannot be shown by the stipulation of litigants that a bill as originally in-

troduced, together with indorsements thereon, was not the same as the enrolled bill passed by the legislature. *Re Granger*, 56 Neb. 260, 76 N. W. 588.

Nor will the court determine whether an act was properly approved by the governor, upon the stipulation of the parties as to the facts upon which the claim of irregularity is based. *Morris v. Newark*, 73 N. J. L. 268, 67 Atl. 1005.

Nor can a local or special act be impeached by the admissions of litigants to the effect that constitutional notice of intention to apply for its passage was not given. *Fullington v. Williams*, 98 Ga. 807, 27 S. E. 183; *Cutcher v. Crawford*, 105 Ga. 180, 31 S. E. 139; *Gatlin v. Tarboro*, 78 N. C. 119. *Contra*, *Chalfant v. Edwards*, 173 Pa. 246, 33 Atl. 1048.

Nor will an enrolled bill be declared void upon the admission in the pleadings that it was not passed in a constitutional manner. *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642, 10 Ann. Cas. 774.

Nor are admissions of parties or stipulations of counsel as to the contents of the journals competent for the purpose of impeaching the validity of an enrolled bill. *Anderson v. Grand Valley Irrig. Dist.* 35 Colo. 525, 85 Pac. 313.

But, on the contrary, it has been held or assumed in some cases that admissions or stipulations of litigants are admissible to impeach an enrolled bill. *Chalfant v. Edwards*, 173 Pa. 246, 33 Atl. 1048; *Sala's Succession*, 50 La. Ann. 1009, 24 So. 674; *Givanovich's Succession*, 50 La. Ann. 625, 24 So. 679; *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380; and *State ex rel. Hynds v. Cahill*, 12 Wyo. 225, 75 Pac. 433.

Thus, an enrolled bill for raising revenue was declared void upon a concession that it originated in the senate in violation of the Constitution. *Sala's Succession*, 50 La. Ann. 1009, 24 So. 674; *Givanovich's Succession*, 50 La. Ann. 625, 24 So. 679.

And in *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380, a bill was held void on a concession that it was not passed by a constitutional two-third majority.

So, in *State ex rel. Hynds v. Cahill*, 12 Wyo. 225, 75 Pac. 433, the court considered an agreed statement of facts as to the regularity of the passage of an act in compliance with constitutional requirements.

V. Resort to legislative journals in aid of bills.

a. To establish law for which no enrolled bill can be found.

In *State ex rel. Colbert v. Wheeler*, 172 Ind. 578, 89 N. E. 1, 19 Ann. Cas. 834, the legislative journals and files of the governor's office, as well as those of the state librarian, were consulted in order to determine whether an act actually existed, where the enrolled bill was not found in the office of the secretary of state.

And in *State v. Savings Bank*, 79 Conn.

141, 64 Atl. 5, the journals as well as the original file of the bill, with a record of the legislative proceedings pertaining thereto indorsed thereon, were resorted to in order to determine whether a bill that was not found in the office of the secretary of state actually became a law.

But it was held in *Graves v. Alsap*, 1 Ariz. 274, 25 Pac. 836 that the legislative journals could not be resorted to in order to ascertain whether a law was enacted and still in force, where no enrolled bill was found in the proper archives, since the absence of an enrolled bill therefrom was conclusive evidence, said the court, that such an act never existed.

b. To show passage of bill by constitutional majority.

The legislative journals may be used to sustain a joint resolution, by showing that it was passed by a necessary two-thirds majority, notwithstanding the certificate of the presiding officers of the two houses of the legislature annexed to such resolutions, as required by statute, stated that it was passed by a majority vote. *Re Weeks*, 109 App. Div. 859, 96 N. Y. Supp. 876, affirmed without opinion in 185 N. Y. 541, 77 N. E. 1197.

And in *New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, 42 N. E. 1088, an enrolled bill was sustained where the journals showed that it was passed by a necessary two-thirds vote, notwithstanding the certificate attached to the bill stated only that three-fifths of the members of the legislature were present when it was passed.

c. To show passage of bill over governor's veto.

It may be shown by the legislative journals that an enrolled bill was passed by the legislature over the governor's veto. *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; *Houston & T. C. R. Co. v. Odum*, 53 Tex. 343.

And in *Re Welman*, 20 Vt. 653, s. c. Fed. Cas. No. 17,407, the court said that it might be necessary and admissible in some instances, particularly where an act becomes a law by passage over a veto, to carry an inquiry into the legislative journals.

In *Hovey v. State*, 119 Ind. 395, 21 N. E. 21, it was said, in substance, that in order to determine whether a bill was passed over the governor's veto, where the bill did not bear his approval, but the certificate of the secretary of state attached thereto stated that it was adopted over his veto, the court might, for the purpose of information merely, resort to any public record for which the law provides, in order to furnish a history of legislative events, although no evidence could override the constitutional authentication on the face of an enrolled bill, behind which courts will not look.

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d. To show enactment of bill with emergency clause.

A bill that did not, when approved, contain an emergency clause, cannot be shown by the journals to have been enacted with such clause by a constitutional majority, so as to permit the bill to take immediate effect. *Re General Appropriation Bill*, 16 Colo. 539, 29 Pac. 379.

VI. Resort to evidence other than journals in aid of bills.

a. Documentary.

1. To show passage of bill.

It was held in *State ex rel. McClay v. Mickey*, 73 Neb. 281, 119 Am. St. Rep. 894, 102 N. W. 679, that where the journals did not show that an act was passed, otherwise than to state its title, although it had received the approval of the executive, its existence could not be established by a certificate made by the clerical officer of the legislature after it had adjourned *sine die*, since, if it were permissible to establish a bill in that manner, there would not be a compliance with the constitutional mandate that all bills shall be signed by the presiding officers of both houses in the presence thereof.

A report of a committee of the legislature, as recorded on the journal, is not admissible to show that a bill was, in fact, passed by an aye and nay vote, which the journal did not disclose. *Rio Grande Sampling Co. v. Catlin*, 40 Colo. 450, 94 Pac. 323.

2. To show reading of bill.

In *Black v. Buncombe County*, 129 N. C. 121, 39 S. E. 818, the calendar of the house was examined in order to determine whether a bill was read in the manner directed by the Constitution.

In *New Hanover County v. De Rosset*, 129 N. C. 275, 40 S. E. 43; and *Black v. Buncombe County*, 129 N. C. 121, 39 S. E. 818, an original bill was resorted to which showed by an indorsement thereon that it was read on three several days as the Constitution required.

3. To show approval of bill.

A record kept by the governor of the presentation of bills to him for approval is competent to establish the fact that an enrolled bill was approved within the time limited by the Constitution notwithstanding the entry in such record was made by a subordinate in the course of his duties. *Wrede v. Richardson*, 77 Ohio St. 182, 122 Am. St. Rep. 498, 82 N. E. 1072.

Where the journal entries are conflicting as to the date on which the legislature adjourned, it may be established by records kept by the governor, so as to show that he approved an enrolled bill within the time limited by the Constitution. *State ex rel. Crocker v. Junkin*, 79 Neb. 532, 113 N. W. 256.

4. To identify enrolled bill as that actually passed.

In *Butler v. Fourche Drainage Dist.* — Ark. —, 146 S. W. 120, a bill as originally introduced into the legislature, together with the indorsements made thereon by the officers of the legislature, was examined in order to identify it as the bill that was actually passed, where the journals, as the result of an error in recording the vote on the passage of the bill, referred to it by a wrong number. But the court expressly stated that it did not intend to hold that the journals could be contradicted in such manner, since it resorted to such evidence, in connection with the various journal entries pertaining to the passage of the bill, for the purpose of identification only.

5. To supply omission from enrolled bill.

In *State ex rel. Benton County v. Boice*, 140 Ind. 506, 39 N. E. 64, 40 N. E. 113, it was held that an omission from an enrolled bill could not be supplied by resorting to the engrossment thereof.

b. Parol evidence.

The existence of an act that was not found in the office of the secretary of state, and did not appear upon the legislative journals, cannot be established by parol. *Burke v. Cincinnati*, 10 Ohio S. & C. P. Dec. 544.

So, parol evidence is not admissible to show concurrence of both houses of the legislature in a bill which the journals disclosed was not concurred in. *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, s. c. on rehearing, 60 Iowa, 603, 15 N. W. 609.

But in *United States v. Allen*, 36 Fed. 174, in order to show that a bill actually became a law without the approval of the President, parol evidence of the journal clerk of the House of Representatives of the United States, in connection with a memorandum in his minute book, was admitted, to the effect that the President's veto was returned to the House after the expiration of the time limited by the Constitution therefore.

But the value of this decision is destroyed by *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, which establishes the rule of absolute conclusiveness of an enrolled bill.

So, the member who introduced a bill for the incorporation of a town cannot show by parol that the town of W. in D. county was intended where there were two towns of that name in the state, and the bill did not designate which one it referred to. *State ex rel. Eckhardt v. Hoff*, — Tex. Civ. App. —, 29 S. W. 672.

But in *Portland Gold Min. Co. v. Duke*, 113 C. C. A. 361, 191 Fed. 692, parol evidence was received to show that a bill was passed by a necessary aye and nay vote, and that it was, together with the names of those voting for and against the measure, entered on the journals as the Consti-

tution required, where the pages pertaining to the passage of the bill had been abstracted from the journals, and, when found, sustained such evidence.

VII. Resort to journals to determine which of two inconsistent bills is in force.

In order to determine which of two inconsistent bills, which were approved by the governor on the same day, is valid as the latest expression of the legislative will, the journals of the legislature may be examined. *Somers v. State*, 5 S. D. 321, 58 N. W. 804; *Derby v. State*, 24 Ohio C. C. 304.

VIII. Conclusiveness of journal recitals.

Notwithstanding legislative journals may be used to overthrow an enrolled bill, yet their recitals are conclusive, importing absolute verity, and cannot be contradicted or altered in any manner. *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 599; *Robertson v. State*, 130 Ala. 164, 30 So. 494; *State ex rel. McKinley v. Martin*, 160 Ala. 181, 48 So. 846; *Cohn v. Kingsley*, 5 Idaho, 416, 38 L.R.A. 74, 49 Pac. 485; *People ex rel. Wiese v. Bowman*, 247 Ill. 276, 93 N. E. 244; *McCulloch v. State*, 11 Ind. 424; *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; *Belleville v. Wells*, 74 Kan. 823, 88 Pac. 47; *Missouri, K. & T. R. Co. v. Simons*, 75 Kan. 130, 88 Pac. 551; *State ex rel. Morris v. Mason*, 43 La. Ann. 590, 9 So. 776; *Rash v. Allen*, — Del. —, 76 Atl. 370; *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *People ex rel. Hart v. McElroy*, 72 Mich. 446, 2 L.R.A. 609, 40 N. W. 750; *Rohrbacker v. Jackson*, 51 Miss. 735; *Palatine Ins. Co. v. Northern P. R. Co.* 34 Mont. 268, 85 Pac. 1032, 9 Ann. Cas. 579; *Carr v. Coke*, 116 N. C. 223, 28 L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16; *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023; *New Hanover County v. Armour Packing Co.* 135 N. C. 62, 47 S. E. 411; *Wise v. Bigger*, 79 Va. 269; *Milwaukee County v. Isenring*, 109 Wis. 9, 53 L.R.A. 635, 85 N. W. 131; *White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953; *Chicago, B. & Q. R. Co. v. Smyth*, 103 Fed. 376.

As to matters required by the Constitution to be entered upon the journals, they are conclusive evidence thereof. *Rash v. Allen*, — Del. —, 76 Atl. 370.

But it was said in *State ex rel. Morris v. Mason*, 43 La. Ann. 590, 9 So. 776, that, notwithstanding the conclusiveness of the legislative journals, proof is admissible to show that they have not been made the actual depository of the legislative proceedings as they transpired, or to show fraud, error, or improper exercise of judgment on the part of the state, its agents, or representatives.

As to contradicting the journals by parol, see *supra*, IV. b.

As to contradiction of legislative journals by memoranda of legislative officers or clerks, see *supra*, IV. a, 7.

As to contradiction of legislative journals by a constitutional protest of members of the legislature, entered on the journals, see *Auditor General v. Menominee County and Ensley v. Simpson*, *supra*, IV. a, 10.

And as to the contradiction of the journal records by a bill as originally introduced into the legislature, see *New Hanover County v. Armour Packing Co.* *supra*, IV. a, 2.

As to contradicting the journals by indorsements on a bill as originally introduced into the legislature, see *George Bolln Co. v. North Platte Valley Irrig. Co.* *supra*, IV. a, 2.

IX. Effect of inconsistent journal entries.

Where the recitals of the journals are ambiguous and conflicting as to the observance of some constitutional mandate in the passage of a bill, an enrolled bill will be sustained upon the presumption of regular enactment. *Woolfolk v. Albrecht*, — N. D. —, 133 N. W. 310; *Homrighausen v. Knoche*, 58 Kan. 646, 50 Pac. 879 (whether bill passed by constitutional majority); *Re Taylor*, 60 Kan. 87, 55 Pac. 340 (whether a bill was amended); *Belleville v. Wells*, 74 Kan. 823, 88 Pac. 47 (whether title was altered before approval); *Missouri R. Co. v. Simons*, 75 Kan. 130, 88 Pac. 551 (whether passed by an aye and nay vote).

The presumption of validity of an enrolled act is not overcome by defects or seeming inconsistencies between the journals of the two houses, where, when fairly interpreted, they verify the enrolled act. *Weis v. Stubblefield*, 85 Kan. 199, 116 Pac. 205.

It was held in *Lincoln v. Haugan*, 45 Minn. 451, 48 N. W. 106, that the printed journals would control where the written journals, which were not made up day by day as the statute directed, showed, as the result of an apparent error, that a bill did not receive an affirmative vote necessary to its passage, but which vote was correctly shown by the printed journals, notwithstanding the statute declared that the written journals should "be considered the true and authentic journals," since it also declared that full faith and credit must be given the printed journals.

As to the right to resort to other evidence to show the date of a legislative adjournment, where the journal entries are contradictory, see *State ex rel. Crocker v. Junkin*, 79 Neb. 532, 113 N. W. 256.

X. Presumption of regular enactment of bills.

A strong presumption of the regular enactment arises from the enrolment of a bill with due regard for all constitutional mandates, which may, in those jurisdictions which do not recognize the absolute conclusiveness of such a bill, be overthrown 40 L.R.A.(N.S.)

by an affirmative showing of the nonobservance of a constitutional requirement. *Stein v. Leeper*, 78 Ala. 517; *Uniontown v. State*, 145 Ala. 471, 39 So. 814, 8 Ann. Cas. 320; *English v. Oliver*, 28 Ark. 317; *Scott v. Clark County*, 34 Ark. 283; *Webster v. Little Rock*, 44 Ark. 536; *Felt v. Payne*, 60 Ark. 637, 30 S. W. 426; *State v. Moore*, 76 Ark. 197, 70 L.R.A. 671, 88 S. W. 881; *State v. Bowman*, 90 Ark. 174, 118 S. W. 711; *Re Roberts*, 5 Colo. 525; *Woolfolk v. Albrecht*, — N. D. —, 133 N. W. 310; *State ex rel. Turner v. Hocker*, 36 Fla. 359, 18 So. 767; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Schuyler County v. People*, 25 Ill. 182; *Bedard v. Hall*, 44 Ill. 91; *Hensoldt v. Petersburg*, 63 Ill. 157; *Larrison v. Peoria, A. & D. R. Co.* 77 Ill. 11; *People ex rel. Badger v. Loewenthal*, 93 Ill. 191; *Illinois C. R. Co. v. People*, 143 Ill. 434, 19 L.R.A. 119, 33 N. E. 173; *Jordan v. Circuit Ct.* 69 Iowa, 177, 28 N. W. 548; *Miller v. Oelwein*, — Iowa, —, 136 N. W. 1045; *State ex rel. Atty. Gen. v. Francis*, 26 Kan. 724; *Re Vandenberg*, 28 Kan. 243; *Weyand v. Stover*, 35 Kan. 545, 11 Pac. 355; *Homrighausen v. Knoche*, 58 Kan. 646, 50 Pac. 879; *Chesney v. McClintock*, 61 Kan. 94, 58 Pac. 993; *State ex rel. Godard v. Andrews*, 64 Kan. 474, 67 Pac. 870; *Belleville v. Wells*, 74 Kan. 823, 88 Pac. 47; *Missouri, K. & T. R. Co. v. Simons*, 75 Kan. 130, 88 Pac. 551; *Re Taylor*, 60 Kan. 87, 55 Pac. 340; *Stephens v. Labette County*, 79 Kan. 153, 98 Pac. 790; *Legg v. Annapolis*, 42 Md. 203; *Berry v. Baltimore & D. R. Co.* 41 Md. 446, 20 Am. Rep. 69; *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165; *State ex rel. Minnesota R. Constr. Co. v. Hastings*, 24 Minn. 78; *Miesen v. Canfield*, 64 Minn. 513, 67 N. W. 632; *State ex rel. Bray v. Long*, 21 Mont. 26, 52 Pac. 645; *Bradly v. West*, 50 Miss. 68; *State ex rel. Atty. Gen. v. Mead*, 71 Mo. 272; *State v. Wray*, 109 Mo. 594, 19 S. W. 86; *State ex rel. McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636; *Webster v. Hastings*, 59 Neb. 563, 81 N. W. 510; *State v. Burlington & M. River R. Co.* 60 Neb. 741, 84 N. W. 254; *State ex rel. Douglas County v. Frank*, 60 Neb. 327, 83 N. W. 74, s. c. on subsequent appeal, 61 Neb. 679, 85 N. W. 956; *Colburn v. McDonald*, 72 Neb. 431, 100 N. W. 961; *Stetter v. State*, 77 Neb. 777, 110 N. W. 761; *Stratton v. State*, 79 Neb. 118, 112 N. W. 361; *State ex rel. Oldham v. Dean*, 84 Neb. 344, 121 N. W. 719; *Opinion of Justices*, 35 N. H. 579, 52 N. H. 622; *Slocumb v. Fayetteville*, 125 N. C. 362, 34 S. E. 436; *State ex rel. Whitson v. Algood*, 87 Tenn. 163, 10 S. W. 310; *Nelson v. Haywood County*, 91 Tenn. 596, 20 S. W. 1; *Richardson v. Young*, 122 Tenn. 471, 125 S. W. 664; *Long v. State*, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405; *Lyman v. Martin*, 2 Utah, 136; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *Price v. Moundsville*, 43 W. Va. 523, 64 Am. St. Rep. 878, 27 S. E. 218; *State ex rel. Hynds v. Cahill*, 12 Wyo. 225, 75 Pac. 433; *State ex rel. Cheyenne*

v. Swan, 7 Wyo. 166, 40 L.R.A. 195, 75 Am. St. Rep. 889, 51 Pac. 209. Chicago, B. & Q. R. Co. v. Smyth, 103 Fed. 376.

It was said in *Clendaniel v. Conrad*, — Del. —, 83 Atl. 1036, that "every legal presumption is to be made in favor of the validity of the act. If the journal entries fail to show that the enrolled act was not the act that was in fact passed, or if the journal entries are such as to make it doubtful which one of two acts was passed, then the presumption in favor of the enrolled and published act stands, and the same must be held valid."

It will be presumed that the legislature in enacting a bill complied with all non-mandatory provisions of the Constitution. *State ex rel. McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636.

In order to overcome the prima facie presumption of regularity accompanying an enrolled bill, so as to render it void, the showing by the legislative journals of a disregard of a constitutional requirement must be:

—clear. *Hensoldt v. Petersburg*, 63 Ill. 157; *Larrison v. Peoria, A. & D. R. Co.* 77 Ill. 11; *Berry v. Baltimore & D. P. R. Co.* 41 Md. 446, 20 Am. Rep. 69; *People ex rel. Hart v. McElroy*, 72 Mich. 446, 2 L.R.A. 609, 40 N. W. 750;

—clear and palpable. *Scott v. Clark County*, 34 Ark. 283;

—clear and convincing. *State v. Peterson*, 38 Minn. 143, 36 N. W. 443;

—conclusive. *Auditor General v. Menominee County*, 89 Mich. 552, 51 N. W. 483;

—strong and clear. *Miesen v. Canfield*, 64 Minn. 513, 67 N. W. 632; *Woolfolk v. Albrecht*, — N. D. —, 133 N. W. 310;

—clear and beyond all doubt. *State v. Wray*, 109 Mo. 594, 19 S. W. 86;

—clear, conclusive, and beyond all doubt. *State ex rel. Atty. Gen. v. Francis*, 26 Kan. 724; *Re Vanderberg*, 28 Kan. 243; *Weyand v. Stover*, 35 Kan. 545, 11 Pac. 355; *Homrighausen v. Knoche*, 58 Kan. 646, 50 Pac. 879; *Chesney v. McClintock*, 61 Kan. 94, 58 Pac. 993; *State ex rel. Godard v. Andrews*, 64 Kan. 474, 67 Pac. 870; *Belle-ville v. Wells*, 74 Kan. 823, 88 Pac. 47; *Missouri, K. & T. R. Co. v. Simons*, 75 Kan. 130, 88 Pac. 551; *Re Taylor*, 60 Kan. 87, 55 Pac. 340; *Stephens v. Labette County*, 79 Kan. 153, 98 Pac. 790;

—explicit and unequivocal. *Chicago, B. & Q. R. Co. v. Smyth*, 103 Fed. 376;

—express and unequivocal. *State v. Burlington & M. River R. Co.* 60 Neb. 741, 84 N. W. 254; *Webster v. Hastings*, 59 Neb. 563, 81 N. W. 510; *Stratton v. State*, 79 Neb. 118, 112 N. W. 361.

Where the legislative journals, upon which the Constitution requires to be entered the final vote upon a bill, are so mutilated and incomplete, the pages relating to the passage of a bill being missing, that it does not appear therefrom that such mandate was complied with, and other evidence supplies such defect, the enrolled bill will be sustained, as the silence of the journals in such respect is not sufficient 40 L.R.A. (N.S.)

to overcome the presumption of regular enactment raised by the enrolment of the bill. *State ex rel. Douglas v. Frank*, 60 Neb. 327, 83 N. W. 76, s. c. on rehearing, 61 Neb. 679, 85 N. W. 956.

And such evidence does not contradict the record, but merely establishes it, as it was made in fact by the legislature, and the journal, when mutilated, may be established in the same manner as any other lost record. *State ex rel. Douglas County v. Frank*, 61 Neb. 679, 85 N. W. 956.

XI. Legality of enactment of bill as question of law.

Whether an enrolled bill was legally enacted is a question of law, and not of fact. *Scott v. Clark County*, 34 Ark. 283; *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93; *Stelling v. Kansas City*, 85 Kan. 397, 116 Pac. 511; *Weeks v. Smith*, 81 Me. 538, 18 Atl. 325; *Ramsey County v. Heenan*, 2 Minn. 330, Gil. 281; *Ayars's Appeal*, 122 Pa. 266, 2 L.R.A. 577, 16 Atl. 356; *Blessing v. Galveston*, 42 Tex. 641; *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667, 26 L. ed. 1204; *Portland Gold Min. Co. v. Duke*, 90 C. C. A. 166, 164 Fed. 180, 113 C. C. A. 316, 191 Fed. 692.

And it was held in *Portland Gold Min. Co. v. Duke*, 113 C. C. A. 316, 191 Fed. 692, that such question would be determined by the court whenever drawn in question, irrespective of whether or not it was made an issue by the pleadings.

However, in Colorado it is held that the question of the validity of a bill as affected by defects in its passage, although decided by the court as a question of law, raises a question of fact. *Rio Grande Sampling Co. v. Catlin*, 40 Colo. 450, 94 Pac. 323; *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 36 Colo. 510, 86 Pac. 313, 10 Ann. Cas. 1108; *Anderson v. Grand Valley Irrig. Dist.* 35 Colo. 525, 85 Pac. 313; *Peckham v. People*, 32 Colo. 140, 75 Pac. 422; *Marean v. Stanley*, 21 Colo. 43, 39 Pac. 1086; *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221.

It was said in *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221, that "it may seem paradoxical but it is nevertheless true, that a question of fact respecting the existence or nonexistence of a law is a question of law," to be decided by the court.

XII. Necessity of pleading illegal enactment of bill.

It has been held that the validity of a bill as affected by some defect in its passage involves a question of fact, which must be raised by appropriate pleadings. *Rio Grande Sampling Co. v. Catlin*, 40 Colo. 450, 94 Pac. 323; *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 36 Colo. 510, 86 Pac. 313, 10 Ann. Cas. 1108; *Anderson v. Grand Valley Irrig. Dist.* 35 Colo. 525, 85 Pac. 313; *Peckham v. People*, 32 Colo. 140, 75 Pac. 422; *Marean v. Stanley*, 21 Colo. 43, 39 Pac. 1086; *Colorado & S. R. Co. v. Davis*, — Colo. App. —, 120 Pac. 1048; *Bresee v. Preston*, — Neb. —, 135 N. W. 544; *Dar-*

lington v. New York, 2 Robt. 274, affirmed in 31 N. Y. 164, 88 Am. Dec. 248. *Contra*, State v. Swiggart, 118 Tenn. 556, 102 S. W. 75; Portland Gold Min. Co. v. Duke, 113 C. C. A. 316, 191 Fed. 692.

And it was held in Auditor v. Haycraft, 14 Bush, 284, that, in order to attack the validity of a bill, the question must be raised by appropriate pleadings.

So, it has been held in Texas that, in order to question a special or local act because of the lack of or insufficiency of the constitutional notice of intention to apply for its passage, the question must be raised by appropriate pleadings. Thompson v. State, 23 Tex. Civ. App. 370, 56 S. W. 603; Moller v. Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116; Cravens v. State, 57 Tex. Crim. Rep. 135, 136 Am. St. Rep. 977, 122 S. W. 29.

But it was held in Portland Gold Min. Co. v. Duke, 113 C. C. A. 316, 191 Fed. 692, that the question whether an enrolled bill was enacted with due observance of all constitutional formalities would be determined by the court whenever drawn in question, irrespective of whether made an issue by the pleadings.

XIII. Proof of existence and contents of journals.

a. Necessity of.

In a few jurisdictions it is held that, in order to question the regular enactment of an enrolled bill, the legislative journals must be proved and brought into the record by bill of exceptions. Nesbit v. People, 19 Colo. 450, 36 Pac. 221; Marean v. Stanley, 21 Colo. 43, 39 Pac. 1086; Sargent v. La Plata County, 21 Colo. 158, 40 Pac. 366; Zang v. Wyant, 25 Colo. 557, 71 Am. St. Rep. 145, 56 Pac. 565; Peckham v. People, 32 Colo. 140, 75 Pac. 422; Anderson v. Grand Valley Irrig. Dist. 35 Colo. 525, 85 Pac. 313; Rio Grande Sampling Co. v. Catlin, 40 Colo. 450, 94 Pac. 323; Hill v. Bourkhart, 5 Colo. App. 58, 36 Pac. 1115; Illinois C. R. Co. v. Wren, 43 Ill. 77; Bedford v. Hall, 44 Ill. 91; Hensoldt v. Petersburg, 63 Ill. 157; Grob v. Cushman, 45 Ill. 119; Binz v. Weber, 81 Ill. 288; Erford v. Peoria, 229 Ill. 546, 82 N. E. 374; Coleman v. Dobbins, 8 Ind. 156; Evans v. Browne, 30 Ind. 514, 95 Am. Dec. 710; Auditor v. Haycraft, 14 Bush, 284; Burt v. Winona & St. P. R. Co. 31 Minn. 472, 18 N. W. 285, 289; Green v. Weller, 32 Miss. 650; State v. Wray, 109 Mo. 594, 19 S. W. 86; Darlington v. New York, 2 Robt. 274, affirmed in 31 N. Y. 164, 88 Am. Dec. 248; State v. Brown, 33 S. C. 151, 11 S. E. 641. But the contrary has been held in Scott v. Clark County, 34 Ark. 283; State v. Swiggart, 118 Tenn. 556, 102 S. W. 75; Portland Gold Min. Co. v. Duke, 90 C. C. A. 166, 164 Fed. 180.

In Auditor v. Haycraft, 14 Bush, 284, it was held that the journals must be proved in order to show irregularity in the passage of a bill, since the declaration by

statute that the journals are to be evidence precluded the idea that the court might take judicial notice of them.

But when such journals are offered in evidence, they prove their own authenticity. Grob v. Cushman, 45 Ill. 119.

b. Judicial notice of.

The weight of authority sustains the rule that where an enrolled bill is not considered conclusive, but open to attack, judicial notice will be taken of the existence and contents of the legislative journals pertaining to the passage thereof. Moody v. State, 48 Ala. 115, 17 Am. Rep. 28; Moog v. Randolph, 77 Ala. 597; Montgomery Beer Bottling Works v. Gaston, 126 Ala. 425, 51 L.R.A. 396, 85 Am. St. Rep. 42, 28 So. 497; State ex rel. Crenshaw v. Joseph, — Ala. —, 57 So. 942; Jobe v. Urquhart, — Ark. —, 143 S. W. 121; State ex rel. Turner v. Hocker, 36 Fla. 358, 18 So. 767; State ex rel. Holt v. Denny, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; Re Howard County, 15 Kan. 194; Re Vanderberg, 28 Kan. 243; Homrighausen v. Knoche, 58 Kan. 646, 50 Pac. 879; State ex rel. Godard v. Andrews, 64 Kan. 474, 67 Pac. 870; Stelling v. Kansas City, 85 Kan. 397, 116 Pac. 511; Com. v. Jackson, 5 Bush, 680; Brown v. Broussard, 43 La. Ann. 962, 9 So. 911; People ex rel. Drake v. Mahaney, 13 Mich. 481; Callaghan v. Chipman, 59 Mich. 610, 26 N. W. 806; Atty. Gen. v. Rice, 64 Mich. 385, 31 N. W. 203; People ex rel. Hart v. McElroy, 72 Mich. 453, 2 L.R.A. 609, 40 N. W. 750; Miesen v. Canfield, 64 Minn. 514, 67 N. W. 632; State v. Wray, 109 Mo. 594, 19 S. W. 86; State ex rel. Douglas County v. Frank, 61 Neb. 679, 85 N. W. 956; Gray v. Taylor, 15 N. M. 742, 113 Pac. 588; State ex rel. Herron v. Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; Burke v. Cincinnati, 10 Ohio St. & C. P. Dec. 544; State v. Rogers, 22 Or. 348, 30 Pac. 74; Portland v. Yick, 44 Or. 439, 102 Am. St. Rep. 633, 75 Pac. 706; Somers v. State, 5 S. D. 321, 58 N. W. 804; State v. Swiggart, 118 Tenn. 556, 102 S. W. 75; Ritchie v. Richards, 14 Utah, 345, 47 Pac. 670; McDonald v. State, 95 Pac. 698, 80 Wis. 407, 50 N. W. 185; Dane County v. Reindahl, 104 Wis. 302, 80 N. W. 438; Brown v. Nash, 1 Wyo. 85; State ex rel. Sullivan v. Schnitzer, 16 Wyo. 479, 95 Pac. 608; Milwaukee County v. Isenring, 109 Wis. 91, 53 L.R.A. 635, 85 N. W. 131; State ex rel. Cheyenne v. Swan, 7 Wyo. 166, 40 L.R.A. 198, 72 Am. St. Rep. 889, 51 Pac. 209; Portland Gold Min. Co. v. Duke, 90 C. C. A. 166, 164 Fed. 180.

But the contrary has been held in a few jurisdictions. Hill v. Bourkhart, 5 Colo. App. 58, 36 Pac. 115; Sargent v. La Platte County, 21 Colo. 158, 40 Pac. 366; Zang v. Wyant, 25 Colo. 557, 71 Am. St. Rep. 145, 56 Pac. 565; Illinois C. R. Co. v. Wren, 43 Ill. 77; Grob v. Cushman, 45 Ill. 119; Binz v. Weber, 81 Ill. 288; Erford v. Peoria, 229 Ill. 546, 82 N. E. 374; Coleman v. Dobbins, 8 Ind. 156; Evans v. Browne, 30

Ind. 514, 95 Am. Dec. 710; Auditor v. Haycraft, 14 Bush. 284; Burt v. Winona & St. P. R. Co. 31 Minn. 472, 18 N. W. 285, 289; Green v. Weller, 32 Miss. 650; State v. Wray, 109 Mo. 594, 19 S. W. 86; State v. Brown, 33 S. C. 151, 11 S. E. 641.

It was held in Auditor v. Haycraft, 14 Bush. 284, that the idea that judicial notice might be taken of the legislative journals was precluded by a statutory declaration that they were to be considered as evidence.

While in Somers v. State, 5 S. D. 321, 58 N. W. 804, where the court, of its own motion, took judicial notice of the legislative journals in order to determine which of two inconsistent acts, which were approved by the governor on the same day, was the latest expression of the legislative will, it said that ordinarily it would not take judicial notice of the legislative proceedings as shown by the journals, but that when a question could be intelligently decided only upon information therein contained, they would be resorted to.

W. J. I.

KANSAS SUPREME COURT.

WILLIAM C. LITTLE, Appt.,

v.

JOHN S. LIGGETT.

(86 Kan. 747, 121 Pac. 1125.)

Principal and agent — loan broker — compensation.

1. Where an agent employed to effect a loan has diligently performed services under the employment, but is prevented from an attempt to complete the transaction by the refusal of his employer to accept the loan, he is entitled to recover the reasonable value of his services, even if he has not carried the matter far enough to have fully earned his commissions.

Same — when commissions earned.

2. An agent employed "to procure a loan" has ordinarily earned his commission when he has produced a person willing and able to make the loan upon the prescribed terms; and his claim to compensation will not be defeated by the refusal of such person to complete the transaction, because it turns out that a material representation made by the employer is contrary to the fact.

(March 9, 1912.)

Headnotes by MASON, J.

Note. — As stated in the foregoing opinion, the right of a broker to commissions where the sale fails because of inaccuracy of the owner's representations is considered in the note to Hugill v. Weekley, 15 L.R.A. (N.S.) 1262. The right of a broker to commissions on failure of employer's title is 40 L.R.A. (N.S.)

A PPEAL by plaintiff from a judgment of the District Court for Sedgwick County in defendant's favor in an action brought to recover a commission for securing a loan upon certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. John W. Adams and George W. Adams, for appellant:

Appellee having given the reason for his conduct in failing to carry out the terms of the contract, he was estopped to give other reasons for his conduct.

Redinger v. Jones, 68 Kan. 627, 75 Pac. 997; Gould v. Banks, 8 Wend. 562, 24 Am. Dec. 90; Holbrook v. Wight, 24 Wend. 169, 35 Am. Dec. 607; Everett v. Saltus, 15 Wend. 474; Wright v. Read, 3 T. R. 554; Duffy v. O'Donovan, 46 N. Y. 223; Winter v. Coit, 7 N. Y. 288, 57 Am. Dec. 522.

Where a real estate broker has procured a purchaser for the property of his principal, the solvency and ability of such purchaser to perform the obligation of his contract will be presumed until the contrary is proved.

Grosse v. Cooley, 43 Minn. 188, 45 N. W. 15; Gerding v. Haskin, 2 Misc. 172, 21 N. Y. Supp. 636; Krahner v. Heilman, 16 Daly, 132, 9 N. Y. Supp. 633; Fairly v. Wapoo Mills, 44 S. C. 227, 29 L.R.A. 215, 22 S. E. 108.

If it should be held under the pleadings and proceedings, notwithstanding the refusal of appellee to accept the loan, that appellant was required to procure a lender who was able, ready, and willing to make a loan, before entitled to his commission, the question is for the jury.

Hayden v. Grillo, 42 Mo. App. 1; McFarland v. Lillard, 2 Ind. App. 160, 50 Am. St. Rep. 234, 28 N. E. 229; Goss v. Broom, 31 Minn. 484, 18 N. W. 290; Cook v. Kroe-meke, 4 Daly, 268; Hart v. Hoffman, 44 How. Pr. 168; Phister v. Gove, 48 Mo. App. 455; Duclos v. Cunningham, 102 N. Y. 678, 6 N. E. 790; Gilder v. Davis, 137 N. Y. 504, 20 L.R.A. 398, 33 N. E. 599; Condict v. Cowdrey, 139 N. Y. 273, 34 N. E. 781; Rockwell v. Hurst, 36 N. Y. S. R. 735, 13 N. Y. Supp. 290; Phillips v. Langlow, 55 Wash. 385, 104 Pac. 610; Middleton v. Thompson, 163 Pa. 112, 29 Atl. 796; Van Orden v. Morris, 19 Misc. 497, 43 N. Y. Supp. 1109.

Messrs. S. B. Amidon, D. M. Dale, and Jean Madalene, for appellee:

It was necessary for the plaintiff to prove

treated in the notes to Yoder v. Randol, 3 L.R.A. (N.S.) 576, and Little v. Fleishman, 24 L.R.A. (N.S.) 1182. Various other questions relating to brokers' right to commissions are treated in notes referred to in the Index to Notes under the title "Brokers."

financial responsibility, not because he contracts to guarantee responsibility, but because he must prove before he can recover, that the failure to make a contract was the fault of his principal, and not his own.

Moore v. Irwin, 89 Ark. 289, 20 L.R.A. (N.S.) 1168, 131 Am. St. Rep. 97, 115 S. W. 662; Colburn v. Seymour, 32 Colo. 430, 76 Pac. 1058, 2 Ann. Cas. 182.

The acceptance of the loan on the part of the bank was not shown.

Davidge v. Guardian Trust Co. 203 N. Y. 331, 96 N. E. 751.

The procuring of an agreement to make a loan is not the same as procuring a loan.

Rosenthal v. Gunn, 119 N. Y. Supp. 165; 23 Am. & Eng. Enc. Law, 902; Moore v. Irwin, 89 Ark. 289, 20 L.R.A. (N.S.) 1168, 131 Am. St. Rep. 97, 115 S. W. 662.

Mason, J., delivered the opinion of the court:

William C. Little sued John S. Liggett, alleging, in substance, that Liggett had employed the Wichita Loan & Trust Company to negotiate a loan of \$40,000 upon real estate; that the company had arranged for the loan, but that Liggett, having sold his property, did not accept it; that the company had assigned its claim for compensation to Little, who asked judgment for \$1,000, as the price agreed upon for the company's services, and also as their fair value. The defendant answered with a general denial, admitting, however, that he had made a written application to the company to procure him a loan, but saying that it had been agreed that he need not accept the loan, unless he should desire; and if he did not accept it he was to pay no commission. A reply was filed, consisting of a general denial. Upon trial, a demurrer to the plaintiff's evidence was sustained, and he appeals.

There was evidence to this effect: The defendant employed the company to procure the loan for him, to enable him to build a three-story building upon the property. He told the company's representative that he had \$5,000 on hand and could raise \$25,000 elsewhere; and that the estimated cost of the building was \$55,000. He furnished sketches showing its character. An agent of the company made a trip East and laid the matter before the investment committee of the New Hampshire Savings Bank of Concord, and was afterwards told by the president and treasurer of the bank that it would make the loan. On his return, he told the defendant that the money would be ready for him as soon as he was ready to use it. A number of conversations were had on the subject. Plans for the building were prepared, and bids were made upon 40 L.R.A. (N.S.)

it, ranging from \$60,000 to \$80,000. After the matter had been pending several months the defendant definitely concluded not to build, and sold his lots. The arrangement had been that the money was to be furnished, in accordance with the usual custom in such cases, as the work on the building progressed. There was no agreement that the defendant was not to be liable for the commission, unless he accepted the loan.

We think the demurrer to the evidence should have been overruled. The defendant maintains that it was incumbent on the plaintiff to prove that the bank was financially able to make the loan, and that there was a failure of proof in this respect. Upon the announcement of the ruling on the demurrer, the plaintiff asked to be allowed to show the financial ability of the bank by witnesses then present. The request was refused. In view of the pleadings and the evidence, the question of the bank's ability to make the loan must be regarded as largely formal. The doing of substantial justice required that the plaintiff should be allowed to reopen the case for the purpose of making a showing of that character, if thereby the objections presented by the demurrer could be met. The court must be regarded as having in effect decided that, conceding the financial responsibility of the bank, the plaintiff had failed to make out a *prima facie* case.

The defendant maintains that, in order to recover, it was necessary for the plaintiff to show that the loan was actually procured, or at least that the bank had entered into a binding agreement to lend the money; and that this was not shown, because there was no evidence that the officers of the bank, whose statements were relied upon, had authority to act in the matter. These officers included the president, the treasurer, and the investment committee. Whether or not they may be presumed to have had power to bind the bank, the plaintiff was, under the evidence, entitled, at all events, to a recovery *quantum meruit*. The company that was employed to effect the loan had performed services and incurred expenses under the employment. It had handled the matter with apparent success; it had done all that was incumbent upon it up to the actual closing of the transaction, and was prevented from going further by the refusal of the defendant to accept the loan. In this situation, the agent was entitled to recover, at least to the extent of the value of the services performed. *Mechem, Agency*, § 620; *Glover v. Henderson*, 120 Mo. 367, 41 Am. St. Rep. 695, 25 S. W. 175.

While the plaintiff was upon the witness stand, he returned a negative answer

to the question whether the loan would have been made if the building could not have been erected for its amount. Probably he meant that the money would not have been furnished, unless, together with what the defendant could procure elsewhere, it would have been sufficient for that purpose. Taken literally, the plaintiff's statement was inconsistent with the rest of his testimony; for he said that the building was expected to cost \$55,000, while the loan asked was but for \$40,000. Such inconsistency does not authorize the sustaining of a demurrer. *Acker v. Norman*, 72 Kan. 586, 84 Pac. 531.

The defendant presents an argument substantially amounting to this: The agreement for the loan was procured upon the representation that a building of a particular description and rental value could be constructed for \$40,000, when in reality the cost would have been from \$80,000 to \$80,000; that, with knowledge of this fact, the bank would not have made the loan; that no commission is earned by an agent who produces a person ready and willing to make a loan upon an incorrect statement of fact, even where such statement is obtained from the principal. There are cases apparently supporting that contention. In *Curtiss v. Mott*, 90 Hun, 439, 35 N. Y. Supp. 983, 168 N. Y. 663, 52 N. E. 1124, a real estate broker was employed to find a buyer for a piece of property which the owner represented as producing a certain income. The agent found one who was able and willing to take the property on that representation, but who refused to complete the purchase on learning that in fact the income was considerably less than the amount named. It was held that the agent was not entitled to his commission, although he might, perhaps, have an action against his employer for damages because of the misrepresentation. In *Hausman v. Herdtfelder*, 81 App. Div. 46, 80 N. Y. Supp. 1039, substantially the same ruling was made; the sale being prevented by the fact that the property offered for sale was of less area than the owner had represented. These cases seem to be in conflict with *Cohen v. Farley*, 28 Misc. 168, 58 N. Y. Supp. 1102, and with the great weight of authority. We think that, where a property owner employs an agent to find a purchaser for, or to procure a loan upon, property, the description given by the owner is a material part of the contract of employment: and if the agent fails of success only because the property turns out to be substantially different from that described, he is entitled to his compensation, having performed the service for which he was employed. The situation is entirely analogous 40 L.R.A.(N.S.)

to that arising where a sale is defeated by the inability of the owner to make a marketable title, and in that case the agent is held to have earned his commission. *Davis v. Lawrence*, 52 Kan. 383, 34 Pac. 1051. The cases bearing upon the question are fully collected in a note in 15 L.R.A.(N.S.) 1262, entitled "Right of broker to commissions where sale fails because of inaccuracy of owner's representations." The statement of any circumstance which has a bearing upon the expedience of making the loan may be, for practical purposes, regarded as a part of the description of the property; it is essentially of the same effect.

The written application signed by the defendant recited that he appointed the company his agent "to procure a loan." It is argued that this language shows an agreement that no commission was to be paid, unless the loan was actually made. We think the rule is the same as in the case of the ordinary real estate broker's contract,—the commission is earned when the agent has produced a person willing and able to deal with the employer upon the terms specified. 19 Cyc. 263, 269, note 78.

The judgment is reversed, and the cause remanded for a new trial.

MASSACHUSETTS SUPREME JUDICIAL COURT.

EMELINE A. JACOBS, Admrx., etc., of
Stephen O. Jacobs, Jr.,

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

(212 Mass. 96, 98 N. E. 688.)

Explosives — railroad torpedo — negligence — liability for injury.

A railroad company is not liable for the death of a boy whose companion, while with him at its station for a proper purpose, had picked up a torpedo carelessly dropped from

Note. — As to liability for injury to children from explosives left accessible to them, see notes to *Akin v. Bradley Engineering & Machinery Co.* 14 L.R.A.(N.S.) 586, and *Finkbeiner v. Solomon*, 24 L.R.A.(N.S.) 1257. And see also later cases, *Olson v. Gill Home Invest. Co.* 27 L.R.A.(N.S.) 884, and *St. Louis & S. F. R. Co. v. Williams*, 33 L.R.A.(N.S.) 94.

For explosives as attractive nuisance, see note to *Cahill v. Stone*, 19 L.R.A.(N.S.) 1094, 1127.

For general question whether the intervening act of a child will break the causal connection between the defendant's negligence and the injury, see note to *United States Natural Gas Co. v. Hicks*, 23 L.R.A.(N.S.) 249.

a train, carried it to his home and kept it a number of days, and then with his assistance attempted to explode it, with a fatal result to him, since it was not bound to anticipate such a result of its carelessness.

(May 24, 1912.)

REPORT by the Superior Court of Plymouth County for the opinion of the Supreme Judicial Court after directing a verdict in defendant's favor, of an action brought to recover damages for the suffering and death of plaintiff's intestate, caused by the explosion of a railroad signal torpedo, the property of defendant. Judgment for defendant.

The facts are stated in the opinion.

Messrs. Charles W. Bartlett, Joseph W. Bartlett, Frederick E. Jennings, and Arthur Thad Smith, for plaintiff:

The defendant having in its custody a powerful and treacherous explosive in an unmarked container, which completely concealed its true character, owed to the plaintiff's intestate the highest degree of care to prevent such explosive from falling into his hands and injuring him.

Lopp v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 543; Euting v. Chicago & N. W. R. Co. 116 Wis. 13, 60 L.R.A. 158, 96 Am. St. Rep. 936, 92 N. W. 358; Evensen v. Lexington & B. Street R. Co. 187 Mass. 77, 72 N. E. 355; Pollock, Torts, 8th ed. p. 499; Merschel v. Louisville & N. R. Co. 121 Ky. 620, 85 S. W. 710; Clark v. Chambers, L. R. 3 Q. B. Div. 327, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 19 Eng. Rul. Cas. 28; Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726; Flynn v. Butler, 189 Mass. 377, 75 N. E. 730; Bigwood v. Boston & N. Street R. Co. 209 Mass. 345, 35 L.R.A.(N.S.) 113, 95 N. E. 751; Holbrook v. Aldrich, 168 Mass. 15, 36 L.R.A. 493, 60 Am. St. Rep. 364, 46 N. E. 115; Obertoni v. Boston & M. R. Co. 186 Mass. 481, 67 L.R.A. 422, 71 N. E. 980; Makins v. Piggott, 29 Can. S. C. 188; Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; Pittsburgh, C. & St. L. R. Co. v. Shields, 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658; Wells v. Gallagher, 144 Ala. 363, 3 L.R.A.(N.S.) 759, 113 Am. St. Rep. 50, 39 So. 747; Bianki v. Greater American Exposition, 3 Neb. (Unof.) 656, 92 N. W. 615; Meibus v. Dodge, 38 Wis. 300, 20 Am. Rep. 6; Fitzpatrick v. Garri- sons & W. P. Ferry Co. 49 Hun, 288, 1 N. Y. Supp. 794; Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; O'Leary v. Michigan State Teleph. Co. 146 Mich. 243, 109 N. W. 434. 40 L.R.A.(N.S.)

Messrs. Frank W. Knowlton and Roger B. Hull, for defendant:

The duty of care owed by the defendant to all the world does not impose upon it the duty of seeing, at its peril, that the railroad torpedoes, however potentially dangerous they may be, are not carried away from its premises and so used as to cause injury.

Obertoni v. Boston & M. R. Co. 186 Mass. 481, 67 L.R.A. 422, 71 N. E. 980; Afflick v. Bates, 21 R. I. 281, 79 Am. St. Rep. 801, 43 Atl. 539; Slayton v. Fremont, E. & M. Valley R. Co. 40 Neb. 840, 59 N. W. 510; McShane v. Toronto, H. & B. R. Co. 31 Ont. Rep. 185; Cleveland Terminal & Valley R. Co. v. Marsh, 63 Ohio St. 236, 52 L.R.A. 142, 58 N. E. 821; Hughes v. Boston & M. R. Co. 71 N. H. 279, 93 Am. St. Rep. 518, 51 Atl. 1070; Chicago, B. & Q. R. Co. v. Epperson, 26 Ill. App. 72; Smith v. New York C. & H. R. R. Co. 78 Hun, 524, 29 N. Y. Supp. 540; Holmes v. Delaware & H. Co. 128 App. Div. 24, 112 N. Y. Supp. 421; Carter v. Columbia & G. R. Co. 19 S. C. 20, 45 Am. Rep. 754; Louisville & N. R. Co. v. Hart, 24 Ky. L. Rep. 1123, 70 S. W. 830; Sullivan v. Louisville & N. R. Co. 115 Ky. 447, 103 Am. St. Rep. 330, 74 S. W. 171.

Braley, J., delivered the opinion of the court:

The injuries to the plaintiff's intestate which resulted in his death after a period of conscious suffering were caused by the explosion of a railroad signal torpedo, the property of the defendant. It may be assumed that the jury would have been warranted in finding upon the evidence the following facts: In the management of its business as a carrier of passengers, trains were provided with torpedoes, which whenever necessary were to be used by the flagman on the train ahead to warn trains approaching from the rear that a preceding train not very far distant was passing over the same track. The warning consisted in the noise of the explosion as the oncoming train struck the torpedo which the flagman affixed to the rail by straps forming a part of the apparatus. To be effective, not only the torpedo must be exploded by contact with the train, but the detonation must be sufficiently great to attract the attention of trainmen. The jury properly could infer from these circumstances, and from the testimony of the plaintiff's expert as to the character of the composition with which it was charged, as well as from the rule promulgated by the company, which was introduced in evidence, that the defendant knew, or by the use of due diligence should have known, that the torpedo contained a highly

explosive compound. If exploded without proper precautions, or under extraneous conditions, pieces of the shell or case might fly with such force in various directions as to endanger the safety of persons in the vicinity. The use of a dangerous agency of this nature, which must be classed with gunpowder, and explosives like nitroglycerine and dynamite in its various forms, while lawful, imposed upon the defendant the duty of taking every proper precaution to prevent personal injuries to those lawfully upon the company's premises, from explosions which might be precipitated through the carelessness of its servants. *Derry v. Flitner*, 118 Mass. 131; *Oulighan v. Butler*, 189 Mass. 287, 292, 75 N. E. 726; *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227, 231, 87 N. E. 567. The inquiry, accordingly, is whether the injury in question reasonably should have been anticipated by the defendant. *Obertoni v. Boston & M. R. Co.* 186 Mass. 481, 67 L.R.A. 422, 71 N. E. 980. The train which came into the station where the intestate, a boy of fifteen years of age, and his young companions, were waiting for the departure of friends, carried in the baggage car a torpedo to be used as a signal, which the jury could find was carelessly ejected by the defendant's baggage master, and fell within the railroad location. The evidence having warranted a finding that the intestate was not a trespasser, it would follow that if from the impact of the fall, or from the innocent intermeddling of bystanders, whose presence might have been anticipated, an explosion had followed injuring him, the company as matter of law would not have been exonerated. *Lucas v. New Bedford & T. R. Co.* 6 Gray, 64, 66 Am. Dec. 406; *Bradford v. Boston & M. R. Co.* 160 Mass. 392, 35 N. E. 1131; *McKone v. Michigan C. R. Co.* 51 Mich. 601, 47 Am. Rep. 596, 17 N. W. 74; *Illinois C. R. Co. v. Hammer*, 72 Ill. 347; *Lane v. Atlantic Works*, 111 Mass. 136. But the defendant was not bound to foresee that one of the intestate's companions, actuated doubtless by a boy's impulse and curiosity, in which apparently the intestate shared, to possess and explode the torpedo, would remove it almost immediately from the premises, and that after the lapse of ten days the experiment would be tried in the vicinity of their homes, and the intestate, who participated, would be fatally injured by the explosion. *Denny v. New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Quigley v. Clough*, 173 Mass. 429, 430, 45 L.R.A. 500, 73 Am. St. Rep. 303, 53 N. E. 884; *Smith v. Peach*, 200 Mass. 504, 86 N. E. 908; *McDowell v. Great Western R. Co.* [1903] 2 K. B. 331, 72 L. J. K. B. N. S. 652, 88 L. T. N. S. 825, 19 40 L.R.A. (N.S.)

Times L. R. 552. The accident is deplorable, but the wrongful asportation which brought the intestate in contact with the exploding torpedo occasioned the mischief, and distinguishes the case at bar from *Lane v. Atlantic Works*, 111 Mass. 136, and the doctrine stated in *Lebourdais v. Vittrified Wheel Co.* 194 Mass. 341, 344, 80 N. E. 482. The injury not having been caused by its negligence, the presiding judge correctly ruled that there could be no recovery under either count, and in accordance with the terms of the report, judgment must be entered for the defendant on the verdicts.

OKLAHOMA CRIMINAL COURT OF APPEALS.

J. C. HAMPTON, Appt.,
v.
STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 123 Pac. 571.)

Evidence — order of introduction — rebuttal.

1. (a) The fact that evidence may have been introduced in chief by the state does not necessarily prevent its introduction as evidence in rebuttal. The introduction of such evidence is a matter of discretion of the trial court, and will not be ground for reversal, unless an abuse of this discretion is shown.

(b) For evidence which might have been introduced in chief, but which was properly introduced in rebuttal, see opinion.

Same — crime — intention.

2. (a) Any fact is admissible in evidence which tends to shed light upon the intention of a defendant charged with the commission of a crime for which he is upon trial, even though it may tend to prove a separate offense.

(b) In a homicide case, it is competent to put in evidence the actions, conduct, and general demeanor of a defendant before the killing, for the purpose of proving that he was armed and in a vicious humor, provided only that such conduct is so near the time of the homicide as to tend to show the

Headnotes by FURMAN, P. J.

Note. — Waiver of privilege as to communication between husband and wife by calling one spouse as a witness for the other.

The competency of a spouse as witness in a cause in which the other is a party is often confused with the privilege as to disclosure of confidential communications, when, as a matter of principle, the two are entirely distinct, the one being a question of competency, the other a question of privilege. A spouse may be a competent witness

state of mind of the defendant at the time of the killing.

Witness — failure to call wife — comment.

3. (a) Where it appears from the record that the wife of a defendant who is upon trial is a material witness in his behalf, and he does not place her on the witness stand or account for his not doing so, such failure of the defendant to call his wife as a witness in his behalf is a proper subject of comment to the jury by counsel for the state.

(b) The statute which prohibits husband and wife from being witnesses against each other is intended to protect confidential communications between them, but does not deprive the husband or wife of the testimony of the other as to any communications between them which would be competent evidence, were it not for the marital relations.

(c) The statute referred to is for the benefit of the husband and wife, and such communications are rigidly protected by the law from disclosure, except where this protection is waived by the party upon trial; and the husband or wife may waive the provisions of the statute by calling the other

party to the marital relations as a witness. For the reasons supporting this construction of the statute, see opinion.

(May 7, 1912.)

APPEAL by defendant from a judgment of the District Court for Bryan County convicting him of manslaughter. **Affirmed.** The facts are stated in the opinion.

Messrs. W. F. Semple and Utterback, Hayes & McDonald for appellant.

Messrs. Charles West, Attorney General, Smith C. Matson, Assistant Attorney General, and C. F. Davenport, for the State:

The reception of evidence is discretionary with the court, and no abuse of discretion has been shown.

Shires v. State, 2 Okla. Crim. Rep. 69, 99 Pac. 1100; Harvey v. Territory, 11 Okla. 157, 65 Pac. 837; Cochran v. United States, 14 Okla. 108, 76 Pac. 672; 12 Cyc. 559.

Evidence of the conduct, actions, and general demeanor of the defendant before the

in a cause in which the other is an interested party, and yet not be permitted to disclose confidential communications with the other. *Ex parte Beville*, 27 L.R.A. (N.S.) 273, and note.

The rule which limits cross-examination generally to such matters as are brought out in the examination in chief seems to have been applied in some of the cases. This is the rule in California, New York, and Texas, while in Missouri, cross-examination is allowed as to any matter pertinent to the case. 40 Cyc. 2500.

The general rule is that the privilege of such communications may be waived, but in some jurisdictions the rule is otherwise. 40 Cyc. 2397. The question as to whether it is waived by calling one spouse as a witness for the other has not been considered in many cases.

In *Percival v. Jack*, 4 Cal. App. 199, 90 Pac. 555, where a party to a civil action called her husband, who testified in her behalf and was cross-examined by the defendant, it was held that the husband might be recalled for further cross-examination without the consent of the wife, and the general rule is laid down that where one spouse calls the other as a witness, the other side is entitled to cross-examine as to all matters brought out on the examination in chief. It is further stated in this opinion, however, that the testimony obtained from the witness was immaterial.

In *Hobbs v. State*, 53 Tex. Crim. Rep. 71, 112 S. W. 308, neither the question of waiver nor confidential communications is directly discussed, but it is held that where the defendant in a criminal prosecution calls his wife to testify to a communication made to her, the state may subject her credibility to such tests by reasonable cross-

examination as will disclose the truthfulness or inaccuracy of any statement which she makes. The same rule is applied in *Marsh v. State*, 54 Tex. Crim. Rep. 144, 112 S. W. 320. The cases apparently go only to the question as to whether the cross-examination of the wife was proper within the Texas rule limiting cross-examination to matters gone into on direct. The same appears to have been true in a second appeal of the former case. 55 Tex. Crim. Rep. 299, 117 S. W. 811.

In *Columbia & P. S. R. Co. v. Hawthorne*, 3 Wash. Terr. 353, 19 Pac. 25, where a plaintiff had called his wife to testify, it was held that he thereby consented that she might testify. Only this general statement appears in the report of this case, and it is not clear that any confidential communications were involved.

In *People v. Wood*, 126 N. Y. 249, 27 N. E. 362, where the wife of the defendant in a criminal prosecution was called as a witness for him, the question of waiver was not considered, but it was held that the defendant could object to any disclosure of confidential communications, thereby overruling the holding of the trial court that the wife was the only one who could object to disclosure under such circumstances.

In *State v. Bell*, 212 Mo. 111, 111 S. W. 24, where a defendant in a criminal prosecution called his wife as a witness, it was held error to require her to testify as to a confidential communication with her husband; but no question of waiver was discussed.

See note to *Brown v. State*, 34 L.R.A. (N.S.) 811, as to comment by prosecuting attorney on failure of defendant to produce witness, as ground for reversal or new trial.

W. A. E.

killing is admissible to prove that he was armed and in a vicious humor.

Williams v. State, 4 Okla. Crim. Rep. 523, 114 Pac. 1114.

Furman, P. J., delivered the opinion of the court:

First. Upon the trial of this cause, the state placed Richard Nichols on the stand to testify in rebuttal, and, over the repeated objections of counsel for appellant, said witness was permitted to state that he was present and witnessed the difficulty in which the appellant killed the deceased, and said witness saw the appellant, J. C. Hampton, just before the fatal shot was fired, and that the witness saw the right hand of the deceased at the time he was shot by appellant, and knows what the deceased was doing with his right hand at that time, and that the deceased did not make any motion with his right arm toward his right side or right pants' pocket at the time he was shot by appellant.

Counsel for appellant objected to the introduction of this testimony, on the ground that it was not in rebuttal of anything testified to upon the part of appellant, and should have been introduced as evidence in chief. Appellant was a witness in his own behalf and testified to a state of facts which were intended to make out a case of self-defense.

He testified that he was first assaulted by the deceased, and then proceeds to testify as follows:

A. After he struck that lick, it staggered me back a step, I guess, or such a matter, and he stepped back just a half a step, I reckon, or something like that. I know he made a step, and throwed his hand back by his right side.

Q. Show the jury the position he was in, Jule.

A. I don't know whether I can show it. I can't tell just exactly where his hand was. He was back that way; I couldn't see it. I heard him exclaim, "Damn you, I will kill you," and he had his hand back that way.

Q. What did you do then, Jule?

A. I—

Q. Show them what you did.

A. I jerked my gun and shot as quick as I could; just jerked it out and shoved it out and shot.

From this it is evident that the appellant tried to make the jury believe that at the time he fired the fatal shot he had reasonable ground to believe that the deceased was attempting to draw some weapon with which to kill him. So it is seen that the testimony admitted on the part of the state was flatly contradictory of appellant's evi-

dence. While the testimony of the witness Nichols might have been introduced by the state as evidence in chief, yet it does not necessarily follow that it should therefore have been rejected as evidence in rebuttal. The introduction of such evidence is a matter of discretion with the trial court, and will not be ground for reversal, unless an abuse of this discretion is shown. *Shires v. State*, 2 Okla. Crim. Rep. 98, 99 Pac. 1100; *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837; *Cochran v. United States*, 14 Okla. 108, 76 Pac. 672. We do not think that the court erred in admitting the evidence objected to.

Second. Mrs. Lizzie Fahy testified on the part of the state that on the night on which the deceased was killed the witness attended an entertainment or show; that while there she saw the appellant, and heard him say to Mr. Boysdon something about someone taking property away from him at Savannah, and heard appellant say: "I ain't going to stand it; before I will let them have it, I will knock the block of them. No; I will shoot it off of them." She also heard appellant say in the same conversation, "I was man enough to serve a term in the penitentiary once, and I am man enough to serve another term." Appellant objected to all of this testimony, upon the ground that it was incompetent, irrelevant, and immaterial. The same witness testified that after the show broke up and the parties started home, the shooting occurred in which the deceased lost his life. Mrs. Mary Boysdon, a witness for the state, testified that she heard the same conversation and statement made by appellant as previously testified to by Mrs. Fahy, and that the conversation occurred an hour or two before the time of the shooting. To this testimony, the same objection was made.

Ira Smith testified in behalf of the state that he was present at the show which was given just before the difficulty in which the deceased lost his life. That he saw the appellant there. That he heard the appellant say: "I have settled that McGregor matter; but old man Lamb is trying to get the rest of what I have got, and he has started something he can't get away with." Witness then said to appellant: "I understand that you and old man Lamb are lodge brothers and belong to the same lodge, and a few minutes' conversation with you might be worth a whole lot to me." That appellant said that he and Macon Green and another man were going to get the old man that night, and said, "Will you stay with me?" To which witness replied, "I will do anything I can for you that is right." That witness and appellant then took a drink,

and about that time Dr. Rappolee passed along, and appellant says, "There goes the son of a bitch now," and said, "Let him take this, if he can," and produced a gun. That witness told appellant that the man passing was Dr. Rappolee. Appellant then hollered and asked the man if he was Dr. Rappolee. The man replied, "Yes," and appellant asked him to come back and take a drink. That appellant told witness that he was going to get the deceased at his front yard gate, or between the place where the show was being held and the front yard gate. That witness saw a pistol in the hands of appellant at the time. When appellant was upon the witness stand, he was asked with reference to these conversations. He testified that he did use some such language.

In the light of this evidence, we think that the testimony of Mrs. Lizzie Fahy and Mrs. Mary Boysdon was properly admitted, because it tended to prove that the appellant was armed and in a vicious humor just before the killing, and it threw light upon the main transaction.

In the case of *Williams v. State*, 4 Okla. Crim. Rep. 523, 114 Pac. 1114, this court held that any fact is admissible in evidence which tends to shed light upon the intention of a defendant in the commission of a crime for which he is upon trial, even though it may prove a separate offense. In a homicide case, it is competent to put in evidence the actions, conduct, and general demeanor of a defendant before the killing, for the purpose of proving he was armed and in a vicious humor, provided that such conduct is so near the time of the homicide as to tend to show the state of mind of the defendant at the time of the killing. For a full discussion of this question and citation of authorities thereon, see *Williams v. State*, supra.

Third. Upon the trial of this case, in the closing argument for the prosecution, counsel for the state addressed the jury as follows: "Ah, gentlemen, is it not a remarkable fact, further, that he builds his defense upon what his wife told him, and she sits here by his side? Under the law, she is a competent witness in his behalf; but the state is not permitted to reach out and place her upon the stand against him. Her mouth is closed, so far as the state is concerned. If what he says about her,—if what he says that she said to him is true, if it is unlike what he says everybody else told him, why in the name of human justice don't he put her on the stand and have her tell about it?" This argument was objected to by counsel for appellant, and a motion was made requesting the court to exclude it from the jury. This motion was overruled, 40 L.R.A. (N.S.)

to which ruling of the court appellant excepted. These facts all appear by proper recitals in the case made.

In the case of *Rhea v. Territory*, 3 Okla. Crim. Rep. 231, 105 Pac. 314, this court held that in a criminal case, where it appears from the record that the wife of a defendant is a material witness in the case in his behalf, and he does not place her on the witness stand, such failure upon the part of the defendant to call his wife as a witness may be commented upon by counsel for the state. We are still of the same opinion.

Counsel for appellant rely upon § 6834, Comp. Laws 1909, which is as follows: "Except as otherwise provided in chapters [89] on Procedure—Criminal, and [90] Procedure—Criminal—Before Justice, the rules of evidence in civil cases are applicable also in criminal cases; provided, however, that neither husband nor wife shall in any case be a witness against the other except in a criminal prosecution for a crime committed one against the other, but they may in all cases be witnesses for each other, and shall be subject to cross-examination, as other witnesses, and shall in no event on a criminal trial be permitted to disclose communications made by one to the other except on a trial of an offense committed by one against the other."

In their brief, counsel for appellant say: "If the wife had been called as a witness by the defendant, she could not have divulged communications made by her to her husband, the defendant, at that time, and could not have divulged communications made by her husband to her." With this contention, we cannot agree. It makes a discrimination against, and places a burden upon, the marital relation. The true purpose and effect of this statute is to protect confidential communications between the husband and wife, where such communications, if testified to by either the husband or wife, would be injurious to the party against whom the evidence was admitted. It would indeed be a narrow and unjust construction of this statute to hold that it deprives the husband of any testimony which his wife could give in his behalf, which would be competent if she was not his wife.

Section 6487, Comp. Laws 1909, is as follows: "The rule of common law that penal statute are to be strictly construed has no application to this chapter. This chapter establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to promote its objects, and in furtherance of justice."

We therefore hold that the object of this statute, with reference to the testimony of

the wife or husband against or in favor of the other, was adopted for the purpose of protecting confidential relations between them, and was intended for the benefit of both husband and wife, and it cannot be construed so as to deprive either of them of any right which they would otherwise have; and that it is competent for the wife or husband to testify as to any communication passing between them which might be beneficial to the party upon trial, provided only that such communication was otherwise free from objections, and that such wife or husband is called as a witness by the other.

Society is interested in preserving the harmony of the marriage relations, and anything which tends to disrupt those relations is to be discountenanced. The law therefore protects all those private confidences which the relation of husband and wife hold as sacred, the disclosure of which might introduce strife, malevolence, and discord into the married life.

For a splendid brief and citation of authorities on the subject of communications made in confidence as privileged communications, see *Plunkett v. Hamilton*, 136 Ga. 72, 35 L.R.A.(N.S.) 583, 70 S. E. 781, Ann. Cas. 1912 B, 1259.

To further illustrate the principle that a statute should be so construed as to accomplish the purpose for which it was enacted, we will take the statute which makes it a crime for any person confined in prison to escape therefrom, or for any person to assist any prisoner so confined in escaping. The statute does not say a word as to the legality of the confinement, or as to the intention with which the escape is made or aided to be made. On the face of the statute, the offense is complete when any person confined in jail as a prisoner escapes or is aided to escape therefrom. Suppose that a man is confined as a prisoner in jail without warrant or the least show of lawful authority, who will contend that it would be an offense for such person to escape from such confinement and to regain liberty? Grant that a prisoner is legally confined, suppose the jail catches on fire, and he escapes therefrom to save his life, or suppose that the jailer is absent, and other persons assist a prisoner so confined to escape from jail, who will be bold enough to say that, under either of these circumstances, a crime has been committed? Yet, in each of them, the letter of the law would be violated. Suppose a husband, upon his return to his home, finds that during his absence a brutal crime has been committed upon his wife, and she informs him that her despoiler had threatened to kill her and her husband also, if she dared to tell of the outrage committed upon her, and, on

account of what had happened and the threat made, the husband kills this man under circumstances which would raise the issue of self-defense, would it not be an outrage upon humanity and a travesty upon justice to say that the wife was incompetent as a witness in such case in her husband's behalf, as to the facts which she had communicated to him? There was an ancient act of Parliament that whoever shed blood on the streets of London should be guilty of a felony. A man fell down in a fit on the streets of London. A doctor was sent for, who bled the man to relieve his malady. This doctor was arrested, tried, and convicted for shedding blood on the streets of London; but, on appeal to the House of Lords, it was declared by that body that, while he had violated the letter of the law, he had not violated its spirit; that the law had been enacted by Parliament for the purpose of suppressing breaches of the peace, affrays, and riots on the streets of London, and that this was its sole purpose; and that it did not include within its penalty any acts which were done for the preservation of the peace or of human life. But we have even a higher authority than this. If we go to the source of all law, Sacred Writ, we will find written there: "The letter killeth; 'tis the spirit that giveth life." Looking, then, to the intent and purpose of the statute, rather than to its letter, it would be an insult to the intelligence of the legislature and to American manhood and womanhood to hold that the legislature intended to refuse to permit a wife to testify as to communications made by her to her husband which would assist in presenting a defense in his behalf. This court will never hold that a husband is not justified in believing his wife, and in acting upon communications received from her, and that when he so acts that she is not a competent witness regarding such communications in his behalf, provided only that such communications are otherwise competent as testimony.

In the case of *Evans v. State*, 5 Okla. Crim. Rep. 643, 34 L.R.A.(N.S.) 577, 115 Pac. 809, Judge Doyle, in discussing privileged communications made by a client to his attorney, says: "The statute is for the benefit of the client, not the attorney; and such communications are permanently protected from disclosure, except where the client waives the protection." The same fundamental rule applies to all privileged communications. The husband or wife may waive the provisions of the statute.

We believe that the remarks made by the prosecuting attorney in this case were fully justified by the evidence; and we believe the court did not err in refusing to exclude them from the jury. This court stands un-

compromisingly for the enforcement of the law; and when it is shown by the record that a party charged with crime is guilty, and that he has been fairly convicted, this court can be depended upon to sustain such conviction.

We have examined the record carefully, and we have no doubt as to the guilt of appellant. The only question is as to whether or not he should have been convicted of murder or manslaughter. The jury having seen fit to find him guilty of the lower offense, he should be exceedingly thankful therefor. We do not hesitate to say that, if the jury had convicted him of murder and assessed his punishment at death, it would have been sustained. There is considerable evidence in the record tending to show that the deceased and the defendant were both bad men; but this in no wise justifies or mitigates the offense committed.

We find no error in the record. The judgment of the lower court is therefore, in all things, affirmed.

Doyle, J., concurs. Armstrong, J., having presided at the trial of appellant in the court below, was disqualified, and did not participate in the consideration and decision of the case in this court.

SOUTH DAKOTA SUPREME COURT.

CHARLES L. HYDE, Appt.,

v.

MINNESOTA, DAKOTA, & PACIFIC RAILWAY COMPANY et al., Respts.

(— S. D. —, 136 N. W. 92.)

Eminent domain — operation of railroad — injury to adjoining property — liability.

1. A railroad company acting under the power of eminent domain is not, although the Constitution forbids damaging property for public use without compensation, liable for diminution in value of property

Note. — Right under constitutional provision against "damaging" private property for public use without compensation, to compensation for consequential damages to property, no part of which is taken, from smoke, noise, dust, etc., incident to ordinary operation of railroads.

This question is discussed in the note to *Tidewater R. Co. v. Shartzer*, 17 L.R.A. (N.S.) 1053. Since that note it has been held that a constitutional provision that private property shall not be taken or "damaged" without compensation entitles the owner to damages from a railroad company, on account of smoke and cinders car-

ried upon his property by ordinary currents of wind, but not by unusual currents. *Illinois C. R. Co. v. Elliot*, 129 Ky. 121, 110 S. W. 817.

Same — closing highway — liability.

2. A railroad company is not, under a Constitution forbidding the damaging of property for public use without compensation, liable for the diminution in value of private property because of inconvenience caused by the closing of streets not abutting on the property, but which afford access to it, where communication between the property and the general system of highways still remains.

(Haney, J., dissents.)

(May 7, 1912.)

APPEAL by plaintiff from a judgment of the Circuit Court for Brown County in defendant's favor in an action brought to recover damages alleged to have been caused by the construction and operation of defendants' lines of railway. Affirmed.

The facts are stated in the opinion.

Messrs. Taubman & Williamson, for appellant:

Plaintiff is entitled to recover for incidental and consequential damages.

Omaha Horse R. Co. v. Cable Tramway Co. 32 Fed. 727; *Omaha v. Kramer*, 25 Neb. 489, 13 Am. St. Rep. 504, 41 N. W. 295; *Searle v. Lead*, 10 S. D. 312, 39 L.R.A. 345, 73 N. W. 101; *Hyde v. Fall River*, 189 Mass. 439, 2 L.R.A. (N.S.) 269, 75 N. E. 953; *Smith v. St. Paul M. & M. R. Co.* 39 Wash. 355, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Louisville & N. Terminal Co. v. Lelivett*, 1 L.R.A. (N.S.) 1, note; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Lake Erie & W. R. Co. v. Scott*, 132 Ill. 429, 8 L.R.A. 330, 24 N. E. 78; *Shepherd v. Baltimore & O. R. Co.* 130 U. S. 426, 32 L. ed. 970, 9 Sup. Ct. Rep. 598; *McElroy v. Kansas City*, 21 Fed. 257;

ried upon his property by ordinary currents of wind, but not by unusual currents. *Illinois C. R. Co. v. Elliot*, 129 Ky. 121, 110 S. W. 817.

So, in *Idaho & W. N. R. Co. v. Nagle*, 106 C. C. A. 578, 184 Fed. 598, the Federal court, following the decisions of the Washington supreme court, held that the jarring of the earth by the operation of trains, and the casting of soot and cinders upon adjoining property, and the emission of smoke physically injuring such property, are damages within the meaning of such a constitutional provision.

So, damages from smoke, cinders, and ashes thrown from locomotives are recoverable under a constitutional provision

Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 169, 9 L.R.A. 298, 22 Am. St. Rep. 42, 14 S. W. 259.

Messrs. George W. Seevers and Campbell & Walton, for respondents:

Plaintiff has suffered no damage for which as a matter of law he could recover.

Smith v. St. Paul, M. & M. R. Co. 39 Wash. 355, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840; Cram v. Laconia, 71 N. H. 41, 57 L.R.A. 282, 51 Atl. 635; Davis v. Hampshire County, 153 Mass. 218, 11 L.R.A. 750, 26 N. E. 848; Buhl v. Fort Street Union Depot Co. 98 Mich. 596, 23 L.R.A. 392, 57 N. W. 829; East St. Louis v. O'Flynn, 119 Ill. 204, 59 Am. Rep. 795, 10 N. E. 395; McGee's Appeal, 114 Pa. 470, 8 Atl. 237; Stanwood v. Malden, 157 Mass. 17, 16 L.R.A. 591, 31 N. E. 702; Glasgow v. St. Louis, 107 Mo. 204, 17 S. W. 743; Aldrich v. Metropolitan West Side Elev. R. Co. 195 Ill. 456, 57 L.R.A. 237, 63 N. E. 155; Chicago v. Union Stock Yards & Transit Co. 164 Ill. 224, 35 L.R.A. 281, 45 N. E. 430; Illinois C. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39; Bennett v. Long Island R. Co. 181 N. Y. 431, 74 N. E. 418; Pennsylvania R. Co. v. Mar-

chant, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690; Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871; Austin v. Augusta Terminal R. Co. 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852; Van De Vere v. Kansas City, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695; Brown v. San Francisco, 124 Cal. 274, 57 Pac. 82; Gilbert v. Greeley, S. L. & P. R. Co. 13 Colo. 501, 22 Pac. 814; Morgan v. Des Moines & St. L. R. Co. 64 Iowa, 589, 52 Am. Rep. 462, 21 N. W. 96; Rochette v. Chicago, M. & St. P. R. Co. 32 Minn. 201, 20 N. W. 140; Carroll v. Wisconsin C. R. Co. 40 Minn. 168, 41 N. W. 661; Presbrey v. Old Colony & N. R. Co. 103 Mass. 6; Rude v. St. Louis, 93 Mo. 408, 6 S. W. 257; Heller v. Atchison, T. & S. F. R. Co. 28 Kan. 625; Dantzer v. Indianapolis Union R. Co. 141 Ind. 604, 34 L.R.A. 769, 50 Am. St. Rep. 343, 39 N. E. 223; Clute v. North Yakima & Valley R. Co. 62 Wash. 531, 114 Pac. 513; Church of Jesus Christ, L. D. S. v. Oregon Short Line R. Co. 36 Utah, 238, 23 L.R.A. (N.S.) 860, 140 Am. St. Rep. 819, 103 Pac. 243; Smith v. St. Paul, M. & M. R. Co. 39 Wash. 355, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840; Campbell v. Metropolitan Street R. Co. 82 Ga. 320,

against damaging property without compensation. Danville & I. H. R. Co. v. Tidrick, 137 Ill. App. 553.

And likewise damages from vibration or jar from passing trains, resulting in a direct physical disturbance of the property. Ibid.

But there can be no recovery under such a provision by reason of mere noise from the operation of a traction company's road upon its own property. Griveau v. South Chicago City R. Co. 130 Ill. App. 519.

Nor is the operation of trains and engines on tracks lawfully constructed for the purpose of switching and making up trains, near a church, the effect of which is to interrupt religious services in consequence of the noise, a damaging of property within the meaning of such a constitutional provision. Church of Jesus Christ, L. D. S. v. Oregon Short Line R. Co. 36 Utah, 238, 23 L.R.A. (N.S.) 860, 140 Am. St. Rep. 819, 103 Pac. 243. And see HYDE v. MINNESOTA, D. & P. R. Co.

Nor are noise, smoke, and dust, and other inconveniences and discomforts which must be borne by the general public, occasioned by the operation of a railroad in the street, recoverable under a constitutional provision that property shall not be taken, "injured, or destroyed" without compensation. Willock v. Beaver Valley R. Co. 222 Pa. 590, 72 Atl. 237, s. c. on subsequent appeal, 229 Pa. 526, 79 Atl. 138.

Nor can there be any recovery under such a provision, for noise, vibration, and dirt from the operation of a railroad. Wunderlich v. Pennsylvania R. Co. 223 Pa. 114, 72 Atl. 247.
40 L.R.A. (N.S.)

Generally as to the right of an abutter to compensation for railroads in streets, see note to Rasch v. Nassau Electric R. Co. 36 L.R.A. (N.S.) 673, and especially with reference to the effect of a constitutional provision against "damaging" property, and special injuries, on pages 741 et seq. of that note.

It is to be observed that neither the present note nor the one which it supplements deals with the question whether an allowance may be made for damages of the kind under consideration, in condemnation proceedings where part of the property has been taken. In this connection, see note to Idaho & W. R. Co. v. Columbia Conference, 38 L.R.A. (N.S.) 497, as to allowance for noise in proceedings to condemn a railroad right of way.

Nor do these notes deal with the right to recover such damages on the ground of nuisance. In that connection, see note to Ferrell v. Chesapeake & O. R. Co. 32 L.R.A. (N.S.) 371, as to the liability of a railroad company for creating a nuisance, in connection with the note to Louisville & N. Terminal Co. v. Lellyett, 1 L.R.A. (N.S.) 49, as to the effect of legislative authority upon liability for private nuisance.

As to right of property owner whose means of access from one direction is shut off or interfered with by closing of adjoining street or portion of street upon which he is situated, see notes to Hyde v. Fall River, 2 L.R.A. (N.S.) 269; Newark v. Hatt, 30 L.R.A. (N.S.) 637.

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9 S. E. 1078; New Orleans, Ft. J. & G. I. R. Co. v. Barton, 43 La. Ann. 171, 9 So. 19; Carroll v. Wisconsin C. R. Co. 40 Minn. 168, 41 N. W. 661; Jones v. Erie & W. Valley R. Co. 151 Pa. 30, 17 L.R.A. 758, 31 Am. St. Rep. 722, 25 Atl. 134.

Whiting, J., delivered the opinion of the court:

This action was brought to recover damages which plaintiff alleged he had suffered through the acts of defendants. Upon the trial before the circuit court and jury, defendants objected to the introduction of any evidence under the complaint, basing their objection upon the ground that such complaint did not state facts constituting a cause of action. The objection was sustained, and verdict for defendants directed. Judgment having been rendered upon such verdict, plaintiff appealed to this court, and in his brief states: "There is but one question in this case. Plaintiff contends that he is entitled to recover for incidental and consequential damages. Defendant resists this contention, and claims that, inasmuch as the defendants constructed and are operating their line of railway upon their own land, the plaintiff, even though damaged, cannot recover." The cause has been presented to this court, both by the briefs and oral arguments, as though it were an appeal from an order sustaining a demurrer to the complaint when such demurrer had been interposed before answer, and it will be so treated by this court.

The facts which such demurrer would admit are, in substance, as follows: Plaintiff is the owner of numerous lots in a row of blocks running east and west within, but at the extreme southern end of, the city of Aberdeen. There is no highway on the south side of such blocks, but there is a street along the north side thereof, and there are streets between such blocks, which last-mentioned streets originally extended, without interruption, to the north through said city. The defendants acquired the row of blocks next north of the row where plaintiff's property is situate, and, entering said city from the southeast with their right of way, defendants entered upon such row of blocks acquired by them, and used the same for a railroad right of way running westerly across the south end of such city. Defendants used no part of the street adjoining plaintiff's property on the north, but did cross all the streets running north from plaintiff's property, and closed two of such streets where the same crossed their right of way. There were at least two streets east of, and parallel to, and two streets west of and parallel to, those closed, which were not closed by such right of way, and

the street running east and west along the north side of plaintiff's property connected with all of said open streets. It does not appear that there are any structures upon plaintiff's property. The defendants have constructed a line of railroad, depot grounds, coal bins, water tanks, depot, and engine house upon the row of blocks owned by them; their exact location as relates to the property of plaintiff not appearing.

This is not an action asking equitable relief by way of injunction; and, while the plaintiff, in one paragraph of his complaint, has set forth many sources of alleged injury, the only allegation of said complaint upon which he predicates his claim for money damages are those found in paragraph XI. of such complaint. We must therefore disregard all such matters as are not pleaded as grounds for the recovery of the judgment asked for, Paragraph XI. of the complaint reads as follows: "That the defendants are now operating said system of railway and running trains along the tracks of the same, and are using all of the space between Eleventh and Twelfth avenues as aforesaid, as switch yards and depot grounds; that First street and Second street have been closed to travel by the defendants, and no crossings are maintained over and across the switch yards and depot grounds of the defendants at First and Second streets, and that, by reason of the location, construction, operation, and maintenance by said railway company of said line of railway, and the closing and crossing of said streets, as aforesaid, and the continuous operation of trains over and across the streets aforesaid, north and east of the property of the plaintiff, and by reason of the smoke, dust, noise, and trembling of the earth occasioned by the operation of the trains of the defendants, and the location of the depot and roundhouse across or over the streets leading from plaintiff's property to the city proper, the plaintiff has been damaged in the sum of fifteen thousand (\$15,000) dollars. Wherefore, plaintiff demands judgment against the defendants for the sum of fifteen thousand (\$15,000) dollars, besides the costs and disbursements of this action." It will thus be seen that plaintiff's claim for damages is based upon the location, construction, maintenance and operation of the line of road and switch yards, such operation causing smoke, dust, noise, and trembling of the earth, and upon the closing of the streets to the north of, but not adjacent to, plaintiff's property.

We shall not attempt to harmonize the views advanced in the almost numberless decisions wherein the questions presented by this appeal have been discussed. All that

we shall strive to do is to call attention to what we deem certain basic propositions which seem to have been frequently rejected or overlooked, and then determine the principles that should control under the facts presented by the complaint. From the reading of appellant's brief, it is apparent that he bases his right of recovery upon the use of the words "or damaged" in § 13, art. 6, of the Constitution of this state, which section reads: "Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken. . . ." From the reading of many of the decisions, it would seem that the courts have frequently held that the right of action to recover damages rested upon constitutional provisions similar to the above. Such holdings are certainly erroneous. We would cite the reader hereof to the excellent discussion found in a case from a state having no constitutional provision whatsoever, and would like to quote the opinion in full if space permitted. *Staton v. Norfolk & C. R. Co.* 111 N. C. 278, 17 L.R.A. 838, 16 S. E. 181. See also notes in 17 L.R.A. 838-842.

The history of the right to recover for the taking or damaging of property under the power of eminent domain, like the history of such power itself, extends back long prior to our Constitutions, either Federal or state. The power of eminent domain is an inherent right vested in sovereignty as a necessary attribute thereof; but long before the founding of the American Colonies it had become thoroughly established, as part of the English law, that it was unlawful to take the property of an individual for even a public use without making due compensation therefor. The taking of private property without compensation must have been especially repugnant to a people such as those who founded our present government, —the very corner stone of which is the equality of man before the law. We find that some of the courts have held that, even where there was no constitutional inhibition, the legislature had no power to take private property for public use without just compensation. See cases cited in the *Staton Case*, supra. The framers of the Federal Constitution did not even think it necessary to place therein any guaranty of this right to recover damages, thus showing that this right was fully recognized. The guaranty will be found in the 5th Amendment. Very few of the Colonies had any such guaranty in their fundamental laws, and most of them had none until long after statehood, while one, North Carolina, has never seen fit to place such a guaranty in her Constitu-

tion. Sooner or later the sovereign authority, the people, protected themselves from any attempt upon the part of their legislatures to deprive them of their right to recompense, by enacting the several constitutional provisions now in force. In the early days these constitutional provisions only guaranteed reimbursement in case of a "taking" of property, and the result was that some of the courts, construing the word "property" in its narrow sense as the "thing" owned, rather than giving to it the broader and truer meaning of "the exclusive right to possess, enjoy, and dispose of a thing" (*Webster's New Int. Dict.*), held that there was no provision against the mere "damaging" of the thing which was the subject of property, but that one could recover only when there was an actual "taking of the thing." See *Thompson v. Androscoggin River Improv. Co.* 54 N. H. 545, and case of *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147, wherein, as well as in the *Staton Case*, supra, clear discussions of the results flowing from the misconstruction of the word "property" are found.

The cases holding to this narrow construction of the word "property," and holding that no recovery could be had under a constitutional provision guarantying recompense only where there had been a "taking" of the thing, were clearly in error, both in giving too narrow a meaning to the word "property," and also in holding that the right of recovery rested upon the Constitution rather than upon the common law or upon an inherent right superior to any legislative enactment. The result of these decisions was that many of the states amended their Constitutions by inserting therein the words "or damaged," or equivalent words, making them read, in effect, the same as the provision of our Constitution above quoted. The fact, however, remains, that the right to recover damages, whether the injury flows from a "taking" or a "damaging" of the property, is a right not coming from the Constitution; the only effects of the constitutional provisions being to prevent the legislatures from depriving the people of such right, and granting the right, under Constitutions such as ours, of preventing the "taking" or "damaging" until the recompense is made. We think there can be no question but that the including of the words "or damaged" does not broaden the effect of the constitutional provision over what it would be were the word "taken" alone used and the word "property" given its broad meaning, as given to it in the New Hampshire cases, supra, and that the including of such words does not extend the right of recovery to include that for any

injury for which damages could not have been recovered at common law.

We must never lose sight of the fact that the question of negligence has nothing whatever to do with the question of right to recover damages, where such damages have resulted from the exercise of the power of eminent domain. The delegating to a person or corporation of the power of eminent domain can never in any manner absolve the person or corporation exercising such powers from liability for any negligence on his or its part, either in the exercise of such power or in the carrying on of any enterprise after the exercise of such power; and any action for damages resulting from negligence can in no manner raise any question based upon the exercise of the power of eminent domain, whether such action be brought prior to an alleged exercise of the power or afterwards. The damages to be recompensed for under the law of eminent domain are, from the very necessity of things, only those flowing from injuries that cannot reasonably be avoided even by the use of due care in the exercise of the power of eminent domain, and are, ordinarily, only such as could be anticipated by a jury in the trial of an action brought before the "damage" had taken place. In the case at bar there is no plea of negligence. Therefore no question of negligence on the part of defendants is before us, and we must presume that defendants acted with all due care in everything pertaining to the matters complained of.

Not only is the question of negligence entirely foreign to the law of eminent domain, but the laws pertaining to private nuisances and to damages flowing therefrom are in no manner affected by the question of eminent domain. It seems inconceivable that it could ever be claimed that, when the state delegates to a private person or corporation the right to take or damage property under the law of eminent domain, it does more than to declare that lawful which otherwise would be unlawful, perchance render that not a public nuisance which otherwise would be one, leaving he or it, in so far as the taking or damaging of property may infringe upon the superior rights of the owners, liable to compensate for all damages flowing from the injury suffered; yet it is stated by some courts that, by giving to a corporation the right of eminent domain for the purpose of carrying on some enterprise, such enterprise cannot be held to be a private nuisance. This is clearly wrong. Any enterprise which would be a private nuisance when separated from the power of eminent domain will be exactly the same private nuisance if conducted by a person vested with the right to exercise

such power of eminent domain. To illustrate: An abbatoir, when located near a dwelling house, must be conceded to be a private nuisance. If by statute a party be given the right to condemn and take or damage property to use as the site for an abbatoir, such abbatoir properly conducted would not be a public nuisance, yet, if located in a residence district, it would be a private nuisance, and any party injured thereby could recover damage for such private injury, and, under the Constitution, the taking of property for such abbatoir and the erection thereof could be restrained until compensation for the taking and damaging were paid, which compensation, so far as compensation for the "damaging" of property was concerned, would be limited to the amount of injury which the owner of the property would suffer from the carrying on of the enterprise with due care. The payment of such damages would absolve him from further liability only so long as he should run his plant with due care. It is undoubtedly true that it very seldom happens that any statute ever authorizes, under the power of eminent domain, the doing of that which is of necessity a nuisance *per se* regardless of its situs; therefore seldom any question of nuisance necessarily arises from the exercise of the power of eminent domain, and such question ordinarily arises only when an enterprise, not necessarily a nuisance is, under the power of eminent domain, located where, owing to its proximity to some particular property, it becomes a nuisance as to such property.

It must be conceded, and the authorities universally so hold, that a railroad, when properly operated, is not ordinarily a nuisance, and that it can only become a private nuisance when improperly or negligently operated, a question not before us in this case, or when, though properly operated, yet, owing to its peculiar location, it infringes upon some right which an individual has separate and distinct from the rights of the public in general. Railroads are absolute necessities. At the present day the very existence of a city often depends upon them. Their work is such that it is necessary for them to get as close to the centers of business as possible, not only for their own welfare, but for the public good. One who buys land in a city usually hopes that its railroad facilities will increase, thus causing the city to grow and his land to enhance in value. This hope is usually in the breast of every person who has chosen city in preference to country life. Connected with its advantages come its disadvantages. One may be called upon to part with his property for the public benefit. Streets used by him may be closed.

He may reside in the vicinity of the right of way and be disturbed by the noise of moving trains, and by the contamination of the air caused by the smoke and gases therefrom; but these are but things which must necessarily be borne in exchange for the benefits. Of course, if the trains are negligently run, a railway may become both a private and a public nuisance, and holden as such. A railway company may so locate its roundhouse that it may become a nuisance to the adjoining property holders, but the question of nuisance will depend not only upon the location of the roundhouse, but frequently upon the question of negligence in its conduct, and often upon the nature of the adjoining property. A railroad must respond in damages if it cuts off one's access to his property in any direction, but it does not necessarily follow that it cannot destroy a privilege of traveling certain streets distant from the property of such party. A railroad cannot dump cinders upon the land of another, thus injuring it, nor can it allow its engine to blow steam across the land of others. It follows that a railway must condemn sufficient land so that steam from its engines and cinders from its furnaces will not cause physical injuries to persons or property off the right of way.

What, then, is included in the word "damaged" as it is used in the above-quoted section of our Constitution? In the use of the terms "damage" or "damaged," as we have used them herein, we have had in mind only legal damage, and certainly it was in that sense that the word "damaged" was used in the Constitution and in our various statutes. Those Constitutions which use the term "or injured" where ours uses the term "or damaged" are more exact in the use of language. One thing that has often led to confusion is in not distinguishing clearly between "injury" and "damage," and in the careless use of the one term where the other should have been used. A person cannot be injured unless he has been wronged, and he cannot be wronged unless some right is infringed. Legal damage is the loss or detriment caused by the injury, the wrong,—the infringement of some right vested in one. Moreover, one is not wronged, though he may have suffered damages, unless he has suffered the infringement of some right vested in him which right is superior to the right vested in the party causing the damage, upon which right such other party defends against the consequence of his own acts. It therefore follows that, if a person desiring to enjoy the property of which he may be possessed makes a use of the subject thereof, which use is, under all the

surrounding circumstances, a reasonable use thereof, not infringing in any manner upon any superior rights of another, he cannot, by such use, have wronged any other party, and cannot be holden for any damages suffered by any other person, though such damages flowed from such exercise of his right of property. I may be a merchant and have a lucrative business established. Another party may start a business, and by fair competition destroy my business, yet I cannot recover the damage suffered because I have suffered no legal injury. A party may have had a ferry across the river at Pierre, and have been earning good returns therefrom prior to the time when the bridge was built across the river. The building of the bridge may have destroyed the business of the ferryman, but he cannot recover from the bridge company for the injuries suffered. A man may have a low building, with windows on all sides. The owners of adjacent land may erect skyscrapers on three sides, cutting off largely the light and air before enjoyed, and the building may be practically ruined in value, yet there is no right of action to recover the damage, as there has been no wrong,—no legal injury has been inflicted. A person may erect a factory on the lot adjoining one's residence, and, while the operation of such factory may not be a nuisance, yet the fact that there is a factory there may destroy the value of the residence as such. There is no redress, as there is no wrong to redress, though the damage may be great in dollars and cents. *Mohawk Bridge Co. v. Utica & S. R. Co.* 6 Paige, 555; *Bordentown & S. A. Turnp. Road v. Camden & A. R. & Transp. Co.* 17 N. J. L. 314.

So in the case at bar, conceding that the plaintiff has been damaged in the sum of \$15,000, the question is: Does it appear from the allegations of the complaint that such damages flow from an infringement of a superior right vested in plaintiff, from what, under the surrounding circumstances, was an unreasonable use by defendants of their property, from a legal injury, or do they flow from acts on the part of defendants which in no manner constitute a wrong—a legal injury—to plaintiff. Must one to whom is given the power to take or damage property under the right of eminent domain respond for damages of a kind other than those any other person would be liable for? If the power of eminent domain was not given to a railway company, and such a company should acquire property by purchase, and should operate a railway thereon, operating it in a manner not rendering it a nuisance to the adjoining property, should the owners of such adjoining property have any greater or less right to re-

cover damage because of the lack of power of eminent domain? Can the other party be more wronged in the one case than in the other? Certainly a railway company is in no worse position, so far as its duty to respond for damages inflicted upon others is concerned, because to it is given the power of eminent domain, and it obtains its right of way through the exercise of such power. The power of eminent domain vested in a private person or corporation in no manner lessens or increases its rights and liabilities in regard to payment of damages suffered by another through the exercise of such power, from what they would be if it took or damaged property without the exercise of such power, except that, for the taking or damaging, it may be required to respond before it does the taking or damaging.

In its last analysis, the question of whether there is an infringement of a private right, giving rise to an action to recover for "damaging" property, resolves itself into the one question: Did the party complained of so conduct its own business, as, under the circumstances, to constitute the exercise of its property rights a reasonable exercise thereof, and thus comply with the maxim, *Sic utere tuo ut alienum non ladas*? In determining this,—in fact, the sole question before us in this case,—we may discard as absolutely immaterial the existence of the power of eminent domain. Considering now the allegations of the complaint, we find the alleged sources of damage divisible into two classes: (1) Those resulting from the operation of the trains; (2) those resulting from the closing of two streets. We will consider the two separately.

There being no allegation of negligence on the part of the defendants in the management of their trains, and the location and operation of a railroad not being a nuisance *per se*, it cannot be presumed that the conditions and circumstances surrounding the establishment and operation of defendants' business were such that such establishment and operation were an unreasonable use of defendants' property and property rights and thus converted into a nuisance what otherwise would not be one. Neither does the mere allegation that plaintiff has suffered damage suffice, as such damage may have resulted from a use by defendants of their property and property rights which use was perfectly reasonable. Let it not be inferred that we hold that there could be no liability on the part of defendants. We have already mentioned some unreasonable uses of railroad property and unreasonable management thereof, and we fully agree with the decision of the court in Baltimore 40 L.R.A. (N.S.)

& P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, cited by defendants; but the allegations in the case at bar wholly fail to set forth facts bringing this case in analogy with the facts in that case. Plaintiff would have the right to erect upon his land, as would also those of whom defendants purchased their right of way, a factory which, even if properly managed, might produce smoke, noise, and a trembling of the earth, annoying to the occupants of adjoining property and destructive of the value thereof, and yet the operating of such factory might be, under the circumstances, a perfectly reasonable use of property and rights therein. The nearest approach to an allegation sufficient to show an unreasonable use by defendants of their property rights is the allegation as to the "trembling of the earth occasioned by the operation of the trains." There is absolutely nothing to show that such "trembling" was of a nature or degree to be dangerous to any structure that had been or might be erected upon plaintiff's land. There should be sufficient to show that the "trembling" is such that works an injury to plaintiff by injuring his property. Any other "trembling" must be classed with noise and smoke resulting from a reasonable use of property.

As regards the closing of the streets, it matters not how they were closed, whether by location of depot and roundhouse thereon, or in some other manner. They were closed, and the damage, if any, flowing from such closing, would be the same, regardless of how or by whom closed. The authorities are in hopeless conflict upon the question of a railroad's liability for closing a street, where the part of street closed does not abut upon the land owned by the party claiming to be damaged. The great weight of authority seems to be that there is no liability in such a case. It will be found that many of the courts so holding base their decisions upon the wording of the constitutional provisions of the particular state. In that we think they err, as we believe, as hereinbefore stated, that the right to recover damages resulting from an exercise of the power of eminent domain is not based upon the Constitution, though it may be limited thereby.

While a railway company has the implied right, under the power of eminent domain, to cross a public highway with its right of way, and thus impose a further public use upon that part of the highway,—a use that must necessarily interfere to some extent with its use for other highway purposes,—there is no such implied right to vacate and close any part of a highway, upon the pretext that it is needed for rail-

way purposes; and any such closing would constitute a public nuisance, and be punishable as such.

It follows that we must presume, there being no allegation to the contrary, that the defendants did not commit a criminal offense, and that the parts of the streets closed had been vacated by the duly qualified municipal body of the city of Aberdeen.

We note this fact for the reason that, in at least one case, it has been intimated there might be a claim for damages against a railway company if the street had not been duly vacated, where there would be none if it had been vacated at the request of the railway company. *Harrington v. Iowa C. R. Co.* 126 Iowa, 388, 102 N. W. 139. But we think a holding to that effect would be error. If a private right, as distinguished from a public right, is impaired, it is immaterial, so far as the question of private damage is concerned, whether the injury, if any, was inflicted under a rightful exercise of the power of eminent domain, thus eliminating the question of public nuisance, or whether the injury came through the wrongful act of the other party; nor is it material whether the injury was inflicted to further a public purpose or to further a private purpose. Thus it is immaterial in this case, in determining the actionable nature of the damage, whether the damage was inflicted by the closing of the streets by the city at request of defendants, as in case of *Dantzer v. Indianapolis Union R. Co.* 141 Ind. 604, 34 L.R.A. 769, 50 Am. St. Rep. 343, 39 N. E. 223, or whether the closing was by the city. Let us suppose the two streets in question had been duly vacated by the proper authorities prior to defendant's advent into the city of Aberdeen, and with that the situation, defendants had acquired these parts of the former streets; would their keeping the same closed in any manner increase the damage that plaintiff would have already suffered from the closing of the streets? Certainly not. It follows, then, that the damages recoverable for the closing of these streets is none other or greater than the city of Aberdeen itself would be liable for upon their vacation, if vacated through proper action upon the part of such city.

What rights has one in and to the use of streets? He has, whether an owner of the land or not, whether a citizen or a stranger, the right, in common with the rest of the public, to travel all of the public highways, which right may be of great convenience to him so far as certain highways or parts thereof are concerned, but of no convenience whatsoever so far as

other highways are concerned. This is a right not in any manner connected with the ownership of land or other subject of property, and cannot be held to be in any sense a private property in the highways.

He has the right, as the owner of land, to access to such land and to every part thereof where it abuts upon a highway. This is a right resting upon the ownership of the subject of property, and connected with and appurtenant to such subject of property, and is therefore a property right. It is a special private right entirely distinct from the public right, and is one that pertains not only to the part of the highway abutting the owner's land, but extends sufficiently beyond his own premises as to insure him reasonable facilities for connection with those highways in which he has no special rights. Further than this his property rights do not extend, and therefore any interference with a highway beyond the point where one's special rights end is not a "taking or damaging" of property, and is not the infringement of any right giving rise to action for damages.

The learned author of *Elliott on Roads*, 3d ed., at § 1180, says: "The right which an abutter enjoys as one of the public, and in common with other citizens, is not property in such a sense as to entitle him to compensation on the discontinuance of the road or street; but with respect to the right which he has in the highway as a means of enjoying the free and convenient use of his abutting property, it is radically different, for this right is a special one. If this special right is of value,—and it is of value if it increases the worth of his abutting premises,—then it is property, no matter whether it be of great or small value." And at § 1181 further says: "Owners of lands abutting upon neighboring streets, or upon other parts of the same street, at least when beyond the next cross street, are not, however, entitled to damages, notwithstanding the value of their lands may be lessened by its vacation or discontinuance." One of the leading cases upon this question is that of *Smith v. Boston*, 7 Cush. 254, wherein the opinion was written by Chief Justice Shaw. What he said therein seems peculiarly applicable to the facts alleged in the complaint therein: "The inconvenience of the petitioner is experienced by him in common with all the rest of the members of the community. He may feel it more, in consequence of the proximity of his lots and buildings; still it is a damage of like kind, and not in its nature peculiar or specific. The creation of a public nuisance by placing an obstruction in a highway can only be punished and suppressed by a public

prosecution; and though a man who lives near it, and has occasion to pass it daily, suffers a damage altogether greater than one who lives at a distance, he can have no private action, because in its nature it is common and public. But if he suffers a peculiar and special damage, not common to the public,—as by driving upon such an obstruction in the night, and injuring his horse,—he may have his private action against the party who placed it there. The damage complained of in this case, though it may be greater in degree, in consequence of the proximity of the petitioner's estates, does not differ in kind from that of any other members of the community who would have had occasion more or less frequently to pass over the discontinued highway. The petitioner has free access to all his lots by public streets. The burden of his complaint, therefore, is that in going to some of his houses in some directions he may be obliged to go somewhat further than he otherwise would. So must the inhabitant of the south end of the city, or the citizens of other towns, with their teams or carriages, who would have had a right to use the discontinued way. Upon the question of public convenience, it is the province of the mayor and aldermen, upon a balance of all considerations bearing upon it, to decide. It is not to be presumed that they will discontinue a highway once laid out, unless the considerations in favor of the discontinuance decidedly preponderate." This subject is most fully treated in the case of *Dantzer v. Indianapolis Union R. Co.* supra, in which will be found a review of many other cases. We will also cite *Davis v. Hampshire County*, 153 Mass. 218, 11 L.R.A. 750, 26 N. E. 848; *Cram v. Laconia*, 71 N. H. 41, 57 L.R.A. 282, 51 Atl. 635; *Long v. Wilson*, 119 Iowa, 267, 60 L.R.A. 720, 97 Am. St. Rep. 315, 93 N. W. 282; *O'Brien v. Central Iron & Steel Co.* 158 Ind. 218, 57 L.R.A. 508, 92 Am. St. Rep. 305, 63 N. E. 302; *Borghart v. Cedar Rapids*, 126 Iowa, 313, 68 L.R.A. 306, 101 N. W. 1120; *Aldrich v. Metropolitan West Side Elev. R. Co.* 195 Ill. 456, 57 L.R.A. 237, 63 N. E. 155.

The latter case, decided in 1902, seems to be a leading case upon the subject, and directly in point in the case at bar. It appears from the statement of facts in that case that in 1888 the plaintiff owned two lots fronting on Ashland boulevard, in Chicago, and erected thereon an expensive apartment building. In 1892 the defendant obtained, by purchase and condemnation proceedings, a right of way through the same block, and located and constructed on said right of way, north of said premises, an elevated electric railway, and that since 40 L.R.A. (N.S.)

1895 it has run its cars on said railway, propelled by electricity, crossing Ashland boulevard 31 feet north of plaintiff's building. To recover damages to her property caused by the construction and operation of defendant's road, the plaintiff brought this action. On the trial in the court below the court struck out all of the plaintiff's evidence, and directed a verdict for the defendant. The learned supreme court of Illinois, on appeal, affirmed the judgment of the court below, and held, as appears by the headnotes of the case, as follows: "Under the constitutional provision against damaging private property for public use without just compensation, no recovery can be had unless there has been some direct physical disturbance of a right which the plaintiff enjoys in connection with his property, and which gives it an additional value, and by reason of such disturbance the plaintiff has sustained a special damage in excess of that sustained by the public generally. . . . If an elevated railroad occupying its own land or right of way except where it crosses public streets is carefully constructed and operated, no recovery, under the constitutional provision against damaging private property for public use, can be had by the owner of property located near the tracks, because of the usual noise, vibration, interference with light, air, and view necessarily attendant upon the proper operation of the railroad, and suffered by such owner in common with the public generally." The court in its opinion says: "There was no charge or proof that the road was negligently constructed or operated, but only that, by the construction and operation of the road so near to appellant's property and across the public street there, her property was damaged for public use, within the meaning of the Constitution, for which no compensation has been made, and for which she is entitled to recover. The road was located and constructed by the company in accordance with lawful authority, and upon its own land or right of way, and not in any public street or alley, except where it crosses streets or alleys by authority lawfully granted. For the purposes of this case, it must be assumed from the record that it was carefully constructed and carefully operated, and that by such construction and operation it did not injuriously affect the property of others, or the property in question of the plaintiff, any more than any such property would be affected in any case by the construction and operation of such a road so near to such property. Ashland boulevard, running north and south in front of plaintiff's property, was 100 feet wide, and had been paved

and beautified as a residence street. . . . The record shows that no unusual noise or vibration of plaintiff's property was caused by the company in the matter complained of. Access to her property from any public street . . . was not cut off or injuriously affected. In short, whatever damages were sustained by the plaintiff were such, and only such, as were common to the public generally. In *Rigney v. Chicago*, 102 Ill. 64, this court allowed a recovery against the city for damages to the plaintiff's property caused by the construction of a viaduct, on the ground that it cut off access from the public street to plaintiff's property. . . . Here there has been no direct physical disturbance of any right, public or private, which the plaintiff enjoys in connection with her property, and which gives to it an additional value, whereby she has sustained a special damage in excess of that sustained by the public generally. The damages sued for are of the same kind and character as those sustained by the public generally in the ownership of property, which property may have been lessened in value by the construction and operation of the road. Noise, the obstruction of light and of view, are necessary incidents of the construction and operation of such roads, and, if every property owner could recover in all such cases, the making of public improvements would become practically impossible."

The case of *Searle v. Lead*, 10 S. D. 312, 39 L.R.A. 345, 73 N. W. 101, is referred to and relied upon by the appellant as sustaining his contention in the case at bar, but, upon examination of that case, it will be found to come within the rule laid down in *Rigney v. Chicago*, supra, and that it has no application to the case at bar. In that case it will be noticed from an examination of the facts stated in the opinion, the city was threatening to raise the grade of the street 3½ feet in front of plaintiff's property, and that the raising of the grade would necessarily physically interfere with the plaintiff's easement or right of ingress and egress to and from her property, and either compel her to live below the new grade with a stairway, or require her to incur the expense of raising her building to the grade. The city, therefore, threatened a direct physical injury to plaintiff's property, not common to all the property owners of that vicinity. In the case at bar, however, there is no allegation that the plaintiff's property was taken, or any easement or appurtenance thereto interfered with, or that the plaintiff had suffered any damage or injury not common to all the residents of that part of the city. Possibly the depreciation in

plaintiff's property might have been greater in degree than that of other owners of property in the vicinity, but it was of the same nature, and did not physically interfere with any right, easement, or appurtenance belonging to the plaintiff's property. It is clear, therefore, that in no view of the case were the facts stated by the plaintiff in his complaint sufficient to authorize a judgment in his favor. The facts upon which this action is based were before this court in the case of *Hyde v. Minnesota, D. & P. R. Co.* 24 S. D. 386, 123 N. W. 849.

The judgment of the trial court is affirmed.

Corson, J., concurs specially.

Haney, J., dissenting:

The only question properly presented by this appeal is whether, upon the allegations of the complaint, "liberally construed, with a view of substantial justice between the parties," the plaintiff is entitled to any relief. As I read the complaint, it discloses that the defendant the Minnesota, Dakota, & Pacific Railway Company, a domestic corporation, constructed a railroad into and through certain described portions of the city of Aberdeen adjacent to lots then and now owned by the plaintiff; that by reason of the construction and operation of such railroad, the plaintiff's property was and has been rendered "practically valueless;" that the plaintiff has received no compensation for the damage thus caused; and that no proceeding has been heretofore instituted to ascertain the amount of such damage. So it is admitted that the plaintiff's property was and has been rendered "practically valueless" by the construction and operation of the defendants' railroad. In other words, it was and has been substantially damaged by the construction and operation of the railroad. If it should be inferred that all the damage or injury has been caused by the operation of the railroad, I might concede that the complaint fails to state a cause of action, but the alleged causes of injury include construction, and, if the mere construction of this railroad, though constructed in an ordinary and proper manner, substantially depreciated the value of plaintiff's property, he is, I think, entitled to compensation. One whose property is "damaged," though none of it be "taken" is entitled to compensation. State Const. art. 6, § 13. *Searle v. Lead*, 10 S. D. 312, 39 L.R.A. 345, 73 N. W. 101. This action should be governed by the same rules that would have governed a proceeding by the railway company to have the amount of the plaintiff's damage ascer-

tained. In such a proceeding the measure of recovery should be the depreciation, if any, in the fair market value of the property, caused by the construction of the railroad. In such a proceeding, and in the case at bar, the damage is the difference, if any, in the value of the property before and after construction. *Osgood v. Chicago*, 154 Ill. 194, 41 N. E. 40. As I construe the complaint, it shows that there was a substantial depreciation in the value of the plaintiff's property, caused by the construction of the defendants' railroad. Therefore, I think, the defendants' objection to the introduction of any evidence should have been overruled, and the cause submitted, if the evidence would warrant it, under instructions defining the grounds and measure of the plaintiff's recovery as indicated. The determination of what should be considered in estimating the value of property before and after construction of a railroad in this class of cases, depending upon the facts of each particular case, might better, it seems to me, be deferred until required by an appeal involving rulings relating to the admission or rejection of evidence. These, in brief, are my reasons for thinking that the judgment of the circuit court should be reversed.

SOUTH DAKOTA SUPREME COURT.

LUDWIG SEUBERT, Respt.,

v.

FIDELITY-PHENIX INSURANCE COMPANY OF NEW YORK, Appt.

(— S. D. —, 136 N. W. 103.)

Insurance — vacancy of building — sleeping quarters.

A building leased to a woman for a

Note. — Effect of sleeping on premises to prevent their becoming vacant or unoccupied within insurance policy.

Conditions against allowing the insured premises to become "vacant or unoccupied" are construed with reference to the kind of property insured and the uses contemplated by the policy.

The meaning of the term "vacant or unoccupied" is a question of law, but whether the building was, at the time of the loss, vacant or unoccupied within the meaning of the policy, is generally a question of fact. *Rockford Ins. Co. v. Storig*, 137 Ill. 646, 24 N. E. 674; *Moody v. Amazon Ins. Co.* 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011; *Schuermann v. Dwelling House Ins. Co.* 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093.

The decisions upon the question under consideration therefore depend upon the 40 L.R.A. (N.S.)

boarding house does not become vacant and unoccupied within the meaning of a clause in an insurance policy rendering it void under such circumstances, if, after the tenant has removed the most of her furniture to another building, her husband and his man continue to occupy the building nights, looking after his stock, which remains on the premises.

(May 7, 1912.)

APPEAL by defendant from a judgment of the Circuit Court for Minnehaha County in plaintiff's favor and from an order denying a new trial in an action brought to recover the amount alleged to be due on a fire insurance policy. **Affirmed.**

The facts are stated in the opinion.

Messrs. Boyce, Warren, & Fairbank for appellant.

Messrs. Sam H. Wright and W. J. Ellwood, for respondent:

The building was not vacant and unoccupied within the meaning of the policy, and defendant was liable.

Liverpool, L. & G. Ins. Co. v. McGuire, 52 Miss. 227; *Schultz v. Merchants' Ins. Co.* 57 Mo. 331; *O'Neil v. Buffalo F. Ins. Co.* 3 N. Y. 122; *Merchants' Ins. Co. v. Frick*, 5 Ohio Dec. Reprint, 47; *Whitney v. Black River Ins. Co.* 9 Hun, 37; *Pabst Brewing Co. v. Union Ins. Co.* 63 Mo. App. 663; 2 *Cooley*, Ins. pp. 1663, 1668; *Limburg v. German F. Ins. Co.* 90 Iowa, 709, 23 L.R.A. 99, 48 Am. St. Rep. 468, 57 N. W. 626; *Thomas v. Hartford F. Ins. Co.* 21 Ky. L. Rep. 914, 53 S. W. 297; *Norman v. Missouri Town Mut. F. L. T. C. & W. Ins. Co.* 74 Mo. App. 456; *Barry v. Prescott Ins. Co.* 35 Hun, 601; *Woodruff v. Imperial F. Ins. Co.* 83 N. Y. 133; *Sexton v. Hawkeye Ins. Co.* 69 Iowa, 99, 28 N. W. 462; *Richards v. Continental Ins. Co.* 83 Mich. 508, 21 Am. St. Rep. 611, 47 N. W. 350;

facts which are made to appear in each case. Having this in view, many of the decisions which are apparently in conflict may be reconciled, although, even after taking this into account, it seems impossible to harmonize some of the results reached by the courts.

Where person sleeps on premises and other care taker frequently visits building.

In *Traders' Ins. Co. v. Race*, — Ill. —, 29 N. E. 846, it was held that there was no violation of the condition providing for avoidance of the policy on a dwelling house if it should become vacant or unoccupied, where the tenant moved out and the house was destroyed by fire about a month later, and during the intervening time the owner took steps to procure another tenant, and he and his family, who lived in the immediate vicinity, were frequently in the house

Martin v. Rochester German Ins. Co. 86 Hun, 35, 33 N. Y. Supp. 404; *Insurance Co. of N. A. v. Coombs*, 19 Ind. App. 331, 49 N. E. 471; *Paine v. Agricultural Ins. Co.* 5 Thomp. & C. 619; *Wait v. Agricultural Ins. Co.* 13 Hun, 371; *Vanderhoef v. Agricultural Ins.* 46 Hun, 328; *Schuermann v. Dwelling House Ins. Co.* 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 30 L.R.A. 633, 51 Am. St. Rep. 457, 33 Atl. 429; *Bonenfant v. American F. Ins. Co.* 76 Mich. 653, 43 N. W. 682; *Hoover v. Mercantile Town Mut. Ins. Co.* 93 Mo. App. 111, 69 S. W. 42; *Johnson v. New York Bowers F. Ins. Co.* 39 Hun, 410; *Farmers' Ins. Co. v. Wells*, 42 Ohio St.

519; *Weidert v. State Ins. Co.* 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242; *Hartford F. Ins. Co. v. Smith*, 3 Colo. 422; *Rockford Ins. Co. v. Storig*, 137 Ill. 646, 24 N. E. 674, affirming 31 Ill. App. 486; *Home Ins. Co. v. Wood*, 47 Kan. 521, 28 Pac. 167; *Dwelling House Ins. Co. v. Osborn*, 1 Kan. App. 197, 40 Pac. 1099; *Imperial F. Ins. Co. v. Kierman*, 83 Ky. 468; *Home F. Ins. Co. v. Peyson*, 54 Neb. 495, 4 N. W. 960; *Moody v. Amazon Ins. Co.* 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011; *Home Ins. Co. v. Hancock*, 106 Tenn. 513, 52 L.R.A. 665, 62 S. W. 145; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64, 34 Am. Rep. 106; *Shackelton v. Sun Fire Office*, 55 Mich. 288, 54 Am. Rep. 379, 21 N. W. 343; *Herrman v. Merchants' Ins.*

during the daytime, and a man was hired to sleep there at night. The court said: "Conditions of forfeiture in policies of insurance are inserted solely for the benefit of the insurer, and are therefore to be strictly construed. The condition in one of the policies here is that the premises shall not be allowed to become vacant or unoccupied, and so remain, without notice to the company; and in the other, that the house shall not cease to be occupied as a dwelling house. They are such conditions as the parties may lawfully create by contract; but whether they have been broken, so as to incur the forfeiture of the policy, is a question of fact to be determined from a consideration of the attending facts and circumstances proved. The burden of proof was upon appellant. *Bennett v. Agricultural Ins. Co.* 51 Conn. 504; *Kelley v. Home Ins. Co.* 5 Ins. L. J. 134, Fed. Cas. No. 7,658. Conditions against allowing the insured premises to become vacant or unoccupied are to be construed with reference to the species of property insured, and the uses to which it is or may be devoted under the contract. In this case the occupancy was to be as a dwelling house, and any occupancy as a dwelling house will be held to satisfy the condition in respect of its nonoccupancy. Temporary absence or non-user as a dwelling for reasonable time, as, if the occupants were upon a visit, or the like, was clearly not intended to be prohibited, nor can it be held to be within the contemplation of parties that there should have been no reasonable interval of occupation between incoming and outgoing tenants. It here appears that, on the surrender of the premises by the tenant, Frazier, the insured took prompt means to procure another tenant. It is also made to appear that for some days before the fire all that could reasonably be done to procure its occupation by a tenant was done, and in the meantime all was done that could reasonably be required to protect the property and to avoid a forfeiture of the policy. The tenant was to have moved in on the 4th of May, and then again on the 5th, but was prevented by unavoidable casualty; and on 40 L.R.A. (N.S.)

the evening of the 5th, while Miss Race, and those acting with her, were in the actual occupancy of the premises, fitting it for the reception of the tenant, the fire occurred. It is clear that the fire was not the result of nonoccupancy by the tenant. Appellee had the right to occupy the house by tenant or by herself and her brothers and sisters, as she was doing at the time of the accident. It is shown that at the time of the fire, and for some days previous thereto, she was in the actual occupancy of the house, either by herself or some member of her family, for all the purposes of a dwelling, except for the preparation of meals and eating them therein. The contract is silent as to the number of occupants required, and we are not prepared to say, in view of the occupation at night and by day, as here shown, that the house was unoccupied within the meaning of these conditions."

It was held in *Lester v. Mississippi Home Ins. Co.* — Miss. —, 19 So. 99, however, that the insured house was vacant for more than ten days within the terms of the policy, where the owner with her family had been away for some days on a hunting and fishing trip, but her husband returned to the house everyday or so to look after it, and a brother-in-law also cared for it, and a servant who lived two or three hundred yards from the house was left in charge, and stayed in the house every night except on the night of the fire.

And in *Eureka F. & M. Ins. Co. Baldwin*, 62 Ohio St. 368, 57 N. E. 57, it was held that the court should have instructed the jury that a building insured as a dwelling house was unoccupied within the meaning of a provision that it should not become unoccupied without the assent of the insurer, where the insured and his son, who resided in the house at the time the policy was issued, vacated it, and it was vacant up to the time of the fire, although the son slept in the house during the daytime, and had a bed and other furniture there, and the owner visited the house each day and resided next door and obtained rain water from a cistern in the house.

Co. 81 N. Y. 184, 37 Am. Rep. 488, affirming 12 Jones & S. 444; Phoenix Ins. Co. v. Burton, — Tex. Civ. App. —, 39 S. W. 319; German American Ins. Co. v. Evants, 94 Tex. 490, 62 S. W. 417; Omaha F. Ins. Co. v. Sinnott, 54 Neb. 522, 74 N. W. 955; Gibbs v. Continental Ins. Co. 13 Hun, 611; Thieme v. Niagara F. Ins. Co. 100 App. Div. 278, 91 N. Y. Supp. 499; Lockwood v. Middlesex Mut. Assur. Co. 47 Conn. 553; Traders' Ins. Co. v. Race, — Ill. —, 29 N. E. 846; American Ins. Co. v. Padfield, 78 Ill. 167; Snyder v. Fireman's Fund Ins. Co. 78 Iowa, 146, 42 N. W. 630; Richards v. Continental Ins. Co. 83 Mich. 508, 21 Am. St. Rep. 611, 47 N. W. 350; Eureka F. & M. Ins. Co. Baldwin, 62 Ohio St. 368, 57 N. E. 57; 19 Cyc. 731.

Where workmen, clerk, lodger, or care taker sleeps in part of building.

In Hartford F. Ins. Co. v. Smith, 3 Colo. 422, it was held that there was no violation of the provision stipulating for a forfeiture if the building should become vacant or unoccupied, where the insured building, which was used as a boarding house at the time the policy was issued, was vacated, but one of the rooms was furnished and used as a sleeping apartment each night by a man who was engaged in repairing the building. The court said: "We do not think that the company, by requiring that the building should be occupied, stipulated for a higher degree of care and watchfulness than the occupancy by Mr. Feely implies. While we shall endeavor to guard the rights of insurance companies by a fair and reasonable construction of their contracts, we cannot consent to see frittered away the rights of the insured by an illiberal and unjust interpretation of a policy designed for their (the insured's) protection. We are of opinion that the building did not become vacant or unoccupied within the meaning of the policy."

And the provision against allowing the insured building to become vacant or unoccupied is not violated where the insured with his family moved from the premises, but left a large portion of his furniture there, and placed a servant in a room to occupy it, and the servant slept there until the house was destroyed. German American Ins. Co. v. Evants, 94 Tex. 490, 62 S. W. 417.

And there is no breach of the condition of a policy covering a building adapted to be used as a saloon, providing for a forfeiture if it should become "vacant or unoccupied, or not in use," where it appears that a clerk was sent on the Saturday afternoon before the fire to fix up the building for use, and that he made some repairs and cleaned the interior, and slept in the building Saturday night, and was sleeping there Sunday night when the fire broke out, and it also appears that there was some furniture suitable for a saloon and a small stock

Corson, J., delivered the opinion of the court:

This is an appeal by the defendant from a judgment entered in favor of the plaintiff, and from the order denying a new trial. The action was instituted by the plaintiff to recover the sum of \$1,000 upon a policy of insurance issued by the defendant upon a certain dwelling house in the city of Sioux Falls, which was totally destroyed by fire. The complaint is in the usual form, and the only defense interposed by the defendant is that the house became "vacant or unoccupied," and remained so for ten days, within the meaning of the clause in the standard South Dakota fire insurance form, which provides that the "entire policy, unless otherwise provided by agreement in-

of liquors in the building at the time. Stensgaard v. National F. Ins. Co. 36 Minn. 181, 30 N. W. 468.

And in Imperial F. Ins. Co. v. Kiernan, 83 Ky. 468, it was held that a policy describing the insured building as "occupied as a family residence," and containing a clause providing that it should become void if the house "become vacant or unoccupied," was not avoided where the family which had occupied it moved out, but the owner, upon failing to obtain another tenant, immediately got a man to stay in one room of the house, which was furnished for the purpose, and it appeared that such person ate and slept there, having access to the entire building for the purpose of caring for and watching it.

And where, by the terms of the policy, the insured did not obligate himself to limit the occupancy of the premises to any particular purpose, there is no breach of the provision stipulating for a forfeiture if the premises should be left vacant and unoccupied, where one room of the insured building was occupied by a band of musicians and another by a lodger who slept there. Pabst Brewing Co. v. Union Ins. Co. 63 Mo. App. 663.

In Bonenfant v. American F. Ins. Co. 76 Mich. 653, 43 N. W. 682, the court held that the mere fact that the insured, when he moved from the insured building, left someone to look after it, would not prevent a forfeiture where the policy provided that if the building shall become vacant or unoccupied, the risk shall become void. It does not appear in this case, however, whether the person left to care for the premises slept in the building.

In Poor v. Hudson Ins. Co. 2 Fed. 432, a verdict for the insured was held to be supported by the evidence, where a policy covering a building used as a summer hotel contained a provision that a family should live in it throughout the year, and it appeared that when it was destroyed, in November, two men slept in the hotel and had their clothing there, and worked outside and about the house, going in and out several times a day, although they took their

dorsed thereon, or added thereto, shall be void, if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days." At the close of all the testimony, both parties moved the court for a direction of a verdict, and the case was submitted to the court, findings of fact being waived. The court thereupon entered a judgment in favor of the plaintiff and against the defendant for the sum of \$1,061.60, being the amount of the policy, interest, and costs.

The only question presented by the record seems to be as to whether or not the facts warranted the court in holding that the premises had not become "vacant or unoccupied," and so remained for ten days

prior to the fire. It is disclosed by the evidence that the building was occupied by Margaret Filber, a tenant, at the time the policy was issued, as a boarding house; that on or about the 27th day of September, more than ten days prior to the fire, the principal part of the furniture was moved to another house in the vicinity, and Mrs. Filber, with a woman assisting her, lived thereafter at the new place of residence; that Mrs. Filber's husband and hired man slept for several nights thereafter at their former residence, and so continued to occupy the same nights until within about five or six days of the time of the fire; and that the horses, chickens, etc., belonging to the husband, remained in a barn upon the premises until the husband finally le-

meals at an adjoining hotel. But in *Poor v. Humboldt Ins. Co.* 125 Mass. 274, 28 Am. Rep. 228, which apparently involved the same loss, it was held that the jury was not warranted in finding that a warranty that the insured building should be occupied by a family throughout the year had been complied with, where the evidence showed that for some time prior to the fire the building was occupied only by two workmen who were employed elsewhere during the daytime and who took their meals away from the building, but left their clothing in the building and slept there.

Where some furniture was left in building and a person slept there until shortly before fire.

A provision in an insurance policy on a dwelling house that the policy should become void if the premises became unoccupied without the consent of the company is avoided where the insured, about two weeks before the fire, moved to another city to reside, taking a part of her furniture and leaving the remainder in charge of a person to be sold, although she left a man in possession with instructions to remain and sleep in the house until he could rent it, and he slept there several nights, but at the time of the fire, had been absent in another place for three or four days. *Cook v. Continental Ins. Co.* 70 Mo. 610, 35 Am. Rep. 438. The court said: "After she left the premises, there was no one living in it. She lived in Kansas City, and Southwick was, by her, instructed to sleep in the house, but he did not sleep in it after Wednesday night next preceding the Saturday night of the fire. His sleeping there at night was not an occupation of the house within the meaning of the policy. He did not occupy the house during the day. It is true that there is more danger from incendiaries at night than in the daytime, but dwelling houses unoccupied during the day are in more danger from that class than when occupied, and the abandonment of the premises by plaintiff diminished the security against the destruction of the house 40 L.R.A. (N.S.)

by fire. It will be observed that the condition avoids the policy if the premises become unoccupied, without regard to the period of time that they remain unoccupied, therein differing from the cases cited; and, giving it a liberal construction, while the temporary absence of the entire family for a day, or a few days, might not avoid the policy, yet if the family occupying the house abandon it, as in this case, for another residence, requesting a person to sleep there until it should be rented, and such person leaves the place several days before the fire occurs and remains away until it is consumed by fire, with what propriety can it be said that it was 'occupied' when burned? If the absence of plaintiff had been for a visit, and not to change her residence, the case might (we do not say would) be different. 'Occupation of a dwelling house is living in it.' 'A mere supervision over it is not sufficient.' It was plaintiff's business, under the policy, to see that the house was occupied. If she had put a tenant in possession under a lease for a month or a year, and, four days previous to the fire, the tenant had vacated the premises and taken another house, her agreement with that tenant would not have availed her in a suit with the insurance company. So her instructions to Southwick, admitting that the observance of them by him would have saved the policy, cannot avail her, if, with or without her consent, he did vacate the premises several days before they were burned. He slept there at night when in Sedalia, but did not take his meals there; was not there during the day. He was not living in the house, and this is not the case of an occupant of the house who was but temporarily absent when the fire occurred; and the circuit court did not err in holding that the house was unoccupied when burned."

But in *Home Ins. Co. v. Wood*, 47 Kan. 521, 28 Pac. 167, it was held that the jury were justified in finding that the insured house was occupied, where the evidence showed that the furniture and household goods were still in the building, although they had been packed in some of the rooms

and joined his wife at the new place of residence.

It is contended by the defendant that when Mrs. Filber, the tenant, left the premises and moved a larger part of the furniture therefrom, the house became "vacant or unoccupied," within the meaning of the clause contained in the policy. The respondent, however, in support of the judgment of the court below, insists that, as the house was occupied by the husband and his hired man nights for sleeping purposes, and the horses, chickens, etc., were retained upon the premises, and a part of the furniture still remained in the house, the same did not become vacant or unoccupied within the meaning of the terms of the policy, and that the court was therefore right in en-

tering judgment in favor of the plaintiff. We are inclined to take the view that the respondent is right in his contention, and that, under the evidence, the house did not become vacant or unoccupied, and so remain for ten days prior to the fire. It is quite clear that the house was not vacant for a period of ten days prior to the fire, as there was some furniture belonging to the tenant still remaining in the house. In *Woodruff v. Imperial F. Ins. Co.* 83 N. Y. 133, the learned court of appeals of that state, in discussing a similar question, says: "A vacant house is literally an empty house. This house was not shown to be empty. There were some things actually seen in it," etc. It seems equally clear that the house was not unoccupied for ten

to make other rooms vacant, and it appeared that the insured had slept in the house until within a week or five days of the fire, when he left to sleep elsewhere because he was not well, but he was at the house each day, as was another person to whom he had given a key and who was fixing one of the rooms as a sleeping room for himself, into which he had moved his bed and trunk, but who had not actually slept there.

Where furniture is left in building and it is occasionally slept in.

There is no breach of the condition against allowing the insured building to become vacant or unoccupied, where the insured's family had been absent from the premises for about ten days upon a visit, but the husband during that time came back and stayed in the house overnight on two occasions and he and another man slept in the house on the night of the fire. *Johnson v. New York Bowery F. Ins. Co.* 39 Hun, 410.

And where the policy does not stipulate that the insured building shall be used as a dwelling, or require any particular mode of occupancy, it might be found that the provisions avoiding the policy in case the building is vacant or unoccupied were not violated, where the insured occupied the building at the time the policy was issued, and some months after rented the property, and after his first tenants had left, he let it to another tenant, who moved his goods into it, and the goods of a son-in-law were also placed there, and members of both families occupied the house to a limited extent, sleeping there occasionally and doing some work there, and it appearing that the property was carefully watched and cared for up to the time it was burned. *Moody v. Amazon Ins. Co.* 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011.

So, there is no breach of a condition of a policy providing for a forfeiture if the premises become unoccupied and remain so for thirty days, where the buildings in-

sured had been used for a number of years as a summer residence by the insured, who spent the winter months in the city, and it appeared that after the family had returned to the city for the winter, the insured visited the premises as often as once a month, and her husband during the whole winter season visited the house several times a week slept there from two to five nights each week, and on several occasions entertained friends and prepared his meals there. *Western Assur. Co. v. Mason*, 5 Ill. App. 141.

And the fact that the custodian of an insured house has access to only one room does not render vacant or unoccupied so as to avoid a policy of insurance, where the agent was notified that the owner's family was to be absent, and agreed that it would be sufficient to have a man in the yard, the furniture having been left in the building, and the custodian occupying an adjoining building only 30 feet away, and a part of the time sleeping in the room to which he had access. *Home Ins. Co. v. Hancock*, 106 Tenn. 513, 52 L.R.A. 665, 62 S. W. 145.

And the jury are warranted in finding that a dwelling house was not vacant or unoccupied within the meaning of a policy, where the insured and his wife, who occupied the premises at the time the policy was issued, shortly afterward went to another city to enable the wife to receive medical treatment, and they did not again regularly occupy the house, but during the absence the husband slept there about half of the time, and was never away from it for more than three days at a time, except upon one occasion when he was absent on business, and it appeared that a part of the time he slept in the house every night, and that later on he and his wife visited it, cooked meals there, and spent the night there, and it appeared further that practically all of their household furniture remained in the house. *Home F. Ins. Co. v. Peyson*, 54 Neb. 495, 74 N. W. 960.

But in *Spahr v. North Waterloo Ins. Co.* 31 Ont. Rep. 525, it was held that a provision that a policy should become void

days previous to the fire, as the husband of the tenant, Mr. Filber, and his hired man, slept in the house up to within five or six days of the fire. So long as a part of the furniture remained in the house, and the same was occupied nights by the husband of the tenant and his hired man, and he had his live stock on the premises, it cannot properly be said that it was vacant or unoccupied.

The authorities upon the question of what constitutes vacancy or nonoccupancy within the meaning of the clause in the policy are numerous, and the circumstances involved in each case are so different it is difficult to extract from these authorities any general rule upon the subject. As before stated, it is quite clear the premises

were not vacant within the meaning of that term as used in the policy, as we have seen in the case at bar a part of the furniture of the tenant was still in the house up to within five or six days of the fire. It seems equally clear that the house was not unoccupied within the meaning of the policy, as it was in fact occupied by the husband of the tenant and his hired man up to within five or six days of the fire. In *Thieme v. Niagara F. Ins. Co.* 100 App. Div. 278, 91 N. Y. Supp. 499, the supreme court, appellate division, first department, of the state of New York, held in an analogous case, as appears by the headnote, that "where plaintiff's husband, who lived in another house on the same lot, placed a bed in the insured house after the tenant

if the premises were untenanted or vacant, and remained so for more than ten days without notifying the insurer, was violated where the occupant of the house ceased to reside in it for several weeks, but left his furniture and clothing there, and during the interval persons looked after the stock around the place, watered flowers, and did washing in the house, and the husband slept in it twice during the time.

Where most of furniture is moved, but building is occasionally slept in.

In *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 30 L.R.A. 633, 51 Am. St. Rep. 457, 33 Atl. 429, it was held that there was a breach of the condition of a policy providing that it should become void if the house became vacant or unoccupied, where the insured moved from the building to another near by, and no person occupied it from that time until it was destroyed, although occasionally some of the insured's workmen and his son slept in the house for a few nights, but did not occupy it during the daytime, and although provisions and other stores were kept in the house, and the insured's wife visited it to get provisions daily. The court in this case said: "Occupation of a dwelling house primarily implies a living in it; and consequently a fair and reasonable interpretation of the words, 'vacant and unoccupied,' when used to describe a dwelling house, would seem to be that the house is without an occupant, —without some person living in it. An actual use of the house as a place of abode or habitation is what the insurer contemplates, and what the policy designs to secure. When the occupant of a dwelling house moves out with his family, taking part of his furniture and nearly all his wearing apparel, and makes his place of abode elsewhere, such dwelling house, whilst thus deserted, must be regarded as unoccupied, that is, vacated, if the word be given its natural and ordinary signification. It is the very situation against the hazards of which the company clearly undertook to guard itself by an express stipulation and 40 L.R.A. (N.S.)

condition inserted in the very contract upon which the suit is founded. Obviously the word "unoccupied," as applied to a dwelling house in a fire insurance policy, signifies not used as a residence; and consequently a designated tenement becomes unoccupied when it is no longer used for the accustomed and ordinary purposes of a dwelling or place of abode. Hence, no matter what other use it may be devoted to, so long as it ceases to be a place of actual abode,—a place really occupied as a residence or habitation,—it is vacant or unoccupied according to the plain import of those words, and according, too, to the sense in which they are manifestly employed in the contract of insurance. It is not a mere casual or occasional sleeping in a house that constitutes an occupancy of it. The element of a fixed abode is an essential ingredient of every concept of occupancy, when applied to a dwelling house; and the term 'unoccupied' is employed to express the directly opposite condition."

And a provision against allowing the insured premises to become vacant or unoccupied is violated where a dwelling house, granary, and horse barn were insured under a policy stating that they were occupied by a tenant, and the tenant subsequently moved out, and the insured told the agent of the company that he was not going to leave a tenant in the house in the future, but wanted his men to stay there when they were at work on the place, and, in accordance with this, the agent indorsed on the policy that it was thereafter to be occupied for dwelling and farm purposes, and after that it appeared that the premises were occupied only by the insured's men, who cooked and ate and slept in the house only when they were at work on that place, and for periods of more than ten days no one occupied the house nights. *Fitzgerald v. Connecticut F. Ins. Co.* 64 Wis. 463, 25 N. W. 785.

And in *Hartshorne v. Agricultural Ins. Co.* 50 N. J. L. 427, 14 Atl. 615, it was held that there had been a breach of a policy providing that if the dwelling house insured should cease to be occupied as a

vacated, and slept there five nights each week, carrying on his business on the premises during the day, the house was not vacant and unoccupied for ten days, within the forfeiture clause of the insurance policy." In the opinion the court, in construing the forfeiture clause, which is similar to that in the case at bar, says: "The policy of insurance is the standard policy, and the question is whether at the time of the fire the premises were vacant or unoccupied within the meaning of the terms of the policy. To forfeit the policy, it was required that the premises should be or become vacant or unoccupied, and so remain for ten days. The fact that the plaintiff's husband did not sleep in the house on the night of the fire would not avoid the policy, unless the house was vacant or unoccupied, notwithstanding the fact that he was in the habit of sleeping there at least

five nights a week during the period that the premises were unrented. The reasonable meaning to be given to this provision seems to me to be that a house does not become vacant or unoccupied so long as there are persons living in the house for some portion of each day. The plaintiff and her family lived in an adjoining house, and the premises in question had been rented and occupied by the tenant. When the tenant moved away, the plaintiff's husband moved into the house. He was about the premises all day, attending to his business, which was carried on there, and at night he generally slept in the house that was destroyed. This, it seems to me, was an occupation of the house within the meaning of this provision of the policy. If the plaintiff had hired a man to look out for the house and occupy it until it was rented, the mere fact that occasionally he slept

dwelling, the contract of insurance should become void, where the occupant of the insured house moved to an adjoining farm, taking all of his furniture from the dwelling except a bedstead and some bedclothes which were used by his son, who slept at the house for about a month after the family left, when he also ceased to sleep there because the weather became too cold.

But in *Thieme v. Niagara F. Ins. Co.* 100 App. Div. 278, 91 N. Y. Supp. 499, affirmed in 185 N. Y. 576, 78 N. E. 1113, it was held that the provision in a policy stipulating against the insured building becoming vacant or unoccupied was not violated where the building in question was a two-story one containing living apartments, which had been rented prior to the month of May, when the tenants moved out and a lounge was immediately put in the building and the insured's husband slept there five or six nights a week, and sometimes a whole week, and slept there on July 3d, when the building was rented, but did not sleep there on the 4th of July, when the fire occurred, although he went around the house on that evening and slept near by in another house situated upon the same lot in which he and his wife resided. The court said: "The fact that the plaintiff's husband did not sleep in the house on the night of the fire would not avoid the policy, unless the house was vacant or unoccupied, notwithstanding the fact that he was in the habit of sleeping there at least five nights a week during the period that the premises were unrented. The reasonable meaning to be given to this provision seems to me to be that a house does not become vacant or unoccupied so long as there are persons living in the house for some portion of each day. The plaintiff and her family lived in an adjoining house, and the premises in question had been rented and occupied by the tenant. When the tenant moved away, the plaintiff's husband moved into the house. He was about the premises all day attending to his business, which was carried on

there, and at night he generally slept in the house that was destroyed. This, it seems to me, was an occupation of the house within the meaning of this provision of the policy. If the plaintiff had hired a man to look out for the house and occupy it until it was rented, the mere fact that occasionally he slept away from the house would not have made it a vacant or unoccupied house, which remained vacant and unoccupied for ten days. . . . The clause in question contemplates that the building might be one which was rented and usually in the occupation of a tenant; but there is no provision inserted that in such case where the premises remained unrented, the policy should be void; but the condition is that whether intended for occupancy by the owner or by a tenant, if the premises became either vacant or unoccupied, the policy should be void. It is not claimed that the premises were vacant, and I do not think that they became unoccupied so long as a human being lived in the house, using it to sleep in or for such other purposes as a dwelling is habitually used. Now, the plaintiff recognized the necessity of someone being actually in the house at night to protect it, and for that purpose her husband habitually slept there while it was unrented; and it seems to me that this was an occupation of the house within the meaning of this clause of the policy."

And in *Agricultural Ins. Co. v. Owens*, — Tex. Civ. App. —, 132 S. W. 828, there was held to be no breach of the condition providing for a forfeiture in case the building was allowed to become vacant or unoccupied, where, shortly after a tenant moved out, the insured's brother-in-law moved into one room of the insured house, into which he moved a bed and clothes, etc., and slept there every night except when he was absent for a few days, although he took his meals at a house across the street, and it appeared that the other rooms in the house were not furnished.

J. T. W.

away from the house would not have made it a vacant or unoccupied house which remained vacant and unoccupied for ten days."

The court was clearly right, therefore, in holding that upon the undisputed evidence in the case the conditions in the policy relied on by the defendant were not violated, and that the plaintiff was therefore entitled to judgment. As bearing upon this question, though not directly in point, see *Shackelton v. Sun Fire Office*, 55 Mich. 288, 54 Am. Rep. 379, 21 N. W. 343; *Home F. Ins. Co. v. Peyson*, 54 Neb. 495, 74 N. W. 960; *Moody v. Amazon Ins. Co.* 52 Ohio St. 12, 38 N. E. 1011, 26 L.R.A. 313, 49 Am. St. Rep. 699, and note; *Imperial F. Ins. Co. v. Kiernan*, 83 Ky. 468; *Halpin v. Insurance Co. of N. A.* 120 N. Y. 73, 8 L.R.A. 79, 23 N. E. 989; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 24 N. E. 727, 9 L.R.A. 81, 19 Am. St. Rep. 77, and note; *Limburg v. German F. Ins. Co.* 90 Iowa, 709, 23 L.R.A. 99, 48 Am. St. Rep. 468, 57 N. W. 626.

The judgment of the court below and order denying a new trial are affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH L. BODINE, Plff. in Err.,
v.
C. BERG et al.

(— N. J. —, 82 Atl. 901.)

Evidence — presumption — foreign law.
1. In the absence of proof of the law of another jurisdiction, the inference is that the common law still prevails there.

Alteration of instrument — note — date.

2. At common law the alteration of the date of a promissory note is a material alteration, and when made by one not a stranger to the obligation, will avoid it as to all parties not consenting thereto.

Principal and agent — alteration of note — binding effect.

3. When the general manager of a bank accepts for the bank a promissory note payable to its order, with surety, in the place of one then held without surety, and as a part of the transaction of acceptance alters the date of the new note to correspond with that of the note surrendered, the bank is chargeable with the act of its officer as one

Headnotes by BERGEN, J.

Note. — The question as to the determination of a case properly governed by the law of another state which is not proved is considered at length in the note to *Cherry v. Sprague*, 67 L.R.A. 33; and the same question in respect of the law of a foreign

done in the course of the business of the bank by a general agent; and it cannot, as to nonconsenting obligors, rely upon the altered note as evidence of the indebtedness, and at the same time disavow the act of its officer and agent, and claim his action to be that of a stranger, or beyond his authority. Same — ratification.

4. The bank is chargeable with the general manager's knowledge of the fact that it holds a note which has been altered by its general manager; and if, with this knowledge, it accepts payments on account of the note, and subsequently assigns the note as altered, such acts amount to a ratification of the act of the manager in altering the note.

(Gummere, Ch. J., and Swayze, Minturn, Bogert, and White, JJ., dissent.)

(March 4, 1912.)

ERROR to the Supreme Court to review a judgment in defendants' favor in an action brought to recover the amount alleged to be due on two promissory notes. Affirmed.

The facts are stated in the opinion.

Mr. Scott Scammell for plaintiff in error.

Mr. William E. Blackman for defendants in error.

Bergen, J., delivered the opinion of the court:

The plaintiff, as assignee of the Mechanics & Traders' Bank, Market Branch, of Brooklyn, New York, brought his suit against the defendants to recover the amount claimed to be due on two promissory notes, the first of which is in the form following:

\$4,435.50. Brooklyn, N. Y., August 31, 1908.

On demand, after date, I promise to pay to the order of Mechanics and Traders' Bank, Market Branch, forty-four hundred and thirty-five & 50/100 dollars at Mechanics and Traders' Bank, Market Branch. Value received.

C. Berg.

Marie Berg.

The other note was dated October 12, 1908, and was in the same form, except as to amount, which is \$4,200. The notes came into existence under the following circumstances: Mr. Berg had obtained from the bank a loan on his individual note, bear-

country, in the notes to *Parrot v. Mexican C. R. Co.* 34 L.R.A. (N.S.) 261, and *Cuba R. Co. v. Crosby*, 38 L.R.A. (N.S.) 40.

For alteration of date of note, see note to *Lombardo v. Lombardini*, 32 L.R.A. (N.S.) 515.

ing date August 31, 1908, and in October of that year the officers of the bank, becoming dissatisfied, called upon Mr. Berg to supply additional security, and agreed to accept his wife as surety. At the same time, it appears that Mr. Berg's account was overdrawn to the extent of about \$4,100, so the loan clerk of the bank, under the direction of Mr. Mailey, who was the manager of the Market Branch of the bank, in which position he had, as he testified, the same control as a cashier ordinarily has, prepared two notes, the first to represent the credit already given on August 31, 1908, and another for \$4,200 to represent the over draft; each note being dated October 12, 1908. Mr. Berg signed both, carried them to his wife, obtained her signature, brought them back, delivered them to the manager, and received from him the individual note, dated August 31, 1908, and tore it up, and thereupon the date of the new note, given for \$4,435.50, was altered by erasing October 12th and inserting August 31st in its place.

Mr. Mailey, the general manager, testifies: "I still held in my possession the original note, and gave Mr. Berg this new note, and he took it home and had his wife sign it and brought it back to me and tore up the old note—that is, the one of C. Berg—and gave me this one in the place of it; and the date was changed in my office, at my desk, in the presence of Mr. Berg, to have it correspond with my loan book and also the original note." The real controversy in this case is over this note and the effect of the alteration of its date, no defense being interposed to the note for \$4,200, except payment, and that question was submitted to the jury.

There is no testimony in the case that the wife ever consented to, or had any knowledge of, the alteration of the date; but, although the plaintiff produced evidence tending to show that Mr. Berg had knowledge of the alteration, he denied it, and this disputed question of fact was submitted to the jury by the trial court. Regarding the effect of the alteration of the note on the liability of the wife, the trial court charged the jury that "the legal effect of that change was to release the wife from any obligation on that note," to which exception was taken. A considerable portion of the brief of the plaintiff in error is based upon the negotiable instruments act of this state (P. L. 1902, p. 583); but the case is barren of any proof of the law of the state of New York, where this contract was made and delivered, relating to commercial contracts. The plaintiff did prove the law of New York state concerning the liability of married women, from which it appears that

married women are not prohibited from assuming liability as surety. As there was no offer made to show what the law of New York was regarding the alteration of commercial paper, the inference is that the common law still prevails there (*Waln v. Waln*, 53 N. J. L. 429, 22 Atl. 203), and under it the alteration of the date of a contract is a material one, and discharges all parties to the instrument from liability thereunder, except those who have consented to it. *Master v. Miller*, 4 T. R. 320, 2 H. Bl. 140, 2 Revised Rep. 399, 2 Eng. Rul. Cas. 669, 1 Smith, Lead. Cas. 8th ed. 1277, and notes.

In *Wood v. Steele*, 6 Wall. 80, 18 L. ed. 725, the date of a promissory note was changed after it was signed by the defendant Steele, as surety for one Newson, without his knowledge or the knowledge of the plaintiff, who accepted the note from Newson for a loan to him. The court instructed the jury "that if the alteration was made after the note was signed by the defendant Steele, and by him delivered to the other maker, Newson, Steele was discharged from all liability on said note." It did not appear by whom the alteration was made; but as it was delivered in its altered condition by Newson, and none of the other parties had knowledge of the change in date, the inference is that it was changed by Newson. In affirming the foregoing instructions, the court said: "It is now settled, both in English and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. . . . The fact in this case that the alteration was made before the note passed from the hands of Newson cannot affect the result. He had no authority to change the date." The suit in the above case was brought by the holder of a promissory note against a surety, who defended upon the ground that the date had been altered, presumably by his joint maker, after he had signed it, and without his consent; and it is not unlike the present case, so far as Mrs. Berg is concerned, if her husband altered the note without her authority or knowledge.

The note in the present case was altered in a material respect by the managing officer of the payee, and retained as the property of the bank, without the knowledge of the wife, and if the party to whom the alteration is charged was not a stranger to the obligation altered, such change would release a nonconsenting obligor; for a material alteration made by a party to a note or obligation will avoid it as against another party not consenting. 2 Cyc. 150, and cases cited; *Draper v. Wood*, 112 Mass.

315, 17 Am. Rep. 92. It is urged that in making the alteration complained of, the general manager of the bank exceeded his authority, and that therefore the alteration was made, not by the bank, but by a stranger. We do not question the correctness of the proposition that the alteration of contracts by one not a party to them, or without authority therefor, would ordinarily be a spoliation which would not change the original contract between the parties to it, but the present case is not confined to such conditions; for here the general manager of the bank, in the due course of its business, accepted, as its agent, a note in substitution of another, and, as a part of the transaction, at once changed the date of the note from October 12, 1908, to August 31, 1908, for the declared purpose of making the date accord with the one to be given up. The act was done in furtherance of the interests of the bank by an officer having general powers over the making of loans and the acceptance of securities therefor, and, as claimed by plaintiff, with the consent and in the presence of one of the obligors, upon whom the change was binding; and the question is whether, as to the nonconsenting obligor, the alteration by the general manager of the bank was so foreign to his authority as to excuse the bank from all responsibility in the matter, and to make the general manager a stranger to the transaction.

In *Hollingsworth v. Holbrook*, 80 Iowa, 151, 20 Am. St. Rep. 411, 45 N. W. 561, a chattel mortgage given to secure the note of the plaintiff was materially altered by the agent of the mortgagee. The trial court instructed the jury as follows: "If, however, you find from the evidence that the property mortgaged was originally purchased by plaintiff from D. W. Halsted [the agent], and that all transactions in relation thereto, including the giving of the notes and securing the same, were had with D. W. Halsted, and that the defendant B. M. Halsted [mortgagee] intrusted the whole matter of renewing and securing the notes to D. W. Halsted, both as to time of extension and the kind and amount of security to be obtained, and that, after obtaining said mortgage, said D. W. Halsted fraudulently and wrongfully made the alleged alteration therein, then said D. W. Halsted was so far the agent of said B. M. Halsted that his said wrongful and fraudulent act will avoid the entire instrument." The action in this case was brought by the mortgagor to recover property taken by the mortgagee under the altered chattel mortgage, and the question presented was whether the holder of the mortgage was chargeable with the alteration made by his

agent, without his knowledge. The appellate court, in affirming the foregoing instructions, said: "We think the paragraph in question was substantially correct, as applied to the facts in this case. The agent was not restricted by the terms of his agency as to the security he might take. He was authorized to act upon his own judgment, and take such security as he thought best. In performing the duties assigned to him, if the claim of the plaintiff be true, he made a fraudulent alteration in the mortgage. In doing so, he did not act for himself, nor for the mortgagor, but for his principal: It may be conceded that such alteration was not contemplated by his instructions as agent; but it was not forbidden, and it operated as a legal fraud upon plaintiff. It was in the line of his agency and because of it."

We are of opinion that when the cashier or manager of a bank accepts a promissory note payable to the order of the bank, with surety, in the place of one then held without surety, at the same time surrendering the unsecured note to its maker, and as a part of the transaction of acceptance alters the date of the new note to correspond with that of the note surrendered, the bank is chargeable with the act of its officer as one done in the course of the business of the bank by a general agent; and it cannot, as to the nonconsenting obligors, rely upon the altered note as evidence of the indebtedness, and at the same time disavow the act of its officer and agent, and claim his action to be that of a stranger, or beyond his authority.

There is a distinction between the authority of a special and of a general agent, which does not depend upon the number of transactions in which the agent is authorized to represent the principal, but upon the scope of his authority so to do in the given transaction. The true distinction, as stated by this court in *Manchester Bldg. & L. Asso. v. Allee*, 81 N. J. L. 605, 80 Atl. 466, is "between the authority to perform a particular act in a particular way, and the authority to perform all acts connected with a particular employment." In the transaction under review, the manager was, as thus defined, the general agent of the bank; and hence all acts performed by him strictly in connection with the particular employment in which he was put forward to represent the bank, and done in supposed furtherance of its interests, were binding upon it, whether or not they were beneficial to it, or whether, through the negligence of the agent or his ignorance of the legal effect of his acts, they were in fact injurious. The mistake or the negligence of such agent is, in law, the mistake or the negligence of the principal. The question is, not whether the

agent, in what he did, acted without negligence, or whether the result of his conduct was beneficial to the principal, but whether the acts he performed were done strictly in connection with the particular matter in which he was employed to act for the principal. There is no rule of law by which an agent represents his principal only so long as his acts are beneficial and performed without negligence, but ceases to represent him when the acts he performs as agent are negligently performed, or turn out to be the reverse of beneficial to the principal. One who claims the beneficial results of a general agency cannot disavow the untoward results of the negligent acts of his own agent in the identical transaction.

The case of *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232, relied on by the plaintiff in error, is not applicable; for there the alteration was made by one without any interest in the note, and therefore a stranger in law to the obligation, his only authority being to carry the note to a bank for discount, and his act in altering it was clearly one of spoliation, in which case, it is well settled, the alteration does not annul the obligation of the maker to satisfy it. Should we assume, however, that the alteration was made by the manager without the authority of the bank, the fact that the bank held as an asset this altered note was known to the manager, which knowledge was acquired by him in a transaction within the scope of the bank's business. "A notice to a cashier is notice to a bank. This must be the rule; otherwise it will be impossible to get on in the ordinary course." *Trenton Bkg. Co. v. Woodruff*, 2 N. J. Eq. 117. Therefore, in this case, the bank had knowledge that it was the holder of a promissory note, the date of which had been, as it is claimed, altered by its general manager without authority. In such case, the act of alteration may be ratified by the bank; and it has been decided that accepting payment on account of the note, and the bringing of a suit on the note as altered, amounts to a ratification of what had been done. *First Nat. Bank v. Fricke*, 75 Mo. 178, 42 Am. Rep. 397.

By accepting and retaining the beneficial result of an unauthorized act of his agent, the principal, having knowledge of the facts, ratifies such act, and cannot repudiate the consequences of a particular act of the same agent in the identical transaction which produces the contract, the fruits of which are retained. *Keim v. Lindley*, — N. J. Eq. —, 30 Atl. 1063, affirmed in 54 N. J. Eq. 418, 34 Atl. 1073; 1 *Parsons, Contr.* 40, 52; *Rader v. Maddox* (*Teague v.* 40 L.R.A. (N.S.)

Maddox) 150 U. S. 128, 37 L. ed. 1025, 14 Sup. Ct. Rep. 46; 31 Cyc. 1257-1270.

In the present case, it is undisputed that, while the bank held the note, chargeable with knowledge of its alteration by its own officer, it did not disavow the act, but accepted payments on account thereof, and, also, after its maturity, assigned the note, as altered, to the plaintiff, who brings his suit on the note as changed. This amounts to a ratification by the bank of the act of its manager in altering the note when he accepted it for the bank; and therefore the alteration was not made by a stranger, but by the payee and holder at the time. We find no error in the conduct of the trial on this branch of the case.

The plaintiff in error also argues that the consideration given to the husband for the first note, which was afterwards destroyed, will support a recovery upon the common counts against both husband and wife, "even though the note was avoided by the markings of the bank." It is sufficient to say on this point that the attention of the trial court was not distinctly called to this matter; nor is there any assignment of error to support it. We are referred to the fourth and sixth assignments of error as raising this question.

The fourth assignment rests upon a refusal to charge as follows: "If you find that the alteration was innocently made, without any fraudulent intention, but did alter the written instrument in a material respect, then, if you find that the defendant Carl Berg was given new credit at the bank, and the loans already made to him were not called by the bank, and that the new note was given in consideration of the extension of time, and in order that further advances might be made, and that the defendants, and both of the defendants, promised to pay the sum of \$4,435.50 if the loans were not called upon the defendant Carl Berg, and if further advances were made to him, then you must give judgment for the plaintiff for the sum of money which you shall find to be due upon the note, marked 'Exhibit P3,' and for the sum of money which you shall find to be due upon the loans made on October 12, 1908, by Mechanics & Traders' Bank to the defendant Carl Berg, upon the faith of the promise of the defendant Carl Berg and the defendant Marie Berg to pay the said loan, against both defendants." This is a request to charge, in substance, that, even if the wife should not be liable on the altered note, still she could be held on an independent promise for a consideration moving to her husband. There is no evidence to support any such promise; and, as the request was not limited to the husband,

but included the wife as to both notes, it was properly refused. There was no request that the husband alone could be held upon the common counts.

The sixth assignment of error affords no basis for the argument that the right of the plaintiff to recover upon the common counts against the husband was excluded from the jury. What the court said was whether the note "can be recovered against the husband depends upon whether the change of date was made with his consent, because the changing of the date, without the consent of either of the parties, destroys the note's efficiency as the basis of an action of this kind upon the note." A careful examination of this record fails to disclose that the point last argued was ever called to the attention of the trial court. The case was tried entirely upon the question of the alteration of the note and the amount of payments made on account of both notes.

The views expressed lead to an affirmance of the judgment.

Gummere, Ch. J., and Swayze, Min-
turn, Bogert, and White, JJ., dissent.

NORTH CAROLINA SUPREME COURT.

L. A. WICKER, Appt.,

v.

HAYES JONES et al.

(— N. C. —, 74 S. E. 801.)

Evidence — burden of proof — inter- lineation in deed.

1. One assailing a deed showing an erasure or interlineation has the burden of proving that it was made after the time of execution.

Same — what may be considered.

2. In determining whether an interlineation in a deed was made before or after execution, the jury may consider any difference in ink and writing, and also the fact that it was withheld from registration.

Same — waiver of objection.

3. Objections to incompetent evidence are waived by permitting the witness subsequently to testify without objection to the facts sought to be elicited by it.

Same — incompetent — waiver of admissions.

4. Error in admitting incompetent evidence is waived by subsequently admitting the fact which it is offered to establish.

Note. — As to presumption and burden of proof as to the time of the alteration of an instrument, see note to *Tharp v. Jamison*, 39 L.R.A. (N.S.) 100.
40 L.R.A. (N.S.)

Ejectment — judgment for defendant — failure of proof.

5. A judgment establishing defendant's title in an action for possession of real property is erroneous, although plaintiff fails to establish his case, if there is no evidence in the case to show that defendant had the title or right of possession.

Judgment — ejectment — estoppel.

6. A judgment against plaintiff for failure of proof in an action for possession of real property, and to establish title, estops him from further prosecution of an action for such relief.

(Clark, Ch. J., dissents.)

(May 2, 1912.)

APPEAL by plaintiff from a judgment of the Superior Court for Lee County in defendants' favor in an action brought to recover possession of certain lands. Modified and affirmed.

Statement by Allen, J.:

This was originally a processioning proceeding, and, it appearing that title to the land was in controversy, it was transferred to the civil issue docket by consent of all parties, and pleadings were filed. The plaintiff complained for the possession of certain lands alleged to be in possession of defendants, and for a judgment clearing the title of certain other parts of the same tract alleged to be in plaintiff's possession. The defendants admitted possession of a portion of the land described in the complaint, which part was described by metes and bounds in the answer, and claimed title thereto. Nearly all the land in controversy was on the west side of Juniper branch, and the remainder on the east side.

The plaintiff offered evidence that Elisha Wicker, his father, was dead, and introduced the following deeds: Deed from Daniel McGilvary to A. H. McLeod, dated October 19, 1867, registered in office of register of deeds of Moore county, in Book 82, p. 558, on the 5th day of November, 1867. Deed of Alexander H. McLeod and wife to Elisha Wicker, dated September 16, 1874, registered in the office of the register of deeds of Lee county, in Book No. —, p. —, July 19, 1911. The plaintiff also offered evidence tending to prove that the deeds covered the lands in controversy and other land, and that he and those under whom he claimed had been in possession of the same for more than thirty years, but he admitted that his home was on the land in the deeds outside of the dispute, and that he had not cultivated continuously the land in controversy.

The defendant introduced the following deeds, which were admitted without objec-

tion: Deed of Daniel Hall and wife, Mary Hall, to Mary J. Jones, dated 15th day of April, 1879, registered in Moore county, September 30, 1885, in Book No. 56, p. 361. The courthouse was burned in that county, and the deed was re-registered the 18th day of January, 1908, in Book No. 40, p. 50. Deed from Daniel Hall and wife to Mary J. Jones, dated the 29th day of April, 1882, registered in the office of the register of deeds in Moore county, September 29, 1885, Book No. 56, p. 359, and re-registered in Moore county on the 5th day of September, 1898, in Book No. 18, p. 470. Deed of W. C. Edwards to Daniel Hall, dated 2d day of April, 1876, registered in Lee county, June 19, 1911, in Book of Deeds No. 5, p. 118. Deed of J. W. Burns to Daniel Hall, dated December 31, 1878, registered in the office of register of deeds, Lee county, March 16, 1909, Book of Deeds No. 1, p. 292. There were erasures and interlineations in material parts, on the first and second of these deeds, and the plaintiff introduced evidence tending to prove that the erasures and interlineations were not in the same handwriting as the body of the deed, that different ink was used, and that they were not made at the date of the deed, but afterwards. The defendant also introduced evidence tending to prove that said deeds covered the lands in controversy, and that she had been in possession thereof for thirty years, and had, during that time, cultivated continuously 5 or 6 acres of the land. The home of the defendant was not on the land in dispute.

John B. Cameron, a surveyor, was asked the following question:

Q. Examine that plat, and see if you can locate this description (attorney reading deed of Daniel Hall and wife to Mary J. Jones, dated 15th day of April, 1876). Also this tract (Daniel Hall and wife to Mary J. Jones, dated 29th day of April, 1882). State whether or not, as a surveyor, you can say whether or not this land on the west side of Juniper branch within that line running from 5 to B, B to C, and from C to Juniper branch, and Juniper branch to the beginning, is contained in that description. (Objection by plaintiff. Overruled. Exception.)

A. According to your papers, it does. I didn't survey that. I platted it.

This witness afterwards testified, without objection, that the deeds of the defendant covered the land in controversy.

Defendant introduced certified copies of the plat of division of the lands of Elisha Wicker, father of the plaintiff. (Objection by plaintiff. Overruled. Plaintiff excepted.) Also certified copy of mortgage of L. A. 40 L.R.A. (N.S.)

Wicker to Elisha Watson, dated 20th day of March, 1891. (Objection by plaintiff. Overruled. Plaintiff excepted.) The western line of the land in the division and of the land in the mortgage is Juniper branch. The plaintiff testified that all the land he owned was not embraced in the mortgage.

The only part of his Honor's charge excepted to is as follows: "Now, in respect to the two deeds put in evidence by the defendants, and purporting to be made to Mary J. Jones,—one dated the 15th of April, 1879, and the other dated the 29th of April, 1882—the plaintiff contends that, according to the evidence on the face of the deeds, there has been, since the execution and delivery of the deeds, a change in the grantee, and that the name of Mary J. Jones has been by such change made the grantee in such deed. Now, the burden of showing this, and that such change was made by the grantee or someone in her interest, or the interest of the defendants, or that it was not made by the grantor or by his consent, is upon the plaintiff."

The following verdict was returned by the jury: "(1) Is the plaintiff the owner of, and entitled to the possession of, the lands included in the following lines: C to D to 3 to 4 to 5 to B and to C,—or any part thereof?" Answer: "No." The court rendered the following judgment: "This cause coming on to be heard, and being heard before his Honor, C. M. Cooke, Judge, and a jury, and the following issues having been submitted to the jury: (1) Is the plaintiff the owner of, and entitled to the possession of, the lands included in the following lines: C to D to 3 to 4 to 5 to B and to C,—or any part thereof? (2) And, if a part, what part? (3) Are the defendants in the wrongful possession of said lands? (4) What damage, if any, is the plaintiff entitled to recover against the defendants? And the jury having answered the first issue, 'No,' it is therefore considered, ordered, and adjudged that the plaintiff is not the owner, nor entitled to the possession, of the lands within the following lines: C to D to 3 to 4 to 5 to B and to C, as shown on the map on file in this cause, but that the defendants are the owners and entitled to the possession of said lands. It is further adjudged that the defendant recover of the plaintiff and D. D. Buie, surety on the prosecution bond filed in this cause, their costs, to be taxed by the clerk of the court."

The plaintiff excepted and appealed.

Mr. A. A. F. Seawell for appellant.
Messrs. Hoyle & Hoyle and D. E. McIver for appellees

Allen, J., delivered the opinion of the court:

When we speak of an "alteration" in a writing, we refer to the legal acceptation of the term, which implies a change made after its execution, and, while an erasure or interlineation may be an alteration, it is not such if made before the final execution of the writing. Under the rule of the ancient common law, as illustrated in its earliest decisions, it was held that any alteration, however insignificant, rendered the writing void, and that the judge must pass on the whole question (*Pigot's Case*, 11 Coke, 26b), but this was modified, even in the time of Lord Coke, to the extent that the alteration must be material, and that the question as to the time when made should be submitted to a jury. In 2 Co. Litt. 225b, it is said that "of ancient time, if the deed appeared to be rased or interlined in places material, the judges adjudged upon their view the deed to be voyd, but of latter time the judges have left that to the jurors to try whether the rasing or interlining were before the deliverie."

Modern authority in England and in the United States have further modified the doctrine, until it is now generally agreed that, when an alteration is established, it avoids the instrument, if it is material; that the materiality of the alteration is a question to be decided by the court, without the aid of a jury; that any alteration is material if it affects the identity of the instrument or the rights and obligations of the parties to it; and that the question of the time when the alteration was made is a fact to be determined by the jury. It is also held in all the states except Missouri and New Jersey, that an immaterial alteration does not affect the validity of the writing.

An alteration by a stranger without the knowledge of the grantee or obligee, while it cannot enlarge the obligations of the grantor or obligor, does not affect the right to enforce the writing as it was originally executed, and the intent with which the alteration is made is immaterial, unless it is fraudulent, in which event a court will not lend its aid. The cases supporting these principles are collected in the valuable note to *Burgess v. Blake*, 86 Am. St. Rep. 79, and in the learned and comprehensive article on *Alteration of Instruments* by Judge John F. Dillon, in 2 Cyc. p. 150.

Many other questions may arise as to the effect of the alteration of instruments, but in the midst of much conflict of authority we confine ourselves to those necessary to the consideration of the principal question presented by the appeal, which is whether the burden is on the party claiming under

a deed on which an erasure or interlineation is apparent, to prove that it was made at the time of or before the execution of the deed; or is the burden on the party attacking the deed to prove that it was made after its execution. The question is important, and many titles may depend on its correct solution, as it will frequently arise after the parties to the transaction are dead. If it is held that the burden is on him who urges that the deed is void because of the erasure or interlineation, it may furnish the opportunity to the grantee to withhold the deed from registration after he has altered it, until the evidence is lost by which the wrongful act can be proven, and thus secure the title to property which was not conveyed to him; and, if it is decided that the burden is on the party claiming under the deed, he may lose property for which he has paid, because of inability to prove that the erasure or interlineation was on the deed when delivered. A brief summary of all the North Carolina cases bearing on the alteration of instruments, which we have been able to find after diligent research, shows that the question has not been settled in this state.

In *Nunnery v. Cotton*, 8 N. C. (1 Hawks) 222, it was held that any alteration by the obligee in a bond, whether material or not, avoided it. In this case the alteration was the cutting off the name of a witness on the bond. In *Pullen v. Shaw*, 14 N. C. (3 Dev. L.) 238, held, that an alteration by the obligee in a bond avoids, whether material or not, and by a stranger does so, if material. If no evidence is introduced, the question whether the alteration was made before or after execution is dependent on whether the alteration is favorable to the obligee or not. In *Sharp v. Bagwell*, 16 N. C. (1 Dev. Eq.) 115, held, that equity would not relieve one who had cut off the name of a witness from the bond in ignorance of its effect. In *Mathis v. Mathis*, 20 N. C. 55 (3 Dev. & B. L. 60), the action was on a bond for \$12.50, and the proof was that the bond was given for \$7.40. Held, that the plaintiff could not recover \$7.50, but that, if he had sued for \$7.50, he could have recovered that amount, as the alteration was made by a stranger. In *Blackwell v. Lane*, 20 N. C. 247, (4 Dev. & B. L. 113) 32 Am. Dec. 675, held, that the addition of the name of a subscribing witness to a bond, without the consent of the obligor, is not an alteration, because not material. In *Davis v. Coleman*, 29 N. C. (7 Ired. L.) 426, held, cutting off the name of one obligor and adding another avoided the bond as to all who did not consent to the change. In *Simms v. Paschall*, 27 N. C. (5 Ired. L.) 276, held, that the fraudulent expunging of

a credit on a bond was no alteration, because the credit was no part of the bond. In *Smith v. Eason*, 49 N. C. (4 Jones, L.) 38, held, that an alteration in a material part of a bond avoids it. In *Dunn v. Clements*, 52 N. C. (7 Jones, L.) 59, held, that retracing the name of the obligor, which had faded, does not avoid, although the name was misspelled in retracing; the sound of the name being the same. In *Norfleet v. Edwards*, 52 N. C. (7 Jones, L.) 457, the action was on an instrument to pay money, and the signature was that of a partnership. Two seals after the partnership name were erased, and the words, "witness," at the left of the paper, stricken out. The judge charged the jury that the burden was on the plaintiff to show that the erasures were made before or at the time of the execution. Held error, because, as the paper was signed by the partnership, the erasure was made to fix its character. The court says: "In most, if not in all, the cases in which the contrariety of decision may be seen, it will be observed that the erasures, interlineations, or rather alterations, were made in deeds, negotiable securities, or other instruments whose nature and character were determined upon or fixed; that is, they either were intended to be, or were, at the time when the alterations were made, deeds or negotiable securities or instruments of some other particular kind. The instrument in the present case differs from them all in this particular: That the alteration was made for the very purpose of determining and fixing its character. With a seal it would be a deed; while, if that were erased, it would become a promissory note. If it were executed as a deed, it could not bind all the partners, but, if made as a promissory note, it would have that effect. . . . Under such circumstances, is it not a fair presumption that the seal was erased at the time when the instrument was given by the one party and accepted by the other?" In *Darwin v. Rippey*, 63 N. C. 319, held, that the addition of the words, "in specie," after "dollars," in a bond, with the consent of the payee and the principal, avoided the bond as to the surety. In *Long v. Mason*, 84 N. C. 16, held, that the addition of the words, "at ten per cent," in a bond, by the principal, without the knowledge of the payee, a guardian, or of the surety, but with the consent of the ward, avoided the bond as to the surety. In *Respass v. Jones*, 102 N. C. 5, 8 S. E. 770, held that where the vendee struck out his name in a deed, and inserted that of his wife, to defraud his creditors, no title passed, and a court of equity would not aid him. In *Cheek v. Nall*, 112 N. C. 370, 17 S. E. 80, a husband raised the amount of a 40 L.R.A. (N.S.)

bond signed by him and his wife. Held, that the bond was void as to the wife. It was also held that an immaterial alteration would not avoid, such as changing the recited consideration in a mortgage; the description of the debt in the mortgage remaining unchanged. In *Howell v. Cloman*, 117 N. C. 77, 23 S. E. 95, a note and mortgage were for \$500 when signed, and for \$1,000 when registered. Held, that the burden was on the plaintiff to prove that the defendant consented to the change. In *Martin v. Buffaloe*, 121 N. C. 35, 27 S. E. 995, held, that the insertion of the name of the attorney and the amount of his fee in a deed to secure creditors, with the consent of the grantor, after he signed it, did not avoid the deed, because it was not a clause necessary to the operation of the deed. In *Wetherington v. Williams*, 134 N. C. 279, 46 S. E. 728, the question was one of fact as to the time of the change, and the question of the burden of proof was not raised. In *Gaskins v. Allen*, 137 N. C. 426, 49 S. E. 919, a married woman while under age signed a deed. After she became of age, she signed another deed to the same party for the same land. Both deeds were registered under one probate, the commission authorizing it being dated before, and the date of probate after, she was twenty-one. A charge was approved, placing the burden on the plaintiff, a subsequent grantee, to prove that the date of the probate had been changed. In *Perry v. Hackney*, 142 N. C. 368, 115 Am. St. Rep. 741, 55 S. E. 289, 9 Ann. Cas. 244, the grantee after probate struck out his name from a deed, and inserted the name of his wife, without the consent of the grantor, and it was held that no title passed. The authorities elsewhere are in hopeless confusion as to the burden of proof.

Judge Freeman says, in the note to *Burgess v. Blake*, 86 Am. St. Rep. 128: "Among the almost innumerable decisions, and the conflict of authorities upon the subject of the presumptions arising from alterations apparent upon the face of the instrument, there seems to be but one principle upon which the authorities are in harmony. That is that where an alteration in an instrument is alleged to have been made, and such alteration is not apparent upon the face of the instrument, the burden of showing that the latter has been altered is upon the party who alleges it. . . . This, however, seems to be the single note of harmony. Where the alteration is apparent, the authorities are hopelessly divided as to the presumptions arising from such apparent alteration. Any attempt to reconcile them would be useless, and an accurate classification of their varying views is impossible. They seem to fall, however, into four gener-

al classes, each of which is representative of a view opposed to that of the others: (1) One line of cases holds that no presumption arises from an alteration apparent on the face of the instrument, but that the entire question of the time when the alteration was made is for the jury to consider in the light of all the evidence, intrinsic and extrinsic. (2) Another holds that an alteration apparent on the face of the paper raises a presumption that it was made after execution and delivery. (3) A third line of authorities holds that the presumption that the alteration was made after execution arises only where the alteration or the facts surrounding it are suspicious. And finally it is held by another group of courts: (4) That an alteration apparent on the face of the paper is, without explanation, presumed to have been made before delivery. This classification of the authorities is, at best, approximate only, as many of the courts have taken compromise positions holding the presumption to depend upon various matters, such as denial under oath that the paper was executed, the nature of the instrument, i. e., whether a specialty or not," etc.

As eminent authority may be found for either position, and we have no precedent in this state to guide us, and we must adopt that rule which in our opinion accords with the habits and customs of our people, and which will, in the majority of cases at least, be conducive to the settlement of controversies of this character according to the right. A very large percentage of the deeds executed in this state are never seen by a lawyer until some question is raised as to title. They are written, in many instances, by men who know little or nothing of legal rules, and who are not expert pensmen, and the materials used—pen, ink, paper—are such as are gathered in the household, and frequently not the best. Under these circumstances, a mistaken in writing the deed may be expected, and, when discovered, an erasure or interlineation follows naturally, without thought of the consequences. If two kinds of ink are present, they would be used indiscriminately, and the draughtsman would not hesitate to ask one sitting by to make a necessary change.

We do not doubt that 99 per cent of the erasures and interlineations that appear in deeds are made in this way, and from honest and proper motives, and, if this is true, it would seem to be wise and just to adopt a rule which will tend to preserve and sustain titles acquired by such deeds, although under it an injustice may occasionally result, and in our opinion it is safer, and in accord with the better public 40 L.R.A. (N.S.)

policy, to hold as we do, that the party claiming under a deed is entitled to introduce it in evidence upon proof of its execution, and that the burden is on the party who assails it, on account of erasures or interlineations appearing on its face, to satisfy the jury by the greater weight of the evidence that the erasures or interlineations were made after the execution of the deed. A discussion of the numerous authorities in favor of this rule (and there are, perhaps, as many against it) would be useless, and we content ourselves by reference to a small number selected from many. In *Doe ex dem. Tatum v. Catomore*, 16 Q. B. 746, Lord Campbell says: "In 2 Co. Litt. 225b, it is said that 'of ancient time, if the deed appeared to be rased or interlined in places material, the judges adjudged upon their view the deed to be void. But of latter time the judges have left that to the jurors to try whether the rasing or interlining were before the delivery.' In a note upon this passage in Hargrave and Butler's edition of Coke upon Littleton, it is laid down: 'Tis to be presumed that an interlining, if the contrary is not proved, was made at the time of making the deed.' This doctrine seems to us to rest upon principle. A deed cannot be altered after it is executed, without fraud or wrong; and the presumption is against fraud or wrong." This language was quoted with approval in *Little v. Herndon*, 10 Wall. 26, 19 L. ed. 878, and the court says, after citing *Doe ex dem. Tatum v. Catomore*, supra: "In the absence of any proof on the subject, the presumption is that the correction was made before the execution of the deed." And this last case was approved in *Hanrick v. Patrick*, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147, the court, after discussing the charge of the judge, saying: "At any rate, the presumption was that the erasure was made before the execution of the deed." In *Wickes v. Caulk*, 5 Harr. & J. 41, the court says: "It is incumbent on the party who wishes to avoid a deed by its erasure, to prove that the alteration was made after its execution and delivery." And in *Hopkins on Real Property*, 429, it is said: "Where alterations or interlineations are present in a deed, the presumption is that they were made before the deed was delivered, though there are cases holding the contrary." To the same effect, see *Hagan v. Merchants' & B. Ins. Co.* 81 Iowa, 330, 25 Am. St. Rep. 493, 46 N. W. 1114; *Neil v. J. I. Case & Co.* 25 Kan. 510, 37 Am. Rep. 259; *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 761, 42 N. W. 467; 2 Cyc. 233, 235.

This presumption is greatly strengthened by the facts appearing in this record, that

the deeds were registered in 1885, and until this day neither the grantor nor any one claiming under him has attacked their integrity; and the defendants have been in the actual occupation of parts of the land since 1879. The Supreme Court of the United States said in *Malarin v. United States*, 1 Wall. 282, 17 L. ed. 594, when speaking of an alteration in a deed, that the fact that no suspicion had been suggested for eighteen years was entitled to no little weight.

The jury will, of course, have the right, in determining when the erasure or interlineation was made, to consider any difference in ink and handwriting and other relevant circumstances, and, if the deed has been withheld from registration, this circumstance, in the absence of explanation, would be entitled to consideration, and should have more or less weight according to the length of time elapsing, and viewed in connection with any change in the condition of the parties to the deed.

If, however, the presumption was against the deed, it is doubtful if the plaintiff is in a position to take advantage of it, as it does not appear that he claims under the grantors in the deed. Judge Dillon says in 2 Cyc. p. 189: "If the parties affected by a change in an instrument do not complain thereof, others who are not parties to the instrument, or affected by the change, cannot ordinarily set up the change, unless there is evidence of fraud between the parties, to the injury of the creditors. The alteration must relate to the parties to the particular instrument altered." See also *Hockmark v. Richler*, 16 Colo. 263, 26 Pac. 818; *Logue v. Smith*, Wright (Ohio) 10; *Central Kentucky Asylum v. Hauns*, 23 Ky. L. Rep. 1016, 64 S. W. 643.

The exceptions to evidence cannot be sustained. If it be conceded that the answers of the surveyor to questions asked him were incompetent, it appears that he afterwards testified, without objection, that the deeds of the defendant covered the land claimed by her, which is all that was elicited by the examination objected to.

In our opinion, the plat of the division of the lands of Elisha Wicker, father of the plaintiff, and the mortgage of the plaintiff to Elisha Watson, of date March 20, 1891, were properly admitted, but, if not, their introduction did not prejudice the plaintiff, as they were offered for the purpose of showing that Juniper branch was the western boundary claimed by the plaintiff, and he admitted on cross-examination that Juniper branch was one of his lines in the division of his father's land.

The objection to the form of the judgment is well taken. The finding of the jury establishes the fact that the plaintiff

is not the owner of any part of the land in controversy, and the defendants allege, in their answer, that they are in possession of all the lands which they claim. The plaintiff must recover upon the strength of his own title, and, upon failure of proof by him, the jury may well find that he is not the owner of the land, although satisfied that the defendant has no title. There is no fact admitted by the pleadings or found by the jury which will support an affirmative judgment in favor of the defendants, and the judgment must be modified by striking out the clause, "but that the defendants are the owners and entitled to the possession of said lands," and, as thus modified, it is affirmed.

The judgment will, of course, operate as an estoppel on the plaintiff to prevent the further prosecution of an action on his behalf.

Modified and affirmed.

Clark, Ch. J., dissenting:

It is reasonably well settled, though contrary to the ancient decisions, that, when there is an immaterial alteration by erasure or interlineation in a deed or other instrument, it does not vitiate. It is also settled that whether an interlineation or erasure is material or not is a question of law for the court. When a material erasure or interlineation appears on the face of an instrument, as is shown by proof *dehors*, whether the burden is upon the party that produces it to account for it, or whether the burden is upon the other party to show that it took place after the execution of the instrument, is a matter as to which the decisions outside this state are in conflict. In many cases the rule is laid down that, "where a written instrument shows an interlineation or erasure upon its face, the presumption, in the absence of evidence, is that it was made after execution, and the burden is upon the party claiming under the instrument to account for the alteration." 3 Enc. L. & P. 478; 2 Am. & Eng. Enc. Law, 2d ed. 276; 2 Cyc. 238, and many cases cited in those volumes. In this state we have but two decisions expressly in point, and they are in accord with the above citations. In *Dum v. Clements*, 52 N. C. (7 Jones, L.) 60, it is said: "Wherever the alteration is a material one, a presumption of fraud arises. But it is, as we conceive, a rebuttable presumption; but, where the alteration is not material, the instrument will not be affected thereby, unless it be shown the alteration was made with an intent to defraud." 2 Parsons, Contr. 226 (notes); *Adams v. Frye*, 3 Met. 103." In *Norfleet v. Edwards*, 52 N. C. (7 Jones, L.) 457, the court cites with approval the following from 2 Parsons, Contr. 228: "In

the absence of explanation, evident alteration of any instrument is generally presumed to have been made after the execution of it, and, consequently, must be explained by the party who relies on the instrument, or seeks to take advantage from it. Such is the view taken by many authorities of great weight. But others of perhaps equal weight hold that there is no such presumption; or, at least, that the question whether the instrument was written as it now stands, before it was executed, or has since been altered, or whether as so altered it was done with or without the authority or consent of the other party, are questions which should go to a jury, to be determined according to all the evidence in the case." Our court then adds: "Very many cases are referred to in the note to that page which fully support the remarks of the learned author in the text." See also *Dunn v. Clements*, 20 N. C. (7 Jones, L.) 58. The rule in *Dunn v. Clements*, thus cited and approved in *Norfleet v. Edwards*, is not only the precedent in this state, but it would seem to comport with reason. The natural and orderly condition of a paper is that it should not bear on its face, or be shown by proof to have, any material alteration or erasure. It is out of the ordinary course, that the party who produces the instrument should account for them. It will be almost impossible for the other party to show when or how the erasures were made. The party in possession has, or should have, knowledge and be able to show that the instrument when received by him already had such erasures or alterations. If prudent, he would not accept such instrument without a contemporaneous entry duly witnessed that they were on the instrument when it was delivered to him. This view has additional weight as to a deed now, since our registration laws require prompt registration. If the deed is promptly registered, notice of any alteration or erasure may be conveyed to anyone examining the record, whereas, if the instrument is withheld from registration, it is in the power of the grantee to make any alteration as to the boundaries, courses, and distances, or acreage as he may think proper, and it will be out of the power of the grantor when, after years have elapsed, the deed is produced in evidence upon a recent registration, to prove that the alterations and erasures were made after delivery. It is always in the power of the grantee to protect himself against the charge that a material erasure or interlineation was made after execution, by requiring a memorandum stating that they were in the instrument at the time of the execution thereof. But the grantor cannot thus protect himself against alterations

and erasures made after the execution, except by requiring proof of the grantee when he produces the instrument in evidence. As to negotiable instruments, though they cannot be held back as a deed can be held from registration, yet as to them the law is well settled, and the burden is on the holder to show that any alterations were made in such instrument at or before its execution, and no prudent bank will accept such paper in the ordinary course of dealings without such proof. It has been the general understanding in this state that material alterations by erasure or interlineation in an instrument, especially in a deed, must be noted and witnessed at the time of the delivery. *Dunn v. Clements*, 52 N. C. (7 Jones, L.) 60, has been understood to be the rule in this state. But, if it is understood that this safe precedent is no longer the law, we may well apprehend that there will be a flood of cases in which instruments have been materially altered after delivery, and are withheld from registration till the grantor or other witnesses who can prove the fact have passed beyond the reach of the court, by death or otherwise. The grantee remains in possession. It should be in his power always either to refuse a conveyance containing material alterations, or require a contemporary note thereof on the instrument. If he does not do so, and especially if he withholds the deed from registration, it is but fair that the burden should be upon him to account for such alterations or erasures.

LOUISIANA SUPREME COURT.

CITY OF SHREVEPORT, Appt.,

v.

LEIDERKRANTZ SOCIETY.

H. C. WESLEY et al., Interveners, Appts.

(130 La. 802, 58 So. 578.)

Municipal corporation — declaring nuisance — bowling alley.

1. Where a common council, without a

Headnotes by SOMMERVILLE, J.

Note. — Bowling alley as a nuisance.

As to municipal power in general over nuisances affecting public morals, decency, peace, and good order, see note to *State v. Karstendiek*, 39 L.R.A. 520.

Generally, as to power of municipal corporation to declare particular kinds of amusement nuisances *per se*, see note to *Re Jones*, 31 L.R.A. (N.S.) 548.

Bowling alleys were held at common law to be nuisances *per se*, where they were run for gain and were open to the public generally, not only because they

full hearing, declares a bowling alley to be a nuisance, with the view of having the matter submitted to the courts for adjudication, the action of the council will be deemed to be arbitrary, and will be set aside.

Same — necessity of hearing.

2. A private bowling alley cannot be singled out by a common council and declared to be a nuisance until after a full hearing of both parties has been had.

Nuisance — bowling alley.

3. A bowling alley is a recognized legitimate place of amusement, and its ordinary use cannot be interfered with by condemning it as a nuisance *per se*.

Municipal corporation — declaring nuisance — effect.

4. An ordinance declaring use of property to be a nuisance does not make it so unless it is in fact so, or is embraced within the common-law or statutory idea of a nuisance. And no authority to remove or abate is derived from the ordinance declaring it a nuisance.

(April 22, 1912.)

were considered great temptations to idleness, but also because they were apt to draw together great numbers of disorderly persons, which could not keep from being very inconvenient to the neighborhood. 1 Hawk. P. C. chap. 75, § 6; Rex v. Hall, 2 Keble, 846.

And in several early cases in the United States, the law on this subject which obtained at common law was recognized as still the law. Tanner v. Albion, 5 Hill, 121, 40 Am. Dec. 337; State v. Haines, 30 Me. 65.

So, in Updike v. Campbell, 4 E. D. Smith, 570, the same view of bowling alleys was entertained as prevailed in Tanner v. Albion, *supra*, and a contract leasing certain premises for the purpose of conducting a bowling alley therein was held to be void, because the leasing was for an illegal purpose, although Woodruff, J. said that he was by no means satisfied with the correctness of the decision in the Tanner Case.

But the modern view is the one held in State v. Hall, 32 N. J. L. 158, that a bowling alley kept by the owner with a view to profit, for public amusement not in itself prohibited by law, cannot be held to be a nuisance, unless such consequences attach from the mode in which it is kept; the mere keeping of a ten-pin alley is not a nuisance *per se*. Mr. Chief Justice Beasley said: "If the purpose of the house be not necessarily injurious to society, the keeping of such house is never criminal, unless it be made so by the manner in which it is conducted. No example, I think, can be found in any adjudication which is authority in this court, which holds that the law forbids the citizen to use his house for any purpose which, in itself, is not necessarily hurtful to the community. That the particular business of the house may, by the neglect or design of

APPEAL by the plaintiff city and interveners from a judgment of the Judicial District Court for the Parish of Caddo refusing an absolute injunction for the suppression of a bowling alley as a nuisance, but enjoining defendant from operating the alley between certain hours, and requiring certain changes to be made in the construction of the alleys. Reversed.

The facts are stated in the opinion.

Messrs. G. W. Jack and J. S. Atkinson, for appellants:

When certain authority is vested by the legislature in the discretion of a city council, the action of the latter must not be interfered with by the court, unless it is clearly arbitrary.

Naccari v. Rappelet, 119 La. 274, 13 L.R.A.(N.S.) 640, 44 So. 13; Coreil v. Welsh, 120 La. 558, 45 So. 438; Monroe v. Gerspach, 33 La. Ann. 1011; Kennedy v. Phelps, 10 La. Ann. 227.

the keeper, sometimes, or many times, be perverted to immoral or other noxious purposes, cannot take away from the generality the right to carry on such business. The only question is whether the business which the house promotes is, in itself, hurtful to the community; and if it is not a house or building appropriated to a business admittedly of such a character, it is not *per se* a nuisance."

To the same effect as the preceding case are Harrison v. People, 101 Ill. App. 224; Bloomhuff v. State, 8 Blackf. 205; Hackney v. State, 8 Ind. 494; State v. Noyes, 30 N. H. 279.

And in Re Jones, 4 Okla. Crim. Rep. 74, 31 L.R.A.(N.S.) 548, 140 Am. St. Rep. 655, 109 Pac. 570, it was merely said: "We do not desire to be understood, however, as holding that billiard halls and bowling alleys are nuisances *per se*. There are plenty of modern decisions to the effect that they are not, and with them we are in entire accord."

So, in Pape v. Pratt Institute, 127 App. Div. 147, 111 N. Y. Supp. 354, although the court recognized that a bowling alley is not in itself a nuisance, yet, since the one at bar was alleged to be located and conducted in such manner as to constitute one, and being of a continuing nature, an injunction was granted to restrain its maintenance.

But where bowling alleys have been licensed by the municipal authorities, their operation will not be enjoined as a nuisance, where they are built in the same manner that such alleys are usually constructed and contain certain pads or cushions designed to deaden the noise caused by the dropping or rolling of the balls, even though the operation of the alleys disturbs the neighbors. Levin v. Goodwin, 191 Mass. 341, 114 Am. St. Rep. 616, 77 N. E. 718.

E. M. S.

Bowling alleys were, however, at common law, held to be nuisances *per se*.

Re Jones, 4 Okla. Crim. Rep. 74, 31 L.R.A. (N.S.) 548, 140 Am. St. Rep. 655, 109 Pac. 570.

Messrs. B. H. Lichtenstein, C. D. Hicks, and J. F. Fisher, for appellee:

A use which is not necessarily a nuisance is not to be treated as a nuisance, and a municipality is without power to suppress that which it may regulate.

State v. Owen, 50 La. Ann. 1181, 24 So. 187.

The fact that a particular use of property is declared a nuisance by a town ordinance does not make it such unless it is in fact so, and is embraced within the common law or statutory idea of a nuisance.

Opelousas v. Norman, 50 La. Ann. 736, 25 So. 401; De Blanc v. New Iberia, 106 La. 680, 56 L.R.A. 285, 31 So. 311; New Orleans v. Lagasse, 114 La. 1055, 38 So. 828; New Orleans v. Lenfant, 126 La. 455, 29 L.R.A. (N.S.) 642, 52 So. 575.

Only exceptional noise and disturbance are actionable. It must, however, be very serious.

Froelicher v. Oswald Ironworks, 111 La. 705, 64 L.R.A. 228, 35 So. 821.

Summerville, J., delivered the opinion of the court:

The Leiderkrantz Society is a German social organization, originally formed for the purpose of having a singing circle, as is suggested by the name. It bought property in the suburbs of Shreveport, where it might have a park, and whereon might be erected a hall, etc., for its purposes. Five years ago it added a bowling alley as one of its adjuncts. The council of Shreveport, declaring that much complaint had been made by citizens residing in the neighborhood of the Leiderkrantz hall, of noise and disturbance emanating from the bowling alley, recently caused defendant, through its proper officers, to be notified to appear before it, the council, and to show cause why such bowling alley should not be suppressed as a nuisance. After hearing, the council by resolution declared that the bowling alley appeared to constitute a public nuisance, and ordered the same suppressed. It caused notice to be sent to the society, and, on failing to abate the nuisance, the city attorney was instructed to take such legal action as might be proper or necessary to suppress it. Whereupon this suit was filed. In its petition, the city alleges that the said bowling alley and clubhouse are located in a residential district; that the noise emanating from said bowling alley greatly interferes with the peace and comfort of the citizens living in that neighborhood; that the alley was conducted in a rough and boisterous manner, and in such a way as to render it a public nuisance; that the city council, in due order, declared by resolution such bowling alley to be a public nuisance, and ordered same abated; and that the continued operation of said bowling alley will cause petitioner and citizens residing in the neighborhood great and irreparable injury. It then asked that a writ of injunction issue enjoining and restraining the said Leiderkrantz Society from operating said bowling alley. After trial there was judgment as follows, in part: "It is therefore ordered, adjudged, and decreed that the demands of plaintiff, city of Shreveport, for a perpetual injunction entirely restraining and enjoining the defendant, Leiderkrantz Society, from operating its bowling alley as claimed by plaintiff under a resolution of the city council of the city of Shreveport, of date October 27, 1911, declaring said bowling alley a public nuisance, and ordering same to be suppressed, annexed to plaintiff's petition, be and the same are hereby rejected and denied."

The record shows that two citizens residing in the neighborhood of the defendant intervened and filed a petition joining the plaintiff, adding a few allegations, and joining in the prayer of the plaintiff herein. The petition of the interveners is not disposed of in the judgment of the court. They (interveners) have nevertheless appealed devolutively from the judgment.

The portion of the judgment given above was in favor of the defendant society. The petition of plaintiff was rejected and denied. In contradiction of what had gone before, the court proceeded to decree as follows: "It is further ordered, adjudged, and decreed that the noise from the operation by defendant's bowling alley complained of by plaintiff and interveners be abated, limited, reduced, confined, and minimized within the periods and limits of time and under the conditions and requirements as follows, to wit."

The court then proceeded to fix hours within which defendant might operate its bowling alley, and to further provide for the remodeling of the building, and to direct certain changes and appliances to be made in the alley. This was not responsive to the prayer of plaintiff's petition, or to anything in defendant's answer. The order of the court is in the nature of an ordinance by a city council. It is a piece of legislation, and the court is without power to make such an order. It has no means of compelling a compliance therewith. That part of the judgment will be reversed and set aside. Both plaintiff and defendant, as well as the interveners, complain of the

both plaintiff and defendant, as well as the interveners, complain of the

judgment. The city and the interveners have appealed, and the defendant has filed an answer to that appeal, asking that the judgment appealed from be set aside in its entirety, and the suit dismissed.

The city attorney says in his printed argument in this court: "Either the city did or did not have the authority to order the suppression of the bowling alley. If it did not, the lower court should have dismissed the suit. If it did, and the action was not arbitrary, the court should have granted the injunction as prayed for." The city has the right, under its police power, to suppress nuisances. It had the right to declare the bowling alley in question to be a nuisance, if, after investigation, it found it to be one. But this finding is subject to review by the courts of justice. A bowling alley is not a nuisance *per se*. Such an alley may become a nuisance, and it would be the duty of the court to sustain the action of the council if, after trial, the evidence proved that the council acted properly, and not arbitrarily. The city attorney asks the court to decide whether, in this instance, the common council acted in an arbitrary manner or not. The court will be slow to find that the council acted in an arbitrary manner, and set aside any act which it is authorized by its charter to perform.

We have not the evidence before us which was presented to the common council before it took action and declared the bowling alley to be a nuisance. The council has not adopted a general ordinance declaring all bowling alleys to be nuisances. It has not defined limits within which public bowling alleys may be established. So far as the record shows, there is no evidence directing how bowling alleys might be operated. We have nothing to guide us in these matters. Bowling alleys are to be found in all communities generally. They are often connected with hotels and other places where people assemble, and they are not usually considered to be nuisances.

A member of the council, while on the witness stand, was asked:

You were present when a resolution was passed by your body in relation to the Leiderkrantz Society?

A. Yes, sir.

Q. Mr. Fullilove, there was no formal hearing when that resolution was passed?

A. Well, there was a hearing. I do not know whether you would call it a formal hearing or not. We so considered it. We had notified the members and officers of the Leiderkrantz Society to appear before the council and show cause why the operation of the bowling alley should not be condemned, and three members appeared, Mr. Goedekin, Mr. 40 L.R.A. (N.S.)

Martineaux, and I do not remember the name of the third gentleman. I know him very well, but I cannot call his name. They appeared, and each one made a statement regarding the operation of the Leiderkrantz, and statements were made by the complainants, and the council thought that there was sufficient showing made to pass the resolution instructing the city attorney to bring the matter before the court. We thought it too serious a proposition to decide without all the evidence, and the court was the proper place to decide it.

This is the only testimony in the record as to how the council proceeded in the matter. It would appear therefrom that the council was of the opinion that the matter was a very serious one, and that it would be best to place it before the court. We think that this is an insufficient reason and an improper motive for the council to have declared the bowling alley of the defendant to be a nuisance. It should have heard all of the parties in interest before it came to any conclusion, and then it should have decided for itself as to whether the complaints were good or not, and whether the bowling alley was really a nuisance or not. It does not appear to have done this. The action was therefore unwarranted, and we conclude that it acted arbitrarily in adopting the ordinance.

The record is a very voluminous one. It is unnecessarily so. The petition of the city contains only two allegations: First, that the bowling alley greatly interferes with the peace and comfort of the citizens living in that neighborhood; and, secondly, that it is conducted in a rough and boisterous manner, and in such a way as to render it a public nuisance. The record contains a great deal of testimony which does not support either one of these two allegations. Some testimony refers only to the hall of the association, which is not connected with the bowling alley; other parts to dances, to concerts, to public meetings, to political meetings, to beer drinking, and various amusements which were indulged in in the hall, which are not complained about in the petitions. The complaints were about the bowling alley. This testimony was timely objected to, but the objections were overruled. It was immaterial, it was not responsive to the issues, some of it was hearsay, and the objections should have therefore been sustained. It would be a waste of time to go over these many bills of exceptions reserved to the rulings of the court. They are too numerous to be reviewed in this opinion.

A careful review of the evidence convinces us that many of the witnesses examined on the trial on behalf of plaintiff

and interveners were actuated by a feeling of resentment towards the defendant society. These witnesses complained principally of the use of the bowling alley on Sundays and Sunday nights. They deemed Sunday to be a day for rest and church going, and not one for recreation and pleasure; and they therefore wanted the bowling alley closed. We recognize the right of all persons to have their opinion on such matters as the one now before us. We cannot undertake to enforce the opinions and ideas of the one party over and against those on the other side of the question. If the conduct of members of the defendant organization materially interfered with their neighbors while the latter were at public worship it would be the duty of the council to suppress them as constituting a nuisance; and the court would uphold the council in such action. The Sabbath was made for man; it is a gift from God to man. A man is not responsible to his neighbor for the use to which he may put his Sabbath, unless the former violates some law, or becomes a nuisance to that neighbor. We will not undertake to enforce the views of the witnesses of the plaintiff, upon the members of the defendant society in this matter.

There is some evidence in the record going to show that the bowling alley was kept open until very late hours at night; but the preponderance of the testimony is to the effect that the alley is closed about 10 o'clock each night on the three nights of the week that the bowling is indulged in. Whether this hour is a proper one or not at which to stop bowling is a question which the council may determine. If the testimony in the record showed that the acts of defendant disturb the physical comfort of the neighbors to an injurious extent, it would become our duty to restrain this defendant; but, in our opinion, it does not.

We have held that an offensive occupation cannot be carried on to the very great annoyance of one dwelling immediately near. That no one has the right to use his property so as to render other property about him in any degree useless. The enjoyment of one must have reference to the right of others in the neighborhood. *Froelicher v. Oswald Ironworks*, 111 La. 705, 64 L.R.A. 228, 35 So. 821. But the fact that a particular use of property is declared a nuisance by a city ordinance does not make it such unless it is in fact so, and is embraced within the common-law or statutory idea of a nuisance. And the things or acts complained of must come within the legal notion of a nuisance; and where it does not, no authority to remove or abate 40 L.R.A. (N.S.)

it is derived from an ordinance declaring it a nuisance. *Opelousas v. Norman*, 51 La. Ann. 736, 25 So. 401; *De Blanc v. New Iberia*, 106 La. 680, 56 L.R.A. 285, 31 So. 311; *New Orleans v. Legasse*, 114 La. 1055, 38 So. 828.

The bowling alley of defendant is used for the pleasure and pastime of its members. It is a private place. It may not be of the same importance in the community as a business enterprise is. Yet the members cannot be interfered with by assuming that it is a nuisance *per se*. The evidence in the record does not sustain the allegations in plaintiff's petition. The action of the council in singling out defendant's bowling alley and declaring it to be a nuisance was arbitrary. The judgment appealed from will be reversed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed; it is further ordered, adjudged, and decreed that this suit be dismissed at plaintiff's costs in both courts.

Petition for rehearing denied May 20. 1912.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

GABRIEL ASTRUC, Plff. in Err.,
v.
STAR COMPANY.

(113 C. C. A. 499, 193 Fed. 631.)

Libel — employment agent — charging boycott.

1. A publication stating that the exclusive agency for securing talent for an opera house boycotts the best singers is not libelous, although boycotting is a crime by statute, since the word is not used in its statutory sense.

Same — charging extortion.

2. It is libelous *per se* to charge that one having the exclusive agency to secure tal-

Note. — Libel and slander: charging one with exacting excessive compensation for goods or services.

This note does not include cases where the charge was generally of cheating, stealing, dishonesty, extortion, blackmail, embezzlement, bribery, swindling, or graft; accordingly, cases are excluded which deal simply with the charge of the foisting upon a customer of inferior goods or services at a standard rate; also cases where the charge was of beating down prices or underselling.

For a discussion of the question whether charging public official with graft in public contracts is libel or slander, see note to *Woolley v. Plaindealer Pub. Co.* 5 L.R.A. (N.S.) 498; and see note to *State v. Sheri-*

ent for a particular opera house exacts exorbitant amounts from artists to secure contracts for them, since it tends to prejudice him in his business.

Appeal — instruction — failure of party to appear as witness.

3. It is error for the court to instruct the jury that they might consider the failure of plaintiff in a libel case to appear as a witness, as raising an inference against him, if he was beyond the seas and there was nothing in the pleadings or evidence which called for any explanation or contradiction on his part.

(February 1, 1912.)

ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in de-

dan, 15 L.R.A. (N.S.) 497, as to charge of graft as libel *per se*.

Generally, to charge another falsely with exacting excessive or exorbitant prices or rates for goods or services, if spoken or published of him in respect of his business or profession, is actionable *per se*, without proof of special damages; such a charge imputes business or professional misconduct, tends to bring the object of it into disrepute, to degrade him in the estimation of the community, to deprive him of public confidence, and thus to injure him in his business or profession. This rule has been applied to the following charges, and they have been held to be libel or slander according as to whether they were published or oral:

—an article published of an attorney speaking in the heading of "the biggest kind of grist," and "rather slight services for a very large fee," and going on to charge him, among other wrongdoings, with making false charges for services and extorting excessive compensation. *Atkinson v. Detroit Free Press Co.* 46 Mich. 341, 9 N. W. 501;

—an article published of an attorney, charging him with exacting an excessive fee for merely nominal services, and sneeringly insinuating that he has outdone Pecksniff and Shylock. *Reynolds v. Holland*, 46 Wash. 537, 90 Pac. 648;

—a letter by an attorney concerning other attorneys, stating that it looked very much as if they put their heads together and each of them got as much out of an estate in settling it as possible, and going on to characterize certain amounts named as fees as outrageous and exorbitant. *Mosnat v. Snyder*, 105 Iowa, 500, 75 N. W. 356;

—the statement published concerning a lawyer who was a candidate for a public office, that he did a good thing in his sober moments in the way of collecting soldiers' claims against the government for a fearful percentage, and that the blood money he had got from the "Boys in Blue" in that way was supposed to be a big thing, and might elect him to the assembly on the "loyal" ticket, although the soldiers and sailors were out in full force against him. 40 L.R.A. (N.S.)

fendant's favor in an action brought to recover damages for the publication of an alleged libel. Reversed.

The facts are stated in the opinion.

Argued before Lacombe, Coxe, and Noyes, Circuit Judges.

Mr. Maurice Leon for plaintiff in error.

Lacombe, Circuit Judge, delivered the opinion of the court:

Plaintiff is a French citizen and a resident of the city of Paris, where—and elsewhere in Europe—he has been engaged in business as intermediary to secure engagements for operatic singers and similar artists.

He had a contract dated October 21, 1908, with the Metropolitan Opera Company of New York, a private corporation,

Sanderson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 106;

—the publication in a newspaper of a letter charging a corporation engaged in the business of selling coal, at a time when there was a coal famine and people were suffering for fuel, not only with exacting extortionate prices for its coal, but with actually refusing to sell even at those prices to people suffering from sickness. *Gross Coal Co. v. Rose*, 128 Wis. 24, 2 L.R.A. (N.S.) 741, 110 Am. St. Rep. 894, 105 N. W. 225, 5 Ann. Cas. 549;

—an article published concerning a vendor of goods by a rival concern, that he charged exorbitant prices for his goods, and thereby practised an imposition on the public. *Ontario Copper Lightning Rod Co. v. Hewitt*, 30 U. C. C. P. 172;

—a statement in a letter concerning a lawyer, that he will milk the purse of a prospective client and fill his own large pockets. *King v. Lake*, 2 Vent. 28; *Anonymous*, 3 Salk. 328;

—a newspaper article reciting that one who had an exclusive contract to secure musical artists based his engagements on sheer favoritism, and specifying one case, as an example of many, where the artist's contract read for \$1,000 a night, but who was said to have received \$500. *Astruc v. Star Co.*;

—an article published of a railway general passenger agent, that he had grown rich by making his local ticket agents or some of them divide their commission with him. *Shattuc v. McArthur*, 25 Fed. 133, reaffirmed in 29 Fed. 136;

—a published article concerning a lawyer and chairman of a county political committee, although not a candidate for office, charging him, as an impudent impostor, with writing an article for pay out of a corruption fund, and with following his profession solely for the purpose of making money, stating that his opinions were molded by the extent of his client's means to pay. *Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367;

—the published statement that there could be no doubt of the fact that there

which was engaged in the business of giving operatic performances in this country. By this contract the Metropolitan Opera Company conferred upon him for a period of five years "the exclusive representation of its artistic and administrative interests in France, in Belgium, and in the principality of Monaco." During that period he was by the contract "solely charged to negotiate the engagements of artists, singers, female singers, dancers, etc." He was given no authority to sign final contracts with them, without special authority, but no final contracts were to be signed (within his territory) with any such persons whose names he did not himself propose. By this arrangement the company restricted itself to contracting with those persons

only who had been approved and were recommended by the plaintiff. The contract recites that it was entered into "by reason of the services rendered by Mr. Gabriel Astruc since the year 1904 to the Metropolitan Opera Company."

The plaintiff by the contract "engages himself not to charge, upon the amount of the salaries of artists (and others) engaged or which may be engaged through his means, a commission exceeding 5 per cent." On March 21, 1909, defendant published in its newspaper an article which it is not necessary to set forth in full. It stated that Astruc had an absolute monopoly of the engagement of French artists for the Metropolitan Opera House; that nobody could be en-

was something "wrong in Denmark," and that the commissioners of a graveling district charged their neighbors and fellow property owners a sum three times as much as that alleged to have been paid by said commissioners. *Murray v. Galbraith*, 86 Ark. 50, 126 Am. St. Rep. 1078, 109 S. W. 1011.

Likewise, a published article charging a cigar company with being a trust and pushing a price of its product up and forcing the public to pay it, not only accuses such company with violation of Federal and state statutes, but also charges that peculiar misconduct that naturally and directly brings down upon the offender's business the disapprobation of the public, and necessarily entails injurious consequences, and is therefore actionable *per se*. *Sternberg Mfg. Co. v. Miller, DuB. & P. Mfg. Co.* 95 C. C. A. 494, 170 Fed. 298, 18 Ann. Cas. 69.

And a published article charging one with having a direct pecuniary interest in the erection and heating of a school building in a district of which he is a school director, which, under the statute, is a misdemeanor, and reciting that he lets the contracts for the building and supplies materials therefor at the highest prices, accepting or rejecting the work at pleasure, thus compelling the contractor to submit to high prices for inferior wares, or invite trouble in having his work accepted, and charging him with getting a rake off, is libelous. *Woolley v. Plaindealer Pub. Co.* 47 Or. 619, 5 L.R.A. (N.S.) 498, 84 Pac. 473.

An article published of a widow of a suicide, that she sent the son to school, although the son was allowed a good salary by the company that had employed her husband, and that she had pocketed a large part of the son's wages, thus leading the husband into financial irregularities and bringing him into difficulties with his employers, and that these exactions of the wife were said to be prime factors in bringing about the self-destruction of her husband, is libelous. *Bradley v. Cramer*, 59 Wis. 309, 48 Am. Rep. 511, 18 N. W. 268. 40 L.R.A. (N.S.)

Where, upon the presentation of claims against an estate, an heir to the estate, in the presence of the commissioners, counsel, and others, states that a claim presented by a physician is false, and adds, "This isn't the first time he has made up an account, either. He made up one against me of between forty and fifty dollars for which he hadn't made a visit, and I paid it and I can prove it," such a charge is wholly disconnected with the claim presented, and with the interest of the one making it, and therefore, not being privileged, is actionable slander, because injurious to the physician in his profession. *Clemmons v. Danforth*, 67 Vt. 617, 48 Am. St. Rep. 836, 32 Atl. 626.

But stating that a superintendent or foreman, in hiring men for his employer, charged them a commission or fee on their wages, is not slander, for such an act is not a criminal offense, and in the absence of allegation to the contrary, it may be interpreted as innocent. *Russell v. Barron*, 111 App. Div. 382, 97 N. Y. Supp. 1061.

Neither does it import anything criminal or disgraceful to charge that a man has received money from a city treasury, or that his services as an expert witness were not worth what he was paid, and, therefore, to publish such a charge is not libelous. *Rositer v. New York Press Co.* 141 App. Div. 339, 126 N. Y. Supp. 325.

And a publication charging that an architect asked and received a commission for giving a contract for certain work upon a building to a certain party is not libelous *per se*, for, even if true, it does not impeach his skill, knowledge, or fitness for his profession, or his professional conduct, nor tend to expose him to public contempt, hatred, or ridicule, and in the absence of averment of extrinsic facts from which the libel results, the action must fail. *Legg v. Dunleavy*, 80 Mo. 558, 50 Am. Rep. 512.

To say of a carpenter: "He has charged Mr. A. for forty days' work, and received the money for the work that might have been done in ten days, and he is a rogue for his pains," is not actionable. *Lancaster v. French*, 2 Strange, 797. H. C. Sh.

gaged unless he acted as intermediary; that he was an autocrat, and held up opera house contracts and boycotted the best singers; that he boasted of his power, saying that he had a "little garden," and that every artist wishing to enter the Metropolitan Opera House must pass through his gate. The article commented unfavorably on such a method of doing business. Although this was expressed in a manner derogatory to the plaintiff, it was not libelous. "Boycotting" is made a crime in New York (N. Y. Penal Law, § 580 [Consol. Laws 1909, chap. 40]), but it is quite apparent that in the article the word "boycott" was used not as referring to the offense covered by that section, but as a mere synonym of "holding up,"—not submitting for engagement the names of any artists whom he did not approve.

The article, however, contained the following sentences: "What makes the situation more demoralizing in effect is the indication that the engagement of artists is based on sheer favoritism and a financial arrangement touching commissions. The case of the tenor Rousseliere, whose contract read for a thousand dollars a night, and who is said to have received five hundred, is an example. There are numerous other cases of the kind, but most of the artists are afraid of talking about them for fear of Astruc, whose sway is considered absolute."

About the meaning of this language there can be no possible doubt or uncertainty. It asserts positively and unambiguously that in the case of the tenor Rousseliere, and in numerous other cases, the plaintiff, having been intrusted by his principal with the power to accept or reject candidates for operatic engagements, used his power to extort from the applicants 50 per cent of their entire salaries before he would make a favorable report upon such application. It might well be that such a charge would lead those who read it to believe that plaintiff was a contemptible person; and certainly it tended to injure him in his business or occupation. Other persons wishing to secure an experienced person as their negotiator with foreign artists would certainly not select a man who had, when similarly employed by someone else, abused his position by such acts of extortion. That words are actionable if they directly tend to the prejudice or injury of a person in his profession or business is well settled by authority. 18 Am. & Eng. Enc. Law, 2d ed. 942; 25 Cyc. 326.

We cannot agree with defendant's contention that the quoted statements are ambiguous, that they "do not say whether the 40 L.R.A.(N.S.)

plaintiff got the half salary from Rousseliere as a condition of getting him a contract, or whether he received it from the opera company for negotiating a contract esteemed by the opera company to be a very valuable one." On the contrary, we think that an intelligent person reading the whole article together would reach no other conclusion than that plaintiff procured an engagement for the tenor upon the basis of a financial arrangement touching plaintiff's commissions, whereby the singer had to yield up one half of his nightly payments.

We are of the opinion, therefore, that the court erred in refusing to charge the jury that the passage quoted was libelous *per se*, and in leaving it to the jury to say whether the article charged plaintiff with dishonest or improper conduct in his mode and manner of engaging and dealing with singers or others for the opera company. By the reservation of various exceptions, plaintiff is in position to present this assignment of error.

Inasmuch as there will be a new trial, we may call attention to another assignment of error. As to malice, damages, etc., the jury was correctly instructed. In the course of the charge, however, the court said: "I will call your attention to the fact right here, lest I forget it, that Astruc has not appeared as a witness, has not given any testimony to contradict the evidence that has been given here on the other side, and there is no reason given for his nonappearance. Now, where a witness who can appear, who is interested and who is a party and who could appear, when he fails to appear and give evidence as to the material facts, and contradict evidence that stands against him, that is a circumstance that may be considered by the jury, which may raise an inference in their minds and satisfy them that his evidence on that point, even if given, would not be favorable to him upon the issues framed in the case by the pleadings or by the evidence."

To this plaintiff reserved an exception. At the close of the proofs one of the defendant's attorneys took the stand, and was allowed to testify as to what steps he had taken towards obtaining the testimony of the plaintiff, who remained continuously abroad. This was objected to and exception reserved. It turned out that the testimony was not obtained because the Federal courts do not allow examination of the plaintiff before the trial, under the New York Code practice; and defendant did not undertake to secure the testimony on commission to examine absent witnesses, because he did not wish to make plaintiff

defendant's witness. This testimony had no relevancy to any issues before the court and should have been excluded. We are satisfied that such testimony, coupled with the quotation from the charge *supra*, must have operated to plaintiff's prejudice with the jury. We think it was error thus to charge, in view of the situation of the case.

Plaintiff resided abroad, and there was no reason why he should attend to testify at the trial unless it was to be expected that his evidence might be important or material. In support of his own *prima facie* case, it is conceded that he need not appear, but defendant contends that the answer contained charges which he was called upon to refute. But this is not so. These "charges" deal merely with the non-libelous parts of the article,—the agency of plaintiff, the large powers conferred on him by his principal, his exercise of those powers so that only such artists as he approved could get engagements, his statement that on the salaries of those whom he did secure he received a commission, his boastful reference to his authority when referring to his "little garden." There was nothing in this which he need cross the seas to contradict. It was a substantially accurate statement of his contract with the opera house company, and the necessary results of such a contract, which made him an "autocrat" in the matter of negotiating engagements. Touching the only libelous passage in the article, the extortion of 50 per cent commissions from Rousseliere and others, the only "justification" pleaded in the answer is that every artist engaged by plaintiff was required to "pay to the plaintiff a large commission." If Astruc had never exacted from anyone a commission in excess of what the opera house contract provided for, he could safely remain absent from the trial, relying on the belief that no one competent to testify would commit perjury by swearing that he did so. There was nothing in the pleadings which called so imperatively for his presence at the trial as to warrant the instruction given to the jury. Nor was there anything in the testimony which called for it. No one testified to the exaction of a 50 per cent commission from Rousseliere or from anyone else. The defendant called the treasurer of the opera house and proved that Rousseliere was engaged at a salary of 5,000 francs a night,—120,000 francs in all,—from which there was deducted a commission to Astruc of 2½ per cent, \$508.40 in all. Had plaintiff been present at the trial, there was nothing

in defendant's case which it was necessary for him to rebut.

For these reasons, the judgment of the court should be reversed.

NORTH CAROLINA SUPREME COURT.

JOHN M. COOK, Appt.,

v.

IRENE J. COOK.

(— N. C. —, 74 S. E. 639.)

Pleadings — action pending — defense on merits.

1. A defendant cannot be required to withdraw an answer on the merits in order to plead a former suit pending.

Divorce — two actions pending.

2. The pendency of an action for absolute divorce in one county does not preclude defendant from instituting an action in the county of her residence, being another county in the same state, for a divorce from bed and board, where she has sought no affirmative relief in the former suit.

(Clark, Ch. J., and Walker, J., dissent.)

(April 17, 1912.)

Note. — Pendency of suit for divorce or separation as bar to another suit in the same state.

For cases on the effect of the pendency of suit for divorce or separation in another state, see the note to Benton's Succession, 59 L.R.A. 187.

"It is a general principle of the law that the pendency of a prior suit for the same thing, or, as is commonly said, for the same cause of action, between the same parties, in a court of competent jurisdiction, will abate a later suit. . . . The rule, however, is not one of unbending rigor or universal application, nor is it a principle of absolute law. It is rather a rule of justice and equity generally applicable, and always so where the two suits are virtually alike and in the same jurisdiction." 1 Cyc. 21, 22.

It will be seen that it was held in *Cook v. Cook*, that, pending an action by the husband for divorce *a vinculo* on account of the separation of the parties for ten years, the wife might properly begin and carry through an action for divorce from bed and board on account of abandonment, although she had answered in the first suit alleging the abandonment by the husband, but did not demand therein any affirmative relief.

It has been held that an action by the husband for annulment on account of duress in entering into the marriage is not for the same cause as an action for divorce by the wife (*Simpson v. Simpson*, —

A PPEAL by defendant from a judgment of the Superior Court for Wake County in plaintiff's favor in an action for a divorce. **Affirmed.**

Statement by Hoke, J.:

The present action was instituted August 26, 1911, and summons therein was personally served on defendant September 1, 1911. Plaintiff filed her complaint to September term, 1911, for divorce from bed and board on account of abandonment "unlawfully and without just cause," the complaint being accompanied by the formal affidavit required by the statute. Defendant thereupon answered denying the alleged abandonment, and answered, further, in bar of plaintiff's right to maintain her action,

that the defendant had theretofore commenced an action for divorce *a vinculo* for cause specified in subsection 5, Revisal, 1908, § 1561; that is, because the parties had lived separate and apart for ten successive years, had resided in the state for that period, and there were no children born of the marriage, etc. It appeared that defendant's action, returnable to superior court of Alamance county, had been commenced September 24, 1910. Summons personally served on plaintiff October 1, 1910, complaint filed November term, 1910, and defendant therein—that is, the present plaintiff—had appeared in that suit, and made formal denial of complaint, and, as a part of such denial, had averred a wrongful abandonment by her husband in Au-

Cal. —, 41 Pac. 804), where the action claimed to be pending was in another state; but the court did not refer to that feature.

In *Cordier v. Cordier*, 26 How. Pr. 187, it was held that, pending an action for divorce on account of the adultery of the defendant with a certain person, the plaintiff may begin another action for divorce on account of adulteries with the same person committed after the beginning of the first action, instead of setting up such later matters by supplemental complaint.

In *DeHaley v. Haley*, 74 Cal. 489, 5 Am. St. Rep. 460, 16 Pac. 248, where the court said that it was doubtful whether cross complaints in actions for divorce were provided for by the Code, it appeared that there were two actions for divorce, one brought by the wife and the other by the husband, and that, while these were both pending, the wife brought an additional action for divorce, alleging cruelty in making statements against her character in the husband's pleadings in the divorce suits. The court said: "The action is for divorce. The complaint avers the defendant was guilty of extreme cruelty, in that, in another action brought by her against him, he filed an affidavit containing statements of want of chastity on her part prior to their marriage; and in that, in an action brought by him against her, he filed a complaint charging that prior to the marriage of these parties, she was pregnant by another man. The complaint herein avers that the statements of defendant in the affidavit and complaint referred to were wholly false and malicious. . . . While the action brought by the wife for a divorce was pending, and the proceeding in such action, in which the affidavit of the husband was filed, was undetermined, could the wife bring the present action, charging, as an act of extreme cruelty, the making by her husband of the statements contained in the affidavit? While the action for divorce brought by the husband (defendant herein) against his wife (plaintiff herein) was still pending and undetermined, could the latter commence the present action, and rely, as ground for divorce, upon statements con-

tained in the complaint of the husband showing fraud by the present plaintiff in the contracting of the marriage?" And it was held that it was error to overrule a demurrer to the complaint.

It has been held that the pendency of an action for separation is not a bar to an action for absolute divorce. *Hall v. Hall*, 135 N. Y. Supp. 741, where the court said: "This is an action for an absolute divorce. The defense demurred to for insufficiency is the pendency of another action between the same parties for separation on the ground of abandonment and nonsupport. It is not even alleged that the action for separation was pending when this action was brought. But even if it were, it would not constitute a bar. The two actions are brought on different grounds for different relief. Even a judgment in the separation action would not bar an action for absolute divorce. The learned justice at special term denied the motion on the authority of *Conrad v. Conrad*, 124 App. Div. 780, 109 N. Y. Supp. 387, in which it was held that it was not proper to unite in the same complaint a cause of action for absolute divorce and one for separation on the ground of abandonment,—a proposition entirely different from the one involved on this motion."

In *Stevens v. Stevens*, 1 Met. 279, a husband brought an action for a divorce *a mensa et thoro* on the ground of desertion. Pending this action a statute was passed permitting divorces for this cause *a vinculo*, after which the husband brought another action praying for a divorce *a vinculo*, to which the wife pleaded the pendency of the first action. Shaw, Ch. J., said: "Here is a formal plea in abatement to a libel for divorce *a vinculo* for desertion, filed during the pendency of a former libel for a divorce *a mensa* for the same cause. Whether a formal plea in abatement is proper or not, when the proceeding is by libel, we have not stopped to consider. It is a rule of justice, applicable to all legal proceedings, that no one shall be twice vexed for the same cause. The question then is whether it is for the same cause.

gust, 1900, and prayed judgment that plaintiff's suit be denied him. This answer was verified in ordinary form of answers in civil actions, but not in the form required in actions for divorce. When the present case was called for trial in Wake superior court, it was admitted by plaintiff that the action by defendant in Alamance was still pending, and, before the jury was impaneled, defendant moved to "abate the action and dismiss the same" by reason of the pending of the Alamance case, and the court held that on the facts the pendency of the action in Alamance county was not necessarily a bar to this, and that the answer to the merits destroyed the plea in abatement, and offered defendant opportunity to withdraw his plea in

bar and file a plea in abatement, which was declined, and defendant excepted. The jury was then impaneled, and the following verdict was rendered:

"(1) Were the plaintiff and the defendant married on March 22, 1900?" Answer: "Yes."

"(2) Did the defendant abandon the plaintiff, as alleged in the complaint?" Answer: "Yes."

"(3) Has the plaintiff been a resident of the state of North Carolina for two years next preceding the filing of the complaint?" Answer: "Yes."

"(4) Is the defendant a resident of the state of North Carolina?" Answer: "Yes."

"(5) Was the plaintiff a resident of Wake

By a statute which took effect after the filing of the first libel, and before the second, a party might obtain a divorce from the bond of matrimony for desertion; whereas, as the law stood before, he could only obtain a divorce *a mensa* for that cause. Here then was a new, distinct, substantive right, not before existing. This was the right sought to be obtained by the second libel, and could not be obtained by the first. Had the first been amended so as to alter the prayer for judgment, still it would appear that, at the time of filing the libel, to which the judgment must refer, no such right existed. The reason why a second suit cannot be commenced for the same cause, pending a former, is that it is unnecessary, inasmuch as the party prosecuting may have the same remedy under the first as he could obtain by prosecuting another. In applying this test, it is apparent, that he could not obtain a decree for the same right under the first, which he seeks in this; that is, a divorce *a vinculo*. The facts are the same, and the parties are the same, but the right and the object of the prosecution are wholly distinct. The court are therefore of opinion that the plea cannot prevail."

It has been held that while a bill for divorce and alimony is pending, the court will not entertain a suit for separate maintenance. *Dunnock v. Dunnock*, 3 Md. Ch. 140, where the wife brought an action alleging that the husband, to defraud her of reasonable maintenance, made a fraudulent sale of certain negroes, and asking that their sale be set aside, the negroes placed in the hands of a receiver, and that she might, from the product of their labor, have a reasonable allowance for her maintenance and support, or that they be divided and she have a third thereof, while she and her husband were living apart. The court, in deciding against the plaintiff, said: "There is, moreover, another objection to the relief prayed by this bill, and to the interposition of this court in behalf of the complaint, for the purpose for which she has invoked its aid, and which is presented by the answer, and which appears

to be insuperable. The answer alleges that prior to the filing of the bill in this court, the complainant filed her bill on the equity side of Dorchester county court, praying to be divorced from her husband, and for alimony, which bill is still depending in that court, and that, consequently, this court has no jurisdiction in the premises, and a copy of the bill so filed in Dorchester county court, duly authenticated, is filed as an exhibit with the answer. It thus appears that before the present bill was filed, a court of competent jurisdiction had possession of this subject of alimony. It is true Samuel Dunnock, the grantee in the bill of sale, was not a party to the bill filed in Dorchester county court, but he might, by an amended or supplemental bill, have been made a party, and the question now raised between him and the complainant have been litigated in that court. The question of the right of the complainant to alimony was distinctly presented by her bill in the county court, and constitutes a part of the relief specifically prayed for, and it is undoubtedly competent to that court to say whether she is entitled to that relief or not."

An action for divorce is not for the same cause as one to declare written evidence of the marriage forged and fraudulent. *Sharon v. Hill*, 10 Sawy. 394, 22 Fed. 28. Sharon's action in the United States circuit court was to have a certain instrument in writing, purporting to be a declaration of his marriage to the defendant, delivered up as forged and fraudulent, and to enjoin the defendant from using it. While this suit was pending, the defendant therein brought a suit in the state court for divorce against Sharon, based on the instrument in question and cohabitation, on the ground of adultery and desertion, and the woman pleaded in abatement to Sharon's suit in the United States court the pendency of her suit in the state court, and it was held not only that the plea was bad because the suits were pending in two jurisdictions, but also that the causes of action in the two suits were not identical. The court said: "It is true, the same principal

county, North Carolina, at the time this action was commenced?" Answer: "Yes."

Judgment on the verdict, and the defendant excepted and appealed.

Messrs. Parker & Parker, Long & Long, Dameron & Long, and Holding & Snow for appellant.

Mr. R. N. Simms, for appellee:

The pendency of a former action between the same parties, wherein the defendant is the same person as the plaintiff in the later action, and the plaintiff in the former is the defendant in the later, does not constitute a defense to the later action.

Walsworth v. Johnson, 41 Cal. 61; Barr v. Chapman, 5 Ohio C. C. 69, 3 Ohio C. D. 36; Washburn & M. Mfg. Co. v. H. B.

issue will arise in both cases, but the bills of complaint in the respective suits call and pray for entirely different and inconsistent relief. They are therefore not the same cause of suit; nor is the relief sought in the two suits by the same party. . . . The whole effect sought in the second suit could not be had in the first, nor by the same party. A cross bill, at least, would be necessary, which would, in effect, be another suit. The suit in the state court for divorce and a division of the community property rests, for cause of suit, upon an alleged valid and subsisting contract. . . . The cause of suit in this court is a forgery in making, and fraud in setting up, a contract alleged to have never been entered into. It is sought to have the pretended contract decreed to be void *ab initio*, as a forgery and a fraud. An alleged valid and subsisting contract is therefore the basis and cause of one suit; and forgery and fraud, the basis and cause upon which the other rests. These, certainly, do not constitute the same causes of suit. The causes of suit are clearly not identical. It is also bad on another ground: That the suit set up is not pending in a court of the same jurisdiction. *Id.* It is well settled by the Supreme Court of the United States that a suit pending in another jurisdiction for the same cause cannot be pleaded in abatement of a suit in the United States courts, and that the courts of the states and of the United States are courts of different jurisdictions. *Stanton v. Embrey*, 93 U. S. 548, 550, 23 L. ed. 983; *Gordon v. Gilfoil*, 99 U. S. 169, 178, 25 L. ed. 383, 386. Here there are two jurisdictions,—jurisdictions of two distinct governments. One is state jurisdiction, and the other is the jurisdiction of a national court. If it were a fact that a suit is pending for the same cause in the state court,—a court of a different sovereign jurisdiction,—it would not abate the suit here." It is interesting to note in this connection the distinction made in the same case in 26 Fed. 337, between identity of issues to support the plea of another action pending and the finding of a judgment which will be *res judicata*. It then 40 L.R.A. (N.S.)

Scutt & Co. 22 Fed. 710; *Rapier v. Gulf City Paper Co.* 64 Ala. 330; *Osborn v. Cloud*, 23 Iowa, 104, 92 Am. Dec. 413; *Long v. Lackawanna Coal & I. Co.* 233 Mo. 713, 136 S. W. 673; *Rodney v. Gibbs*, 184 Mo. 1, 82 S. W. 187; *Simpson v. Simpson*, — Cal. —, 41 Pac. 804; *Stevens v. Stevens*, 1 Met. 279.

Mr. H. E. Norris also for appellee.

Hoke, J., delivered the opinion of the court:

Under our present procedure, a defendant is allowed to demur when it appears on the face of the complaint that there is another action pending between the same parties for the same cause (*Revisal*, 1905, § 474, subsec. 3), and where this does

appeared that, while the United States court case was still pending, the suit in the state court had been decided in favor of the woman, but that an appeal was then pending to the state supreme court, and the circuit court of the United States, while holding that the state suit was still pending so long as the appeal was undecided, and that therefore the judgment therein was not *res judicata* upon the matters in the circuit court, nevertheless said: "This suit and the action of Sharon v. Sharon are not brought on the same claim or demand. The subject-matter and the relief sought are not identical. This suit is brought to cancel and annul an alleged false and forged writing, and enjoin the use of it by the defendant to the prejudice and injury of the plaintiff, while the other is brought to establish the validity of said writing as a declaration of marriage, as well as the marriage itself, and also to procure a dissolution thereof, and for a division of the common property, and for alimony. But the validity and genuineness of this declaration of marriage were directly involved in the action of Sharon v. Sharon, and determined in favor of the same by the finding and judgment therein. The plaintiff is therefore estopped to show the contrary in this suit, unless the effect of that judgment, as an estoppel in this case, has been obviated by the appeal therefrom to the supreme court, and the pending motion for a new trial."

In some cases it is indicated that the court has considerable discretion. In *Flanagan v. Flanagan*, 28 N. Y. Week Dig. 88, 13 N. Y. S. R. 432, a husband brought an action against his wife for absolute divorce, and under a substituted order of service the summons was served upon her on the 10th day of May, but the papers were not filed to make the service complete until the following day. On the 10th of May, and after the service of such summons, a summons was served upon the husband in a suit brought by the wife against him for divorce. In the husband's suit the wife answered setting up adultery on his part, to which he replied. He did not answer the

not appear from the complaint, the objection may be taken by answer (Revisal, § 477), and it has been held with us that an objection of this character may be joined with plea in bar or an answer on the merits. *Blackwell v. Dibrell Bros.* 103 N. C. 270, 9 S. E. 192, citing on this position *Pomeroy's Remedies*, § 721. The judge below, therefore, had no right to require defendant to withdraw his answer on the merits as a condition for having his plea in abatement considered and passed upon.

We hold, however, that the verdict and judgment should not be disturbed on this account, being of opinion that the pendency of defendant's suit in Alamance county, in which the husband is seeking to obtain a divorce *a vinculo*, is not necessa-

rily a good plea against the present prosecution of plaintiff's suit for divorce from bed and board. As a general rule, this right to plead the pendency of another action between the same parties before judgment had is regarded to a large extent as a rule of convenience, resting on the principle embodied in the maxim, *Nemo debet bis vexari*, etc. The defect is one that can be waived, and it may also be cured by dismissing the prior action at any time before the hearing (1 Cyc. 25; *Grubbs v. Ferguson*, 136 N. C. 60, 48 S. E. 551), and the plea presenting it is usually confined to suits in which the same litigant is plaintiff, or is at least an actor seeking the same relief (*Long v. Lackawanna Coal & I. Co.* 233 Mo. 714, 136 S. W. 673; *Rod-*

wife's suit or appear in it, but an order of reference having been made to take the proof in the wife's suit, the court, on the husband's application, stayed the wife's suit until the determination of the husband's, holding that all the facts alleged by one party against the other were embraced in the issues in the husband's suit, and could be properly tried and disposed of therein.

In *Osborne v. Osborne*, 10 Jur. N. S. 80, a husband brought an action for dissolution of marriage on account of his wife's adultery. She, in her answer, charged him with adultery, cruelty, and desertion, and prayed a judicial separation, and his answer contained the same charges against the wife as in his petition. These matters, it seems, under the English practice, constituted a cross suit. Upon applications for commissions to be taken in each suit, the court said: "In this case the motion was for two commissions in two suits, the one a suit by the husband against the wife, and the other a suit in retaliation by the wife against the husband. The wife's suit was not commenced until several months after that of the husband. I made an order in chambers, which incidentally came under discussion when the motion for commission was made, the purport of which was that the wife's suit should be stayed until that of the husband has been decided. It is a great hardship that a fresh suit should be necessary to enable a wife to obtain a decree. I shall adhere to the order I have made, that the wife's suit be stayed until that of the husband has been determined; because the husband's suit, if it is one way, may put an end to the wife's suit. The case of *Hepworth v. Hepworth*, 31 L. J. Prob. N. S. 18, 2 Swabey & T. 414, 5 L. T. N. S. 565, 10 Week. Rep. 195, shows to what an extravagant degree the principle might be pressed, of allowing two suits to proceed together. Whenever two suits are instituted in the court, in which the same questions are raised, I shall stay one of them."

In *Monroy v. Monroy*, 1 Edw. Ch. 382, the wife sued the husband for divorce *a mens et thoro* on the ground of cruelty, 40 L.R.A. (N.S.)

and the husband sued the wife for a divorce *a vinculo* on the ground of adultery, and moved to stay the wife's proceedings in the first suit until the cause for adultery was at an end; his charges were fully denied by the wife's affidavit, and by the affidavit of one of the alleged persons with whom she was charged to have misconducted herself. The vice chancellor said: "Under the circumstances, I cannot interfere to arrest the prosecution of the wife's suit. The husband is bound to show a preponderance in his favor upon the merits in the respective suits, in order to entitle him to the order he asks for; and this he has not yet done. I must deny the husband's motion, with costs."

It may be noted that in *Bancroft v. Bancroft*, 3 Swabey & T. 597, 34 L. J. Prob. N. S. 31, where a husband sued for a dissolution of the marriage on account of adultery, the wife brought a cross suit for separation on account of cruelty, to which he answered charging the same adulteries as in his petition. In the wife's suit, the jury found cruelty of the husband and the innocence of the wife, she being a witness as to her innocence, and it was held that this verdict was not admissible in the husband's suit.

In *Cupples v. Cupples*, 33 Colo. 449, 80 Pac. 1039, the court said: "A suit was brought by Mrs. Cupples against her husband in the district court of Rio Grande county, praying for separate maintenance and the custody of the children. The defendant in the suit filed his answer and cross complaint, praying for a divorce and for the custody of the children. Upon motion, the cross complaint was stricken, and thirty days was allowed the defendant in which to answer or to take such action as he might deem advisable. Within the thirty days, the defendant in the suit mentioned brought his action in the county court of Rio Grande county, praying for a divorce. Within the time prescribed by the statute for answering, the defendant filed her answer and cross complaint, in which she denied the allegations of the complaint, set up the pendency of the ac-

ney v. Gibbs, 184 Mo. 1-10, 82 S. W. 187; State ex rel. Craig v. Dougherty, 45 Mo. 294; Mattel v. Conant, 156 Mass. 418, 31 N. E. 487; Washburn & M. Mfg. Co. v. H. B. Scutt & Co. [C. C.] 22 Fed. 711; Walsworth v. Johnson, 41 Cal. 61; New England Screw Co. v. Bliven, 3 Blatchf. 240, Fed. Cas. No. 10,156). In the case before us, the present plaintiff is not the plaintiff in the action pending in Alamance county, nor is she an actor in that suit seeking affirmative relief. She asks for no judgment there, and has not filed the affidavit required by our law in divorce proceedings, and which we have often held is jurisdictional in its nature. Johnson v. Johnson, 142 N. C. 462, 55 S. E. 341; Hopkins v. Hopkins, 132 N. C. 22, 43 S. E. 508. In divorce proceedings a defendant sued is allowed with us to ask for and obtain a divorce on his own account, but he can only do so by cross action or petition, accompanied by this jurisdictional affidavit, and coming within the definition of the general term "counterclaim," as it is understood and used in the Code. Smith v. French, 141 N. C. 1, 53 S. E. 435, citing Green on Code Pleadings and Practice, § 815. It is well recognized here that a party sued is not required as a rule to set up a counterclaim existent in his favor, but is allowed to assert the same in a different or a subsequent action. Shakespeare v. Caldwell Land & Lumber Co. 144 N. C. p. 521, 57 S. E. 213; Mauney v. Hamilton, 132 N. C. 303, 43 S. E. 903; Blackwell Durham Tobacco Co. v. McElwee, 94 N. C. 425.

It is urged that, while this rule may hold in ordinary actions, it should not obtain in divorce proceedings, because the status of the parties is then necessarily involved. It would seem, however, to be especially insistent in such proceedings

where a party may not desire to presently seek affirmative relief in the hope that a different course would more likely lead to a reconciliation, and assuredly we think the reluctance or failure to take such course from such a motive should not be held to defeat or prejudice the right of a defendant to bring his cause before the court at another time. This plea, upon which defendant now relies to defeat plaintiff's recovery, is referred to in 1 Enc. Pl. & Pr. p. 750, as available when there is a former suit pending in the same jurisdiction between the same parties for the same cause of action and for the same relief. Not only is present plaintiff not an actor in the suit in Alamance county, but the relief sought by her is not the same as that involved in the other issue, nor is it dependent altogether on the same state of facts. And authority seems to favor the position that the pendency of an action seeking one kind of divorce does not necessarily forbid the maintenance of a suit to secure a divorce of a different kind. Simpson v. Simpson (1895) — Cal. —, 41 Pac. 804; Stevens v. Stevens, 1 Met. 279; Monroy v. Monroy, 1 Edw. Ch. 382; Thornton v. Thornton (1886) L. R. 11 Prob. Div. p. 176, 55 L. J. Prob. N. S. 40, 54 L. T. N. S. 774, 34 Week. Rep. 509, 2 Bishop, Marr. & Div. § 565; 1 Cyc. 31; 9 Am. & Eng. Enc. Law, 2d ed. 840. In this last citation the author says: "It is not a bar to a suit for separation that another suit is pending for an absolute divorce, and the courts will under some circumstances refuse to stay the former proceeding until the latter is determined." Pursuing this statement, if it should be made to appear that a prior suit was pending between the same parties, which embraced the same issue and involved to a large extent the same state of facts, a court would and

tion in the district court. . . . The court held that there were not two actions pending, and permitted the defendant in the former suit to maintain his action for divorce. . . . No error was committed by the court in his ruling concerning the pendency of another action. The record shows that the cross complaint was stricken, and the defendant given thirty days in which to elect what action he would take. The filing of the complaint in this case must be regarded as an election; and, having filed the complaint in this case, the cross complaint, having been stricken, was of no force or effect. The court proceeded upon the theory that, under our statute concerning divorce and alimony, unless the defendant should file a cross complaint and pray for a divorce, the court could not

hear testimony concerning acts which would entitle the defendant to a divorce. The statute is as follows: 'In all actions for divorce, the defendant may file a cross complaint, in which may be set forth any legal grounds for divorce against the plaintiff; and if, upon trial thereof, both parties shall be found guilty of injuries or offenses which would entitle the opposite party to decree of divorce, then no divorce shall be granted to either party. And in all cases where a cross complaint for a divorce shall be filed, the party filing the same shall be entitled to all the rights granted to a plaintiff by this act, and subjected to all the requirements of a plaintiff.' 3 Mills's Anno. Stat. § 1566a."

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should, if right and justice would be thereby best promoted, stay the proceedings until the results of the former suit could be attained, but, as we have endeavored to show, there is nothing in this case that requires such a course as a matter of law, and nothing appears of record to justify it as a matter of discretion.

After a full and fair trial, in which defendant, having answered, was present in court, the plaintiff has established that she was abandoned by defendant wrongfully and without just cause, and we find nothing in the law or the facts of the case to justify the court in depriving the plaintiff of her verdict and the rights which flow from it under the law.

The judgment in plaintiff's favor is therefore affirmed.

Clark, Ch. J., dissenting:

The defendant brought an action against his wife, the plaintiff herein, for an absolute divorce, in Alamance county, which was the place of his residence, in September, 1910. The present plaintiff, the defendant in that action, appeared and filed an answer. Subsequently she instituted this action in Wake, in August, 1911. The defendant herein moved to abate this action by reason of the pendency of his prior action which had been brought in Alamance. This motion should have been granted. In *Smith v. Morehead*, 59 N. C. (6 Jones, Eq.) 360, the court held that the domicile of the husband was the domicile of the wife, and that proceedings in divorce instituted by the wife against the husband must be brought in the county where the husband resided. But, independently of that, an action for divorce is *sui generis*, and is to determine the status of the parties. Hence there can be nothing in the nature of a counterclaim. In *Bidwell v. Bidwell*, 139 N. C. 409, 2 L.R.A. (N.S.) 324, 111 Am. St. Rep. 797, 52 S. E. 57, Hoke, J., says: "Actions for divorce deal with the status of the parties," and held that, there having been a decree of divorce between the parties, a subsequent action would be barred, though it might set up matters which would have affected the former decree, if pleaded in time.

In the present case, even if this action had been properly brought by the wife in Wake, the judgment decreeing her a divorce from bed and board was a determination that such was the legal status of the parties at the date of that judgment. Hence, in the further prosecution of plain-

tiff's suit in Alamance, which he had a right to bring in that county, and which he did bring therein nearly a year prior to the institution of the present suit by his wife in Wake, he will be estopped by the judgment in this case from further prosecuting his action. He can only bring a new action, and only as to causes arising subsequent to the date of the judgment in this. He is estopped by the judgment in this case. As the husband instituted his action in Alamance prior to the beginning of this action, he had a right to prosecute it to judgment, and the action in this case in Wake should have been dismissed, for the wife could have had her full remedy by a defense to the action in Alamance, which was already pending for the purpose of determining the status of the parties.

In *Haley v. Haley*, 74 Cal. 489, 5 Am. St. Rep. 460, 16 Pac. 248, the point is expressly decided, the court holding that while an action for a divorce is pending, one of the parties thereto cannot maintain a subsequent action for divorce against the other, but that all matters affecting the status of the parties should be determined in the action first brought, and not by a new action setting up matters in recrimination or defense. In 2 Nelson, Separation and Divorce, § 745, it is said: "The term 'counterclaim' is not applicable to a cause for divorce, which is neither a tort or a breach of contract, but is cause of action unlike all other causes." The husband having brought his prior action in Alamance, the wife should have tried out her grounds of defense or her claim for relief in that action. The test of a counterclaim is that its decision is not necessarily involved in the pending action, and the claimant can bring his counteraction on it even after judgment. If the plaintiff in the Alamance case, which was first brought, had obtained judgment of absolute divorce, the defendant in that case could not have brought her action for divorce from bed and board. *Bidwell v. Bidwell*, supra. It follows that she could not bring such suit pending the Alamance action. Her demand is not a counterclaim, but a recrimination, and would be barred by a decision granting the demand in the plaintiff's action against her, for it is a matter necessarily involved in the decree in the action against her, which would determine her status. *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108.

Walker, J., concurs in this dissent.

KANSAS SUPREME COURT.

STATE OF KANSAS
v.
HENRY MEYER, Appt.

('86 Kan. 793, 122 Pac. 101.)

Contempt — punishment — wrongful arrest.

1. In a proceeding brought under § 4388, Gen. Stat. 1909, to punish a defendant for the violation of an injunction previously granted, wherein he appeared in the district court and defended against the accusation filed against him, the power of

Headnotes by JOHNSTON, Ch. J.

Note.— Power to amend commitment or sentence by increasing punishment.

The rule adopted with practical unanimity by the courts is that a court may alter its sentence by increasing the punishment during the same term, before any part of the sentence has been put into effect, but that it has no such power either after the term at which the sentence was rendered or after any part of the sentence has been carried out. *State v. Dougherty*, 70 Iowa, 439, 30 N. W. 685; *State v. Hughes*, 35 Kan. 626, 57 Am. Rep. 195, 12 Pac. 28; *Com. v. Weymouth*, 2 Allen, 144, 79 Am. Dec. 776; *Com. ex rel. Nuber v. Keeper of Workhouse*, 6 Pa. Super. Ct. 420; *Brown v. Rice*, 57 Me. 55, 2 Am. Rep. 11; *People v. Sullivan*, 54 Misc. 489, 106 N. Y. Supp. 143; *State v. Cannon*, 11 Or. 312, 2 Pac. 191.

In *Rex v. Price*, 6 East, 323, 2 Smith, 525, the sentence imposed was vacated and a greater one imposed on the last day of the term.

And in *Reg. v. Fitzgerald*, 1 Salk. 401, the punishment was increased during the same term, because defendant behaved himself impudently in court and justified his offense.

In *Meaders v. State*, 96 Ga. 299, 22 S. E. 527, it was held that, while a court may amend its sentence at any time before the end of the term and before execution has begun, it had no right to increase the sentence merely because counsel for accused gave notice of an intention to move for a new trial.

But in *Nichols v. United States*, 46 C. C. A. 405, 106 Fed. 672, it was held that a court which had sentenced a prisoner had power to call him again to the bar before any part of the sentence had been executed, and increase the punishment, and it would not be presumed that the reason the court increased the sentence was because defendant had declared his intention to appeal.

And in *Com. v. Brown*, 12 Phila. 600, the court says that the court has power during the term to reconsider a sentence and impose a greater one, but that such a power should be exercised with great caution. 40 L.R.A. (N.S.)

the court to try the defendant, and to adjudge punishment for a contempt, is not affected by the fact that he was arrested under an unwarranted order issued by the probate court; nor was it material, under the circumstances, whether a preliminary order of arrest was issued or an arrest in fact made.

Same — violation of injunction — sufficiency of proof.

2. In a case where defendant was enjoined from keeping intoxicating liquors in a certain place for sale, and from selling them at that place, proof that large quantities of intoxicating liquors were subsequently purchased by defendant, some of which were kept at the place, and that he sold a pint of whisky to a purchaser, is sufficient to uphold a judgment finding defendant guilty of contempt.

When a court is under a misapprehension in passing sentence, it may, during the same term and before any part of the sentence has been executed, set it aside and impose a greater sentence; and in the absence of a showing to the contrary, it will be presumed that there are sufficient reasons for the action of the court. *Lee v. State*, 32 Ohio St. 113, 3 Am. Crim. Rep. 376.

But although the judgment rendered is erroneous, the court has no power at a subsequent term to revise it and substitute an entirely new judgment, the original judgment having been partly complied with. *Ex parte Cornwall*, 223 Mo. 272, 135 Am. St. Rep. 507, 122 S. W. 666.

And a defendant who has been found guilty generally upon an indictment containing several counts for distinct offenses, and been sentenced on some of the counts and imprisoned, cannot, at a subsequent term, be brought up and sentenced anew upon another count in the same indictment. *Com. v. Foster*, 122 Mass. 317, 23 Am. Rep. 326, 2 Am. Crim. Rep. 499.

In *Bollinger v. Com.* 16 Ky. L. Rep. 395, it is held that where judgment for a fine in accordance with the verdict against one convicted of maintaining a nuisance has been rendered, the court may, on a subsequent day during the same term, order an abatement of the nuisance, this being considered merely an addition to the judgment.

In *Whitney v. State*, 6 Lea, 247, where a court entered a judgment that the defendant should pay a fine of \$10 and costs, but suspended judgment until the next term of court, it was held that the court could not, at the next term, change the sentence to embrace an alternative jail term, upon defendant appearing and informing the court that he was unable to procure the fine and costs.

And in *Pifer v. Com.* 14 Gratt. 710, it was held that a judgment upon conviction, of a fine and costs, was final, and the court could not at a later term alter the sentence by imposing a term of imprisonment.

And in *Ex parte Friday*, 43 Fed. 916, 8 Am. Crim. Rep. 351, the court says it is

Same — amended sentence — validity.

3. The court found the defendant guilty of contempt and entered judgment that he be committed to the jail of the county for three months and pay a fine of \$100. After he had been imprisoned under this judgment for twelve hours, he was recalled, and the court attempted to render a second or modified judgment sentencing the defendant to six months' imprisonment and the payment of a fine of \$100. Held, that as the first sentence was one the court had authority to impose, and that as the defendant had suffered punishment under it, there was then no authority in the court to change and increase the punishment; and further held, that the first judgment is valid and still enforceable.

(March 9, 1912.)

unquestioned that a valid sentence made at one term cannot be set aside and a different and more severe sentence pronounced at a subsequent term.

The larger group of cases supporting the general rule stated at the beginning of this note is to the effect that the sentence of a prisoner cannot be increased after execution of it has been commenced.

Thus, it was held in *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, where a court imposed a sentence of fine and imprisonment, when it had authority to impose only a fine or imprisonment, that it had no power, though at the same term, after the fine had been paid, to set aside the judgment and resentence the prisoner to a prison term.

In *People ex rel. Manyx v. Whitson*, 74 Ill. 20, where a court sentenced a defendant to ten days' imprisonment upon forty counts, and, because of the form of the sentence, it was held that it ran simultaneously on all the counts, the court could not, after defendant had served the ten days, amend its sentence to ten days for each count separately.

In *State v. Warren*, 92 N. C. 825, it is held that a court cannot, after commitment of defendant, remit the remainder of the sentence and place him on probation, and later resentence him for the term originally fixed.

In *Grisham v. State*, 19 Tex. App. 504, where defendant pleaded guilty to a charge of aggravated assault, and was fined and ordered to be committed until the fine was paid, it was held that the court had no power, during the same term but after commitment, to set aside the judgment and award a new trial without defendant's consent, at which he was convicted of assault with the intent to kill, and sentenced to a term of two years in the penitentiary.

In *Com. v. Pennsylvania R. Co.* 41 Pa. Super. Co. 29, where a railroad convicted of maintaining a nuisance was sentenced to build a crossing in a particular way, and performed the sentence as specified, it was held that the court could not afterward amend the sentence by making additional

A PPEAL by defendant from a judgment of the District Court for Trego County convicting him of contempt of court. Affirmed.

The facts are stated in the opinion.

Mr. James T. Burney for appellant.

Messrs. John S. Dawson, Attorney General, S. N. Hawkes, S. M. Brewster, and J. P. Coleman for the State.

Johnston, Ch. J., delivered the opinion of the court:

This is an appeal from a decision of the district court of Trego county finding the appellant guilty of contempt of court. A judgment was rendered against the appellant on November 8, 1907, perpetually enjoining and restraining him from keeping

requirements, upon it being shown that the crossing was inadequate and improper.

And where a fine has been imposed and the prisoner taken to prison, the sentence is then in execution and the court has no power to recall him and impose a larger fine. *Re Habeas Corpus*, 5 Ohio S. & C. P. Dec. 571, 7 Ohio N. P. 604.

In *People v. Meservey*, 76 Mich. 223, 42 N. W. 1133, and *People v. Kelley*, 79 Mich. 320, 44 N. W. 615, it is held that a judge cannot vacate a sentence of imprisonment in the state prison after the prisoner has been remanded to jail to await its execution, and increase the term imposed, because the prisoner attempted to escape from jail.

But in *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013, it is held that a sentence to the penitentiary commences to run upon actual confinement therein, so that the court could change the sentence three days after it was pronounced, though defendant during that time was confined in the county jail to prevent his escape.

When a prisoner has been sentenced to a reform institution as being under a certain age, and execution of the sentence has been commenced, the court has no jurisdiction to vacate its judgment and resentence the prisoner to the penitentiary upon it appearing that he was over the age at which he could be sentenced to the reform institution. *Re Jones*, 35 Neb. 499, 53 N. W. 468; *Re Mason*, 8 Mich. 70.

In *State v. Addy*, 43 N. J. L. 113, 39 Am. Rep. 547, which was a conviction for nuisance by obstructing a culvert, where the court ordered that sentence be suspended on payment of costs "so long as defendant shall keep the culvert complained of clear and unobstructed, and shall do whatever else may be necessary to abate the nuisance," and defendant did pay the costs and abate the nuisance under direction of the sheriff, and was discharged, it was held that this did substantially amount to a rendition of and compliance with a judgment on conviction, and the declaration that sentence was suspended was contrary-

or maintaining a liquor nuisance upon certain premises, and "from ever again engaging in the keeping or selling or in any way maintaining" such nuisance, or from "ever keeping at said place or on said premises any intoxicating liquors for sale." An accusation was filed in the district court of Trego county charging defendant with having violated the terms of the injunction. The charge appears to have been presented to the probate court of Trego county, and on August 15th the judge of that court ordered the arrest of the defendant, and that he should be held subject to the further order of that court. The clerk of the district court issued a writ of attachment, and the appellant was accordingly arrested. Later, he came into the district court with his counsel, and a trial was had upon the accusation filed in that court, which resulted in a finding that he was guilty of violating the order of injunction and of contempt of the court. At first the court announced and entered a judgment that he be committed to the jail of the county for three months and pay a fine of \$100, together with the costs of the proceeding. In pursuance of this judgment he was imprisoned for about twelve hours, and, on a late hour of the same day, he was brought back into court by its order and another judgment was rendered, sentencing him to imprisonment in the county jail for a period of six months, instead of three months, as first adjudged.

On this appeal it is contended that the district court had no jurisdiction to try appellant, because he was arrested on an order of the probate court. Why the application

for an order of arrest was made to the probate court is not explained, and it is certain that that court had no authority to order the arrest or to make any order in the proceeding. The act of the probate court in making the invalid order, and the unwarranted arrest of appellant under it, did not deprive the district court, in which the accusation was filed, of jurisdiction to determine whether appellant had violated the terms of the injunction previously granted. While an arrest of one charged with being guilty of contempt of court is provided for, it is not an essential step in the proceeding. It is important that the accusation shall, on its face, show facts sufficient to constitute a contempt; that the accused shall have reasonable notice of the proceeding, and a hearing in which he has an opportunity to make any explanation or defense that he may have. Here there was an accusation which fully stated the facts constituting the contempt; there was notice of the hearing, and an opportunity for appellant to defend, of which he availed himself. Besides, there was no challenge of the authority of the district court to try the case. No complaint was there made that appellant was not properly brought into that court, nor did he make any objections there as to the initiatory steps in the proceedings. After submitting to a trial without objection to any of the preliminary steps in the case, it is a little late to complain that he was not brought into court in the ordinary way. Neither an improper arrest nor the absence of any arrest would be ground for overthrowing a judgment rendered upon due no-

to the fact, and reserved no power in the court afterward to order that defendant be confined in the county jail on the ground that he did not keep the culvert clear.

State v. Addy is, however, distinguished in *State v. Crook*, 115 N. C. 760, 29 L.R.A. 260, 20 S. E. 513, in which it was held that, where judgment was suspended on condition that defendant pay costs, neither the payment of part of the costs nor confinement for failure to pay the balance constituted performance of part of the suspended sentence, and defendant might thereafter be sentenced to imprisonment.

However, in *Smithey v. State*, 93 Miss. 257, 46 So. 410, it was held that a justice of the peace who imposed a fine only, when the law required both fine and imprisonment, might and should issue an alias *capias* for defendant, and impose a proper sentence, although the fine and costs had been paid.

In *Ex parte Sizelove*, 158 Cal. 493, 111 Pac. 527, it was held that under a probation statute giving the court power to revoke or modify its order, the court had power to extend the probationary period before its expiration.
40 L.R.A. (N.S.)

And *Jobe v. State*, 28 Ga. 235, sustains the right of a court to increase its oral sentence before its entry on the minutes of the court, from a fine and thirty days' imprisonment to the same fine and six months' imprisonment, after an escape of defendant, especially where the defendant had solicited the court to reconsider its sentence with a view to its modification.

As to the power of an appellate court to increase the commitment sentence of a prisoner, it was held in *Gipson v. State*, 58 Tex. Crim. Rep. 403, 126 S. W. 267, where a jury assessed defendant's punishment at a fine and imprisonment, but the judgment of the court embraced only a fine and costs, that it could be reformed by the appellate court on motion of the state to conform to the verdict.

But in *Killman v. State*, 53 Tex. Crim. Rep. 512, 112 S. W. 90, where it appeared that defendant was convicted in two cases in the county court, but that in entering the judgment the clerk failed to make the punishment assessed cumulative, it was held that the appellate court could not, on motion of the state, amend the judgment in this respect.
R. L. S.

tice and after a hearing wherein full opportunity was given the accused to explain and defend.

The contention that the evidence was insufficient to sustain the judgment is not good. Appellant was enjoined from keeping intoxicating liquors on the premises for sale and from selling such liquors there. There was testimony that two barrels of whisky were consigned to appellant, which were received by him at the railway station. Testimony was introduced that liquors were kept at the hotel, although appellant claimed that they were kept there for his own use. It was shown that a guest at the hotel purchased a pint of whisky from appellant for which 75 cents was paid. There was conflicting testimony offered by appellant; but the trial court accepted as true that which was produced by the state, and it is sufficient to sustain the judgment. When appellant kept liquor for sale in the hotel and made a single sale of it in that place, he violated the injunction and was guilty of contempt.

The remaining question raised on the appeal is the validity of the action of the court in modifying the judgment. The modification was made during the term in which the original judgment was entered and on the same day. The reasons which led the judge to change and increase the period of imprisonment are not shown. The statute provides that "any person violating the terms of any injunction granted in proceedings shall be punished for contempt by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months, in the discretion of the court or judge thereof." Gen. Stat. 1909, § 4388.

It is competent for the court to modify a judgment in either a civil or a criminal case, during the term at which the judgment was rendered. *State v. Hughes*, 35 Kan. 626, 57 Am. Rep. 195, 12 Pac. 28; *State ex rel. Minard v. Sowders*, 42 Kan. 312, 22 Pac. 425; *Re Beck*, 63 Kan. 57, 64 Pac. 971; *Johnson v. Jones*, 58 Kan. 745, 51 Pac. 224; *Chapman v. Western Irrig. Co.* 75 Kan. 765, 90 Pac. 284.

In *State v. Hughes*, supra, it was decided that "the district court may, until the term ends, revise, correct, or increase a sentence which it has imposed upon a prisoner, where the original sentence has not been executed or put into operation." Syl. ¶ 4. Here the judgment first rendered had been executed in part before the attempted modification was made. Appellant had been imprisoned under the judgment, and had undergone twelve hours of the punishment imposed by the court, before the judgment was changed

and the term of imprisonment doubled. Was it competent for the court to change the judgment and increase the penalty at that time? The trend of the authorities is that the power of the court to revise judgments of conviction extends to the end of the term if execution of the judgment has not been begun, but that the power is exhausted when the judgment is executed or is in process of execution.

In *Brown v. Rice*, 57 Me. 55, 57, 2 Am. Rep. 11, the defendant was found guilty and sentenced to serve six months in the jail. Nineteen days after he was imprisoned under the judgment, he was brought from the jail, and the court undertook to revoke the judgment and to sentence him to the state's prison for a term of three years. The last and longer sentence was within the limit fixed by law for offenses of which he was convicted. It was held that the court could not, at that time, revise and increase the sentence, and that the first sentence was legal and binding, notwithstanding the attempt of the court to revoke it. After citing certain cases which authorized amendments during the term so long as the judgments remained unexecuted, the court remarked: "These cases certainly are as strong for the respondent as any that can be found, and recognize the right of the court to go so far, at least, as we can find either reason or authority for going. But they stop at the point of execution, and clearly express or imply that after execution or warrant issued and executed, this power of summarily changing the record or judgment or sentence is at an end."

In Michigan a defendant was convicted of burglary and sentenced to imprisonment for five years. On the next day the court learned that he had made an unsuccessful attempt to escape from the prison to which he was committed. He was brought back into the court and resented to a term of ten years. It was held that the sentence having gone into effect, and that one day of the imprisonment under the sentence having been served, the court was without authority to make the change. The second sentence was set aside and the original one enforced. *People v. Meservey*, 76 Mich. 223, 42 N. W. 1133.

In *People ex rel. Manyx v. Whitson*, 74 Ill. 20, it was held that "where a defendant in a criminal case has suffered punishment according to a legal sentence, a second judgment in the same case, even if rendered at the same term of court, is void." Syl. ¶ 3.

In *State v. Cannon*, 11 Or. 312, 314, 2 Pac. 191, 192, it was held that "where a sentence has been passed upon a defendant, and the judgment has gone into effect by

commitment of the defendant under it, the court has done all that it had the legal power to do under the proceedings in that case."

Other cases of similar import are: *Re Jones*, 35 Neb. 499, 53 N. W. 468; *State v. Warren*, 92 N. C. 825; *Com. v. Weymouth*, 2 Allen, 144, 79 Am. Dec. 776; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Lee v. State*, 32 Ohio St. 113, 3 Am. Crim. Rep. 376; *State v. Dougherty*, 70 Iowa, 439, 30 N. W. 685; *Elsner v. Shrigley*, 80 Iowa, 30, 45 N. W. 393; *People v. Kelley*, 79 Mich. 320, 44 N. W. 615. See also 12 Cyc. 783.

The decision of this case does not require that we extend the rule as far as is done in some of the cited cases. We need not determine the effect of a modification which remitted a part of the penalty or shortened the term of imprisonment at the instance of the defendant, nor where the first judgment was outside of the statute, or not within the power of the court to impose. In this case the court had the authority and discretion to impose the penalty first adjudged. The judgment was in process of execution, and the defendant had undergone a part of the punishment before the attempted change of the judgment. After punishment had been inflicted under that judgment, the court was powerless to recall the defendant and to resentence him to a longer term.

The second judgment, which is a nullity, is set aside. The first judgment was not affected by the subsequent action of the court, and it is affirmed and will be enforced.

OHIO SUPREME COURT.

VILLAGE OF BARNESVILLE, Plff. in Err.,
v.

JOSIAH P. WARD.

(85 Ohio St. 1, 96 N. E. 937.)

Highway — park strips — validity.

1. Where a street is sufficiently wide that enough will remain unobstructed for the purpose of public travel, a municipality

Headnotes by the COURT.

Note. — *Liability for injury by defect or obstruction in space between sidewalk and carriage way.*

Other cases on the present question will be found at pages 592, 593, and 597 of the note to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 513, covering the general subject of municipal liability for defects in streets.

The liability of county, town, or municipality for obstructions outside of trav-

may maintain, or permit to be maintained, park strips between the curbing of the paved street and the pavement of the sidewalk, in which strip grass, flowers, and trees may be grown for the purpose of beautifying and ornamenting the streets of the city and contributing to the pleasure and comfort of its citizens, and may by proper barriers prevent travel thereon.

Same — nuisance — flowers and barriers.

2. The trees, grass, and flowers growing thereon, and proper barriers placed around the same to protect them, are not obstructions or nuisances within the meaning of the statute requiring the city council to keep the streets of a municipality open, in repair, and free from nuisance.

Same — unsafe barriers.

3. A city may not maintain, or permit to be maintained, a fence, wire, or other barrier around such a park strips dangerous to the life or safety of any traveler who undertakes to pass over the same, and, if a pedestrian in the exercise of due care for his own safety is injured by reason of the dangerous condition of such barrier, the municipality is liable in damages for such injury, if it knew, or in the exercise of ordinary care ought to have known, the dangerous condition thereof.

(October 31, 1911.)

ERROR to the Circuit Court for Belmont County to review a judgment affirming a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover damages for personal injuries sustained by plaintiff in tripping and falling over a wire in the street. Affirmed.

Statement by Donahue, J.:

Josiah P. Ward brought a civil action against the village of Barnesville in the common pleas court of Belmont county, praying damages in the sum of \$10,000 for personal injuries sustained by him in tripping and falling over a wire placed between the paved sidewalk and the curb on the east side of Arch street, south of Walnut street, in said village. In his petition he averred that this wire was supported upon posts or stakes about 2 feet high and 18 inches apart at each end, and about 30 feet from end to end; that the wire was stretched around these stakes and was permitted to

eled portion of highway is discussed in the note to *Blankenship v. King County*, post, 182. The following notes may also be consulted with profit: *Liability of municipality for injuries by trees*. *Dyer v. Danbury*, 39 L.R.A. (N.S.) 405; *Duty toward children as to obstructions or defects in street*. *Townley v. Huntington*, 34 L.R.A. (N.S.) 118.

On the ground that a pedestrian had no right to cross a grass plot, and that the

sag in the middle so that it was about 8 inches high at the place where he was injured; that this obstruction had been continued there for many weeks prior to December 10, 1908; that the same was dangerous and likely to injure pedestrians lawfully going upon said street, all of which the defendant village well knew, or in the exercise of ordinary care ought to have known; that plaintiff had no notice or knowledge of such dangerous condition; and that in the night season of December 10, 1908, while he was carefully walking on said street, he was tripped by said wires, and violently thrown upon the curb and pavement, sustaining severe injuries, for which he asks damages.

The village for its answer admits it is a

wire was strung around such a place for the very purpose of keeping people off from it, it was held in *McCurdy v. Newark*, 10 Ohio N. P. N. S. 526, that a municipality was not responsible to a pedestrian for injuries sustained while attempting to cross the space between sidewalk and curb, by falling over a wire stretched a few inches from the ground to protect the grass. This case, however, is overruled by *BARNESVILLE v. WARD*.

So, on the theory that when a city has rightfully set apart and improved a part of a street for a boulevard, it is not bound to use due care to keep such part free from all obvious obstructions which are necessarily incidental to its use as a boulevard, although they may endanger the safety of travelers thereon, where one, while attempting to cross the street diagonally at the corner of two streets, was thrown to the ground by a supporting wire stretched along the boulevard from a tree to a stake in the ground, whereby she was injured, the question of the city's negligence and that of the injured person was held rightfully submitted to the jury. *McDonald v. St. Paul*, 82 Minn. 308, 83 Am. St. Rep. 428, 84 N. W. 1022. In the above case the court said that if the accident had occurred on the boulevard between the block lines, instead of at the street corner, the case would not be so clearly one for the jury. And in a separate opinion Mr. Justice Collins observed that if this accident had occurred anywhere upon the boulevard except at the corner, there could have been no recovery.

So, in *Dougherty v. Horseheads*, 159 N. Y. 154, 53 N. E. 799, a city is held not liable for injury caused by a cutter colliding with a snow-covered stone used to protect a grass plot and a tree at a private driveway.

But, on the principle that the space between the sidewalk and curb is a portion of the street or sidewalk which a municipality is bound to keep in a reasonably safe condition for pedestrians and other travelers, a city was held liable for personal injuries caused by falling over a stone curb used as stepping-stone, placed within curb

municipal corporation, admits that Arch street is a public street of said village frequently traveled and used as such by the public generally, and improved by paved sidewalks, curbing, and street paving, and denies every other allegation of the petition. For a second defense it denies plaintiff was injured in the manner alleged in the petition, and avers that if he was injured in any manner or form whatever, that his own negligence and want of care contributed to that injury. The defendant for a third defense avers that that portion of the street around which this wire was stretched was a grass plat between the paved sidewalk and the curb of the street; that the defendant village adopted, established, permitted, and maintained a plan and system of leav-

on the banquettes by paving contractors (*McCormack v. Robin*, 126 La. 594, 139 Am. St. Rep. 549, 52 So. 779); by falling over water box (*Aston v. Newton*, 134 Mass. 507, 45 Am. Rep. 347); by fall of one of pile of beer kegs negligently stacked at intersection of two streets by hotel keeper (*Havre de Grace v. Fletcher*, 112 Md. 562, 77 Atl. 114); by stepping upon grade stake left in curb long after its necessary use and purpose had been accomplished (*Jones v. Deering*, 94 Me. 165, 47 Atl. 140); by buggy striking post at intersection of two roads (*Phelps v. Mankato*, 23 Minn. 276); by falling over pile of stones placed between sidewalk and curb, such an obstacle being not one that a traveler would expect to encounter (*Fockler v. Kansas City*, 94 Mo. App. 464, 68 S. W. 363); by stepping upon a metal covering of a water meter negligently constructed by city, while looking for a lost article (*Riley v. Kansas City*, 161 Mo. App. 290, 143 S. W. 541); by defect in space between sidewalk and curb (*Coffey v. Carthage*, 200 Mo. 616, 98 S. W. 562); by stepping upon the cover of a catch-basin in the curbing, but extending into the sidewalk space (*Colton v. Kansas City*, 162 Mo. App. 429, 145 S. W. 494); by falling into an excavation in the margin of an alley (*Niblett v. Nashville*, 12 Heisk. 684, 27 Am. Rep. 755); by tripping over a water pipe projecting 4 inches above the surface between the flagstone and curb, which had existed in that condition for nine months (*Archer v. Mt. Vernon*, 57 App. Div. 32, 67 N. Y. Supp. 1040); by falling into trench dug in such space by lot owner (*Townley v. Huntington*, 68 W. Va. 574, 34 L.R.A. (N.S.) 118, 70 S. E. 368).

So, where a boy ran across the street against a wire about 4 feet from the ground, stretched along the outer edge of the sidewalk between two telegraph poles, and intended to serve no public purpose, whereby he was injured, the city was held liable. *Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389. It seems, however, in the above case, that the sidewalk extended right up to the curb.

But, although towns and cities are bound

ing a strip of ground between the outside of the paved portion of the sidewalks and the inside of the curb of said paved street, on which to maintain grass plats and shade trees, in order to beautify, ornament, and add to the cleanliness and healthfulness of said streets, and, in accordance with said plan and system, trees were permitted to

be placed and grow upon said strip of ground, and grass was sown thereon, or the same was sodded; that passageways were made over and across said strip of ground leading from the paved part of the sidewalk to the curb, over which pedestrians could pass when wishing to cross to the opposite side of the street; and that said strip

to exercise ordinary care to keep the part of the street between the carriage way and sidewalk in such a state of repair that pedestrians may cross any part thereof with a reasonable degree of safety, where a person attempted to cross the street and was injured by stumbling over the iron grating covering a drain near the sidewalk, it was held in *Raymond v. Lowell*, 6 Cush. 526, 53 Am. Dec. 57, that his negligence in crossing at this particular spot, when he could have crossed any other part of the street in that vicinity in safety, precluded recovery.

Generally, such things as stepping-stones, hitching posts, hydrants, and telegraph posts properly placed between the sidewalk and curb, are regarded not as unlawful obstructions, but, by immemorial custom and usage, as being necessary to the health, convenience, protection, and enjoyment of the inhabitants of the city.

So, whether a marble stepping-stone between the sidewalk and traveled part of the highway is such a nuisance within the limits of the highway, as to render its owner liable to a person injured by collision therewith, is a question of fact determinable by its character, location, and effect. *Nutter v. Pearl*, 71 N. H. 247, 51 Atl. 897.

Hitching posts or stepping blocks in public streets as unlawful obstructions or nuisances is the subject of a note to *Lacey v. Oskaloosa*, 31 L.R.A. (N.S.) 853.

So, where one driving along the street was injured by his buggy striking against a post 2 feet in height, surrounded by weeds and placed at the corner of two streets to prevent wagons running against shade trees, it was held a question of fact for the jury whether the city was guilty of negligence in maintaining the post, and it could not be affirmed that, as matter of law, the city was guilty of negligence in permitting such an obstruction. *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482, 1 Pac. 253.

And where a pedestrian was injured by stepping into a hitching post hole in the grass plot between the sidewalk and curb, the lot owner was held liable in *Harrison v. New York Bay Cemetery*, 77 N. J. L. 514, 73 Atl. 546, under the rule that if an abutting owner, for his own convenience, places an object in the public highway, his failure to use reasonable care that the highway be not thereby rendered unsafe makes him liable in damages to users of the highway, for injuries resulting from such neglect.

But where a person fell into a pit some distance from the sidewalk toward the road, which was left open and unguarded by a town, and which he knew existed, the town 40 L.R.A. (N.S.)

was held not liable, on the ground that his negligence contributed to the injury. *Walker v. Reidsville*, 96 N. C. 382, 2 S. E. 74. In the above case the court observed, however, that if the injured party, though not entirely free from fault, could not, by ordinary care and prudence, have avoided the danger, he might recover damages.

And where a telegraph company placed a telegraph post between the sidewalk and the traveled part of the way, a place prescribed by selectmen of the town under statute, the town, in *Young v. Yarmouth*, 9 Gray, 386, was held not liable to a traveler for damages occasioned by being thrown from his carriage against such post.

So, where a traveler whose horse became frightened and unmanageable was injured by colliding with an iron hydrant erected by the city in the curb, about 8 inches in diameter and 2½ feet high, with a nozzle about 6 inches from the top projecting over the gutter about 4 inches, it was held in *Ring v. Cohoes*, 77 N. Y. 83, 23 Am. Rep. 574, that the liability of the city rested not upon the hydrant, which was properly located, but upon an obstruction in the street caused by a heap of ashes.

But where a hydrant stands in the curbing so that a projecting nut strikes the wheel of a carriage passing close to the curb, it is, in *St. Germain v. Fall River*, 177 Mass. 550, 59 N. E. 447, held a defect for which the city is liable, where a person was injured thereby; and the fact that he knew of the hydrant will not preclude recovery.

So, where a horse shied, and the driver's leg was broken by coming in contact with a hydrant, the city was, in *Burnes v. St. Joseph*, 91 Mo. App. 489, held liable; and the fact that the driver knew of such obstacle was of no consequence when it was so dark that he could not see it.

Where lumber was piled between the sidewalk and traveled portion of a road, extending to but not projecting over the road, the city was held not liable in *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313, where a horse ran the buggy against the pile, throwing out and killing the occupant. In the above case the court held that the statute for collection of damages sustained by reason of defective highways or streets was confined to such defects as arose from want of repair, but did not apply to objects or material, such as a lumber pile, forming no part of the streets, and not affecting their condition as ways properly kept in repair.

J. D. C.

of ground, by reason of the grass and shade trees thereon growing, indicated to pedestrians that it was not to be used as a part of the sidewalk, and was not intended to be traveled or crossed by pedestrians. It is also averred that the plaintiff knew, or ought to have known, before, and at the time of his injury, that such strip of ground was not to be used for the purpose for which he attempted to use it; that there was no occasion or necessity for his attempting to so use it; and in doing so he assumed all risk and hazard of danger. Defendant denies that it was charged with any duty or obligation to keep that portion of the strip of ground occupied by trees and grass plats, and located between the regular passageways leading from the portion of the sidewalk to the curb of the street, open for travel, in repair, and free from obstructions. For a fourth defense defendant avers that the plaintiff attempted to pass from the paved portion of the sidewalk over and across said strip of ground and grass plat or lawn, to the curb of the street, without necessity, and for his own pleasure and convenience departed from said paved portion of the sidewalk, passageway, and street crossings, upon which he would have avoided injury.

The plaintiff replied denying the averments of the second, third, and fourth defense.

Upon the issue so joined, the jury returned a verdict in favor of the plaintiff. A motion for new trial was overruled and judgment rendered upon the verdict, which judgment was affirmed by the circuit court. The plaintiff in error now seeks the reversal of the judgment of the common pleas court and the reversal of the judgment of the circuit court affirming the same.

Messrs. Smith & Howard and J. C. Tallman, for plaintiff in error:

Plaintiff must or at least ought to have had full knowledge of the situation and condition of the streets, the system of park strips, their passageways, their reservation for travel, and of any wire or other protection erected to guard these public improvements.

Norwalk v. Tuttle, 73 Ohio St. 242, 76 N. E. 617; *Schaeffer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Akron v. Keister*, 6 Ohio C. C. N. S. 603, 27 Ohio C. C. 809; *Bond Hill v. Atkinson*, 16 Ohio C. C. 470, 9 Ohio C. D. 185; *Cincinnati v. Taylor*, 19 Ohio C. C. 737, 10 Ohio C. D. 677.

It is reasonable to maintain park strips between the sidewalks and the paved or macadamized part of the street, reserved from travel and planted with grass and trees.

Fockler v. Kansas City, 94 Mo. App. 464; 68 S. W. 363.

A pedestrian may not cross a part of the street properly reserved from travel just as he pleases, especially where there are passageways provided through the reserved part.

Dayton v. Taylor, 62 Ohio St. 11, 56 N. E. 480; *Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co.* 32 Ohio St. 116; *Groveport v. Bradfield*, 2 Ohio C. C. 145, 1 Ohio C. D. 411; *McCurdy v. Newark*, 10 Ohio N. P. N. S. 526; *Raymond v. Lowell*, 6 Cush. 524, 53 Am. Dec. 61; *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482, 1 Pac. 253; *Fockler v. Kansas City*, 94 Mo. App. 464, 68 S. W. 363; *Keith v. Worcester & B. Valley Street R. Co.* 196 Mass. 478, 14 L.R.A. (N.S.) 648, 82 N. E. 680; *Louisville v. Johnson*, 24 Ky. L. Rep. 685, 69 S. W. 803; *Larsen v. Sebro-Woolley*, 49 Wash. 134, 94 Pac. 938; *Bell v. Clarion*, 113 Iowa, 126, 84 N. W. 962; *Alline v. Le Mars*, 71 Iowa, 654, 33 N. W. 160; *Collins v. Dodge*, 37 Minn. 503, 35 N. W. 368; *Cincinnati v. Fleischer*, 63 Ohio St. 229, 58 N. E. 568.

Messrs. Albert W. Kennon and Newell K. Kennon, for defendant in error:

Defendant is liable for injuries from dangerous obstructions on the sidewalk.

Fockler v. Kansas City, 94 Mo. App. 464, 68 S. W. 363; *Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 392; *Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 382; *Olathe v. Mizee*, 48 Kan. 435, 30 Am. St. Rep. 308, 29 Pac. 754; *Baker v. Grand Rapids*, 111 Mich. 447, 69 N. W. 740; *Brusso v. Buffalo*, 90 N. Y. 681.

Donahue, J., delivered the opinion of the court:

The question presented by the record in this case is in some respects a novel one in Ohio. There seems to be neither a statute nor adjudicated case dispositive of some of the propositions urged by the plaintiff in error in its defense to plaintiff's suit.

It is undoubtedly the common practice in this state, and it would seem to be practically the universal interpretation of the law, that, where a street is sufficiently wide that enough will remain unobstructed to meet the needs of public travel, a municipality may maintain, or permit to be maintained, park strips between the curbing and the paved street and the pavement of the sidewalk, in which strip grass, flowers, and trees may be grown, for the purpose of beautifying and ornamenting the streets of the city and contributing to the pleasure and comfort of its citizens, and may, if it be deemed necessary, construct, or permit to be constructed, proper barriers around the same to prevent travel thereon, and such trees, grass, and flowers growing upon such

park strip, and the proper barriers placed around the same to protect them, are not obstructions or nuisances within the meaning of the statute requiring the city council to keep the streets of a municipality in repair, open for travel, and free from nuisances.

This construction of the law would not authorize a municipality to maintain, or permit to be maintained, a fence, wire, or other barrier around such park strip in such condition as to become dangerous to the life or the safety of any traveler who undertakes to pass over the same, and, if a pedestrian in the exercise of due care for his own safety is injured by reason of the dangerous or defective condition of the barrier, the municipality is liable in damages for such injury, if it be shown that it knew, or in the exercise of ordinary care should have known, the dangerous condition thereof. The plaintiff in error contends that the trial court erred in refusing to give its first and second special requests. These requests were predicated upon the assumption that, no matter if the wires placed around this strip of ground were so placed as to be dangerous, the plaintiff, in going upon this strip, was negligent, and assumed all the risk of injury by reason thereof; and the court very properly refused to give the same.

That the plaintiff attempted to cross this park strip at a point other than where the passageways were provided was not negligence *per se*. Whether he was negligent in so doing under all the circumstances of the case was a proper question for the jury. It is claimed on behalf of this plaintiff that, in passing along the pavement, he saw directly ahead of him a quantity of ice that had accumulated there, and that, in order to avoid this ice, he attempted to cross to the other side of the street at a place where no passageway across this park strip had been provided for that purpose, but that he had no knowledge whatever of the existence of this wire at this point, and that the strip was so narrow, being only about 18 inches wide, that it could be easily covered by one step of a pedestrian, and therefore not likely to need such protection, and the pedestrian would not naturally expect to find such obstruction there; that two stakes were driven at each end of the strip 18 inches apart and 30 feet from end to end; that a small wire had been placed around the top of these stakes, and had been permitted to sag in the middle, so that at the point plaintiff attempted to cross it was not more than 10 or 12 inches high; that the place was not lighted by any street lamp, and the night was so dark that a pedestrian in the exercise of due care for

his own safety could not see this wire or protect himself from injury therefrom, and that therefore this wire, so placed and permitted to remain, was a dangerous nuisance and likely to produce just such an injury to a pedestrian exercising due care for his own safety as the plaintiff sustained. There is evidence in this record in support of these facts, upon which plaintiff rests his right to recover in this action.

The fact that a municipality may maintain, or permit to be maintained, a barrier around such strips to prevent pedestrians from going thereon, does not authorize the maintenance of such a dangerous construction as would be a menace to the life or safety of a pedestrian exercising due care for his own safety, in an attempt to cross over the same.

If the jury found from the evidence that this wire was in the condition described by some of the witnesses, then it could rightly find that it was not a barrier to prevent, but rather a device to trip and punish, anyone who would attempt to cross this strip in the night season. That a pedestrian has not sufficient civic pride to refrain from going upon or passing over this strip does not justify the placing of a nuisance there that might probably cause his death or do him great bodily harm if he should attempt to do so, and the pedestrian could not be held to have assumed the risk of injury from such a device, if it be shown that he had no knowledge of its existence, and could not in the exercise of due care for his own safety see the same, or be required to anticipate its presence. True, if he had collided with a tree, or with a proper barrier placed there to prevent him from going upon the strip, or with a stepping-stone, or other obstruction that might reasonably be expected to be found there, then the contention of the plaintiff in error that he assumed the risk of injury from such obstruction would obtain. In the absence of knowledge of the fact, he could not be required to contemplate the existence of this wire placed so near the ground that it would not prevent his going upon the strip, but rather would more likely result in his injury, than in the accomplishment of the purposes for which it is now claimed it was so placed, and while it might be a proper and sufficient guard in the daytime, or even in the night season if properly lighted, yet it was a question for the jury to determine whether, under the circumstances of this case, it was a legitimate barrier, one that he ought to have expected to meet, and therefore assumed the risk of injury therefrom, or whether it was a dangerous and unlawful nuisance, the existence of which he would not be required

to have in contemplation at the time he attempted to cross the same.

It is also claimed on behalf of the plaintiff in error that the court erred in the rejection of the testimony of S. S. Foreman. The defendant sought to show by this witness the plan of the improvement of the streets of this village with reference to the maintenance of park strips between the curbing of the paved street and the paved portion of the sidewalks, and it was permitted to show this plan as fully as the nature of this defense required. The objections to the questions appearing on pages 255, 256, and 257 of the record were properly sustained for the reason then stated by the court that they were leading questions.

From the whole record it appears that the issue was properly submitted to the jury and that its verdict is sustained by evidence.

The judgment of the Circuit Court affirming the judgment of the Common Pleas Court is affirmed.

Spear, Ch. J., and Davis, Shauck, Price, and Johnson, JJ., concur.

ARIZONA SUPREME COURT.

E. K. SNEED

v.

J. S. SNEED, Plff. in Err.

(— Ariz. —, 123 Pac. 312.)

Divorce — bona fide residence — acquisition by woman.

A woman cannot, by leaving her husband and removing to another state because there had been a few quarrels between them over property, without violence or mental distress which would destroy her health, acquire "an actual bona fide residence" there, within the meaning of the statutes of the state conferring jurisdiction in divorce cases.

(May 1, 1912.)

ERROR to the District Court for Cochise County to review a judgment in plaintiff's favor in an action for divorce. Reversed.

The facts are stated in the opinion.

Messrs. Pickett & Pickett and Morrow & Morrow for plaintiff in error.

Note. — The right of the wife to acquire separate domicile for the purposes of a divorce suit by her is considered in the notes in 59 L.R.A. 146, and 38 L.R.A. (N.S.) 297. That note, however, does not deal with the question whether, upon the particular facts disclosed as to residence and intention, she 40 L.R.A. (N.S.)

Mr. O. Gibson, for defendant in error:

The wife may acquire a separate domicile whenever it is necessary or proper that she should do so, and proceedings for a divorce may be instituted at that place where the wife has her domicile.

Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604; *Dutcher v. Dutcher*, 39 Wis. 659; *Ditson v. Ditson*, 4 R. I. 87; *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372; *Payson v. Payson*, 34 N. H. 518; *Hopkins v. Hopkins*, 35 N. H. 474; *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549; *Yates v. Yates*, 13 N. J. Eq. 280; *Schonwald v. Schonwald*, 55 N. C. (2 Jones, Eq.) 367; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Hubbell v. Hubbell*, 3 Wis. 662, 62 Am. Dec. 702; *Phillips v. Phillips*, 22 Wis. 256; *Shafer v. Bushnell*, 24 Wis. 372; *Craven v. Craven*, 27 Wis. 418; *Tolen v. Tolen*, 2 Blackf. 407, 21 Am. Dec. 742; *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806; *Re Florence*, 64 Hun, 328, 7 N. Y. Supp. 578; *Rundle v. Van-Inuegan*, 9 N. Y. Civ. Proc. Rep. 330; *McGreew v. Mutual L. Ins. Co.* 84 Am. St. Rep. 27, note; *Vence v. Vence*, 15 How. Pr. 497; *Fisk v. Fisk*, 24 Utah, 333, 67 Pac. 1064; *Derby v. Derby*, 14 Ill. App. 645; *Hanberry v. Hanberry*, 29 Ala. 719.

Ross, J., delivered the opinion of the court:

This is an action for divorce based on the ground of desertion and failure to provide. The plaintiff and defendant were intermarried in the state of Georgia in 1868. They subsequently moved to Colorado, Texas, where they lived together for thirty-one years and until December 9, 1909. There were born to them three boys and three girls. The girls are dead, but the boys are living, two of them in Arizona and one in Texas. Prior to December 9th, one of the boys, who was in business in Cochise county, Arizona, wrote to an invalid brother, then in Colorado, Texas, asking him to come to Arizona and assist him in his business, and the invalid brother left Colorado, Texas, on December 9, 1909, for Arizona. His mother, the plaintiff, came with him. She and her invalid son arrived in Cochise county, Arizona, December 11, 1909. The invalid son needed the care and attention of his mother, and, as she testified, she came to Arizona to "keep house for him." Later in her testimony, in answer to a question as to her intention in coming to Arizona, she said:

has in fact acquired a separate domicile. Generally, as to the character of residence essential to give jurisdiction in divorce proceedings. see notes to *Bechtel v. Bechtel*, 12 L.R.A. (N.S.) 1100, and *Wipans v. Winans*, 28 L.R.A. (N.S.) 992.

"I came with the intention of remaining, of making some portion of Arizona my home; but I did not know what portion."

The plaintiff and defendant owned a home in Colorado, Texas, of six or seven rooms, comfortably furnished, and with all necessary outhouses and fences, and were occupying it together with one of their sons and his wife on December 9, 1909, and had occupied it for some time prior thereto. The plaintiff left their home for Arizona without any complaint against her husband or declaration of intention to reside permanently in Arizona; but, on the contrary, her husband accompanied her to the depot, and their parting was one of good feeling, at least to all outward appearances. From that time on, a desultory correspondence was carried on between them, largely concerning their property rights; but no mention was made by plaintiff of her intention to abandon the defendant or to permanently locate in Arizona, until December, 1910, or shortly before that date, when she wrote to defendant of her suit for divorce. The defendant resided at their home in Texas during this time. Under date of August 24, 1910, he wrote the plaintiff asking her to come home and bring their invalid son, suggesting that plaintiff and their son could be much more pleasantly and comfortably situated in Colorado than in Tombstone.

The evidence shows that the defendant, conformable to his station in life, supplied the ordinary comforts and necessary food and clothing for his home and its inmates during all the years up to December 9, 1909, and the plaintiff stated that the defendant "took care of her reasonably well." The defendant is a man of good habits. The plaintiff said her husband was abusive in his language to her a couple of times, and in these family quarrels she "would give it back to him," but not as "heavy as he did." For about one year prior to plaintiff's coming to Arizona the plaintiff and defendant, although living under the same roof and in their residence, by mutual consent, had not cohabited as husband and wife.

The lower court, among other things, found the facts to be: "(2) The court finds that plaintiff came to Arizona December 11, 1909, with the bona fide intention of making Arizona her permanent home. That pursuant to such intention she actually took up her residence on that date in Cochise county, Arizona, and ever since said date to the hearing of this suit, she has continuously so resided in Cochise county and made her home with her invalid son, and kept house for him, and is now residing in this county. That for more than one year prior to plaintiff's coming to Arizona, plaintiff and defendant had not cohabited as husband and

wife, but were living separate and apart, although they occupied the same residence. They had frequent quarrels and difficulties over money and property matters. . . .

(3) The court finds that the allegations in plaintiff's complaint of abandonment of plaintiff by the defendant have not been sustained by evidence." Then follows the judgment of the court dissolving the bonds of matrimony between the plaintiff and defendant.

While many errors are assigned by the plaintiff in error, but one will be considered by us. It is: "The court erred in entertaining jurisdiction of the subject-matter of the suit, because the plaintiff was not a bona fide resident of Arizona at the time this suit was filed, but, having without just cause deserted her husband, whose domicile was in Texas, her domicile was in the state of Texas."

Paragraph 3114 of the Revised Statutes of Arizona, 1901, provides: "No suit for divorce from the bonds of matrimony shall be maintained in the courts unless the plaintiff shall, at the time of filing his or her complaint, have been in actual bona fide resident of the territory for one year, and shall have resided in the county where the suit is filed six months, next preceding the filing of the suit." The question as to whether the plaintiff had acquired, at the time of filing her suit, the requisite and sufficient residence under our laws to entitle her to maintain her action, is squarely before us for our decision. Ordinarily an appellate court will not disturb, but will adopt, the findings of the trial court, where there is a conflict in the evidence. The rule is otherwise where there is a substantial failure of the evidence to support the findings. *Miller v. Miller*, 7 Ariz. 316, 64 Pac. 415.

In this case there is no material dispute as to the facts in evidence bearing upon the question of the residence of plaintiff, and it is the legal effect of those facts and circumstances that we are to ascertain. The expression "actual bona fide" resident, as used in paragraph 3114, supra, is very much the same language as that used in the statutes of other states concerning divorce, and we are therefore not without a construction of the expression by the highest courts of such states. In *Hamill v. Talbott*, 81 Mo. App. 215, the court said: "The statutory terms 'resident or residence,' as used in divorce statutes, contemplate, as we think, an actual residence with substantially the same attributes as are intended when the term 'domicil' is used. They do not mean the place where the defendant in fact resides for the time being. They mean a residence of a permanent and fixed character,—a

domicil,"—citing Bishop, on Marr. & Div. § 109; Pate v. Pate, 6 Mo. App. 49, and a number of cases from other states.

In *Hendricks v. Hendricks*, 72 Ala. 132, 133, the court said: "The statute, in express terms, prohibits the filing [of] a bill for divorce upon the ground of voluntary abandonment, unless it is alleged and proved that, for three years next before the filing of the bill, the complainant has been bona fide a resident of this state. Code of 1876, § 2691. The obvious purpose of the statute is the prohibition of divorces by the jurisdiction having authority to decree them, to those who, it is possible, may have transiently and temporarily transferred their residence to this state, or who, after the abandonment has occurred, may have transferred their actual domicil from this to another state,—the prevention of frauds upon the law by a temporary residence raised for the purpose of giving jurisdiction to the court."

In *Whitcomb v. Whitcomb*, 46 Iowa, 437-443, the court said: The statute "providing for six months' residence in the state in order to give jurisdiction in divorce proceedings means 'a legal residence, not an actual residing alone, but such a residence as that when a man leaves it temporarily, or on business, he has an intention of returning to, and which, when he has returned, becomes and is *de facto* and *de jure* his domicil, his residence. There must be a fixed habitation, with no intention of removing therefrom.'"

The same rule of construction has been adopted by the supreme courts of Massachusetts and Oklahoma. *Hanson v. Hanson*, 111 Mass. 158; *Beach v. Beach*, 4 Okla. 359, 46 Pac. 514.

We conclude that "an actual bona fide resident" means a person who is in Arizona to reside permanently, and who, at least for the time being, entertains no idea of having or seeking a permanent home elsewhere.

The general rule may be stated to be that "the law fixes the domicil of the wife by that of the husband, and denies to her during cohabitation the power of acquiring a domicil of her own, separate and apart from him." The later and better "cases, however, have broken away from the rule where the wife has been abandoned, or forced by brutal treatment [or, we add, for any cause sufficient in law as grounds for divorce] to leave the husband, when she is permitted to establish a domicil for herself." 14 Cyc. 846-848.

It remains for us to determine if, from the evidence, this case falls within the exceptions to the rule above stated. In this connection it may be noted that the trial court found that the allegations in plain-

tiff's complaint of abandonment of the plaintiff by defendant had not been sustained, and our examination of the evidence in the case satisfies us that this finding of the lower court is correct. The only evidence of ill treatment of plaintiff by the defendant was the testimony of the plaintiff wherein she stated that she and her husband at different times had had quarrels with each other. She particularizes as to these quarrels and points out only two occasions, in one of which she states that her husband had driven her span of horses, and upon his return home, because of the fatigued look and condition of the animals, she had upbraided her husband; that he resented the censure and then stated he would leave home; that he would not stand to be talked to in that way; that he did go away from home, but returned the following day and continued to live in their residence. Another time there was some trouble and passing of unpleasant words over some property rights. Notwithstanding these family troubles, the plaintiff and defendant continued to live under the same roof, and at their parting at Colorado, Texas, December 9, 1909, they were on friendly terms.

Cruelty of a kind sufficient to authorize the granting of a divorce has been variously defined by the courts; but nowhere, so far as we are advised, has an occasional and isolated disturbance of the family relations participated in by both of the spouses been considered sufficient to authorize the dissolution of the marital relation. There is no evidence of physical violence actually applied or threatened. Nor is there any evidence pretending to show any mental distress that is likely to destroy the life or health of the plaintiff. In *Beach v. Beach*, 4 Okla. 359, 389, 46 Pac. 514, 524, the court said: "With reference to acts of physical violence, the rule has always been that a reasonable apprehension of bodily hurt was sufficient; but where the conduct complained of operates primarily upon the mind, producing mental pain, it is not sufficient that there should be simply danger that such conduct, thus operating through the mental faculties, may produce injury to the physical system or bodily hurt, but it must be shown that such is in fact the effect, or, at least, that such effect may be reasonably apprehended as the result of the conduct."

Neither are sporadic quarrels or disagreements between the spouses, in which both of the parties are equally guilty, to be treated by the courts as constituting grounds for divorce. "The authorities are too numerous to require citation which hold that no single act operating mentally is sufficient to constitute cruelty justifying divorce, but that there must be a continuity

of such conduct, and many, if not the great majority of, authorities, hold that such conduct must be shown to have been induced by malevolence, hatred, or spite." 4 Okla. 390.

The conduct complained of by the plaintiff on the part of the defendant is not such excessive cruelty as would have entitled her to a divorce under the laws of the state of Texas. In *Scott v. Scott*, 61 Tex. 119, it is said by the court that the wife may have a divorce for words spoken by her husband which impeach her chastity, but that same court added: "In no other cases have mere words alone, unaccompanied by other acts of cruelty, been held sufficient excesses to justify a separation from the bonds of matrimony."

We conclude that the conduct complained of by the plaintiff was not such cruelty as would justify her in abandoning her home; and in contemplation of law her residence or domicile was fixed by that of her husband, and she did not acquire an actual bona fide residence in the territory of Arizona by reason of her presence therein during the year previous to the institution of her suit for divorce. The marriage relation being the question involved in an action of this kind, the only court vested with jurisdiction to hear and determine the matter was the court of their matrimonial home.

We therefore hold that the District Court of Cochise County was without jurisdiction to try the case. The case is remanded to the Superior Court of Cochise County, with directions that the same be dismissed for want of jurisdiction.

Franklin, Ch. J., and Cunningham, J., concur.

IOWA SUPREME COURT.

WILLIAM TACKABERRY COMPANY,
Appt.,

v.

SIoux CITY SERVICE COMPANY et al.

(— Iowa —, 132 N. W. 945.)

Joint tort feasons — common injury by independent acts — liability.

1. Several riparian owners are not jointly liable for injury to upper riparian property by water backed upon it because of

Note. — Character of liability of several persons whose independent wrongs of the same kind contribute to enhance degree or extent of injury sustained by plaintiff.

This note is supplemental to the note to *Day v. Louisville Coal & Coke Co.* 10 L.R.A.(N.S.) 167, and, so far as the question arises in suits for damages for the pol-

structures which, acting independently, they erect along and across the stream so as to diminish its capacity and cause the water to set back, to the injury of the upper proprietor.

On Petition for Rehearing.

2. A cause of action against two jointly for obstructing a stream cannot be joined with other causes against such persons and others severally for acts contributing to such obstruction.

(Weaver, J., dissents.)

(October 26, 1911.)

APPEAL by plaintiff from an order of the District Court for Woodbury County sustaining motions of the several defendants for the separation of an action brought to recover damages from flood water alleged to have been caused by obstructions placed in a certain creek by defendants. Affirmed.

Statement by Evans, J.:

This is an action for damages against eighteen defendants for unlawfully obstructing a stream, and thereby causing plaintiff's premises to be flooded to his injury. Several defendants filed motions wherein each asked that the alleged cause of action as to him be separated from that charged against the other defendants, on the ground that the plaintiff had improperly joined causes of action, and had improperly joined such moving party as a joint defendant with the other defendants. These motions were sustained, and the plaintiff appeals.

Messrs. M. L. Sears and Edwin J. Stason, for appellant:

Where an injury is the direct result of the concurring or contributing acts of two or more persons, such persons are jointly and severally liable for the injury, and an action will lie against all or any one of them for the damages sustained.

Cooley, Torts, *133; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *Bryant v. Bigelow Carpet Co.* 131 Mass. 491; *Campbell Turnp. Road Co. v. Maxfield*, 28 Ky. L. Rep. 1198, 91 S. W. 1135; *Coleman v. Bennett*, 111 Tenn. 705, 69 S. W. 734; *Holloway v. McIntosh*, 7 Kan. App. 34, 51 Pac. 963; *Hanrahan v. Coch-*

lution of streams, to the note to *Giboney Sand Bar Co. v. Pulaski Anthracite Coal Co.* 24 L.R.A.(N.S.) 1185, and, so far as it arises in suits to restrain such pollution, to the note to *Warren v. Parkhurst*, 6 L.R.A.(N.S.) 1149.

As to the connection with or participation in a nuisance essential to render one responsible therefor, see the note to *Adler v. Pruitt*, 32 L.R.A.(N.S.) 889.

ran, 12 App. Div. 91, 42 N. Y. Supp. 1031; Corey v. Havener, 182 Mass. 250, 65 N. E. 69; 21 Am. & Eng. Enc. Law, 2d ed. 496; Deering, Neg. § 395; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 10 L.R.A. 698, 23 Am. St. Rep. 688, 25 N. E. 799; McClellan v. St. Paul, M. & M. R. Co. 58 Minn. 104, 59 N. W. 978; 15 Enc. Pl. & Pr. 557, 559; Cuddy v. Horn, 46 Mich. 596, 41 Am. Rep. 178, 10 N. W. 32; Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744.

A cause of action for damages for maintaining a nuisance in the form of an obstruction to a stream accrues, not when the obstruction is placed in the stream, but when the injury is sustained.

Van Orsdol v. Burlington, C. R. & N. R.

Following the scope of the earlier note to Day v. Louisville Coal & Coke Co., this note relates to cases where the wrong of each person, independently of that of another tortfeasor, would have caused some injury, and it does not aim to include cases where, without the torts of two or more persons, no injury at all would have resulted; but some cases of this class are referred to in illustration.

Beyond its scope are cases where parties act in concert or are engaged in the same enterprise, or where, while not acting in concert, they purpose the same general result, as the manufacturer and seller of a noxious article, or the owner and the hirer of an unseaworthy vessel. Thus, the question of joining master and servant, landlord and tenant, principal and agent, etc., is in general excluded.

While the scope of this note does not permit of a general discussion upon the subject of the joinder of tortfeasors, it may be permitted here briefly to suggest to the reader one or two matters for his consideration.

By the weight of authority, and speaking of actions at law as distinguished from equity, independent tortfeasors, the act of each of whom alone would have caused some damage, are not liable jointly, but each is liable severally only for the proportion of the damage caused by him. As may be seen in the earlier note, a different view prevails in two or three jurisdictions.

But where the act of each independent tortfeasor would by itself have been harmless to the plaintiff, but from the total of these acts damage results to him, are the tortfeasors liable jointly or severally? All the authorities agree that in such case they are often liable both jointly and severally in certain cases of negligence. It will be seen that in WILLIAM TACKABERRY CO. v. SIOUX CITY SERVICE CO., we are left in doubt whether or not the court considered that the acts of all the tortfeasors were essential in producing the injury. Some of the courts have sought, in this connection, to separate wilful torts from negligence. Thus, it is stated in some of the cases that wilful torts

Co. 56 Iowa, 470, 9 N. W. 379; Miller v. Keokuk & D. M. R. Co. 63 Iowa, 680, 16 N. W. 567; Haisch v. Keokuk & D. M. R. Co. 71 Iowa, 606, 33 N. W. 126; Sullens v. Chicago, R. I. & P. R. Co. 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545; Hunt v. Iowa C. R. Co. 86 Iowa, 15, 41 Am. St. Rep. 473, 52 N. W. 668; Innis v. Cedar Rapids, I. F. & N. W. R. Co. 76 Iowa, 165; 2 L.R.A. 282, 40 N. W. 701, 21 Am. & Eng. Enc. Law, 2d ed. 724; Frankle v. Jackson, 30 Fed. 398; Leroy v. Springfield, 81 Ill. 114; Joseph Schlitz Brewing Co. v. Compton, 142 Ill. 511, 18 L.R.A. 390, 34 Am. St. Rep. 92, 32 N. E. 693; Over v. Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883; Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792; Harvey v. Mason City & Ft.

are to be distinguished from negligence in that there must be co-operation to hold the perpetrators of a wilful tort jointly liable therefor, while co-operation is not necessarily requisite in negligence. See Schafer v. Ostmann, 148 Mo. App. 644, 129 S. W. 63 (assault and battery); Barton v. Barton, 119 Mo. App. 507, 94 S. W. 574 (alienation of spouse's affections), followed in Heisler v. Heisler, 151 Iowa, 503, 131 N. W. 676 (also a suit for alienation of spouse's affections). But no such distinction seems to have been in the mind of the court in the slander case of Green v. Davies, *infra*, nor indeed in the TACKABERRY CASE, the circumstances of which may be taken as an illustration of a preliminary difficulty which would arise in carrying out such a doctrine, to wit, the solving of the question whether the placing of obstructions to the stream, for example, was a wilful tort or a negligent one.

It would seem at least doubtful whether there is soundness in any such distinction. If we go to the negligence cases which hold independent tortfeasors jointly liable, it will be seen that in general they are cases in which, without the negligence of all the tortfeasors, there would have been no injury. Coming back to the cases of wilful torts, it is seen that in many, if not in most, of the cases where it has been held that independent tortfeasors without co-operation are not jointly liable, there would have been some injury from the tort of each. And while this may not have been so in the foregoing cases on assault and alienation of affections, and in a number of the cases cited below, they are not convincing upon the question. Nor is the possibility of contribution in negligence a sufficient reason for greater tenderness towards the wilful wrongdoer than towards the merely negligent.

Two independent polluters of a river, the acts of each of whom by themselves would be injurious to their lower neighbor, are by most courts held severally, but not jointly, liable. Suppose that each of two upper proprietors has a little brook on his land flowing into a river, and has dammed the brook and made a pond, and the dams are

D. R. Co. 129 Iowa, 465, 3 L.R.A.(N.S.) 973, 113 Am. St. Rep. 483, 105 N. W. 958; Day v. Louisville Coal & Coke Co. 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 53 S. E. 776.

By a statute the unlawful diversion of a stream is declared to be a public nuisance, and persons who, by their several acts, maintain a public nuisance, are jointly and severally liable for such damages as are the direct consequence of such unlawful acts.

Waterloo v. Waterloo, C. F. & N. R. Co. 149 Iowa, 129, 125 N. W. 819; West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879; South Bend Mfg. Co. v. Liphart, 12 Ind. App. 185, 39 N. E. 908; Valparaiso v. Moffitt, 12 Ind. App. 250, 54

Am. St. Rep. 522, 39 N. E. 909; Simmons v. Everson, 124 N. Y. 319, 21 Am. St. Rep. 676, 26 N. E. 911.

Where parties severally place obstructions in a stream, whether they act in concert or not, and even though the act of each might alone cause no damage, yet when the acts unite in effect and cause an overflow and an injury to one not a riparian owner, they are jointly and severally liable for maintaining a nuisance, and for the damages they occasion private property.

Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Joyce, Nuisances, § 474; People v. Gold Run Ditch & Min. Co. 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1162; Simmons v. Everson, 124 N. Y. 319, 21 Am. St. Rep. 676, 26 N. E. 911; West Muncie

swept away by a storm, owing to negligence in their construction, and that the breaking of each dam alone would have been injurious to their neighbor below. It is conceived that here, as in the wilful tort, most of the courts would hold the tortfeasors liable severally, but not jointly. Perhaps the *crux* here in each case is that the torts of all were not required to effect damage. In Blair v. Deakin, *infra*, which was a suit in equity, so that the point was not decided, Kay, J., suggested a case which is particularly interesting in this connection. He supposed that one proprietor cast into a stream a chemical which by itself was harmless and caused no bad effect upon the water, and that another proprietor likewise cast in another chemical harmless in itself, but that the two chemicals in combination produced a third substance which poisoned the water. An important case in this connection is Boston & A. R. Co. v. Shanly, 107 Mass. 568, where, on orders of a certain third party, each of two independent manufacturers, each ignorant of the acts of the other, sent to a common carrier for transportation a different explosive, which two explosives, while to some extent dangerous in themselves, were it seems particularly so in combination, and an explosion of them occurred, and the manufacturers were held jointly liable to the carrier therefor.

There is another unsatisfactory doctrine that an act several when committed cannot be made joint because of consequences which follow it in connection with similar acts of others. If this doctrine is limited to cases of wilful tort, to the exclusion of cases of negligence, is it again because in negligence it is not so important to the defendant that he escape the total liability, as he may possibly have contribution? But it will be seen that in the TACKABERRY CASE this doctrine is referred to as if in force in negligence cases also; but the court does not make it clear why such a doctrine does not apply in its illustration of the passenger injured in a collision due to the negligence of his carrier and of another party. As heretofore stated, the matters just referred to relate to actions at law. In suits

in equity there is greater liberality in the joinder of independent tortfeasors.

Actions for damages.

As heretofore stated, it is the rule in most jurisdictions that independent tortfeasors, the act of each of whom alone would have caused some damage, are liable only severally, and only for the proportion of the damage caused by him. And that the acts of all may be required to cause any damage seems to be considered as immaterial in the cases of Willard v. Red Bank Oil Co.; Equitable Powder Mfg. Co. v. Cleveland; Sun Co. v. Wyatt; and Hinds v. Barrie, — *infra*.

In Southern Salt Co. v. Roberson, — Tex. Civ. App. —, 97 S. W. 107, where, by reason of odors, vapors, smoke, and dust, a landowner suffered damages from the operation of a salt works, and possibly also by reason of the operation of a railroad spur extending to the salt works, it was held that the liability of the owner of the salt works was limited to the damages caused by such works.

In McFadden v. Missouri, K. & T. R. Co. 41 Tex. Civ. App. 350, 92 S. W. 989, where the plaintiff sued the defendant for creating ponds on its right of way, which were a nuisance, the court said: "We think the charge substantially correct wherein the jury are told, in effect, that if the damages suffered by appellant, if any, were caused by stagnant water or poisonous gases or odors, or that the mosquitoes complained of were caused proximately by ponds of water, if there were any, that they were not upon the right of way of the railway company, it would not be liable therefor. It does not appear, as we understand the evidence, that the railway company was in any way responsible for the existence of any such ponds. If, as a matter of fact, there were ponds of water near appellant's residence, not on the railway company's right of way, to the creation and existence of which no act of the company contributed, then the company would not be responsi-

Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879; Marine Ins. Co. v. St. Louis, I. M. & S. R. Co. 41 Fed. 643; Harley v. Merrill Brick Co. 83 Iowa, 73, 48 N. W. 1000; Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603; Waterloo v. Waterloo, C. F. & N. R. Co. 149 Iowa, 129, 125 N. W. 819; Hillman v. Newton, 57 Cal. 56; Carmichael v. Texarkana, 58 L.R.A. 911, 54 C. C. A. 179, 116 Fed. 845; South Bend Mfg. Co. v. Liphart, 12 Ind. App. 185, 39 N. E. 908; Valparaiso v. Moffitt, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909; Bailey v. Chicago, St. P. M. & O. R. Co. 25 S. D. 200, 126 N. W. 268; Campbell Turnp. Road Co. v. Maxfield, 28 Ky. L. Rep. 1198, 91 S. W. 1136; Coleman v. Bennett, 111 Tenn. 705, 69 S. W. 734; Kansas City v. Slang-

strom, 53 Kan. 431, 36 Pac. 706; Slater v. Mersereau, 64 N. Y. 138; Klauder v. McGrath, 35 Pa. 128, 78 Am. Dec. 329; Bryant v. Bigelow Carpet Co. 131 Mass. 491; Bowman v. Humphrey, 132 Iowa, 234, 6 L.R.A.(N.S.) 1111, 109 N. W. 714, 11 Ann. Cas. 131, 124 Iowa, 744, 100 N. W. 854; Day v. Louisville Coal & Coke Co. 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 53 S. E. 776; Cooley, Torts, *133.

Messrs. J. L. Kennedy and J. P. Shoup, for appellees:

To hold one of two or more parties responsible for the entire damages caused by the construction and maintenance of a nuisance, or for damage by obstructing the water, there must be concert of action.

Little Schuylkill Nav. R. & Coal Co. v.

ble for any injury resulting to appellant therefrom. Or, if such ponds existed and constituted a nuisance, emitting and diffusing over and about appellant's premises obnoxious and poisonous gases and smells, and a nuisance of like character existed at the same time through the act of the railway company on its right of way, and the two combined resulted in the injuries complained of, said company would not be relieved of liability, but would be liable only for the portion of the injuries which resulted from the nuisance created by it."

In *Sadler v. Great Western R. Co.* [1896] A. C. 450, affirming the decision cited in the TACKABERRY CASE, the plaintiff brought an action against two railway companies, alleging that his premises were between those of the respective defendants, which used their premises respectively as parcel offices; that in carrying on these businesses, each of the companies caused many carts and vans to assemble for long periods on the public highway in front of the appellant's premises, obstructing the highway and footway and causing inconvenience and peril to the public, and a special inconvenience and annoyance to the appellant as occupier of his premises, to which access was thus unreasonably obstructed, and that "further, each of the defendant companies frequently causes or permits access to the plaintiff's premises to be blocked by its vans and carts in manner aforesaid, at the same time while access to such premises is already blocked by vans and carts on the other side of his premises by the other defendant company, in manner aforesaid, and by their respective combined acts the defendants thus prevent all access to the plaintiff's premises by vehicle or cycle, and also cause special inconvenience and peril to the plaintiff and his servants and customers on the footway." The court held that the case could proceed against only one defendant, and that only separate torts were alleged. Halsbury, L. C., was of the opinion that if a joint tort were alleged in the second paragraph, a joint cause could not be joined with several causes of action.

In *Thompson v. London County Council* 40 L.R.A.(N.S.)

[1899] 1 Q. B. 840, the lessees and occupiers of premises alleged that the defendants, in excavating the earth of the street adjoining the premises and pumping water out of the excavation, negligently abstracted subsoil water and subsoil supporting the premises, which thereby were damaged. The defendants denied the alleged negligence, and that the injuries to the premises were caused by the matters complained of. Their statement of defense alleged, among other things, that the defendants would, if necessary, contend that the injuries were caused wholly or in part by the Central London Railway, which was excavating a large shaft for one of its stations close to the premises, and by the negligence or default of the New River Company in leaving its water main at a point in front of the premises unstopped, or insufficiently and improperly stopped. The court, in reversing an order permitting the plaintiff to join the New River Company as an additional defendant, said: "The plaintiffs bring an action against the London county council for letting down their house. The London county council by their defense deny that they let down the house, and assert that the persons who let it down were the New River Company, by not looking after their main, so that the land underneath the house got into a moist state, which was the cause of the house falling down. The plaintiffs thereupon desire to join the New River Company as codefendants. . . . To allow that to be done would be to allow the joinder of a separate cause of action. It is all very well to say that whatever we do the plaintiffs get the same damages. That is not the question; the question is, who is the tortfeasor?"

In *Millard v. Miller*, 39 Colo. 103, 88 Pac. 845, where a landlord, having leased premises to a plaintiff, sold one part of the premises to one purchaser, and another part to another, it seems to be held that the tenant could not join the two purchasers for depriving him severally of the pasturage on the lands severally bought by them. The suit was against one purchaser and another person, probably the agent of the other pur-

Richards, 57 Pa. 142, 98 Am. Dec. 209, 10 Mor. Min. Rep. 661; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Mansfield v. Bristol, 76 Ohio St. 270, 10 L.R.A.(N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 Ann. Cas. 767; Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; Miller v. Highland Ditch Co. 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; Ames v. Dorset Marble Co. 64 Vt. 10, 23 Atl. 857; Martinowsky v. Hannibal, 35 Mo. App. 70; Lull v. Fox & W. Improv. Co. 19 Wis. 100; Sellick v. Hall, 47 Conn. 260; Gould, Waters, 3d ed. § 222; 30 Cyc. 129, 131; Bowman v. Humphrey, 124 Iowa, 744, 100 N. W. 854, 132 Iowa, 234, 6 L.R.A.(N.S.) 1111, 109 N. W. 714, 11 Ann. Cas. 131.

chaser, though the report is obscure on this point.

It may be noted that the authorities are not agreed as to whether there can be a joinder of more than one person in slander.

In *Pope v. Hawtrey*, 85 L. T. N. S. 263, 17 Times L. R. 717, where one of the defendants, who was a manager of a theater, said to one of the actors, concerning the plaintiff, who was another actor: "I won't have him in my theater at any price," and the other defendant said to the plaintiff afterwards in the hearing of a third person: "He (meaning the other defendant) won't have you in his theater at any price," it was held that actions for these two statements could not be joined in one action, although it was also charged that there was a conspiracy between the two defendants to dismiss the plaintiff from his employment as actor.

But in *Green v. Davies*, 182 N. Y. 499, 75 N. E. 536, 3 Ann. Cas. 310, the court, in holding that an action for slander could be maintained against more than one person, said: "As to the second objection to the complaint, that an action for slander can be maintained against one person only, we are of opinion that it is not well founded. There is no decision in this state on the point, and though *dicta* are to be found in the old text-books and in some of the English cases, which support the appellants' contention, the opinion of modern writers is against it. *Odgers, Libel & Slander*, p. 370. It is difficult to see on principle why there should be any such rule. The reason given by the old authorities, that a slander can be the utterance of but a single tongue, is not conclusive. Granting that only one person can speak the slander, still other persons may hire or procure him to utter it. In the case of other torts, such persons and the actual perpetrator of the act are joint tortfeasors. Thus, a principal and agent may be jointly sued for the negligence of the latter. *Phelps v. Wait*, 30 N. Y. 78. There is no reason for any different rule in a slander case. We do not mean to suggest that the repetition by one person of a slander uttered by

Messrs. Fred W. Sargent, Shull, Farnsworth, & Sammis, F. E. Gill, James C. Davis, Wright & Sargent, Ferris & Iddings, Lewis S. Haslam, Henderson & Fribourg, E. A. Burgess, C. K. Williams, George H. Bliven, and George M. Pardoe also for appellees.

Evans, J., delivered the opinion of the court:

The petition is lengthy, and we will not set it out verbatim. The following statement from appellant's argument is a sufficient abstract thereof:

"The action is one at law, brought by the plaintiff to recover damages sustained by it on account of the flooding of the basement of its wholesale house, filled with perishable

another is any part of the original slander. On the contrary, they give rise to two distinct causes of action. But if the two slanders were uttered in pursuance of a common agreement between the parties that such slanders should be uttered, then each is jointly liable with the other for their utterance, and separate causes of action for slander may be joined in the same complaint, under § 484 of the Code."

—floods, pollution, or obstruction of streams.

In *Willard v. Red Bank Oil Co.* 151 Ill. App. 433, the plaintiff sued thirteen defendants who had oil lands and oil wells from 1 to 4 miles from him on higher lands, alleging that when the rains came, oil which had escaped and flowed upon their lands was brought down into a creek, and from the creek, by the overflow of it, upon the plaintiff's lands, and injured them greatly. The court, in holding that a verdict was properly directed for the defendants, said: "A person polluting a water course is liable in damages only for his own act, and not for that of any others who may contribute to the injury. If others have contributed, his deposit must be separated by means of the best proof the nature of the case affords, and his liability ascertained accordingly." 2 *Farnham, Waters*, 1716; *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566. We are of opinion that the acts of each of the defendants in allowing the escape of oil upon its own premises was separate and independent, and without any connection with the acts of others, and, being a several act when committed, it cannot be made joint because of the consequences which followed in connection with others who had done similar acts, and while it is true it is difficult or impracticable to separate the injury, that is no reason why one of the defendants should be liable as a joint tortfeasor (among whom there is no contribution), because of the consequences which followed the acts of

goods, the flood water coming from Perry creek, which it is alleged overflowed its banks because of obstructions placed in it by the defendants. The plaintiff alleges in its petition that Perry creek is a natural water course which has its source a considerable distance north of Sioux City, and flows in a regular, well-defined channel through a thickly settled portion of the residence and business section of the city. The stream, as it passes through the city, has a channel of from 50 to 100 feet in width, with well-defined banks from 15 to 20 feet in height. The plaintiff's wholesale house is in the wholesale and retail business district of the city, and about 500 feet west of the creek, near where it empties into the

Missouri river, and from 700 to 1,000 from and below the obstructions complained of.

"Prior to the 10th day of July, 1908, the defendant city constructed, and still maintains, a large iron bridge across Perry creek, at the junction of what is known as Fourth and West Third streets, constructed so low and short as to materially lessen the capacity of the stream, and materially prevent the waters from passing under the bridge, and in connection therewith constructed and maintains a closed cement apron to the south of the bridge, and joined with it in such manner as to prevent overflow water from flowing back into the channel of the stream; and prior to the said date the defendant Simmons Warehouse Company, without warrant or authority of

others who have not acted in concert with it."

In *Equitable Powder Mfg. Co. v. Cleveland, C. C. & St. L. R. Co.* 155 Ill. App. 265, affirmed in 246 Ill. 582, 92 N. E. 979, without passing upon the question, the plaintiff sued several railroads, each of which had one or more embankments or structures on which they crossed a stream near his premises, some of them more than once, and he claimed that these embankments impeded the flow of the stream, whereby his lands were flooded and damaged. The court said: "It is argued this is a case where 'appellant's loss flowed not from the combined result of each appellee's act, but was the result of the combined acts of appellees.' We cannot agree to this conclusion. The evidence shows that each of the appellees, in performing the acts complained of, acted separately for itself and independently of the others and without concert of action. There could be no loss result to appellant except as a result not from the combined acts, but from the separate and independent acts of appellees, which caused the loss claimed by appellant."

... It will be found that most if not all the cases where they [tortfeasors] have been held liable have been cases where no injury, and no part of the injury, would have resulted but for the act of the several defendants held to be liable."

In *Sun Co. v. Wyatt*, 48 Tex. Civ. App. 349, 107 S. W. 934, the plaintiff claimed that the defendants, each acting for itself, laid their pipe lines in the ditch alongside of Highland avenue in the city of Beaumont, on which plaintiff had his residence, and immediately in front of his premises; that the combined result of these acts obstructed the flow of the surface water through the ditch; that by reason of leakage, oil which was being conveyed through the pipe lines ran into the ditch, and after a rainfall, by the overflow of this water caused by the obstruction aforesaid, was carried by the water and deposited upon plaintiff's premises, causing him the damages claimed. The court, in holding that the petition was demurrable, 40 L.R.A. (N.S.)

said: "It does not appear from the allegations of the petition, that there was any joint or concurrent action on the part of plaintiffs in error. On the contrary, it appears that each of the corporations joined as defendants acted independently of the others in the laying of the pipe lines and in maintaining and operating the same,—each defendant laying its own pipe line and maintaining and operating the same without regard to, or connection with, either of the others. It is not contended by plaintiff that the defendants acted jointly in the laying of their pipe lines in the ditch, but that the combined result of their separate and independent acts was to obstruct the flow of water through the ditch, causing the consequential injury of which he complains, and that this authorized the joinder of all of them in this suit. . . . In the present and similar actions where the parties act separately and independently, with no concert of action and no common purpose, it would be manifestly unjust to make each liable for the entire injury, without regard to the extent to which its acts contributed to the general result."

In *Hinds v. Barrie*, 6 Ont. L. Rep. 656, where the plaintiff joined the town and an individual in an action for damages, and such other relief as she might be entitled to, for obstructing a water course, whereby driftwood and rubbish were thrown upon her land, the court, in holding that an action against the two defendants together could not be maintained, said: "I am obliged, however, to say that no joint cause of action is disclosed. An unlawful act is alleged against each defendant. It is not charged that these acts were done in concert, or that the defendants were jointly concerned in their commission. The town is charged with having increased the volume of water flowing into the water course, at the same time obstructing the latter and diminishing its capacity for carrying it away. Webb is also charged with having contracted the water course where it passes through his land, and it is charged that the natural effect of the combined acts of the defendants is to cause the water

law, and in violation of the statutes of Iowa, had constructed and was maintaining over the said Perry creek, and in the bed, bottom, and banks thereof, a solid piece of masonry known as a cement conduit, . . . of a size and capacity materially less than the size and capacity of the stream; that the said Simmons Warehouse Company, also in connection with the said conduit, and without warrant or authority of law, and in violation of the statutes of Iowa, constructed and was maintaining a solid cement apron from the top of the said conduit to the south edge of the bridge constructed by the city of Sioux City, and heretofore referred to; that the said cement apron was so constructed that water to the south of the said bridge could

not again enter the bed of said Perry creek, but was forced out of and away from the bed of said stream, and upon public and private property; that the said bridge . . . and the apron and conduit aforesaid were constructed under the supervision and co-operation of the defendant Simmons Warehouse Company and the defendant city of Sioux City, and has been so maintained and kept to the present time. Prior to the said date, the defendants Sioux City Service Company, the Chicago, Milwaukee, & St. Paul Railway Company, Chicago & Northwestern Railway Company, Great Northern Railway Company, and city of Sioux City had each built and were maintaining pile bridges in and over said creek at points both to the north and south of

flowing through the water course to become obstructed and to be dammed back upon, and to overflow, the plaintiff's land. 'Combined,' in this connection, the wrongful acts being independent of each other, means no more than 'concurrent' (*Sadler v. Great Western R. Co.* [1895] 2 Q. B. 688, at p. 694), and does not charge a joint cause of action (p. 693). Each of these acts, being wrongful, gives rise to a separate cause of action against each defendant, though their injurious result may be increased, or even sensibly caused, by the concurrence of both."

It seems probable that the court took the view that there was a distinction between wilful torts and negligence in *Goldstein v. Tunick*, 59 Misc. 516, 110 N. Y. Supp. 905, where the court below gave judgment for the defendant in an action by a man against his next door neighbor for flooding the alley between them by water from his roof, whence the water came into his basement, and where it was claimed by the defendant that the plaintiff's landlord was also guilty of negligence which caused part of the damage. The court seemed to be of the opinion that the defendant might be sued for the entire damage, although the plaintiff's landlord had contributed to it, and quoted from the opinion in *Slater v. Mersereau*, 64 N. Y. 138, this proposition: "Where separate acts of negligence of two parties are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this although, without fault on his part, the damages would have resulted from the act of the other." But this it seems was not necessary to the reversal of the judgment.

The separation of joint action from several actions is often a matter of great difficulty. In *Timms v. Vancouver*, 15 B. C. 336, where the plaintiff sued the defendant corporations,—one being a city, the other a railway company,—for damages to his land, whereby a water course on his land was obstructed or its capacity diminished by the city by its arrangement of its

drains, etc., and by the railroad by the erection of a building, the court, in declining to direct the plaintiff to elect which of the defendants he should proceed against, said: "If there was joint action by the two defendants in the laying out of a drainage system, and that system should prove to have been negligently devised or carried out (with, of course, resultant damage to riparian owners), the defendants would in my opinion be joint tortfeasors, in which case they would be properly joined in one action. That being a possible construction of this statement of claim, this motion must be dismissed."

In *Pickerrill v. Louisville*, 125 Ky. 213, 100 S. W. 873, it was alleged that the defendant city by its manner of drainage, and the two defendant railroad companies by their constructions, threw water and filth upon the plaintiff's lot, causing him injury by the joint and several negligence of the defendants; that the two railroad companies were jointly interested in certain of these constructions, and that their wrongful acts were committed and done with the knowledge and approval of the defendant city. The court said: "There was no misjoinder of parties or of actions. According to the allegations of the petition, and much of appellant's testimony, all the appellees were wrongdoers, as by their joint and several acts and conduct appellant's property was injured. If the averments of the petition are true, and appellant's testimony can be relied on, all contributed in some material measure to the injuries complained of. The injuries resulted from the diversion of the water from its natural course, and the accumulation of an unusual quantity of it upon appellant's lot. If this was caused in part by the acts of each of the appellees, and the entire volume of water produced by their joint and concurring negligence inflicted the injury, unquestionably it was inflicted by the combined or joint action of all three of them; therefore they are jointly, as well as severally, liable." See also, as to pollution of stream, cases cited in note in 24 L.R.A. (N.S.) 1185.

plaintiff's place of business, and in building and maintaining the said bridges they had driven several hundred large piles in the banks and bed of the stream, and had built piers therein, and each is still maintaining the said bridges, piles, and piers. Prior to the said date, the other defendants had each constructed buildings between Fourth and Fifth streets on the banks and bed of the creek, and in the construction thereof they had deposited large quantities of rock, stone, and cement adjacent to their buildings, thus lessening the carrying capacity of the stream.

"The plaintiff alleges that the said bridges, buildings, and other structures were so improperly, unskilfully, and negligently constructed and placed in the chan-

nel of the creek, that no adequate space was left for the free and unobstructed passage of the water, and, through the narrowing and restricting of the channel of the creek in this manner, and by the catching and lodgment of great quantities of *débris* and drift by the piles, piers, girders, walls, and projections of said bridges, conduit, buildings, and other structures, caused the overflow of the waters of the creek and the flooding of the plaintiff's premises. The plaintiff further alleges in its petition that, had the stream been kept free from obstructions, its waters would have remained in the channel of the stream, and would have flowed into the Missouri river without damage to the plaintiff; that the defendants knew or should have known of the obstruc-

—damages by animals of different owners.

In *Nobre v. Wright*, 98 Minn. 477, 108 N. W. 865, 8 Ann. Cas. 1071, where the plaintiff brought an action for sheep killed by defendants' dogs, the court said: "The complaint alleged that the two dogs 'were owned and in the possession of the defendants herein,' but the evidence very clearly showed that one dog belonged to the defendant George Wright, and the other to the defendant William Wright. The common-law rule is that, where domestic animals of different owners unite in committing an injury, the wrong is not the joint wrong of the owners, but each owner is liable separately for the damages done by his own animal. Separate owners of several animals are not jointly liable for damages done by them all at the same time."

Where two dogs attacked and killed sheep, in an action against the owner of one of the dogs, there was evidence that he killed one of the sheep, and the court gave judgment for the value of that sheep and for the value of one half of the other sheep killed; and this was affirmed by an evenly divided court. *Williams v. Woodworth*, 32 N. S. 271.

So, the owner of trespassing sheep may show that the cattle of the plaintiff and others were grazing on the land at the time of the alleged trespass, and did part of the damage complained of, as he is liable only for the mischief done by his sheep, and not for that done by the animals of others. *Pacific Livestock Co. v. Murray*, 45 Or. 103, 76 Pac. 1079.

In *Wood v. Snider*, 187 N. Y. 28, 12 L.R.A.(N.S.) 912, 79 N. E. 858, where a drove of cattle owned by several persons in severalty, and attended by their owners and others, trespassed on the plaintiff's lands, and the evidence justified a finding that they all did equal damage, it was held that the defendant, the owner of part of the cattle, was liable for such part of the whole damage as his cattle bore to all the cattle.

But where there is concert of action the rule is otherwise. In *Martin v. Farrell*, 66 40 L.R.A.(N.S.)

App. Div. 177, 72 N. Y. Supp. 934, it appeared that the two defendants and two other persons coming back from horse riding found that the stable man of the defendants was away, and thereupon the horses of the Farrells and of one of the other riders were put in a lot where the plaintiff's horse was rightfully pasturing, the locked gate of which was opened by drawing the staple. Later the plaintiff's horse was found to be injured. The court said: "The three horses were heard in the lots with the plaintiff's horse during the night, and they were seen there during the early part of the following day. One of the three horses was seen to kick at the forward part of the plaintiff's horse, and the plaintiff's horse started away limping on the left foreleg. Subsequently, the plaintiff found his horse in the lot with an injury on the left foreleg. . . . This action is brought against the defendants for damages to the plaintiff's horse. It is an action for a wrong. The wrong consists in putting the horses into the field where plaintiff's horse was rightfully pasturing. It was a single wrongful act, although several were concerned therein. This case does not depend upon the ownership of the horses, nor as to whether they were known to be vicious. The rule that each person is liable only for damages done by his own animal does not apply. If the injury to the plaintiff's horse was one fairly to have been anticipated from the wrongful act of turning the three horses into the lots, then all persons participating in the wrong were joint wrongdoers." Judgment against one of the defendants was affirmed, but judgment against the other defendant was reversed by lack of evidence that he took part in turning the horses into the lot.

In an action for trespass on lands by the defendant's cattle, where the facts are not reported so that the exact nature of the situation can appear, the court said: "The defendants were in the joint, or at least common, occupation of an adjoining cattle range, and each of them owned animals going to make up a herd that pastured the range and that committed the trespass and

tions which were being placed in the stream, and maintained there, and that they would render the carrying capacity of the creek insufficient; that they would divert the waters of the stream, and cause it to overflow, to the injury of the plaintiff and others; that the construction and maintenance of the said obstructions constituted an unlawful obstruction of the creek, and the obstructions united in their effect and results and caused the diversion of the waters of the creek, and constituted a public and common nuisance, in violation of both public and private rights; and that the defendants, by the exercise of reasonable care and diligence, should have known that the structures would combine and unite in obstructing the stream, and would

constitute a public nuisance, in violation of both public and private rights. By the flooding of the plaintiff's premises, it was damaged, so it alleges, in the sum of \$20,000, for which it demands judgment, and that the obstruction maintained by the defendants, and each of them, be adjudged to constitute nuisances, and an order be made directing the abatement thereof."

The principal question presented under the motions of the moving defendants is whether, upon the showing of the petition, a joint liability of the defendants is made to appear. If the facts pleaded show only a several liability, and not a joint liability, then the motions were properly sustained. The appellant contends for the application of the rule that, where an injury is caused

inflicted the damage complained of, and for which the recovery was had." It was held that the defendants were jointly liable. *Wilson v. White*, 77 Neb. 351, 124 Am. St. Rep. 852, 109 N. W. 367.

Suits to restrain tortfeasors.

See also note in 6 L.R.A.(N.S.) 1149.

As heretofore stated, the courts show greater liberality in allowing the joining of tortfeasors in suits to restrain their wrongful acts, than in actions for damages.

In *State ex rel. Federal Lead Co. v. Dearing*, — Mo. —, 148 S. W. 618, it appears that an action was begun by the owner of land upon a river, to enjoin the relator and several other parties from polluting the waters of the stream by discharging into it certain substances from their various mines and mills, and that the relator brought a writ of prohibition to prevent the judge from going on with the case. In dismissing the writ, the court said: "It does not appear from the petition that whatever was done by the several defendants toward polluting the stream was done independently. In other words, each defendant has its own separate milling plant, and the refuse from them is placed into the stream by the several defendants in the ordinary and usual manner of doing their respective work. One defendant had nothing to do with the work and doings of the other. But, on the other hand, the petition charges that the combined wrongful doings of all defendants has produced the present condition of the river, and has therefore produced the nuisance sought to be abated."

There is a marked distinction between actions in equity and actions at law in cases of this character. If the plaintiff, Steinmetz, had sued these five defendants for damages resulting to his property by reason of their alleged separate acts, the cause of action stated would be a separable cause of action, because each defendant would only be liable for such proportionate part of the whole damage as it had done by reason of its individual wrongful act. Better stated, each defendant would only

be liable to plaintiff for such damage as its individual wrongful acts had occasioned. But in equity where the purpose of the action is to abate the nuisance which produces the injury, and thereby restore the stream, the rule as to joinder of parties is different. In such cases each party contributing in any way to produce the pollution of the stream is a proper party defendant, and no separable cause of action stated. In a note to the case of *Warren v. Parkhurst*, 6 L.R.A.(N.S.) 1149, the learned annotator has clearly drawn the distinction." (The court then quotes the note.)

In *Madison v. Ducktown Sulphur, Copper & Iron Co.* 113 Tenn. 331, 83 S. W. 658, where several plaintiffs sued two defendants for an injunction based on the ground of nuisance, in that, in the operation of their plant in the course of reducing copper ore, large volumes of smoke were emitted which descended upon the surrounding lands and injured trees and crops, and rendered the homes of the complainants less comfortable and their lands less profitable than before, the court said: "The rule is that two or more persons may unite in a bill to enjoin a nuisance, although their lands are separate and distinct from each other, where it appears that the lands of all are affected in substantially the same way by the nuisance complained of. . . . So, when several persons, acting independently, combine to produce a nuisance, such persons may be joined as defendants in a suit for injunctive relief. . . . But there can be joinder neither of complainants nor of defendants for the purpose of recovering damages for the injuries caused by such nuisance." But an injunction was denied conditionally.

In *Wood v. Sutcliffe*, 16 Jur. 75, 2 Sim. N. S. 163, 21 L. J. Ch. N. S. 253, the court was of the opinion that it would be no answer to a claim for an injunction for polluting the waters of a stream, that other parties also were polluting it.

So, in *Crossley v. Lightowler*, L. R. 3 Eq. 279, the court, while it is stated that the point was not necessary for the deci-

to a third person by the concurring wrongful acts of others, each and all such wrongdoers are severally and jointly liable for the injury thus inflicted. As to the general statement of this rule, there is no difficulty. All authorities concur in it. But in the application of this rule to the concrete case difficulty has often been encountered, and diversity of opinion has arisen. Such is the form of the controversy here. It is not claimed in the petition that there was any concert of action in the erection of the alleged nuisances by the defendants, nor that there was any concurrence of action in either place or time. Some of the defendants built bridges across the stream at different points thereon. Others built structures upon its banks, and encroached

upon its capacity. But each acted independently and for himself alone. Because of the lack of concert, appellees contend that each is liable only for his own wrong and the consequences thereof. The appellant contends that the rule referred to may apply even though there be no prior concert of action. A familiar illustration of such an application is a case wherein a collision may occur between trains owned and operated independently, and as a result of the independent and separate negligence of the persons in control of the respective trains. In such a case, both parties are held liable for the injuries resulting from the collision. Again, the application of the rule has been denied in many cases where concurring negligences have con-

sion under the facts, was of the opinion that it was no answer to an application to enjoin a man from polluting a stream that others were also polluting the stream, and that an injunction against him would not make the water clear.

In *Cowan v. Buccleuch*, L. R. 2 App. Cas. 344, it was held that it was proper practice under the Scotch law to join in one action for an injunction independent polluters of a river.

In *Blair v. Deakin*, 57 L. T. N. S. 522, in granting an injunction against a manufacturer for polluting a stream, the court considered that it was shown that the defendants' acts alone were polluting the water, but discussed the question whether the action would lie if the pollution caused by the defendants was by itself not material, and said: "Given, first, the fact that the amount of pollution brought in by the defendants is such that by itself it would not sufficiently injure this water as to make it unfit for bleaching at the works or either of the plaintiffs; but given also the fact that the amount poured in by the defendants, together with the amount poured in by their father at his works, is enough to produce the condition of things which actually exists,—namely, that the water at the plaintiffs' works is unfit for bleaching,—now, is it the law that, supposing it is impossible to say that any one of those persons pours into this stream foul matter enough by itself to create a nuisance, but that what they all pour in together does create a nuisance, that the plaintiffs cannot sue any one of them? If that were so, I suppose a plaintiff who lost that which is his natural right—namely, to have the water of the stream pass in its original pure condition—might lose that right entirely by the combined action of a number of manufactures above him. They might all laugh at him and say, 'You cannot sue any one of us because you cannot prove that what each one of us does would of itself be enough to cause you damage.' All I can observe is that, in my opinion, it would be a most unjust law if there were such a law." He said, further, if the ri-

parian owner finds that the bad condition "was produced by the combined acts of a number of riparian proprietors above him, is he without remedy? Has he no remedy because each one of them can say: 'It was not my doing. I only contributed a part, and the part I did contribute was not enough to do you damage?' I put another illustration during the course of the argument which has not been answered to my satisfaction. Suppose that there were only two polluting sources; suppose that one of two manufacturers sent in a particular chemical which of itself would do no kind of harm, and then that the other below him sent in another chemical which of itself would do no kind of harm; suppose that the combined effect of those two chemicals—and the thing is quite possible—would be such that the stream would become poisoned and quite unusable for any domestic or manufacturing use, would neither of those manufacturers be liable? I have no hesitation in saying that in my opinion a man so injured has distinctly a right to take the several persons who injure him in detail and to say, 'I am suffering from the combined acts of all of you; if I can prove that each one of you contributes to that result which is damaging me, I have a right to sue, and a right to ask the court to prevent each of you from sending in his contribution to that which in the aggregate does me damage.'"

In *Sammons v. Gloversville*, decided in 1901, 34 Misc. 459, 70 N. Y. Supp. 284, affirmed in 67 App. Div. 628, 74 N. Y. Supp. 1145, 175 N. Y. 346, 67 N. E. 622, it was held that where a city had injured the plaintiff by throwing its sewer into a stream, he was entitled to injunctive relief against the city, although there were tanneries and another city which also contributed to the pollution of the water, as he was not required to sue them all at once; but the judgment was framed in such a way as to give the city an opportunity to apply to the legislature for leave to condemn the land before it became operative. Compare *Whalen v. Union Bag & Paper Co. infra*.

tributed to an injury without concert of action on the part of the wrongdoers. The most frequent illustration of this holding is to be found in cases of nuisance wherein different parties have independently contributed to the pollution of the atmosphere, or to the pollution of a stream by sewage or otherwise, or to the obstruction of a stream.

Appellant introduces the discussion at this point with the following quotation from Cooley on Torts, *153: "Where several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow, it is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all. To require the party injured to ascertain and point out how much of the injury was done by one person and how much by another, or what share of responsibility is fairly attributable to each as between themselves, and to leave this to be apportioned among them by the jury according to the mischief found to have been done by each, would, in many cases, be equivalent to a practical denial of justice. The law does not require this, but, on the other hand, permits the party injured to treat all concerned in the injury as constituting together one party, by their joint co-operation accomplishing certain injurious results, and liable to respond to him in a gross sum as damages."

As against this, the appellees quote the same authority, 3d ed. *166: "But where different proprietors on a stream, each acting independently and for his own purposes, conduct filth or refuse into the stream from their respective estates, they are held not to be jointly liable. So, where

several proprietors drain their premises into the same ditch or water way, and the combined waters flood or otherwise damage a lower proprietor. But it would be otherwise, if there was some concert of action, as if they joined in constructing or maintaining the ditch. The same rule applies to the pollution of the atmosphere as to the pollution of a stream. And where different factories or works owned and carried on by different proprietors each discharge volumes of smoke and gases into the atmosphere, which mingle and spread over the surrounding territory, injuring vegetation and affecting the health and comfort of those who live in the vicinity, each proprietor is liable only for the proportion of the damage caused by him, and not jointly and severally for the entire damage."

Our own cases are committed to the doctrine that a party who wrongfully pollutes the atmosphere, or who so pollutes a stream, is liable for the extent of the injury caused by his wrongful act, and that he is not jointly liable with other parties who, acting independently, may also be guilty at the same time of the same kind of pollution. *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Harley v. Merrill Brick Co.* 83 Iowa, 73, 48 N. W. 1000; *Bowman v. Humphrey*, 124 Iowa, 744, 100 N. W. 854, Id., 132 Iowa, 234, 6 L.R.A.(N.S.) 1111, 109 N. W. 714, 11 Ann. Cas. 131.

In the *Bowman* Case last cited, it is said: "Now, while the doctrine here stated is undoubtedly correct as applied to an appropriate state of facts, it is not difficult to see that it is misapplied under circumstances such as are here presented. Joint liability of wrongdoers, each for all and all for each, exists only where the wrong itself is joint. If the separate wrongful acts of two or more persons acting inde-

But in *Whalen v. Union Bag & Paper Co.* 145 App. Div. 1, 129 N. Y. Supp. 391, in reversing a judgment for the plaintiff in an action to restrain the defendant from polluting a stream by its pulp mill, and for damages, the court stated that the damages sustained by the plaintiff were insignificant in comparison with the damage that the defendant would suffer if obliged to discontinue its mill; that the stream was also polluted by other mills, one in particular, and that the injunction would not clear the stream; and that the damages had not been apportioned so as to charge the defendant merely with the damage which it had caused, and said: "The judgment should be modified by eliminating that part granting an injunction and providing that the plaintiff may at any time apply at the foot of the judgment for an injunction, upon showing that otherwise the creek is reasonably pure, or that the other par-

ties illegally contaminating it are properly enjoined or have ceased to pollute the same, and that upon showing such facts and making it appear that the ends of justice so require, an injunction substantially as mentioned in the judgment, or such as the court may direct, shall issue, or, at the plaintiff's election, that he may take such action for such other or further relief as he may be advised, on account of any injury to his property hereafter occurring; and the judgment is reversed upon the law and facts and new trial granted, with costs to appellant to abide event, unless plaintiff stipulates to reduce the damages to \$100 per year, in which case the judgment is so modified, and as modified hereby affirmed, without costs to either party." The damages awarded in the trial court were about \$312 per year; *Betts, J.*, dissented and cited, among other cases, *Sammons v. Gloversville*, supra.

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pendently, without concert, plan, or agreement, unite to cause injury to another, such persons are not joint wrongdoers within the meaning of the law, and each is liable to the injured party for only so much of said injury as is chargeable to his own separate individual act. *Bonte v. Postel*, 109 Ky. 64, 51 L.R.A. 187, 58 S. W. 536; *Sparkman v. Swift*, 81 Ala. 231, 8 So. 160; *Bard v. Yohn*, 26 Pa. 482; *La France v. Krayner*, 42 Iowa, 143; *Harley v. Merrill Brick Co.* 83 Iowa, 79, 48 N. W. 1000; *De Donato v. Morrison*, 160 Mo. 581, 61 S. W. 641; *Little Schuykill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209; *Wiest v. Electric Traction Co.* (*Wiest v. Philadelphia*) 200 Pa. 148, 58 L.R.A. 666, 49 Atl. 891; *Lull v. Fox & W. Improv. Co.* 19 Wis. 101. As suggested by the Pennsylvania court, if the tort of the parties was several when committed, it did not become joint because of the union of the consequences of the several torts in producing an injury. *Wiest v. Electric Traction Co.* supra; *Gallagher v. Kemmerer*, 144 Pa. 509, 27 Am. St. Rep. 673, 22 Atl. 970.

In the *Harley Case*, 83 Iowa, 73, 48 N. W. 1000, it is said: "It is well settled that each person who acts in maintaining a nuisance is liable for the resulting damage. If he act independently, and not in concert with others, he is liable for the damages which result from his own act only. *Loughran v. Des Moines*, 72 Iowa, 386, 34 N. W. 172; *Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 578, 14 Am. St. Rep. 319, 42 N. W. 448; *Sloggy v. Dilworth*, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; *Sellick v. Hall*, 47 Conn. 273; *Evans v. Wilmington & W. R. Co.* 96 N. C. 45, 1 S. E. 529; 3 *Sutherland, Damages*, 425; 1 *Addison, Torts*, 364; *Gould, Waters*, §§ 222, 398; *Wood, Nuisances*, § 831. And the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not affect the rule, nor make any one liable for the acts of others. *Chipman v. Palmer*, 77 N. Y. 53, 33 Am. Rep. 566; *Lull v. Fox & W. Improv. Co.* 19 Wis. 101. It is said that a different rule applies to smoke than to other nuisances, for the reason that it is much more common, and in many cities not to be avoided. We know of no reason why the rule under consideration should not be applied to all nuisances, whether due to smoke, smell, water, gas, noise, or other of the common sources of nuisance. See 2 *Thomp. Trials*, § 1899; *Crump v. Lambert*, L. R. 3 Eq. 412, 15 *Week. Rep.* 417."

In the *Loughran Case*, 72 Iowa, 386, 34 N. W. 172, it was said: "It was surely the right of the defendant to show that the 40 L.R.A. (N.S.)

damages to the plaintiff resulted from other causes than that upon which he founded his action; and it was competent for the city to show that the sewer was not the cause of all the damages complained of, and thus mitigate the damages complained of in the action. If several persons drain their premises into the same ditch, the waters of which are discharged near the premises of another, and produce an injury either to his estate or to its comfortable enjoyment, each of the persons so using the drain is liable for the damage occasioned by his act; but he is not liable for the damage caused by others. *Chipman v. Palmer*, 9 Hun, 517, 77 N. Y. 51, 33 Am. Rep. 566; *Keyes v. Little York Gold Washing & Water Co.* 53 Cal. 724, 14 *Mor. Min. Rep.* 95."

No cases are cited to us which run counter to the above, except certain Indiana cases and one case from West Virginia, viz., *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185, 39 N. E. 908; *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909; *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879; *Day v. Louisville Coal & Coke Co.* 60 W. Va. 27, 10 L.R.A. (N.S.) 167, 53 S. E. 776. Reference will be made to these cases later herein. Other cases are cited by appellant, but they bear only remotely upon the precise question here involved.

In *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, the action was for damages for injuries which resulted to plaintiff from falling into a coal hole in the sidewalk. It was held that both the landlord and the tenant in possession were responsible for the nuisance, and were jointly liable to the plaintiff for his injuries.

In *Slater v. Mersereau*, 64 N. Y. 138, the contractor and his subcontractor, while at work upon a building, each separately allowed water to run in such a way as to injure a neighboring building. In a suit against the contractor alone, he was held liable for the entire damage.

In *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676, 26 N. E. 911, three defendants were held jointly liable for damages for the killing of a pedestrian upon the sidewalk, by reason of the falling of a wall upon him. The defendants, Lloyd Pierce, and Everson, were the several owners of three adjoining and parallel lots upon which a building was constructed, constituting three separate storerooms, each being 22 feet wide. One continuous front wall was made for the three stores, and the partition walls were joined thereto. After a fire which destroyed the rest of the structure, this front wall was left standing. It was in a damaged condition, and was leaning toward the street. Its construction and

condition were such that the falling of a part thereof would naturally carry down the rest of it. At the time of its final collapse, it first gave way at the partition line between Lloyd and Pierce, and the whole wall thereupon fell. That part of the wall opposite the lots of Pierce and Everson fell upon the decedent. No part of the material of Lloyd's part of the wall fell upon the decedent. It was held that the relations of the three defendants to the wall in question were such as to render them each and all responsible for its condition as a nuisance, and that they were jointly liable for the injury.

In *Bryant v. Bigelow Carpet Co.* 131 Mass. 491, there was a claim of concert of action between the two defendants. There was no claim of joint liability independent of such alleged concert of action. The same is true of *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 10 L.R.A. 698, 23 Am. St. Rep. 688, 25 N. E. 799.

In *Coleman v. Bennett*, 111 Tenn. 705, 69 S. W. 734, there was only one defendant in the case. He was charged in the petition to have collected surface water and cast the same upon plaintiff's land. It was held that he was liable for damages, even though a levee built by a third person was instrumental in preventing the escape of the water from plaintiff's land. Cases are also cited by appellant, wherein parties were held jointly liable for damages caused by their racing of horses in the street.

Cuddy v. Horn, 46 Mich. 596, 41 Am. Rep. 178, 10 N. W. 32, was an action for damages resulting from a collision between two steamboats. The collision occurred as a result of negligence in the management of each boat. It was held that there was a joint liability.

McClellan v. St. Paul, M. & M. R. Co. 58 Minn. 104, 59 N. W. 978, was a fire case. There was but one defendant, and it was held liable. The origin of the fire was in dispute as to whether it resulted from a fire set out by the defendant, or from one set out by a third party. In the discussion of the case, it was said, in effect, that the commingling of the defendant's fire, if any, with that set out by another, did not relieve the defendant from liability. This we understand to be the general holding on the question of commingling fires.

Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706, was an action against the city alone, wherein the question of joint liability was not directly involved. The defense was that the damage was caused by a third party. This defense was overruled. It was said in the opinion that, upon the facts shown both parties would be liable.

Klauder v. McGrath, 35 Pa. 128, 78 Am. 40 L.R.A. (N.S.)

Dec. 329, was an action for damages for injuries resulting from the falling of a party wall. Both owners were held to be jointly liable.

The foregoing indicates the general nature of the authorities relied upon by appellant in support of its contention. As against this, the following authorities outside of our own are directly in point, and clearly adverse to appellant's contention: *Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209, 10 Mor. Min. Rep. 661; *Gallagher v. Kemmerer*, 144 Pa. 509, 27 Am. St. Rep. 673, 22 Atl. 970; *Ames v. Dorset Marble Co.* 64 Vt. 10, 23 Atl. 857; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *Swain v. Tennessee Copper Co.* 111 Tenn. 430, 78 S. W. 93; *Watson v. Colusa-Parrot Min. & Smelting Co.* 31 Mont. 513, 79 Pac. 14; *Miller v. Highland Ditch Co.* 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; *Mansfield v. Bristol*, 76 Ohio St. 270, 10 L.R.A. (N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 Ann. Cas. 787; *Martinowsky v. Hannibal*, 35 Mo. App. 70; *Sloggy v. Dilworth*, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; *Lull v. Fox & W. Improv. Co.* 19 Wis. 100.

The general reason which underlies the holding in these various cases is indicated in the following excerpts:

Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566, involved the pollutions of a stream. From the opinion, we quote the following: "The defendant's act, being several when it was committed, cannot be made joint because of the consequences which followed in connection with others who had done the same or a similar act. It is true that it is difficult to separate the injury, but that furnishes no reason why one tortfeasor should be liable for the act of others who have no association, and do not act in concert, with him. If the law was otherwise, the one who did the least might be made liable for the damages of others far exceeding the amount for which he really was chargeable, without any means to enforce contribution, or to adjust the amount among the different parties; so, also, proof of an act by one person would entitle plaintiff to recover for all the damages sustained by the acts of others who severally and independently may have contributed to the injury. Such a rule cannot be upheld upon any sound principle of law. . . . The authorities relied upon to sustain such a doctrine come far short of establishing any such rule, and have no application. [Citing cases.] Each of the cases cited was disposed of upon a different principle. They merely hold that, where a direct personal injury is occasioned

by the separate and concurring negligence of two parties at one and the same time, an action against one or all of them will lie. The distinction is plain." The case of *Slater v. Mersereau*, 64 N. Y. 138, "in no way upholds the doctrine contended for by plaintiff's counsel, and is not in point. . . . While, as we have seen, an equitable action will lie to restrain parties who severally contributed to a nuisance, the general rule is well settled that, where different parties are engaged in polluting or obstructing a stream at different times and places, the whole damages . . . cannot be collected of one of the parties."

The *Ames Case*, 64 Vt. 10, 23 Atl. 857, was an action for damages for obstructing a stream, which resulted in the flooding of plaintiff's meadow. We quote the following from the opinion: "Each defendant is liable in damages in proportion only as its wrongful acts have contributed to obstructing the flow of water and setting it back upon the orator's meadow. The defendants are not joint wrongdoers in the sense that they join in doing the same wrongful act, but only in the sense that their several wrongful acts combine in causing damage to the orator's meadow. This does not make them jointly tortfeasors in the sense that each is liable for all the damages occasioned to the orator's meadow."

Lull v. Fox & W. Improv. Co. 19 Wis. 100, was a case of obstructing a stream. We quote the following from the opinion: "Here are two distinct causes of action set out; one against the corporation defendant; the other against the other defendants. There is no allegation that all the defendants acted together in erecting or maintaining either or both of these dams; on the contrary, it is alleged they acted separately; each dam was erected and has been maintained by a part of the defendants without the aid or even approval of the others. We are at a loss to perceive how, by the well-established rules of pleading, these causes of action can be united. It is argued that the result of the separate acts of the defendants in erecting and maintaining the dams is a joint result, the same as if all the defendants had been engaged in erecting and maintaining both dams. If it were so, it does not follow that the defendant or defendants who alone erected and maintained one dam, without any concert of action or connection with the defendant or defendants erecting and maintaining the other dam, should be held liable to pay the damages occasioned by erecting and maintaining both. The argument that there is difficulty in ascertaining the damage done or caused by the erection of each dam, or that it is impossible, is certainly 40 L.R.A. (N.S.)

no reason why one defendant should pay for the damages caused by another with whom he is in no way connected. In fact, if this action can be maintained jointly against all the defendants, then each defendant is separately liable in a separate action for all the damages occasioned by the erection of both dams."

From *Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209, *supra*, we quote the following from the opinion: "The substance of the charge and answers to points was that, if, at the time the defendants were engaged in throwing the coal dirt into the river, about 10 miles above the dam, the same thing was being done at other collieries, and the defendants knew of this, they were liable for the combined result of all the series of deposits of dirt from the mines above from 1851 till 1858. . . . But the fallacy lies in the assumption that the deposit of the dirt by the stream in the basin is of the foundation of liability. It is the immediate cause of the injury; but the ground of the action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream; this is the tort, while the deposit below is only a consequence. The liability, therefore, began above with the defendant's act upon his own land, and this act was wholly separate and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterwards became joint because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream, his dirt filled only its own space, and it was made neither more nor less by the accretions. . . . But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert. It would be simply to say, because the plaintiff fails to prove the injury one man does him, he may therefore recover from that one all the injury that others do. This is bad logic and hard law. Without concert of action, no joint suit could be brought against the owners of all the collieries, and clearly this must be the test; for, if the defendants can be held liable for the acts of all the others, so each and every owner can be made liable for all the rest, and the action must be joint and several. But the moment we should find them jointly sued, then the want of concert and the several liability of each would be apparent."

Reference has already been made to the cases in Indiana and West Virginia. The first cited of the Indiana cases, *supra*, in-

volved damages for a washout caused by the alleged negligence of two adjoining owners of flumes connected to the same mill race. The other two cases involved the pollution of streams by the independent acts of various parties, not acting in concert. The holding in all these cases is very sweeping in favor of the theory of joint liability in all such cases. The only authorities relied upon for such holdings are the cases of *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, and *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676, 26 N. E. 911, both of which cases we have already stated. Neither of such cited cases involved the question of polluting or obstructing a stream.

The following quotation from the *West Muncie Case*, 164 Ind. 21, 72 N. E. 879, being the latest of the cited Indiana cases, is illustrative of the real state of the authorities on the question now under consideration: "Objection is made by the appellants that the acts alleged, if done at all, were performed severally and independently by them, and hence there can be no joint liability therefor. It is probably true that an action at law for the recovery of money damages, as distinguished from a suit in equity, cannot be maintained jointly against various tort feors among whom there is no concert or unity of action and no common design, but whose independent acts unite in their consequence to produce the damage in question. *Miller v. Highland Ditch Co.* 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Sloggy v. Dilworth*, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; *Martinowsky v. Hannibal*, 35 Mo. App. 70; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523, 7 Mor. Min. Rep. 599; *Long v. Swindell*, 77 N. C. 176; *Little Schuykill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209; *Draper v. Brown* (1902) 115 Wis. 361, 91 N. W. 1001; *Débris Case* (C. C.) 16 Fed. 25. And see *Sellick v. Hall*, 47 Conn. 260. A distinction, however, is recognized between such acts which are wrongful only because injurious to individual rights, and those which combine and constitute a public nuisance. *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676, 26 N. E. 911; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Valparaiso v. Moffitt*, 12 Ind. App. 250, 255, 54 Am. St. Rep. 522, 39 N. E. 909. In the former class of cases, each separate wrongdoer is chargeable with his own acts alone, in the absence of a joint purpose among the participants; in the latter, each may be answerable in a joint and several action, not 40 L.R.A. (N.S.)

only for what he himself does, but likewise for the acts of those who, with him, violate public, as well as private, rights."

More confusion has been put into this question by passing *dictum* of the courts in cases where the question was not directly involved, than by actual conflict of decision. The text-books, too, have been responsible for some inaccuracies of statement, and have been criticized by the courts in some adjudicated cases already cited. It is to be noticed that the Indiana court cites no authorities in support of the doctrine which it announces, except its own previous holdings and the two New York cases referred to.

The supreme court of Ohio, in the recent case of *Mansfield v. Bristol*, 76 Chio St. 270, 10 L.R.A. (N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 Ann. Cas. 767, commenting upon this case, said: "The distinction suggested in *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879, has no foundation in precedent, and is not believed to be maintainable on principle. The distinction assumes that several torts have been committed, but holds the perpetrator of one liable for the damage from all, on the sole ground that his act is a public wrong."

Some stress is laid by appellant upon the *Slater Case*, 64 N. Y. 138, to which we have already referred. That case bears some analogy to the case at bar, and is properly urged upon us by the appellant. Nevertheless the opinion in that case was written by the same judge who wrote the opinion in the later case of *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566, from which we have already quoted. It will appear from the latter case that the New York court refused to construe the *Slater Case* as authority to the proposition to which it is now urged by appellant. At this point, the appellant is in the position of relying upon New York precedents to establish, by analogy, a proposition which runs counter to the pronouncement of that court in the *Chipman Case*.

Appellant's brief contains a suggestion that there is a distinction between pollution cases and those cases which involve the obstruction of streams. This suggestion was accompanied by the concession in oral argument that practically all the pollution cases were against the theory of joint liability in the absence of concerted action. No authority is cited to us, wherein any distinction has ever been recognized between the nature of the liability for polluting a stream and that for obstructing it. We have already quoted herein from our own cases, wherein it is distinctly stated that there is no distinction in such cases; and such seems to be the holding, either expressly or by impli-

eration, in all the cases which have been cited for our attention. In this respect, the Indiana cases are in harmony with our own. The first two cases cited from the Indiana court, *supra*, were both decided at the same term; the opinions therein being written by the same judge. The first was an action for damages resulting from a washout, and the second was an action for damages for polluting a stream by sewage. That court applied to both cases the same rule of joint liability. The ground of the holding in the Indiana cases was not that there was any distinction between polluting a stream and obstructing it; it was that the act complained of was a public nuisance, and that such fact alone rendered all persons contributing thereto jointly liable for all damages, regardless of whether they were joint tortfeasors or not. This is the doctrine upon which the Indiana court seems to stand alone up to this point. This doctrine would overrule practically all the holdings of other courts in the pollution cases. Practically all such cases involved public nuisances. We agree with the Ohio court that the doctrine thus announced is not tenable. (It may be noted here parenthetically that the Indiana court had adopted a rule counter to that obtaining in this state as to damages done by trespassing animals. In this state it is the rule that the separate owners of trespassing cattle are not jointly liable for the damages done by all. *Cogswell v. Murphy*, 46 Iowa, 44. In Indiana the contrary rule prevails. *Brady v. Ball*, 14 Ind. 317.)

In a recent English case (*Sadler v. Great Western R. Co.* [1895] 2 Q. B. 688), a question was involved which bears some analogy to the question before us. The plaintiff was a dealer in cycles, and had a place of business between the separate offices of two railroad companies. He brought an action against both companies, alleging a joint liability against them for obstructing the highway in front of his office, in that each company caused carts to stand upon the highway for an unreasonable length of time, and that by their combined acts they prevented access to the plaintiff's shop. We quote as follows from the opinion of the court: "He is trying to sue as codefendants two independent, separate alleged tortfeasors, neither of whom has any control or power over the acts of the other tortfeasor. He is trying to sue them jointly in one action. . . . In my opinion, these two torts, if they are torts, are independent torts by the different companies, although, as I have already stated, the acts of each company can be taken into account in considering the acts of one company and deciding whether they amount to a nuisance or not. 40 L.R.A. (N.S.)

The acts of the other company must be taken into account, because it may be that the one company ought not to be doing what it was when the other company was doing what it did. But that does not make these two causes of action a joint cause of action, or give any right to join one company with the other in one action."

We quote from *Pollock on Torts*, 2d ed. p. 406, as follows: "A cause of action for nuisance may be created by independent acts of different persons, though the acts of one only of those persons would not amount to a nuisance. Suppose one person leaves a wheelbarrow standing on a way; that may cause no appreciable inconvenience; but, if one hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defense to any one person among the one hundred to say that what he does causes of itself no damage to the complainant. But this does not mean that a plaintiff may make two or more independent wrongdoers codefendants in a single action for damages, whatever may be the rule where only an injunction is claimed."

The case of *Day v. Louisville Coal & Coke Co.* 60 W. Va. 27, 10 L.R.A. (N.S.) 167, 53 S. E. 776, being the West Virginia case to which we have already referred, was one wherein a hydraulic mining company cast into a stream the *débris* or tailings from its mill, and such *débris* was cast upon plaintiff's land further down the stream. A similar course was followed by other mining companies at different points of the stream. There was no claim of concert of action. The defendant was held liable for all the damages as a joint tortfeasor. This case stands alone on this particular question, and is contrary to the holding in other states. The authorities cited in the opinion consist principally of general statements quoted from the text books and encyclopedias. To our minds, the reasoning of the learned court in that opinion is not persuasive, nor do the authorities cited therein justify the conclusion reached. The text-book quotations therein simply consist of a statement of the general rule concerning liability for concurring negligence, to which general rule we have already adverted herein.

We think that it must be said, therefore, that the greater weight of the authorities is against the appellants in the case at bar. The question involved is one upon which it is difficult to formulate a general rule which shall govern all cases. None of the courts have attempted to formulate such general rule, as far as we can discover. (Perhaps it can safely be said that, where the nuisance which is contributed to by independ-

ent wrongdoers is such that such contribution will tend to increase the extent or magnitude of the injury naturally resulting therefrom, then the liability of the independent contributor should be deemed several, and not joint, and each wrongdoer should be held to pay such proportionate part of the damages as was caused by his own contribution.)

The rule of joint liability has been contended for in some cases, on the ground that it would be impossible for plaintiff to prove the precise damage caused by each separate contributor to his injury, and that the rule of several liability would therefore result in a denial of justice to plaintiff. On the other hand, such rule of joint liability has been resisted on the ground that it makes it possible for a plaintiff to overwhelm a defendant with a claim for damages out of all proportion to his wrongdoing; and that, even though such defendant may have contributed only slightly to the nuisance, he might be held liable for the greater wrongs committed by others, over which he had no control. In those jurisdictions where the rule of several liability in such cases is adhered to, the rule of measure of damages is tempered to the circumstances. The plaintiff is not required to prove the precise damage inflicted upon him by the single defendant. He may prove the proportionate extent to which the defendant contributed to his injury, and the jury may award such proportion of the damage as is commensurate with the defendant's contribution thereto. This results in practical justice, both to the plaintiff and to the defendant; whereas the other rule may be highly penal in its result; and the most innocent of the wrongdoers may, at the mere will of the plaintiff, be held for all of the damage, without right of contribution against the principal perpetrators of the injury. The foregoing disposes of the principal and most persuasive points in appellant's argument. Other points are made which do not seem to us well taken.

It is our conclusion that the ruling of the lower court was right, and it is accordingly affirmed.

Weaver, J., dissenting:

I dissent from the conclusion above announced and from the argument by which it is supported. In my judgment, there is a marked distinction to be observed between rights of action which involve the conflicting rights and interests of riparian owners, and rights of action by a nonriparian owner against those who interfere with the natural flow of the stream, and, by union of the forces thus wrongfully set in motion, inflict injury upon nonriparian property. More-
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over, as a matter of general principle, parties who obstruct the stream should be held to intend the natural consequences of their acts, and if A obstructs it at one place, B at another, and C at still another, each knowing, as he is bound to know, that the united effect of their several acts will work to the material injury of property exposed to overflow, it is certainly a somewhat surprising illustration of the inefficiency of the law if there be no union of liability on the part of the wrongdoers, and he whose property is thus flooded must assume the burden of showing what particular fraction of his loss is traceable to each obstruction, even though, but for the existence of all, no damage would have been done. In so holding, it seems to me we are sacrificing substantial right to empty forms.

A petition for rehearing having been filed, Evans, J., on March 14, 1912, handed down the following additional opinion (— Iowa, —, 134 N. W. 1064):

Plaintiff urges upon our attention paragraph 29 of the petition, and contends that a joint liability is charged therein as against the two defendants, Simmons Warehouse Company and the city of Sioux City. Such paragraph is as follows: "(29) That the said iron bridge at the junction of Fourth and West Third streets across Perry creek, and the apron and conduit aforesaid, were constructed under the supervision and co-operation of the defendant Simmons Warehouse Company, and the defendant city of Sioux City, and has been so maintained and kept to the present time."

At the original submission of the case, it did not appear from the printed record before us that this paragraph was involved in the appeal. All the parties have now stipulated that this omission was an inadvertence, and they join in a proposed correction and ask that the appellant's exception at this point be considered. We think that this paragraph does in terms charge somewhat imperfectly a joint liability against the two defendants. The difficulty with appellant's position, however, is that this alleged joint cause of action is improperly joined with other alleged causes of action against the same defendants, which are not joint, but several. For instance, paragraph 26 charges a several liability against the city of Sioux City for the construction of various bridges at different points on the stream. Other allegations charge a several liability against the defendant Simmons Warehouse Company.

If a plaintiff chooses to declare upon a cause of action upon which a defendant is only severally liable, he cannot join another defendant by merely alleging a further

joint cause of action against both such defendants. He must reduce his allegations either to a cause or causes of action against one defendant, or else to a wholly joint cause of action against both. If the plaintiff herein chooses to confine his petition against the Simmons Warehouse Company and the city of Sioux City to an alleged cause of action wholly joint, and to eliminate therefrom all allegations upon which only several liability can be predicated, there is nothing in our holding to forbid such course.

The petition for rehearing is accordingly overruled.

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MISSOURI SUPREME COURT.
(In Banc.)

MOREY ENGINEERING & CONSTRUCTION COMPANY, Resp't.,

v.

ST. LOUIS ARTIFICIAL ICE RINK COMPANY et al., Appts.

(— Mo. —, 146 S. W. 1142.)

Tax — special assessment — priority.

1. In the absence of statutory directions to the contrary, special assessments for street improvement have priority over existing encumbrances on the property.

Same — statutory priority.

2. Under a statute making tax bills for special improvements a lien on the property charged therewith, and permitting them to be collected of the owner of the land, and providing that the owner or any other person having an interest in the property may pay the tax within a specified time without interest, the lien takes priority over existing encumbrances upon the property.

(Valliant, Ch. J., and Lamm and Kenish, JJ., dissent.)

(March 28, 1912.)

APPEAL by defendants from a judgment of the Circuit Court for the city of St. Louis in plaintiff's favor in an action brought to enforce a special tax bill. Affirmed.

The facts are stated in the opinion.

Mr. H. A. Loevy, for appellants:

The operation and extent of a tax lien must be determined by the statute creating

Note. — As to superiority of lien of local assessment over prior lien, see notes to *Seattle v. Hill*, 35 L.R.A. 372, and *Baldwin v. Moroney*, 30 L.R.A.(N.S.) 761.

As to the necessity of giving mortgagee or other lienor notice of assessment, see note to *Fitchpatrick v. Botheras*, 37 L.R.A.(N.S.) 558.
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it, and its enforcement regulated by the charter if a municipal tax.

Everett v. Marston, 186 Mo. 599, 85 S. W. 540; *Jaicks v. Sullivan*, 128 Mo. 177, 30 S. W. 890; 27 Am. & Eng. Enc. Law, 2d ed. 735.

The power to make assessments to pay for street improvements is a part of the taxing power, but such assessments are not taxes in the sense that that word usually implies.

Independence v. Gates, 110 Mo. 374, 19 S. W. 728; *Farrar v. St. Louis*, 80 Mo. 370; *Adams v. Lindell*, 72 Mo. 198; *Clinton v. Henry County*, 115 Mo. 564, 37 Am. St. Rep. 415, 22 S. W. 494; *Morrison v. Morey*, 146 Mo. 564, 48 S. W. 629; *Union Trust Co. v. Pagenstecher*, 221 Mo. 131, 119 S. W. 1105; *Barber Asphalt Paving Co. v. St. Joseph*, 183 Mo. 458, 82 S. W. 64; 5 Dill. Mun. Corp. 1911 ed. § 1430.

Messrs. Carter, Collins, & Jones, David Goldsmith, and Charles W. Bates for respondent.

Messrs. Lambert E. Walther and Truman P. Young, amici curiæ:

The lien of general taxes is, in its nature, in the absence of any express statutory provision, a lien superior to all pre-existing encumbrances.

Osterberg v. Union Trust Co. 93 U. S. 424, 428, 23 L. ed. 964, 965; *Stafford v. Fizer*, 82 Mo. 393; *Gitchell v. Kreidler*, 84 Mo. 475; *Williams v. Hudson*, 93 Mo. 529, 6 S. W. 261; *Fleckenstein v. Baxter*, 114 Mo. 496, 21 S. W. 852; *Meriwether v. Overly*, 228 Mo. 250, 129 S. W. 1; *Minnesota v. Central Trust Co.* 35 C. C. A. 218, 94 Fed. 244; *Butler v. Baily*, 2 Bay, 249; *Doe ex dem. Gledney v. Deavors*, 8 Ga. 481; *Re Brand*, 2 Hughes, 334, Fed. Cas. No. 1,809; *Georgia v. Atlantic & G. R. Co.* 3 Woods, 434, Fed. Cas. No. 5,351; *Steubenville & I. R. Co. v. Tuscarawas County*, 6 Pittsb. L. J. 68, Fed. Cas. No. 13,388; *Dunlap v. Gallatin County*, 15 Ill. 7; *Dennis v. Maynard*, 15 Ill. 477; *Jack v. Weiennett*, 115 Ill. 110, 56 Am. Rep. 129, 3 N. E. 445; *Peckham v. Millikan*, 99 Ind. 352; *Bodertha v. Spencer*, 40 Ind. 353; *Isaacs v. Decker*, 41 Ind. 410; *Justice v. Logansport*, 101 Ind. 326; *Jenkins v. Newman*, 122 Ind. 99, 23 N. E. 683; *Eddy v. Kimerer*, 61 Neb. 498, 85 N. W. 540; *State ex rel. Mortg. & T. Co. v. Godfrey*, 20 Ohio C. C. 649, 10 Ohio C. D. 751; *Kerr v. Hoskinson*, 5 Kan. App. 193, 47 Pac. 172; *Thomas v. Jones*, 94 Va. 756, 27 S. E. 813; *Packwood v. Briggs*, 25 Wash. 530, 65 Pac. 846; *White v. Knowlton*, 84 Minn. 141, 86 N. W. 755; *White v. Thomas*, 91 Minn. 395, 98 N. W. 101.

If the words of the statute, either by reference in terms or by reference to the general statutes, manifest a clear intention to

make taxes assessed after the execution of a mortgage a prior lien, such paramount effect will be given them.

Howell v. Essex County Road Board, 32 N. J. Eq. 672; *Thompson v. Thorp*, 33 N. J. Eq. 401; *State ex rel. Ely v. Aetna L. Ins. Co.* 117 Ind. 251, 20 N. E. 144.

Ferriss, J., delivered the opinion of the court:

This is an action brought in the circuit court of the city of St. Louis by the contractor to whom the city of St. Louis issued a special tax bill, for the improvement of Cook avenue, for the sum of \$721.31 against a lot of ground on said Cook avenue, charged with said special tax bill. The defendants (appellants here) are the St. Louis Artificial Ice Rink Company, owner of the equity of redemption in said lot, and the owners and holders of certain notes secured by two deeds of trust upon the said lot, together with their trustees. The first deed of trust was dated November 1, 1898, and recorded on the 5th day of November, 1898, securing the payment of \$15,000, with interest; and the second deed of trust was for \$2,060, executed on the 14th day of July, 1900, and duly recorded on the same date. The ordinance for the improvement of Cook avenue, for which the tax bill in question was issued, was approved April 7, 1902, and the tax bill was issued May 7, 1903. Judgment below was for plaintiff.

The record presents a single question: Under the charter of the city of St. Louis, has the lien of a special tax bill, issued for street improvements, priority over a deed of trust which antedates the tax bill?

Defendants contend that tax liens, whether general or special, have no priority over earlier encumbrances, unless such priority is accorded by statute; and that this is certainly true as to special tax assessments for street improvements, which, it is claimed, are essentially different from general taxes. Defendants contend, further, that the charter under which the tax bill in controversy was issued does not give priority to the lien for the special tax; and that it is therefore inferior to the lien of their deeds of trust, which are earlier in point of time. On the other hand, respondent contends that in this state both general and special tax liens have priority, (a) in the absence of statutory direction to the contrary, and (b) such priority of the special tax lien is fairly inferable from the language of the statute (charter) creating the lien. We will discuss these propositions in order.

First, as to general taxes. From an early date, this state has maintained the policy of impressing upon real property a lien 40 L.R.A. (N.S.)

for the taxes assessed thereon. In 1815 the territorial laws provided that the taxes on confirmed lands should be a perpetual lien. *Territorial Laws, 1814-15*, p. 59. In 1820, a perpetual lien was declared by statute upon all lands for the taxes thereon. *Laws 1820*, p. 97. To the same effect in 1835, *Rev. Stat. 1835*, p. 541. The revisions of 1845-55-65 contain no such express provision; but the revenue acts from 1835 to 1872 have been construed to recognize and reserve this lien of the state. The general revenue law enacted in March, 1872, reintroduced the express provision reserving to the state a lien upon real property for the taxes thereon. *Wagner's Statutes 1872*, p. 1170, § 60. From its earliest decisions on the question, this court has uniformly ruled that real estate taxes are a lien upon the property against which they are assessed; and, further, when the question has arisen, that they are prior to all other liens. In May, 1877, our legislature enacted a statute (now § 11,499, *Rev. Stat. 1909*) making the judgment for such taxes a first lien. The decisions, however, presently to be referred to, were upon taxes levied prior to the enactment of this statute, upon which they in no wise depend, and to which no reference is made in the cases.

In 1864, in the case of *Blossom v. Van Court*, 34 Mo. 390, 86 Am. Dec. 114, the taxes were said to be an encumbrance on the land, and covered by the covenant contained in the words "grant, bargain, and sell." *McLaren v. Sheble*, 45 Mo. 130, is to the same effect, and speaks of the "lien of the tax imposed by virtue of the assessment." Both cases hold that the lien of the tax takes effect from the initial point of the assessment, and by virtue of the assessment. We come next to the case of *Stafford v. Fizer*, 82 Mo. 393. As this case is discussed fully pro and con by appellants and respondent, we will examine it at length. This was an action in ejectment. James A. Clark, the common source of title, executed a deed of trust in 1863. In 1878 suit was filed by the state for the taxes for the years 1868 to 1878, inclusive. Sale under judgment for taxes and execution thereon October 30, 1878, to plaintiff. There was a sale under the trust deed in April, 1879, to the defendants. This suit filed in 1880. In the tax proceeding, Clark, the trustee, and one of the beneficiaries in the trust deed, were made defendants. One other beneficiary was not made a defendant. It was contended by the plaintiff that the tax sale gave a complete title as against both beneficiaries in the trust deed. The court states the question presented for adjudication thus: "Whether the deed of a purchaser at execution sale under a proceed-

ing to enforce the state's lien for taxes is good against the beneficiary of a deed of trust, antedating the origin of the tax lien, who has not been made a party to the proceedings."

After stating, further, that the question was new in this court, the opinion proceeds: "But the principles of law, as well as the decisions of this court governing the enforcement of liens on real estate, ought to furnish a sufficient guide for us in determining it. It will be observed that we are dealing with two liens,—one created by law in favor of the state, which necessarily takes precedence of other prior as well as subsequent liens, on account of its peculiar character (Rev. Stat. 1879, §§ 6831, 6832; Blossom v. Van Court and McLaren v. Sheble, supra; Dunlap v. Gallatin County, 15 Ill. 7; Almy v. Hunt, 48 Ill. 45; Binkert v. Wabash R. Co. 98 Ill. 205); the other, in favor of creditors, created by the act of the debtor. These two liens have been foreclosed, and the purchasers stand opposed to each other with deeds under the proceedings respectively employed for enforcing them. The lien of the state is the superior one, although subsequent in time, a superiority invariably accorded to it, in absence of some legislative declaration to the contrary. (Cadmus v. Jackson, 52 Pa. 295; Doane v. Chittenden, 25 Ga. 103; Hopper v. Malleson, 16 N. J. Eq. 382; Cooper v. Corbin, 105 Ill. 224. No system of jurisprudence would command respect which failed to maintain and enforce the benefits of this priority by all necessary and reasonable proceedings to that end."

The holding of the court is that a beneficiary in a prior deed of trust, who is not a party to the tax suit, has still the right to redeem as a junior lienor by proper action in that regard. Speaking of the revenue law which required the collector to bring suit against the owner of the property, the court says: "I do not see how to escape the conclusion that a *cestui que trust* in a deed of trust is an owner, within the meaning of this act, if his interests are to be affected by the proceeding authorized." It was concluded in that case that, inasmuch as the right to redeem was not asserted, and as it was apparent that plaintiff had the superior title, she should recover.

It is suggested that what the court says in the first above extract from the opinion as to the priority of the lien, and upon the general rule of priority, is *obiter*. We think not. The plaintiff's right to recover depended upon the priority of the tax lien. It is further suggested that the cases cited in the opinion do not support the text. In this we think counsel errs. It must be 40 L.R.A. (N.S.)

remembered that when the taxes involved in the case were assessed there was no statute making a judgment for taxes a first lien. Indeed, there was no express declaration in the statutes that the taxes were a lien. The court cites the Blossom and McLaren Cases, above referred to, which declare that such taxes were a lien; and that such lien was impressed by virtue of the assessment.

The next citation is Dunlap v. Gallatin County, 15 Ill. 7, which says: "A tax is not an ordinary debt. It is levied for the support of the government, and takes precedence of all other demands against the owner. It is a charge upon the property, without reference to the matter of ownership. The property itself may be seized and sold, although there may be prior liens or encumbrances upon it."

The next cited case, Almy v. Hunt, 48 Ill. 45, involved the question of liability for taxes as between seller and buyer. It was held that the lien attaches when the assessment is made; and that the property itself is liable therefor.

Binkert v. Wabash R. Co. 98 Ill. 205, the next cited case, holds that the tax suit is "a direct proceeding against the land itself, by which judgment may be had against it as if it were a person," and points out the distinction between real and personal taxes; the latter not authorizing a direct proceeding against personal property.

The cases of Cadmus v. Jackson, Doane v. Chittenden, and Hopper v. Malleson, cited in the opinion, hold the tax liens involved in these cases inferior to prior liens; but this upon the ground that they are made so by statute. In the Hopper (N. J.) Case, the ruling that the lien of the tax is inferior to that of the prior encumbrance is put upon the ground that the statute makes the tax on real estate a personal demand against the owner, to satisfy which his goods may be sold or his body arrested; and, further, that the mortgagee is taxed for his interest, and the mortgagor taxed separately for the value of his equity. The opinion says: "If the tax for the whole value of the land were assessed upon the land as an entire thing against the mortgagor or party in possession, there would seem to be more propriety in subjecting the entire estate, including both the interest of the mortgagee and mortgagor, to the operation of the tax sale."

The last case cited in the Stafford Case (Cooper v. Corbin, 105 Ill. 224) holds taxes on personality an inferior lien, but that taxes on real estate "become a charge upon the land itself, and if they are not paid the land may be sold for the taxes thereon, and the title will pass, regardless

of any encumbrance resting on the land. Taxes on personal property rest on a different principle,—they are not a charge on any specific property.”

The foregoing cases sustain the proposition laid down in the Stafford Case, namely, that real estate taxes are accorded a prior lien by virtue of their peculiar character, unless there is a legislative declaration to the contrary. The Stafford Case has not been criticized, but has often been approved in our later decisions. It is followed in *Gitchell v. Kreidler*, 84 Mo. 472, which gives priority to the lien for the taxes of 1877 (assessed August 1, 1876), but holds, as the Stafford Case did, that the beneficiary in the prior deed of trust, not being a party to the suit, did not lose his right to redeem. The case holds that all parties in interest must be made defendants, in order to bind their interests. Construing the statutory requirement that suit shall be brought against the owner, the court says the word “owner” has no precise legal signification, and may be applied to any well-defined interest in the estate; and, further: “The lien of the state thus enforced is the superior. The mortgagee certainly had the right to pay off the taxes, and under the former method of making tax sales could have redeemed within the time prescribed by the law. He has not been made a party to the tax suit, and his rights in that respect have not been foreclosed.”

Williams v. Hudson, 93 Mo. 524, 6 S. W. 261, involved similar questions regarding the taxes for 1869 to 1879, and followed the above cases. In the course of the opinion, the court says, “Tax liens, whether prior in point of time or not, are superior to the lien of the deed of trust.” To the same effect is *Allen v. McCabe*, 93 Mo. 138, 6 S. W. 62, involving taxes for 1876, 1877, and 1878, wherein the court says: “It must be remembered that, although the statute makes it necessary that the owner of the property should be made a party, and this is necessary to call into activity the jurisdiction of the court over the subject-matter; yet, when this is done, the proceeding is *in rem* against the property to enforce the lien of the state on that property, subordinate to which the owner holds his title; the judgment is *in rem*. The execution goes against, and the sheriff sells, the property and not the interest of any particular person in it.”

In *Neenan v. St. Joseph*, 126 Mo. 96, 28 S. W. 963, the contest was between owners of the fee, and did not involve encumbrances. The court, however, uses this significant language: “The policy of the revenue law is to charge the land and every interest therein with the delinquent taxes, and not

to look to the owners personally for its payment.”

This doctrine is quoted with approval by *Graves, J.*, in *Walker v. Mills*, 210 Mo. loc. cit. 694, 109 S. W. 44, a case involving both owner of the equity and the encumbrancers. In *Meriwether v. Overly*, 228 Mo. 218, 129 S. W. 1, the decree ordered the successful plaintiff, in an action to quiet title, to refund to the defendant taxes paid by the latter, on the theory that same were a burden upon the land. The court says: “A tax against real estate is a tax against the property, and not against the owner. If the taxes have been legally assessed, they became a lien on the property prior to all other liens.”

It will be perceived from the foregoing review of the cases that, under all the varying revenue laws of the state, this court has held that real estate taxes constitute *ex proprio vigore* a prior lien against the property on which they are assessed, not depending upon any express declaration of the statute to that effect, and not depending, as it is now claimed they do, upon the provision in the statute first enacted in April, 1877 (Acts 1877, p. 387), which gives the judgment for taxes a first lien. The foregoing cases further establish the proposition that the word “owner,” in a statute which provides that suits for delinquent taxes shall be brought against the owner of the land, includes the holders of encumbrances on the land.

Our conclusion on this point rests as well upon sound reason. It is uniformly recognized that the claim of the state for the taxes necessary for its support is superior to demands created by private contract. In *Minnesota v. Central Trust Co.* 36 C. C. A. 214, 94 Fed. 244, Judge Thayer discusses this subject fully upon authority and reason. He cites numerous cases to sustain the proposition, which he enunciates thus: “It has been held frequently that a tax lawfully imposed by the state on its citizens is not an ordinary debt, but is an obligation which, by its very nature, should be regarded as paramount to all other demands against the taxpayer, although the law imposing the tax does not in express terms declare such priority.” And then he says: “These decisions also express a thought which is generally prevalent in the public mind, that taxes levied by the state for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support. In view of that neces-

city, it has been a common practice to provide summary remedies for enforcing such demands, which have been upheld by the courts whenever assailed, although it is quite probable that some of the remedies so provided could not have been sustained as affording due process of law, if the proceedings had related to the collection of purely private debts." This thought is in line with what is said by the supreme court of Illinois in *Dennis v. Maynard*, 15 Ill. 477: "All the principles applicable to the prerogative priority of the Crown in this respect equally apply to public dues for taxes."

It is said that, even if the foregoing views as to general taxes are correct, they cannot be made to apply to special taxes or assessments for improvements of the character in question in this case. The question, then, is whether the principles enunciated above apply to special as well as general taxes. Both are created by the sovereign power of the state. The distinction between them has been often discussed on our former opinions. Some of these opinions say that, while created by the taxing power of the state, they are not taxes. *Morrison v. Morey*, 146 Mo. 564, 48 S. W. 629; *Independence v. Gates*, 110 Mo. 374, 19 S. W. 728. These cases, however, have in mind the general taxes referred to in certain constitutional limitations, which limitations, however, do not refer to these special taxes for local improvements. Speaking in the above case of *Independence v. Gates* of the power to levy local assessments, we say: "It is settled in Missouri, and generally elsewhere, that it is referable to the taxing power, though such assessments are not taxes in the sense that word is usually employed." Again, in *Meier v. St. Louis*, 180 Mo. 408, 79 S. W. 957: "It is now settled law in this court that special assessments for local improvements are referable to the taxing power."

In *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. loc. cit. 177, 12 L.R.A.(N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 68, 12 Ann. Cas. 630, we say: "While a distinction is made between local assessments and taxes levied for general revenue purposes, in that an assessment for a local improvement is not a tax, within the meaning of the constitutional provision regarding uniformity of taxation, it is in a sense a tax, not, however, for the purpose of sustaining the government, but imposed upon individual property upon the theory that such property receives a special benefit different from the general one which the owner enjoys in common with others; in other words, an assessment for benefits."

As long ago as *Garrett v. St. Louis*, 25 Mo. 505, 69 Am. Dec. 475, this court said: "That this assessment upon the lot owners

fronting on the street is an exercise of the taxing power seems too plain to admit of argument."

This special tax is assessed because of special benefit to property, and yet there is also a public benefit. Indeed, it is this public benefit that justifies the exercise of the state's sovereign power. As said by Woodson, J., in *St. Louis v. G. W. Wright Contracting Co.* 202 Mo. loc. cit. 463, 119 Am. St. Rep. 810, 101 S. W. 8: "The tax is imposed for public purposes in the payment of street improvements, and not for private use. As an incident only to the public improvement, the adjoining property is benefited, and because of that benefit the tax is assessed against the property, and not against its owner."

So we are dealing with a tax, not a general tax to support the government, but a special tax imposed by the same general power, and for the same general purpose,—the public good. General taxes are exacted for the public good. True it is quite common to speak of them as being levied for the support of the government. This, however, is a too narrow limitation. Taxes are used for the public good in many ways other than government support; as, for instance, public improvements and schools. Government exists for the public good; and it is for the public good that streets are improved and sewers constructed. The state could not compel a man to improve a street in front of his lot for the sole purpose of benefiting his lot. There is in such improvement a special benefit to the abutting lot. Therefore the tax for such improvement may be greater upon that lot than it is upon the general property in the city; and hence we speak of this special tax as a benefit assessment. The abutting property is not taxed for the entire cost of the improvement. Section 18, art. 6, of the St. Louis Charter, provides: "The cost of construction of all the foregoing improvements within the city shall be apportioned as follows: The grading of new streets, alleys, and the making of cross walks, and the repairs of all streets and highways and cleaning of the same, and of all alleys and cross walks, shall be paid out of the general revenue of the city; and the paving, curbing, guttering, sidewalks, and the materials for the roadways, the repairs of all alleys and sidewalks, shall be charged upon the adjoining property as a special tax, and collected and paid as hereinafter provided."

Here we have both general and special taxes levied by the same power, and both used for the same purpose; namely, making and maintaining a public street. There is no essential difference between them, so far as concerns the questions under discuss...

These special taxes are, by § 18, above set out, charged upon the property,—not against the owner. By § 25, art. 6, of the charter, the tax bill is a lien upon the property charged, to be enforced by suit against the "owner of the land."

We have ruled above that, as to general taxes, a similar provision gives the lien priority over earlier encumbrances. We have also ruled that, as to general taxes, the word "owner," in a similar provision for suit against the owner of the land, must be construed to include encumbrances. On principle, it would seem that the same ruling should be applied to these special taxes. The exigencies of government are as great as to the necessity for the tax and for its prompt and certain collection. The application of the rule of priority bears less hardly on the encumbrancer. The general tax benefits the property taxed, but remotely and indirectly. The special tax is of direct benefit to the property, enhancing its value in proportion to the tax, and benefits the encumbrancer by adding to the value of his security. On this point, the supreme court of Minnesota, in *Morey v. Duluth*, 75 Minn. 221, 77 N. W. 829, says: "The improvement is for the benefit of all interests in the land, for that of the lien holder as well as that of the fee owner, and necessarily the lien of the assessment for the improvement must be coextensive with the estate benefited and assessed." And further: "It is apparent, however, from the provisions of the charter that the word 'owner' is not used therein in a strict sense, but that it means persons interested in the land, which includes mortgagees."

We have decided that a judgment for special taxes must be and can only be one enforcing the lien against the particular property. In *Barber Asphalt Paving Co. v. St. Joseph*, 183 Mo. 451, 82 S. W. 64, we say: "Proceedings to enforce special tax bills are in the nature of proceedings *in rem*, and compulsory payment of the judgment can only be made by a sale of the assessed property."

The law governing the tax in this case is found in the charter of the city of St. Louis, which provides: "Said tax bills shall be and become a lien on the property charged therewith, and may be collected of the owner of the land and in the name of and by the contractor as any other claim in any court of competent jurisdiction." Section 25, art. 6.

Construed in the light of the case last cited, this means that the tax is a lien on the property, to be enforced by a proceeding *in rem* against the property. And, as ruled above, the word "owner" includes encumbrancers. So far as concerns the method of

procedure provided in the charter,—namely, to sue as upon any other claim in any court of competent jurisdiction,—this must mean such suit "as is adapted to the enforcement of the lien." *Barber Asphalt Paving Co. v. St. Joseph*, *supra*. That this tax is given priority inferentially by the charter is shown by the further provision in said § 25: "That the owner or any other person having an interest in the property charged with the tax bill may pay the same in full at any time within thirty days after notice of the tax bill, without interest."

The clause "any other person having an interest in the property" certainly includes encumbrancers. This provision is meaningless, without it is designed to enable encumbrancers to protect their interests by paying, without penalty, taxes to which their interests are subordinate. If their interests are not liable for the tax, why should they be referred to in connection with its payment?

The charter contains no provision making either the tax itself or the judgment a first lien; and yet we have seen that, without anything more in the general law than is found in the charter provision, general taxes have been held by this court to constitute a first lien.

These views are sustained by the case of *Keating v. Craig*, 73 Mo. 507. That case involved a special tax bill, issued under the charter of Kansas City, § 3 of article 9 of which provides that in suits to enforce the lien of a special tax bill all or any of the owners of the land charged, or of any interest or estate therein, may be made defendants, and that a judgment in such suit shall bind all the right, title, interest, and estate in the land the defendants and each of them owned at the time the lien of the tax bill commenced, or acquired thereafter; and, further, that parties interested in the land, not made defendants, shall not be affected thereby; and, if they claim through or under any parties defendant prior to suit brought, they may redeem from the purchaser. It was held in the *Keating Case* that the tax lien was prior to an earlier deed of trust. It is true that reference is made in the opinion to the foregoing charter provisions as indicating the intention of the framers to give it priority; but, under the law as we have construed it in this opinion, and in the light of the former rulings of this court, cited herein, this provision of the Kansas City charter is simply declaratory of the law, and is no more indicative of the intent of the lawmakers than is the provision in the St. Louis charter allowing parties owning interests in the property to pay the tax without penalty. The *Keating Case* says: "The lien of the special

tax bill, like the lien for general taxes, is superior to any encumbrance with which the owner may charge his land." The opinion adds: "This is the evident meaning of that portion of § 3, above referred to, which declares the effect of a judgment on a special tax bill."

No doubt, § 3 does mean that, and no doubt, under our decisions, the meaning of the law would be the same without § 3. Such evidently was the construction put upon the Keating Case by Norton, J., in his dissenting opinion in the case of State v. St. Louis, K. C. & N. R. Co. 77 Mo. loc. cit. 220. (In this there was no conflict with the majority opinion.) He quotes the above statement of the law from the Keating Case in a discussion upon general taxes, and without any reference to the charter provision. In our judgment, there is as much warrant in the St. Louis charter for the rule declared in the Keating Case as can be found in the Kansas City charter. That rule we approve.

It is urged by respondent that we should consider the exigencies of the case; that it is essential to the proper improvement of the city streets and sewers that special tax bills shall be first liens, in order to insure their prompt and certain collection; further, that we should consider the fact that under the charter adopted in 1876 special tax bills have been always enforced as first liens, without question of their priority until now. The appellants object that such considerations ought not affect our conclusions as to the law. We appreciate the force of this objection; and yet in construing the charter, in order to arrive at the intent of the framers, it is proper to consider the objects which they sought to accomplish, and the practical situation they were attempting to provide for. It was doubtless obvious to them that, unless tax bills became first liens on property, the improvement of the city would be seriously hampered. It is also proper to consider that, while the fact that a certain construction of the law has been usually recognized by the city authorities, the bar, and the people at large, does not establish its validity, still such fact is not without some persuasive force in favor of such construction.

This case has been ably and exhaustively briefed and argued on both sides. Counsel have cited the decisions in other jurisdictions on the question involved, both as to general and special taxes. We have examined the cases in detail. To discuss them would extend this opinion to unreasonable length. The cases will be found in the digest of the briefs. They hold diverse views; but, in our judgment, the weight of authori-

ty as found in the decided cases supports the views herein expressed.

The judgment is affirmed.

Brown, Woodson, and Graves, JJ., concur.

Kennish, J., dissents in opinion filed, in which Valliant, Ch. J., and Lamm, J., concur.

Kennish, J., dissenting:

The principles of law announced in the foregoing opinion, and upon which the case is decided, are so at variance with the conclusions arrived at by the writer after a thorough examination of the subject, as to require that I give expression to my views.

There is but one question in the case, and that is, as stated in the opinion: "Under the charter of the city of St. Louis, has the lien of a special tax bill, issued for street improvements, priority over a deed of trust which antedates the bill?" Notwithstanding the singleness of the issue thus in judgment, the majority opinion, in deciding the case, states and affirms the following proposition: "In this state, both general and special tax liens have priority, (a) in the absence of statutory direction to the contrary, and (b) such priority of the special tax lien is fairly inferable from the language of the statute (charter) creating the lien." In this case, the litigants are private persons, one claiming under a trust deed taken as security for a loan when the property was clear and unencumbered, and the other claiming under a special tax bill for street improvements subsequently made. Neither the state nor any subdivision thereof is seeking to enforce a lien for general taxes levied for the support of the government, nor is even a party to the proceeding. It follows that no question as to the lien for general taxes is before us, and any pronouncement as to the law applicable thereto cannot be authoritatively decided in this case. The two kinds of taxes, general and special, differ in many respects; and, as there is an abundance of authority upon the one question in this case—priority as between the special tax and the prior encumbrance—it is difficult to understand wherein the issue to be decided is simplified by combining it with a proposition as to taxes not in any wise involved in this suit.

As to the two propositions "a" and "b," above referred to, it should be stated at the outset that if the special tax lien has priority, in the absence of a statute to the contrary, that ends the controversy; for it is not pretended that such a statute exists under the facts of this case. If that contention is sound law, it is unnecessary, as it is

inconsistent, to invoke the doctrine that such priority is fairly inferable from the provisions of the charter. On the other hand, if the priority of the special tax lien is fairly to be inferred from the charter, no issue of law remains, because appellants concede that if such priority is expressed in the charter, or can be deduced therefrom by fair inference, then the lien of the special tax must prevail. The questions before us, therefore, are two: (1) Is the special tax bill a superior lien over a pre-existing encumbrance, in the absence of statutory direction to the contrary, and, if not, (2) does the charter fairly imply an intent to give such priority? I say fairly imply such intent, because there is no claim that it does so expressly.

Taking up these two propositions in their order, it should be observed that the first stated is not a question of first impression, to be reasoned out without the aid of adjudications and of those writers who have made a specialty of this branch of the law. Although there is an abundance of such authority in the books, as will be shown presently, it is noticeable that not a single textbook or writer upon the subject is cited (or can be cited) in support of the opinion of the court herein. The following excerpts will show the views of the great jurists who have written upon the subject:

"The general rule is that taxes are not a lien, unless expressly made so; and when liens are expressly created they are not to be enlarged by construction. . . . Not only is it competent for the state to charge land with a lien for the taxes imposed thereupon, but the legislature may, if it shall deem it proper or necessary to do so, make the lien a first claim on the property, with precedence of all other claims and liens whatsoever, whether created by judgment, mortgage, execution, or otherwise, and whether arising before or after the execution of the tax. When that is done, the lien does not stand on the same footing with an ordinary encumbrance, but attaches itself to the *res*, without regard to individual ownership, and, if enforced by sale of the land, the purchaser will take a valid and unimpeachable title." 2 Cooley, Taxn. 3d ed. pp. 865, 866.

"The provisions of the statute determine the question of the priority between the lien of an assessment and other liens upon realty, if both liens are created after the enactment of such statute. . . . If it is so provided by statute, the lien of an assessment may have priority over a lien which is earlier in point of time; such as a mortgage lien. In some cases, the right of a mortgagee as against an assessment lien has been discussed, but not decided. A statute may 40 L.R.A. (N.S.)

make the lien of an assessment superior to the liens of existing encumbrances, since all property owners hold in subordination to the taxing power. In the absence of a statute giving an assessment priority over an earlier mortgage lien, an assessment has no such priority." 2 Page & J. Taxation by Assessments, § 1068.

"A lien for public taxes and assessments is upon the property, and is paramount to all liens acquired by personal contract, when so provided by statute. . . . Although the lien of a prior recorded mortgage is superior to that of a special assessment, it is within the power of the legislature to change the rule, and make the mortgage lien secondary to that of the assessment." Hamilton, Special Assessments, § 708.

"There is no common-law rule which makes a levy and assessment of taxes *eo proprio vigore* a lien on the property of the taxpayer. Such liens owe their existence wholly to statute; and their duration, limitation, and priorities, together with the property to which they attach, must be determined by the statutes creating them." 27 Am. & Eng. Enc. Law, 2d ed. 735.

"Taxes and assessments levied upon land which is already subject to a mortgage do not displace or outrank the lien of the mortgage, in the absence of an express legislative declaration that they shall constitute a paramount lien." 27 Cyc. 1176.

"It is, for these reasons, often proper to deduce from the general language of the statute giving a lien the conclusion that it gives a paramount lien to which mortgage estates or judgment liens must yield. But this conclusion cannot, perhaps, be inferred where no provision is made for giving those who hold such interests a hearing, and where there are no words declaring the superiority of the lien." 2 Elliott, Roads & Streets, 3d ed. § 749.

The learned author last cited, writing the opinion in the case of State ex rel. Ely v. Aetna Ins. Co. 117 Ind. 251, 20 N. E. 144, and discussing the subject of the lien of a special tax created by statute, said: "The statute does not declare that the assessment shall be a prior lien, but simply provides that the assessment shall be a lien from the date of filing the report of the commissioners." Acts of 1883, p. 179, § 5. We do not doubt that it would have been within the power of the legislature to provide by express words that the lien should have priority over pre-existing mortgages. Provident Inst. for Savings v. Jersey City, 113 U. S. 506, 28 L. ed. 1102, 5 Sup. Ct. Rep. 612. But there is no such provision in our statute, and the question is whether the courts can put one there. We appreciate the force of the appellant's argument, but

think it one that should be addressed to the legislature, rather than the courts. We can readily perceive that there are cases in which the adjudication in favor of the priority of a mortgage lien would seriously interfere with the prosecution of a work for the promotion of the public welfare; but the creation of liens and their incidents is a legislative matter, and the courts cannot create such liens. 1 Jones, Liens, §§ 97-112. The statute must determine the character and extent of the lien. 1 Jones, Liens, § 105. It is not necessary that it should in express terms declare that the lien shall be a paramount one; for, if the intention can be gathered from the general words and purposes of the statute, the courts will give it effect. The statute under consideration does not contain any provision indicating an intention to make the lien paramount to that of a pre-existing mortgage."

These authorities, as might reasonably be expected from the fact that they so state the law, are supported by the weight of adjudications of the courts of last resort. We shall not encumber this opinion by citing the cases. They will be found in the footnotes of the foregoing works.

In the case of *Everett v. Marston*, 186 Mo. loc. cit. 599, 85 S. W. 542, discussing tax liens, this court, quoting with approval from one of the above authorities, said: "There is no common-law rule which makes a levy and assessment of taxes *ex proprio vigore* a lien on the property of the taxpayer. Such liens owe their existence wholly to statute; and their duration, limitation, and priorities, together with the property to which they attach, must be determined by the statutes creating them."

Without admitting that a general tax due the state and a special tax due a private citizen stand upon the same footing as to priority, some reference should be made to the law of this state as to the liens for general and special taxes. It is provided by § 11,499, Revised Statutes 1909, that the judgment for general taxes shall be a prior lien. Many other statutes expressly provide for the priority of a lien for special assessments and other taxes. See §§ 11,517, 11,588, 9347, 9049, 9296, 9297, 5523, 5524, 5599, 5722, and 9618, Revised Statutes 1909. If the tax lien has priority of its own force and without the aid of any statute, it is plain that the legislature did not so understand it. But it is said that the act making a judgment for general taxes a prior lien was passed in the year 1877, and that until then such taxes were uniformly given priority by the courts, without a statute so providing. The limits of this dissent preclude a discussion of all the various statutory provisions as to the lien for taxes during the history of this state; but an examination of them has left no doubt that the law, by necessary inference, has at all times recognized the priority and dominant character of the statutory lien for general taxes. In the several revisions of the statutes, the following appear:

Missouri Territorial Laws, 1804-24, vol. 1, p. 738, § 22, provide that a deed under a sale for taxes "shall vest in the purchaser, his heirs and assigns, all the right, title, claim, and interest of the said lands (the right of the United States only excepted) to the part so sold." Revised Statutes 1835, pp. 542 and 543, provide that the lands upon which the taxes are not paid within the time prescribed "shall be forfeited to the state," and that a sale of such lands for taxes shall "convey to the purchaser all the right, title, and interest of the state in and to the land sold." Revised Statutes 1845, p. 948, speak of lands on which taxes shall not be paid within the time prescribed, as "forfeited to the state," and at page 952 provide that the register of lands shall "execute good and sufficient deeds of conveyance" to the persons purchasing lands at tax sales. Revised Statutes 1855, p. 1360, § 34, provide that the deed delivered to the purchaser at a tax sale "shall be prima facie evidence of title in fee simple." In the General Statutes of 1865, p. 127, it is provided that the tax deed "shall vest in the grantee, his heirs, and assigns the title to the real estate herein described." And at page 128, after providing that when lands offered for sale by the collector shall not be sold for want of bidders, the same shall be forfeited to the state of Missouri, "and thenceforth all right, title, and interest of every person whomsoever in and to such land or lot shall be considered as transferred to and vested absolutely in the state." In Wagner's Statutes of 1872, vol. 2, p. 1197, it is provided that the collector shall give notice of an application to the court to sell lands upon which there are delinquent taxes. The form of notice is prescribed in the statute, and begins as follows: "Notice is hereby given to all persons interested that the undersigned collector . . . will make application to the county court . . . for a judgment to enforce the lien of the state of Missouri against the tracts of land . . . described in the foregoing list, and for an order to sell so much of said real property," etc. And at page 1199 it is provided that "any person interested in any of said lands or lots may make a defense to the proceeding." The form of the judgment is also set out in the statutes, and concludes as follows: "It is therefore ordered, adjudged, and decreed that the several tracts of land . . .

severally be condemned and be sold to satisfy the same as the law directs."

From the foregoing, it is clear that the law of this state always has recognized the priority of the state's lien for taxes; and it follows that the cases cited in the opinion of the court herein as holding the priority of the lien of general taxes are merely in accord with the statutory law, and are not in point as supporting the doctrine that the lien of a special tax is a prior lien, in the absence of a statute.

The case of *Stafford v. Fizer*, 82 Mo. 393, written by Commissioner Martin, is discussed at length in the opinion of the court herein, and announces the law (as to general taxes) that the tax lien is prior, in the absence of a statute. The cases it cites do not warrant that conclusion. One of those cases is *Hopper v. Malleeson*, 16 N. J. Eq. 382. The contest in that case was between a prior mortgagee and the owner of a tax title acquired under a sale of taxes levied after the execution of the mortgage. The court held in favor of the mortgagee, saying in the course of the opinion (loc. cit. 386): "The power of the legislature, by virtue of its sovereignty, to make the tax a charge upon the estate of all parties interested in the land, and to make the tax title paramount to all other and prior claims and encumbrances, is not questioned. But has that power been exercised in the act under consideration? Was it the intention of the legislature that the tax deed should operate to destroy all prior interests in the estate, vested or contingent, executed or executory, in possession or in expectancy?"

Before passing from this branch of the case, reference should be made to the case of *Dressman v. Farmers' & T. Nat. Bank*, 100 Ky. 571, 36 L.R.A. 121, 38 S. W. 1052, the leading authority relied upon by respondent. That a mistake was made in that case is placed beyond a doubt by the fact that, although the sole question involved was priority as between the lien of a special assessment and that of an antecedent encumbrance, the court said, "The attention of the court has not been directed to an adjudicated case where the precise question involved in this appeal has been passed upon,"—and cited in the opinion the very section of *Elliott on Roads & Streets*, supra, which states the law directly to the contrary.

The question remains: Does the charter, by fair inference, make the lien of the tax bill prior to that of an existing mortgage?

The language of the charter is: "Said tax bill shall be and become a lien on the property charged therewith, and may be collected of the owner of the land in the name of and by the contractor as any other 40 L.R.A. (N.S.)

claim in any court of competent jurisdiction," etc. It cannot fairly be said that this language indicates an intention to give priority to a special tax bill; but it is said that the word "owner," as used therein, was intended to include prior encumbrancers. That the word was not intended to have such meaning is evident. In the last sentence of the section, it is provided that, "in case the owner of the ground is a nonresident of the state, suit may be brought by attachment, which shall be equivalent to notice and demand of payment." The next section of the charter provides that "such certified tax bill shall in all cases be prima facie evidence . . . of the liability of the person therein named as the owner of the land." If the mortgagee is an owner, why the necessity of an attachment, simply because the owner of the equity happens to be a nonresident? Why not bring the suit in such case against the mortgagee? And, as the foreclosure of the mortgage lien would carry full title, why make the owner of the equity a party at all? Again, if "owner" means "mortgagee," it follows that in all cases where the mortgage was held by a nonresident an attachment would lie against the property, even though the owner of the equity lived upon it. The charter provides in detail the procedure for the collection of the tax bill by suit, but nowhere recognizes the right of the holder of the tax bill to make a prior encumbrancer a party to the proceeding. It is also said that the provision of the charter that "the owner or any person having an interest in the property charged with the tax bill may pay the same in full at any time within thirty days after notice of the tax bill, without interest," was intended to include prior encumbrancers; and that by such language an intent is disclosed to give priority to the special tax. It is a matter of common knowledge that the building and improvement of property liable for the tax frequently goes on concurrently with the street improvement. In making such improvements, encumbrances may be placed upon the property by the owner, and liens of contractors or others, later in point of time than the tax bill, may exist. Such persons would be directly interested in the payment of the special tax, and the charter language would clearly be applicable to them. In view of the law as heretofore quoted from *Cooley*, that "when liens are expressly created they are not to be enlarged by construction," it seems most unreasonable to hold that the language of the charter which is directly applicable to a class holding subject to the special tax was intended to subordinate the lien of a prior mortgage to that of a later special tax bill,

The case of *Keating v. Craig*, 73 Mo. 507, we are unable to understand in any other light than as authority against respondent. The case was almost identical in its facts with the case now before us, and the question for decision, as stated by this court, was: "Was the lien of the tax bill superior to the lien of the trust deeds?" This court then answered the question affirmatively and held in favor of the superiority of the lien of the tax bill; but the charter provision there construed, and under which such ruling was made, was stated by the court as follows: "It is provided in § 3, art. 9, of the city charter, that in suits to enforce the lien of a special tax bill all or any of the owners of the land charged, or of any interest or estate therein, may be made defendants, and that a judgment in such suit shall bind all the right, title, interest, and estate in the land that the defendants and each of them owned at the time the lien of the tax bill commenced, or acquired afterward." That provision expressly authorized the joining of a mortgagee as a defendant and by so doing gave priority to the lien of the tax bill. But no such provision, or one remotely kindred to it, can be found in the charter under consideration.

In the course of the opinion in the *Keating Case*, the court said: "The lien of the special tax bill, like the lien for general taxes, is superior to any encumbrance with which the owner may charge his land. This is the evident meaning of that portion of § 3, above referred to, which declares the effect of a judgment on a special tax bill." The court thus recognizes the priority of the lien for general taxes, which lien, as heretofore shown, was made prior by statute, and for a like reason holds the special tax a prior lien, because made so by the charter.

The foregoing review of the law, it is submitted, shows an array of authority in favor of the position maintained by appellants, which should be controlling in the decision of this case. And on reason why should it not be so, where the legislative body has not acted, when by acting it would have served notice on the public of the priority of such taxes? A person residing in a distant part of this state, or in another state, may loan his money on property which, in his opinion, is adequate security for the loan. Without any notice to him, a special tax bill is issued against the property, and is held by the contractor who made the improvement. Does this improvement increase the amount of the mortgagee's loan or his rate of interest? All he can claim is what he could have gotten without the improvement. Wherein is he benefited that he should be postponed to the contractor? As to the latter, if the improvement

benefits the property to the extent of the tax, he has the equity of the owner and the enhanced value to secure his tax bill. And, in any event, he knows when he undertakes the contract exactly what security he must rely upon. If the legislative body desires a different rule, it is always in its power to enact it. It has not done so under the facts of this case, and the judgment should be for the appellants.

Valliant, Ch. J., and Lamm, J., concur in this opinion.

Petition for rehearing denied April 9, 1912.

ALABAMA SUPREME COURT.

LAURA J. NORTON, Appt.,

v.

RICHARD RANDOLPH.

(— Ala. —, 58 So. 283.)

Nuisance — high fence.

1. A fence 20 feet high is not a nuisance merely because it excludes the light and air from the rooms of the adjoining building of a neighbor, and is liable to be blown against the house, to its injury.

Injunction — spite fence.

2. Injunction lies against the maintenance of a spite fence erected merely to annoy a neighbor and injure his property.

Pleading — bill for injunction — spite fence.

3. To maintain a suit for injunction against a spite fence, the bill should allege not only that the structure is entirely useless to defendant and without value to his property, but that it was maliciously erected for the purpose of injuring complainant in the use and enjoyment of his property.

(April 4, 1912.)

APPEAL by defendant from a decree of the Chancery Court for Jefferson County, overruling a demurrer to a bill filed to enjoin the maintenance of a fence which was alleged to constitute a nuisance. Reversed.

The facts are stated in the opinion.

Note. — Generally, as to injunction to compel or prevent the erection, maintenance, or removal of a fence, see note to *Miller v. Hoeschler*, 7 L.R.A. (N.S.) 49. As to liability for malicious erection of a fence, including the right to an injunction against such a fence, see note to *Barger v. Barringer*, 25 L.R.A. (N.S.) 831.

Generally, as to the effect of bad motive to make actionable what would otherwise not be, see note to *Passaic Print Works v. Ely & W. Dry-Goods Co.* 62 L.R.A. 673.

Mr. George Huddleston, for appellant:

The maintenance of a "spite fence" is not actionable.

Pickard v. Collins, 23 Barb. 458; Levy v. Brothers, 4 Misc. 48, 23 N. Y. Supp. 825; Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461; Kanabe v. Levelle, 23 N. Y. Supp. 818; Phelps v. Nowlen, 72 N. Y. 46, 28 Am. Rep. 93; Paine v. Chandler, 134 N. Y. 385, 19 L.R.A. 99, 32 N. E. 18; Auburn & C. Pl. Road Co. v. Douglass, 9 N. Y. 444; Dawson v. Kemper, 32 Ohio L. J. 15; Letts v. Kessler, 54 Ohio St. 73, 40 L.R.A. 177, 42 N. E. 765; Falloon v. Schilling, 29 Kan. 295, 44 Am. Rep. 642; Triplett v. Jackson, 5 Kan. App. 777, 48 Pac. 931; Lapere v. Luckey, 23 Kan. 534, 33 Am. Rep. 196; Honsel v. Conant, 12 Ill. App. 259; Guest v. Reynolds, 68 Ill. 478, 18 Am. Rep. 570; Ransom v. McCallister, 9 Ky. L. Rep. 495; Saddler v. Alexander, 21 Ky. L. Rep. 1835, 56 S. W. 518; Bordeaux v. Greene, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218; Metzger v. Hochrein, 107 Wis. 267, 50 L.R.A. 305, 81 Am. St. Rep. 841, 83 N. W. 308.

One's motive in exercising a right is immaterial, where no legal right of another is infringed, and the fact that he acts from a malicious desire to injure such person does not make the act actionable.

National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Orr v. Home Mut. Ins. Co. 12 La. Ann. 255, 68 Am. Dec. 770; Brothers v. Morris, 49 Vt. 460; Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543; McCune v. Norwich City Gas Co. 30 Conn. 521, 79 Am. Dec. 278; Foster v. McKibben, 14 Pa. 168; Humphrey v. Douglass, 11 Vt. 22, 34 Am. Dec. 669; Raycroft v. Tayntor, 68 Vt. 219, 33 L.R.A. 225, 54 Am. St. Rep. 882, 35 Atl. 53; South Royalton Bank v. Suffolk Bank, 27 Vt. 505; Robison v. Texas Pine Land Asso. — Tex. Civ. App. —, 40 S. W. 843; Payne v. Western & A. R. Co. 13 Lea, 507, 49 Am. Rep. 666; Passaic Print Works v. Ely & W. Dry Goods Co. 62 L.R.A. 673, 44 C. C. A. 426, 105 Fed. 163; Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186; Glendon Iron Co. v. Uhler, 75 Pa. 467, 15 Am. Rep. 599; West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; Jaggard, Torts, p. 55; Pollock, Torts, p. 152; White v. Kincaid, 149 N. C. 415, 23 L.R.A. (N.S.) 1177, 128 Am. St. Rep. 663, 63 S. E. 109. 40 L.R.A. (N.S.)

Messrs. A. C. Howze & H. R. Howze, for appellee:

Any use of one's property which causes injury to his neighbor, and interferes with the proper use and enjoyment of his property, is a nuisance.

Grady v. Wolaner, 46 Ala. 381, 7 Am. Rep. 593; Ogletree v. McQuaggs, 67 Ala. 580, 42 Am. Rep. 112; Rouse v. Martin, 75 Ala. 515, 51 Am. Rep. 463; English v. Progress Electric Light & Motor Co. 95 Ala. 264, 10 So. 134; Hundley v. Harrison, 123 Ala. 292, 26 So. 294; Richards v. Daugherty, 133 Ala. 569, 31 So. 934; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567.

If one, with the sole and malicious purpose of injuring another, and without any benefit, interest, or pleasure (other than that which he derives from his wicked intent) to himself or others, commits an act which, if done in good faith, would be justifiable, he is liable in an action in favor of such other person for the damages he may have sustained therefrom.

Burke v. Smith, 69 Mich. 383, 3 L.R.A. 184, 37 N. W. 838; Flaherty v. Moran, 81 Mich. 52, 8 L.R.A. 183, 21 Am. St. Rep. 510, 45 N. W. 381; Kirkwood v. Finegan, 95 Mich. 543, 55 N. W. 457; Peek v. Roe, 110 Mich. 52, 67 N. W. 1080; Barger v. Barringer, 151 N. C. 433, 25 L.R.A. (N.S.) 831, 66 S. E. 439, 19 Ann. Cas. 472; Sankey v. St. Mary's Female Academy, 8 Mont. 267, 21 Pac. 23; Havens v. Klein, 49 How. Pr. 95.

Somerville, J., delivered the opinion of the court:

The bill is filed by the appellee, Randolph, against the appellant, Mrs. Norton, seeking to abate an alleged nuisance erected by her on a vacant lot adjoining his residence property in the city of Birmingham. The averments of the bill are substantially as follows: Complainant is the owner of a lot on which he has erected for selling or renting a valuable dwelling house, costing about \$6,000. This dwelling is in a desirable part of the city, and many other dwellings of like character have been erected on the same street. Respondent owns a vacant lot, immediately adjoining complainant's lot, "which is vacant and unimproved property, and is not used by her for any purpose." She has nevertheless erected on said vacant lot, within 3 or 4 feet of complainant's house, "a large plank wall or structure about 20 feet high and 30 feet long, by means of which she has almost entirely excluded the air and light from the rooms on that side." This structure is alleged to be useless, and also unsafe, in that it endangers the adjoining dwelling

by its liability to be blown over and thus cause damage thereto. It is further alleged that this structure "does not serve any useful purpose, nor add any value to the property of the said Laura J. Norton;" and that complainant "does not know for what purpose said structure was erected by the said Laura J. Norton, unless it was for the purpose of vexing, annoying, and injuring" him, "by preventing him from using his property, either by sale or rent; and that it has prevented his selling or renting said property, and its selling or renting value has been greatly diminished thereby." Respondent demurred to the bill as a whole, and assigned the following grounds: "(1) For that there is no equity in said bill. (2) For that complainant has an adequate remedy at law for the matters and things complained of therein. (3) For that it does not sufficiently appear therefrom that the said wall or structure alleged to have been erected by defendant is a nuisance. (4) For that it is not sufficiently shown that the said wall or structure erected by defendant is dangerous, unsafe, or defective, or was not erected with proper and necessary skill and care, nor that same is unsafe in such way or measure as to constitute same a nuisance. (5) For that it does not sufficiently appear from the bill that defendant's erection of said wall or structure on her lot was not lawful nor in the exercise of her subsisting legal rights, nor that she has thereby interfered with complainant or his property, or his legal rights or privileges." The chancellor overruled the demurrer, and the appeal is from that decree.

The jurisdiction of equity to abate nuisances by injunction is too well settled to require discussion. The main question, therefore, involved in this case, is whether the allegations of the bill, which are admitted to be true by the demurrer, establish such a nuisance as to justly invoke the intervention of a court of equity.

We think it clear that the averments of the bill are insufficient to show that the structure complained of is dangerous to the safety of complainant's premises in such sense as to constitute a nuisance, and the grounds of demurrer pointing out this defect should have been sustained had they been directed and limited to that aspect of the bill. But, being directed to the whole bill, they were properly overruled if the bill had equity in some other aspect.

We come, then, to the decisive questions raised by the fifth ground of demurrer: Is the structure described in the bill brought by appropriate averment within the class known in legal parlance as "spite fences;" that is, was it erected by respondent solely

for the malicious purpose of vexing and injuring complainant in the lawful use and enjoyment of his dwelling house, and was it at the same time devoid of all benefit or value to respondent in the use or improvement of her property? And, if so, is it legally a nuisance?

It is of course true, as argued by appellant, that the old English doctrine of ancient lights is not, and never has been, in force in this state. *Ward v. Neal*, 37 Ala. 500. And the general rule is well settled that the owner of land has no right, as against adjoining owners, to the unobstructed access of light and air to his premises over adjoining premises, unless such right has been acquired by grant, express or implied.

Many of the cases dealing with the subject of malicious structures like the one here complained of are cited and reviewed in a case note to *Koblegard v. Hale*, 60 W. Va. 37, 116 Am. St. Rep. 868, 53 S. E. 793, 9 Ann. Cas. 732-734, and the great weight of authority, it must be conceded, is opposed to the equity of complainant's bill. *Bordeaux v. Greene*, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218; *Metzger v. Hochrein*, 107 Wis. 267, 50 L.R.A. 305, 81 Am. St. Rep. 841, 83 N. W. 308; *Guethler v. Altman*, 26 Ind. App. 587, 84 Am. St. Rep. 313, 60 N. E. 355; *Fisher v. Feige*, 137 Cal. 39, 59 L.R.A. 333, 92 Am. St. Rep. 77, 69 Pac. 618.

The doctrine of these cases, based on the alleged right of the owner of land to use it according to his malicious fancy, and without any advantage to himself or his land, for the sole purpose of injuring his neighbor in the lawful and beneficial use of his adjoining property, has been carried to such an extent as in many cases to be justly characterized as "odious." And hence statutes have been passed in a number of states abrogating the principle on account of the unjust and injurious effects resulting from its enforcement.

The authority of precedents, however, must often yield to the force of reason, and to the paramount demands of justice, as well as the decencies of civilized society, and the law ought to speak with a voice responsive to these demands.

We have examined the decisions and the reasoning of the various courts upon this question; and, unfettered by any precedents of our own, we are led to the deliberate conclusion that the majority view, as above stated, is founded upon a vicious fallacy, and is violative of sound legal principle as well as of common justice.

This conclusion has already found eloquent and forcible expression in decisions of the supreme courts of Michigan and North Carolina. *Burke v. Smith*, 69 Mich. 380, 8

L.R.A. 184, 37 N. W. 838; Flaherty v. Moran, 81 Mich. 52, 8 L.R.A. 183, 21 Am. St. Rep. 510, 45 N. W. 381; Kirkwood v. Finegan, 95 Mich. 543, 55 N. W. 457; Peek v. Roe, 110 Mich. 52, 67 N. W. 1080; Barger v. Barringer, 151 N. C. 433, 25 L.R.A.(N.S.) 831, 66 S. E. 439, 19 Ann. Cas. 472. And, it may be added, its underlying reasons have been convincingly stated in the decisions of several other states in the course of opinions dealing with and sustaining the constitutionality of statutes making certain malicious and nonuseful structures unlawful. Horan v. Byrnes, 72 N. H. 93, 62 L.R.A. 602, 101 Am. St. Rep. 670, 54 Atl. 945; Rideout v. Knox, 148 Mass. 368, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390.

As said by Parsons, Ch. J., in Horan v. Byrnes, supra: "The conclusion that a landowner's property right in real estate includes the right to use it solely for the injury and annoyance of his neighbor, without intending to subvert any useful purpose of his own, is 'based upon a narrow view of the effect of the land titles,' and is reached 'by the strict enforcement of a technical rule of ownership' briefly expressed in an ancient maxim, *Cujus est solum, ejus est usque ad caelum*. . . . Because when employed for a useful purpose such use may rightfully injure another, it does not follow that the same use for a wrongful purpose may also rightfully injure another, except upon the theory of absolute dominion; for the character of the use is an element of the right. . . . As, therefore, the statute does not deprive the plaintiff of any right to a reasonable use of his land, but only prohibits an unnecessary, unreasonable use, it does not deprive him of any property right."

And as said by Holmes, J., in Rideout v. Knox, supra: "But it is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends."

We approve the judicial reasoning as well as the Christian ethics of the Michigan court as expressed in the language of Morse, J., in Burke v. Smith, 69 Mich. 380, 8 L.R.A. 184, 37 N. E. 838: "If a man has no right to dig a hole upon his premises, not for any benefit to himself or his premises, but for the express purpose of destroying his neighbor's spring, why can he be permitted to shut out light and air from his neighbor's windows maliciously and without profit or benefit to himself? By analogy, it seems to me that the same

principle applies in both cases, and that the law will interpose and prevent the wanton injury in both cases. . . . It must be remembered that no man has a legal right to make a malicious use of his property, . . . for the avowed purpose of damaging his neighbor. To hold otherwise would be to make the law a convenient engine in cases like the present to injure and destroy the peace and comfort, and to damage the property of one's neighbor, for no other than a wicked purpose, which in itself is or ought to be unlawful. The right to do this cannot, in an enlightened country, exist either in the use of property or in any way or manner. . . . The right to breathe the air and to enjoy the sunshine is a natural one; and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice toward his neighbor." "I do not think the common law permits a man to be deprived of water, air, or light for the mere gratification of malice."

We quote also the following language of Brown, J., in Barger v. Barringer, 151 N. C. 433, 25 L.R.A.(N.S.) 831, 66 S. E. 439, 19 Ann. Cas. 472, adopted by the North Carolina court: "There are many annoyances arising from legitimate improvement and businesses which those living near must endure, but no one should be compelled to submit to a nuisance created and continued for no useful end, but solely to inflict upon him humiliation as well as physical pain. The ancient maxim of the common law, *Sic utere tuo, ut alienum non laedas*, is not founded in any human statute, but in that sentiment expressed by Him who taught good will toward men, and said, 'Love thy neighbor as thyself.' Freely translated, it enjoins that every person, in the use of his own property, should avoid injury to his neighbor as much as possible. No one ought to have the legal right to make a malicious use of his property for no benefit to himself, but merely to injure his fellow man. . . . The doctrine of private nuisances is founded upon this humane and venerable maxim of the law. If it can be successfully invoked to prevent the keeping of stables and hogpens so near ones neighbor as to cause discomfort, why cannot he whom it is sought to needlessly and maliciously deprive of air and sunlight also seek the *argis* of its protection? The right thus to injure one's neighbor with impunity cannot long continue to exist anywhere in an enlightened country where God is acknowledged and the Golden Rule is taught. On this subject, if need be, we will do better

to follow the pandects of the heathen Romans, whose jurists have inculcated a doctrine more consistent with the teachings of Him whom they permitted to be crucified, than to be governed by the principles of the common law as expounded by some Christian courts and text writers."

But little else remains to be said in support of the rule of reason and good morals. The rule of malice was, we think, conceived in error, and has indeed become a Caliban of the law,—the ugly and misshapen offspring of a decent and honorable parentage,—and we are unwilling to sanction in this jurisdiction its evil and odious sway. We therefore hold that there is equity in the bill of complaint.

As a matter of pleading, however, we think the averments of the bill are not sufficient to bring the case clearly within the rule above enunciated. It should be distinctly alleged, not only that the structure complained of is entirely useless to the respondent, and without value to her property, but also that it was maliciously erected for the purpose of injuring complainant in the use and enjoyment of his property. It may be conceded that the facts stated in the bill are sufficient to justify the inference of malice as a matter of evidence merely, but they may conceivably be consistent also with its absence; and, on demurrer, the averments of fact must, of course, be strictly construed against the pleader in so far as opposing conclusions may be drawn. Nor does the averment that complainant "does not know for what purpose said structure was erected, . . . unless it was for the purpose of vexing, annoying, and injuring" him, meet the requirements of good pleading as to the assumption of the burden of proof by complainant in this regard.

The fifth ground of demurrer should therefore have been sustained, and to that extent the decree of the chancellor will be reversed, and a decree here rendered to that effect.

Reversed and rendered.

All the Justices concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FRED F. BRYANT

v.

BOSTON ELEVATED RAILWAY COMPANY et al.

(212 Mass. 62, 98 N. E. 587.)

Street railway — injury by overhang of car on curve — liability.

1. A street car company which attempts 40 L.R.A. (N.S.)

to run a car around a curve at a time when a wagon is between the track and the curb, in a space so narrow that it will be hit by the overhang of the car as it rounds the curve, is liable for the resulting injury in case the car hits the wagon and forces it against a pedestrian on the sidewalk.

Highway — placing wagon where it will be hit by street car — liability.

2. The owner of a wagon, who, at a curve, drives into a space between a street car track and the curb, so narrow that the wagon will be hit by the overhang of a car attempting to round the curve at a time when a car must pass the wagon while there, is liable for the resulting injury in case the wagon is hit by a car and driven against a pedestrian on the sidewalk.

(May 24, 1912.)

R EPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court, after verdict in favor of the defendant railway, of an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Judgment for plaintiff.

The facts are stated in the opinion.

Messrs. W. C. Cogswell and F. O. Gilpatrick, for plaintiff:

Each defendant owed to the plaintiff, as a traveler upon the highway, the ordinary care of a prudent person.

Driscoll v. West End Street R. Co. 159 Mass. 142, 34 N. E. 171.

As to each other, each defendant was bound to use due care to avoid coming in contact with the other, and neither is entitled to assume that the other will keep out of his way. A violation of this duty by either, and consequent injury to a third person, is a violation of the duty owed that person; and if each violates his duty, and thereby contributes to an injury, each is responsible for the entire consequences.

Scannell v. Boston Elev. R. Co. 176 Mass. 170, 57 N. E. 341.

The accident was of such nature, and occurred under such circumstances, that it was of itself evidence of negligence against both defendants.

James v. Boston Elev. R. Co. 204 Mass. 158, 90 N. E. 513; Rockwell v. McGovern, 202 Mass. 6, 23 L.R.A. (N.S.) 1022, 88 N. E.

Note. — Liability of street railway company to one hit by swing of car at curve.

The earlier cases on this subject are collected in a note appended to South Covington & C. Street R. Co. v. Besse, 16 L.R.A. (N.S.) 890.

Following South Covington & C. Street R. Co. v. Besse, supra, it was held in Louis-

436; *McNamara v. Boston & M. R. Co.* 202 Mass. 492, 89 N. E. 131; *Sullivan v. Rowe*, 194 Mass. 500, 80 N. E. 459; *Cassady v. Old Colony Street R. Co.* 184 Mass. 156, 63 L.R.A. 285, 68 N. E. 10; *Melvin v. Pennsylvania Steel Co.* 180 Mass. 196, 62 N. E. 379; *Manning v. West End Street R. Co.* 166 Mass. 230, 44 N. E. 135; *Ugla v. West End Street R. Co.* 160 Mass. 351, 39 Am. St. Rep. 481, 35 N. E. 1126.

Messrs. M. J. Sughrue and Daniel M. Lyons for defendant railway company.

Messrs. Henry F. Hurlburt, Henry F. Hurlburt, Jr., and Carroll A. Wilson, for defendant express company:

The facts show that the accident was caused not by any negligent act on the part of its driver, but by the acts, or omission to act, on the part of the motorman and conductor of the car of the defendant elevated railway.

Lindenbaum v. New York, N. H. & H. R. Co. 197 Mass. 314, 84 N. E. 129; *Goldthwait v. Haverhill & G. Street R. Co.* 160 Mass. 554, 36 N. E. 486; *Eldredge v. Boston Elev. R. Co.* 203 Mass. 582, 89 N. E. 1041; *Lockwood v. Boston Elev. R. Co.* 200 Mass. 537, 22 L.R.A. (N.S.) 488, 86 N. E. 934.

Braley, J., delivered the opinion of the court:

The plaintiff, while upon a public way as a pedestrian, without any reasonable cause to apprehend that his position might be unsafe, was struck, knocked down, and rendered

ville R. Co. v. Ray, — Ky. —, 124 S. W. 313, that a street car company is not liable for injury to a person whose wagon is struck by the rear end of a car swinging away from the track in a natural manner when passing around a curve, since it is the duty of persons driving on the street to avoid such collisions. The court said that the rule imposing a duty upon those in charge of a street car to keep a lookout so as to avoid injuring those who may be crossing or upon the street in front of the moving car has never been so extended as to require the employees in charge of the car to keep a lookout at corners and curves, so as to prevent others using the street from colliding with the rear end of the car.

In the *Besse* Case, the car was in motion when it passed the wagon near the curve in the street, and in the *Ray* Case the car started just as the wagon passed it.

But in *Pitton v. International R. Co.* 121 N. Y. Supp. 637, where the plaintiff's wagon was struck by the rear end of a car as it rounded a curve, it was held that the question of the plaintiff's negligence was for the jury, where it appeared that the car was standing at the approach of the curve when the plaintiff's wagon, while running in the flange of an adjacent track, approached it in plain view of the motorman in charge, and it did not appear that

unconscious by a wagon driven by a servant of the defendant express company. If the combination of circumstances which produced the injury may be infrequent, they are not extraordinary, and the issue of this defendant's negligence having been a question for the jury, the refusal to order a verdict in its favor was right. *Powell v. Deveney*, 3 Cush. 300, 50 Am. Dec. 738; *Slattery v. Lawrence Ice Co.* 190 Mass. 79, 76 N. E. 459; *Hanley v. Boston Elev. R. Co.* 201 Mass. 55, 59, 87 N. E. 197; *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227, 231, 87 N. E. 567. But the ruling that the plaintiff could not recover against the defendant railway company should not have been given. The parties were concurrently using the public ways, and each defendant could not disregard the rights of other travelers, or escape the consequences if every reasonable precaution was not taken to avoid injury to them. *O'Brien v. Blue Hill Street R. Co.* 186 Mass. 446, 447, 71 N. E. 951. The jury would have been warranted in finding that for some distance below the place of the accident the car and wagon, while moving in the same direction, proceeded with equal speed, when, as they approached a sharp curve in the railway track where it turned into a cross street, the car passed the wagon, which then moved up until, as they entered the curve, the car and wagon were abreast, or the wagon might have been slightly in advance. As it approached the curve the car slackened speed,

the plaintiff had knowledge of the extent of the overhang of such a car, swinging around a curve. The court said that the jury had a right to find that the plaintiff had the right to assume that the car would not start before the rear of plaintiff's wagon had passed the point of danger of a collision with the rear end of the car as it swung around the curve, especially when it must have been plain to be seen that the rear wheel of the wagon was running in the flange of the rail of the adjoining track.

A motorman in charge of a street car approaching a horse and buggy standing in the highway near the track at a point where it curves is bound to take into consideration the swing of the car as it rounds the curve, and the fact that he believed he could pass in safety does not relieve the railway company from liability if injury results from his attempt to pass. *Birmingham R. Light & P. Co. v. Camp*, 161 Ala. 456, 49 So. 846. To the same effect on subsequent appeal in 2 Ala. App. 649, 57 So. 50.

On the general question as to the duty of a motorman upon perceiving a vehicle standing near the track, unattended, or occupied only by a child, see *Louisville R. Co. v. Flannery*, and note appended thereto in 24 L.R.A. (N.S.) 560. A. L. R.

while the wagon moved slowly, and the width of the street, with the sharp curvature of the track, plainly showed that the wagon, and the car could not simultaneously pass substantially abreast around the curve and the car turn to the left, without coming in contact. It also appeared that at this corner travel during the daytime became greatly congested, and because of the volume of traffic a police officer had been stationed for the protection of travelers. It was with this situation before them, that in broad daylight the motorman and the driver, after a signal from the officer that they could proceed, moved forward, and the car, going at greater speed, outstripped the wagon. The projecting rear end of the car in passing swung over the roadway, and coming into collision with the wagon forced it over the sidewalk, where it felled the plaintiff. It was the duty of the motorman to have stopped the car if he saw that the driver had determined to go on, and it was the duty of the driver not to have attempted to pass the car and turn to the left until the car had passed him; and if either the motorman or the driver had acted with ordinary prudence the collision would have been averted, and the injury to the plaintiff would not have happened. *Carrabar v. Boston & N. Street R. Co.* 198 Mass. 549, 126 Am. St. Rep. 461, 85 N. E. 162; *Wright v. Boston & N. Street R. Co.* 203 Mass. 569, 570, 571, 89 N. E. 1073. The plaintiff having offered abundant evidence that his injuries could be attributed to the concurrent misconduct of the defendants, he can recover judgment against both, although he can have but one satisfaction in damages. *Feneff v. Boston & M. R. Co.* 196 Mass. 575, 581, 82 N. E. 705. By the terms of the report, judgment is to be entered on the verdict for the plaintiff against both defendants. So ordered.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FREDERICK M. MORSE, Admr., etc., of
Frank F. Morse, Appt.,
v.

COMMERCIAL TRAVELERS' EASTERN
ACCIDENT ASSOCIATION.

(212 Mass. 140, 98 N. E. 599.)

Insurance — accident — voluntary exposure — drowning from canoe.

One who, while on a pleasure trip in a canoe, continues on his journey on a lake in a high wind when persons familiar with the location warn him of the danger, and no other canoes are out, voluntarily exposes himself to unnecessary danger, and 40 L.R.A. (N.S.)

is negligent, so that in case he is drowned by the overturning of the canoe, no recovery can be had on an accident insurance policy which exempts the insurer from liability in case of death from such exposure.

(May 24, 1912.)

APPEAL by plaintiff from a decree of the Superior Court for Suffolk County confirming the master's report and dismissing a bill filed to recover the amount alleged to be due on an accident insurance policy. Affirmed.

The facts are stated in the opinion.

Mr. Jesse W. Morton, for complainant:

The shipment of a pailful of water only in 10 miles does not show that going was dangerous, and the master was wrong in concluding that the morning trip was dangerous to the extent of being a warning to the insured that he embarked in the afternoon at his peril.

Badenfeld v. Massachusetts Mut. Acci. Asso. 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; *Freeman v. Travelers' Ins. Co.* 144 Mass. 573, 12 N. E. 372; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. St. Rep. 157.

Messrs. William F. Merritt and N. Thomas Merritt, Jr., for respondent:

Upon the facts found by the master the morning trip was an act of negligence on the part of the deceased.

Carpenter v. American Acci. Co. 46 S. C. 541, 24 S. E. 500; *Garcelon v. Commercial Travelers' Eastern Acci. Asso.* 195 Mass. 531, 10 L.R.A. (N.S.) 961, 81 N. E. 201; *Small v. Travelers' Protective Asso.* 118 Ga. 900, 63 L.R.A. 510, 45 S. E. 706; *Diddle v. Continental Casualty Co.* 65 W. Va. 170, 22 L.R.A. (N.S.) 779, 63 S. E. 962; *Alter v. Union Casualty & Surety Co.* 108 Mo. App. 169, 83 S. W. 276.

Note. — *Voluntary exposure to unnecessary danger, within meaning of accident insurance policy.*

The early cases upon the question here under consideration are gathered in the notes to *Fidelity & C. Co. v. Chambers*, 40 L.R.A. 432; *Diddle v. Continental Casualty Co.* 22 L.R.A. (N.S.) 779; and *Da Rin v. Casualty Co.* 27 L.R.A. (N.S.) 1164. And the present note includes only the cases which have dealt with the question since the writing of the last note referred to.

The expression "unnecessary exposure to danger" in an accident policy includes exposure attributable to negligence on the part of the insured, and is intended to hold him to the exercise of ordinary care, and exempt the insurer from liability in all

Morton, J., delivered the opinion of the court:

This is a bill in equity by the administrator of the estate of Frank F. Morse to compel the assessment by the defendant on its members surviving at the death of the intestate of the sum of \$2 each, and from the sum so realized to compel the payment to the plaintiff, for the benefit of Elizabeth G. Morse, the beneficiary named in the certificate of membership in the defendant association which the deceased held at the time of his death, of the amount realized therefrom, not exceeding \$5,000. There was a decree dismissing the bill and the plaintiff appealed.

The deceased came to his death by accidental drowning on Moosehead lake, on September 20, 1898. The certificate provided amongst other things that "no indemnity shall be paid to any member . . . for any injury caused wholly or in part, directly or indirectly, by . . . voluntary exposure to unnecessary danger; . . . nor for any injury which the member, by the exercise of ordinary care, prudence, and foresight, might have averted or prevented, or to which the member's own negligence shall have contributed. Nor shall any indemnity be paid to the beneficiary of any member for the death of said member resulting from an injury caused wholly or in part, directly or indirectly, by either of the foregoing causes."

The intestate and a companion had been

cases of injury occurring in whole or in part through a failure on the part of the insured to exercise such care. *Pacific Mut. L. Ins. Co. v. Adams*, 27 Okla. 496, 112 Pac. 1026.

To defeat a recovery as a matter of law on an accident policy on the ground of voluntary or unnecessary exposure to danger, the voluntary exposure must have been with respect to a danger so obvious that no ordinarily prudent person would have encountered it. *Powell v. Travelers' Protective Assn.* 160 Mo. App. 571, 140 S. W. 939.

Where a given state of facts is such that reasonable men may fairly differ upon the question as to whether the insured died of injuries resulting from "unnecessary exposure to danger," the determination of the matter is for the jury; and it is only where the facts are such that all reasonable men must draw the same conclusion from them that such a question is ever considered one of law for the court. *Pacific Mut. L. Ins. Co. v. Adams*, supra.

In *Powell v. Travelers' Protective Assn.* supra, it was held that the question whether the insured, who was killed by a train, met his death by voluntary or unnecessary exposure to danger, within the meaning of an accident policy, was for the jury, where there was evidence that he was ejected from

in the Moosehead lake region on a canoe trip for a vacation. On the morning of the day of the accident they were at a place called Socatean point, about 10 miles northwest of Mount Kineo, and paddled from there to Point Kineo, arriving about noon. There was a strong northwest wind, and the master found that over a part of the course, going one way, the water was as rough and dangerous as it was in any other part of the lake. There was another course which was much less dangerous. It did not appear which course the intestate and his companion took. But, as already stated, they arrived at Point Kineo safely about noon. They took in a pailful of water on the trip. They stayed at the hotel about two hours and later returned to the canoe and started to paddle to Moody island, about 2 miles down the lake in a southeasterly direction from the hotel. Between the time that they arrived at Point Kineo and the time when they started for Moody island they were spoken to by several guides and cautioned about going out, and were told that it would be dangerous, and that no canoes were out on the lake because the guides thought it dangerous. In spite of the warning thus given and of the condition of the weather, they started out. They were watched for about a mile and a half, the canoe and its occupants occasionally disappearing in the trough of the waves, when a flash was seen, after which the canoe disappeared and was not seen again.

a train at a considerable distance from a station, at about 10 o'clock on a clear evening, that the place in question was outside the city limits, and that there were no lights nearby, and that the track at that point was built on an 8 or 10-foot embankment; that he was struck by a fast train about fifteen minutes after he was ejected, and near the first street of the city connecting with the railroad track by which he could have gotten out of the railroad yards.

Where it was sought to avoid liability on an accident policy issued to one who had been ejected from one train and killed by another, on the ground that the insured had voluntarily exposed himself to danger, it was held that the testimony of the insured's wife as to his mental and physical condition could not be accepted as conclusive of his condition after leaving the train, where she had not seen her husband for some time prior to the accident, and her testimony did not cover the time elapsing between his being thrown off the train and the time when the accident occurred, since, assuming that he was violently thrown off the train, and fell, striking his head and shoulders, it was for the jury to draw its own inference as to the effect upon his mind and body. *Ibid.*

J. T. W.

There is no finding to that effect by the master, but it is probable that the flash referred to was caused by the wet bottom of the canoe as it capsized. The canoe was found on the shore of the island and the bodies were recovered about ten days later. The day was one of the worst of the season, the wind blowing from the northwest and gradually increasing in force till about 4 o'clock. When a northwest wind strikes the mountain, it is divided and a part deflected to one side and a part to the other side. These currents and the wind from over the top of the mountain unite from a half a mile to a mile from the shore, leaving the water protected for that distance, and causing a very rough, choppy sea where they unite. One standing on the shore would not realize this nor be able to determine just how rough the water was where the winds came together. A short distance from Moody island there was a submerged ledge, but the master finds that this had nothing to do with the accident and did not cause the drowning of Morse and his companion. The master finds that Morse and his companion did not know of this ledge and made no inquiries about the conditions which they would have to encounter, and not only failed to seek advice, but refused such advice as was given; that the general condition of the wind and water should have been a warning to them; that having made a 10-mile trip in the morning, they must have known that the trip would be a hard one, and that the fact that there were no guides out on the lake in canoes should also have been a warning to them. He concludes his report as follows: "Upon all the evidence it appears and I find as a fact that the deceased Frank F. Morse did not comply with the terms and conditions of his policy. That his death resulted from an act that he, by the exercise of ordinary care, prudence, and foresight, might have averted or prevented. Further, that his own negligence contributed to his death. Further, that the injury which caused the death was wholly or in part, directly or indirectly, due to this voluntary exposure to unnecessary danger. That he did not use ordinary care, prudence, and foresight, and that his own negligence contributed to his death. I find that the notice of death was good, and complied with the requirements of the by-laws and conditions of policy. Upon all the evidence it appears and I find as a fact that the death of Frank F. Morse was not accidental under the terms of the policy issued to him, and that there can be no recovery under said policy."

It is hard to criticize the conduct of those who have paid for their imprudence, as these young men did, with their lives. But 40 L.R.A. (N.S.)

upon the facts found by the master it is plain, we think, that there can be no recovery under the policy, and that the decree dismissing the bill was right and must be affirmed.

The deceased and his companion were warned of the danger by those whose experience and occupations should have caused their opinion concerning the conditions which existed in regard to wind and weather to be listened to and heeded. They knew that there were no canoes out on the lake because it was considered too dangerous for canoes to be out. They made no inquiries of anyone as to the conditions which they would meet. Apparently they relied on the fact that they had made the trip safely in the morning, and on the appearance of the lake as far as they could see it from the shore. But to start out as the deceased did could be found to be, as the master has found that it was, a lack of ordinary care and prudence on his part and a voluntary exposure to unnecessary danger, which contributed to and caused his death; and which, therefore, according to the express terms of the certificate, prevents any recovery. The case is not one of a catastrophe resulting from an overconfidence for which there were reasonable grounds, or from an error of judgment in regard to a matter concerning which prudent men might differ, but it involved a disregard of warnings which, under the circumstances, the master was warranted in finding the insured was bound, in the exercise of due care, to heed, and of a hazardous exposure to conditions of wind and weather which ordinary prudence and foresight forbade. See *Tuttle v. Travelers' Ins. Co.* 134 Mass. 175, 45 Am. Rep. 316; *Smith v. Aetna L. Ins. Co.* 185 Mass. 74, 64 L.R.A. 117, 102 Am. St. Rep. 326, 69 N. E. 1059; *Garcelon v. Commercial Travellers' Eastern Acci. Asso.* 195 Mass. 531, 10 L.R.A. (N.S.) 961, 81 N. E. 201.

The result is that the decree must be affirmed.

NEW YORK COURT OF APPEALS.

CHARLES E. W. SMITH, Appt.,
v.

WESTERN PACIFIC RAILWAY COMPANY, Reapt.

(203 N. Y. 499, 96 N. E. 1106.)

Jury — separate issues — statutory right to trial — constitutional rights.

1. That a code provision in a section dealing with issues and the mode of trial thereof, which authorizes the court to order one

or more issues to be separately tried prior to the trial of other issues, is in immediate juxtaposition to a section authorizing jury trials in the discretion of the court, does not indicate that such section was not intended to apply to cases where there was a constitutional right to jury trial.

Same — preliminary issues — right to separate.

2. A constitutional provision that the trial by jury in all cases in which it has been heretofore used shall remain inviolate does not prevent the allowance of the trial of preliminary issues in advance of other issues in the case.

(December 19, 1911.)

APPPEAL by plaintiff from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term for New York Coun-

ty, Part I., directing trial of certain issues prior to any trial of other issues in an action brought to recover a balance alleged to be due on a contract for services. Affirmed.

Statement by Hiscock, J.:

The appellant brought the action to recover a balance claimed to be due on a contract for services. Respondent served an answer containing a general denial, and also setting up as one amongst other affirmative defenses the statute of limitations, both of the state of New York and of the state of California, and it was of the issues arising under this defense that the court ordered a separate and preliminary trial.

The questions certified to us by the appellate division are:

First. "Are the provisions of § 973 of

Note. — Constitutionality of provision for separate trial of different issues in same case.

The decision in *SMITH v. WESTERN P. R. Co.*, to the effect that the constitutional provision that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever," was not infringed by an act allowing the trial of preliminary issues in advance of other issues in a case, appears to be sustained by authority.

In 24 Cyc. 176, in the article relating to juries, it is said "the legislature may make any reasonable regulations as to the practice and procedure in civil cases so long as the right to a jury trial is not materially impaired."

It seems clear that an act providing for the separate trial of different issues in a case relates merely to practice and procedure, and that it in no way infringes the right to a jury trial.

The only other decision which appears to have considered a similar statute is in accord with the result reached by the court in *SMITH v. WESTERN P. R. Co.*

In the case referred to, *Bennett v. State*, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912, a statute provided that the defendant in a criminal action, who claimed that he was insane at the time of the commission of the alleged offense, should plead that matter separately as a special plea with the plea of not guilty, and that the issue on the plea of insanity should be first tried by the jury impaneled in the action; and provided further that the verdict of the jury upon that plea should be taken before the case was tried upon the plea of not guilty, and that if the verdict of the jury on such plea was that the defendant was not insane at the time of the commission of the offense, then his trial upon the plea of not guilty should at once proceed before the same jury, and that the finding of the jury upon such special plea should be final and conclusive upon the question of his insanity 40 L.R.A. (N.S.)

at the time of the commission of the offense. It was contended that this statute was in conflict with the provision of the Constitution declaring that the accused in criminal prosecutions should "have the right to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed," but it was held that this provision was not infringed. The court said: "The only other objection made to the act is that it requires the jury to dispose of this plea [of insanity] by a verdict thereon before the trial shall proceed upon the plea of not guilty. This, we think, is a matter which relates merely to the form of a jury trial, and not to the substance; and it is also commendable as being the most practical and convenient method of disposing of the whole case. If the jury find insanity, there will be no need of going through the trial upon the plea of not guilty; such finding disposes of the whole case. Suppose a former conviction or former acquittal was pleaded, together with the plea of not guilty,—certainly an orderly disposition of these issues would be to try the issue on such first-named plea before the issue upon the plea of not guilty; and in such case it is clear that if the verdict on such plea was against the accused, it would be conclusive upon the trial of the issue of not guilty.

"It may be said that the issue on the plea of insanity is not like the plea of a former conviction or acquittal, because the question of insanity is, and always was a fact which might be given in evidence under the plea of not guilty, and that the defendant cannot be required, against his consent, to make a special issue upon that fact, and proceed to try it separately, and be concluded by the verdict thereon when he is tried on the plea of not guilty; that if he can be compelled to be tried upon such issue separately, he may be compelled to plead separately, in all indictments or informations for murder or homicide, that the killing was in self-defense, or that it hap-

the Code of Civil Procedure, if construed to apply to actions in which jury trial is guaranteed by § 2 of article 1 of the state Constitution, invalid, so far as thus applied, because in contravention of said section of the Constitution?"

Second. "Does § 973 of the Code of Civil Procedure authorize the court, in its discretion, upon compliance with said section, to order the trial of one or more issues in advance of the remaining issues in any action in which jury trial is guaranteed by § 2 of article 1 of the state Constitution?"

Messrs. Hardin & Hess, for appellant:

Section 973 of the Code is susceptible of two constructions,—by one of which it is constitutional and by the other it is unconstitutional. Of course the constitutional construction should be adopted and the unconstitutional construction rejected.

pened by misadventure or accident, and thus require the accused, in every case of homicide where he did not deny the killing, to plead specially his defense. Even if the support of this statute goes to that extent, we do not see how this takes away the defendant's right to a jury trial. Such a statute would simply regulate the pleadings and mode of procedure, and not go to the substance of a trial by jury. All the issues would still be tried by a jury, in the same way they are now tried. The only burden imposed upon the accused is that he shall be required to set out his several defenses in his pleadings instead of including them all together in the plea of not guilty. If the accused, under the plea of not guilty, relies upon insanity as a defense, the jury must necessarily determine that question when they render their general verdict; and if they acquit for that cause, the statutes of this state have always required the jury should so state in their verdict. No exception has ever been made to that requirement of the statute.

"In some respects the present law is advantageous to the accused, as it gives him the affirmative of the issue on the question of insanity, and so gives him the right to the close in the argument of that issue before the jury, which is always deemed an advantage in criminal prosecutions. The mere fact that the act requires the jury to announce their verdict upon this issue before the court proceeds to try the other issue cannot render the law unconstitutional. If it be unconstitutional at all, it must be upon the ground that the defendant is compelled to plead insanity specially as a defense to the information, or waive his right to give evidence of it as a defense upon the trial. It is clear, if the legislature have the power to compel the defendant to plead insanity as a defense, or waive it, then it has the power to prescribe the manner of disposing of that issue on the trial so long as it leaves the accused a trial by jury upon such issue.

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United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 407, 408, 53 L. ed. 848, 849, 29 Sup. Ct. Rep. 527; Central P. R. Co. v. Gallatin, 99 U. S. 744, 25 L. ed. 510; 6 Am. & Eng. Enc. Law, 2d ed. 975-982; Steck v. Colorado Fuel & Iron Co. 142 N. Y. 250, 25 L.R.A. 67, 37 N. E. 1; Malone v. St. Peter & Paul's Church, 172 N. Y. 269, 64 N. E. 961; Sporza v. German Sav. Bank, 192 N. Y. 8, 84 N. E. 406; Metz v. Maddox, 189 N. Y. 469, 121 Am. St. Rep. 909, 82 N. E. 507; United States v. Trans-Missouri Freight Assn. 166 U. S. 318, 41 L. ed. 1020, 17 Sup. Ct. Rep. 540.

The constitutional right of trial by jury cannot be infringed by either the court or the legislature.

Metz v. Maddox, 189 N. Y. 460, 121 Am. St. Rep. 909, 82 N. E. 507; Baylis v. Bullock Electric Mfg. Co. 59 App. Div. 576,

"In *Perry v. State*, 9 Wis. 19, this court held 'that to preserve the right of trial by jury it is not necessary to continue the particular method of designating jurors in force at the time of the adoption of the Constitution. The mode is within the control of the legislature. All that the right of trial by jury includes is a fair and impartial jury, not the particular mode of designating it.' See also *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169; *Beers v. Beers*, 4 Conn. 535, 10 Am. Rep. 186; *Jones v. Robbins*, 8 Gray, 329, *Judge Cooley*, speaking of the trial by jury guaranteed by the Constitution to the accused, says 'that in all those cases triable by a jury at common law,' the accused is entitled to such trial, 'with all the common-law incidents to a jury trial; so far, at least, as they can be regarded as tending to the protection of the accused.' The operation of this law is manifestly salutary in a case where a party is charged with a crime, who is apparently insane. In such case it would be in accordance with our idea of justice to first inquire as to the sanity of the accused before putting him on trial for the commission of a high crime. If the accused at the time of trial is, in fact, insane, he is not in a condition to answer the charge against him, and justice seems to demand that the question of his capacity to plead to the charge should be first ascertained before compelling him to a trial upon the issue of not guilty. And we see no impropriety in trying the sane issue first, where there are serious doubts as to the insanity of the accused, if such insanity be set up as a defense. It does not seem to us to deprive the accused of any of the incidents of a jury trial which can be regarded as tending to his protection. Without pursuing this argument further, we are of the opinion that the law in question is a salutary law, and does not deprive the defendant of any constitutional right or privilege."

J. T. W.

69 N. Y. Supp. 693; Gansberg v. Sagemohl, 67 App. Div. 554, 73 N. Y. Supp. 984.

This constitutional right involves or requires a trial of all the issues of fact in the case by a jury of twelve men, and no more or less.

McClave v. Gibb, 157 N. Y. 413, 52 N. E. 186; People ex rel. Murray v. Special Sessions Justices, 74 N. Y. 407; People v. Dunn, 157 N. Y. 535, 43 L.R.A. 247, 52 N. E. 572; Vermilyea v. Palmer, 52 N. Y. 471; Cancemi v. People, 18 N. Y. 135; Capital Traction Co. v. Hof, 174 U. S. 1, 14, 43 L. ed. 873, 878, 19 Sup. Ct. Rep. 580; Blair v. McCormack Constr. Co. 123 App. Div. 30, 107 N. Y. Supp. 750; 17 Am. & Eng. Enc. Law, 2d ed. 1095, 1096; 1 Thomp. Trials, 1st ed. 4, 5; People v. Connor, 142 N. Y. 130, 36 N. E. 807.

Mr. C. M. Travis, with Messrs. Byrne & Cutcheon, for respondent:

Section 973 is not reasonably susceptible of a construction that would limit its application to cases where trial by jury is not a matter of right.

Manhattan Co. v. Kaldenberg, 165 N. Y. 1, 58 N. E. 790; Johnson v. Hudson River R. Co. 49 N. Y. 455; Tasmanian Main Line R. Co. v. Clark, 27 Week. Rep. 677; Weed v. Tucker, 19 N. Y. 432; Acker v. Leland, 109 N. Y. 5, 15 N. E. 743; Wild v. Hobson, 2 Ves. & B. 105; Carrick v. Young, 4 Madd. Ch. 437; Miller v. Priddon, 1 Macn. & G. 687; Emma Silver Min. Co. v. Emma Silver Min. Co. 17 Blatchf. 389, 1 Fed. 39; Terry v. Davy, 46 C. C. A. 141, 107 Fed. 50; Quarles v. Jenkins, 98 N. C. 258, 3 S. E. 395; Brown County v. Van Stralen, 45 Wis. 675; Morris v. Merritt, 52 Iowa, 496, 3 N. W. 504; Baldwin v. Rice, 183 N. Y. 55, 75 N. E. 1096; Johnson v. Hudson River R. Co. 49 N. Y. 455.

The Constitution confers no right to have all of the issues in a suit at law tried by the same jury.

People v. Connor, 142 N. Y. 130, 36 N. E. 807; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; People v. Dunn, 157 N. Y. 528, 43 L.R.A. 247, 52 N. E. 572; Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; People v. Meyer, 162 N. Y. 357, 56 N. E. 758; Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; Hayes v. Missouri, 120 U. S. 68, 70, 30 L. ed. 578, 579, 7 Sup. Ct. Rep. 350; Walter v. People, 32 N. Y. 147.

Hiscock, J., delivered the opinion of the court:

Section 973 of the Code provides: "The 40 L.R.A.(N.S.)

court in its discretion may order one or more issues to be separately tried prior to any trial of the other issues in the case." This action is one in which the parties are constitutionally entitled to a trial by jury. Under the section above quoted, the court ordered a separate trial of the issues raised by an affirmative defense of the statute of limitations before trial of the other issues involving what are ordinarily defined as the merits of the action. There is no question but that this separate and prior trial was to be before and by a common-law jury of twelve men, regularly impaneled, but, nevertheless, the appellant objects to the order as unauthorized and improper. His objections are, first, that the section quoted does not relate to an action where a party is entitled to a jury trial under the Constitution, but only to those cases where trials by jury are allowed by legislative action or judicial discretion; and, second, that if the section does relate to a case where there is a constitutional right to a jury trial it impairs that right and is therefore unconstitutional.

The first objection is almost wholly based on the fact that this section is found in juxtaposition to two sections dealing with trials by jury in the discretion of the court, and not as matter of right, with the argument added that if the application of the section is not so restricted it will be unconstitutional. This contention may be very briefly dismissed. It has no basis to rest on. The section is found in an article which deals with "Issues and the Mode of Trial Thereof," and which contains sections relating to trials by jury where the right thereto is constitutional, as well as those where it is allowed as a matter of discretion; and, under the circumstances, the location of the section is a matter of no significance. Moreover, while the argument that statutory provisions are *in pari materia* may at times be of use in solving doubts concerning the application or meaning of a particular provision, it cannot be made the basis for thwarting the undoubted application and overturning the clear meaning of a statute. The language of the provision in question is so plain and comprehensive that this is what we should do if we adopted the interpretation urged by appellant.

This brings us to the second proposition that, if given the broad application just stated, the act is unconstitutional. With this contention, also, I am unable to agree. The constitutional provision invoked against the act is, "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever," etc. This, of course, as asserted by appellant's counsel,

secures the right of trial before a common-law jury of twelve men of certain classes of issues, which include the ones here involved.

It is well settled that the object of such a provision is to preserve the substance of the right of trial by jury, rather than to prescribe the details of the methods by which it shall be exercised and enjoyed. Thus, in *Walker v. New Mexico & S. P. R. Co.* 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, 422, Judge Brewer, considering whether a statute of New Mexico violated the provisions of the United States Constitution on this subject, said: "The question is whether this act of the territorial legislature in substance impairs the right of trial by jury. The 7th Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. So long as this substance of right is preserved, the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action—the mere manner in which questions are submitted—is different from that which obtained at the common law."

And in *People v. Dunn*, 157 N. Y. 528, 535, 43 L.R.A. 247, 52 N. E. 572, 574, Judge Gray, expressing the same idea, also succinctly stated the fundamental elements of the trial by jury under the common law, and which our Constitution preserved. He wrote: "It is to be observed that our Constitution does not secure to the defendant any particular mode of jury trial, nor any particular method of jury selection. . . . The right was conceded to the citizen [at common law] of having the judgment of an impartial committee, or body, of his fellow citizens, upon charges involving his life, or his liberty, or his property, and two elements became essential ingredients of the right; *viz.*, that the jurors should be twelve in number, and that they should be capable of deciding the cause fairly and impartially."

Even if we assume, as I think we should, that this section of the Code permits separate trials of separate issues at different times, before different juries, it seems very clear that it does not destroy or impair the substantial right of a litigant to have his 40 L.R.A. (N.S.)

case tried before a proper jury, but only prescribes the method in which this may be done. Every issue is submitted to the verdict of a jury. This is the substance of the right. As a matter of convenience, the court may order some issues to be tried before others are taken up. This is a matter of procedure and detail. The Constitution does not provide, and there should not be interpolated into it a provision, that all of the issues, even though completely separate and distinct, must be tried at one and the same time. No amount of analysis will disclose any such protection or benefit to a litigant in having all of the issues submitted to a single jury as will render such a right one of the essential ones secured by the Constitution. On the contrary, it is at once apparent that the convenience of litigants may be much prompted by a prior trial of various jurisdictional and preliminary issues, and it is to be presumed that courts will so administer the provision in question as to make it remedial and beneficial, rather than burdensome.

There are many decisions which, in my opinion, sustain the view that the legislature had power to enact the section as a regulation of mere procedure, and without impairing any constitutional rights, and reference will be made to some of them.

In *People v. Connor*, 142 N. Y. 130, 134, 36 N. E. 807, 808, it appeared that the court had ordered the trial, first and separately, of issues raised by defendant's special plea of a former trial and conviction, and when this had been passed on by the jury adversely to the defendant the court had directed the trial to proceed before the same jury on the other issues raised by the general plea of not guilty. The defendant objected to the latter step, asking that the trial be suspended after disposition of the first issue, and that he be permitted to examine the jurors before proceeding to the trial of the general issue, thus exactly reversing the position assumed by the present appellant. There was no statutory provision for separate trials of different issues at this time, and this court held that there was no basis for appellant's claim to such a method of procedure, and that the trial must be one continuous proceeding. It did say, however, even under these conditions: "The order in which the issues should be disposed of was a matter in the discretion of the court, which had power to direct them to be tried separately or together." (p. 134.)

In *Stokes v. People*, 53 N. Y. 164, 173, 13 Am. Rep. 492, the court considered the constitutionality of an act which overturned what was claimed to be the rule of the common law that the prior formation or expression of an opinion by a proposed juror con-

clusively proved want of impartiality, and disqualified him from serving. Said act, however, amply provided that at the time of the trial it must appear that the proposed juror, notwithstanding such opinion so formed or expressed, was able to render an impartial verdict according to the evidence, and would not be biased or influenced by his prior views. The court, overruling the defendant's plea, said: "While the Constitution secures the right of trial by an impartial jury, the mode of procuring and impaneling such jury is regulated by law, either common or statutory, principally the latter, and it is within the power of the legislature to make, from time to time, such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury." (p. 173.) To similar effect is *Hayes v. Missouri*, 120 U. S. 68, 70, 30 L. ed. 578, 579, 7 Sup. Ct. Rep. 350.

In the following cases it was held directly, or by necessary inference, that separate trials may be had of preliminary or jurisdictional issues: *Fisher v. Fraprie*, 125 Mass. 472; *Central of Georgia R. Co. v. Brown*, 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989; *Jones v. Donnell*, 9 Ala. 695, 698; *Tyler v. Murray*, 57 Md. 418, 441.

In *Lavelle v. Corrignio*, 86 Hun, 135, 33 N. Y. Supp. 376, while that question was not actually decided, it was discussed, and the view expressed that on appeal in a partition action where several distinct and independent issues had been submitted to the jury, one of them incorrectly and the others correctly, a new trial might be granted as to the one without retrial of the others.

The legality of such a course of procedure has, however, fairly been affirmed in *Boyd v. Brown*, 17 Pick. 453, 461; *Kent v. Whitney*, 9 Allen, 62, 85 Am. Dec. 739; *Pratt v. Boston Heel & Leather Co.* 134 Mass. 300; *Leiter v. Lyons*, 24 R. I. 42, 52 Atl. 78, 81, 82; *McKay v. New England Dredging Co.* 93 Me. 201, 44 Atl. 614; *Oberbeck v. Mayer*, 59 Mo. App. 289, 298.

In the state of Missouri there is a provision in its practice act providing for the separate trial of different issues at the same or different terms of court; and, so far as appears, there has been no judicial opinion that this provision was a violation of the Missouri Constitution, securing the right of trial by jury.

In *People v. Trimble*, 60 Hun, 364, 15 N. Y. Supp. 60, affirmed in 131 N. Y. 118, 29 N. E. 1100, the court upheld a conviction for a felony, where the issue under plea of former conviction was first tried before one jury, and the issues raised by a general plea of not guilty before another jury.

None of the authorities cited by the appellant impair the reasoning or authority of 40 L.R.A. (N.S.)

these decisions, and I feel no doubt that the order appealed from should be affirmed, with costs, and the first question certified should be answered in the negative, and the second one in the affirmative.

Cullen, Ch. J., and Haight, Werner, Willard Bartlett, Chase, and Collin, JJ., concur.

OHIO SUPREME COURT.

STATE OF OHIO

v.

PHILLIPS.

(85 Ohio St. 317, 97 N. E. 976.)

Husband and wife — larceny — liability of wife.

The common-law rule that neither husband nor wife can be prosecuted for larceny of the goods of the other is not abrogated by §§ 7995-8004, General Code, defining the rights and liabilities of husband and wife, nor by § 12,447, General Code, defining larceny. An intention of the legislature to abolish an established rule of the common law and to create a crime where none existed before must clearly and unmistakably appear.

(January 16, 1912.)

EXCEPTIONS by the State to the ruling of the Court of Common Pleas for Lucas County acquitting defendant of the crime of larceny from her husband. Overruled.

The facts are stated in the opinion.

Messrs. Holland C. Webster and Roy R. Stuart for the State.

Mr. Paul J. Ragan for defendant.

Davis, Ch. J., delivered the opinion of the court:

This case presents the concrete question whether a wife can be prosecuted for larceny, when she has taken and converted to her own use personal property of her husband. The case is easily distinguishable from many of the cases cited in argument, in which there appear schemes of fraud or violence of which marriage is a part or to which it is an incident, or in which the wife or a husband goes away from the other with adulterous intent, the paramour assisting in the asportation and use of the goods of the defrauded spouse, or in which

Headnote by the COURT.

Note. — As to larceny or embezzlement by one spouse of the other's property, see note to *State v. Hogg*, 29 L.R.A. (N.S.) 830.

a third person without adulterous intercourse or intent, assisted in appropriating and using the goods which were charged to have been stolen; because none of these elements are found in this record. The bill of exceptions tends to prove that the defendant in error, about three weeks after the alleged crime, admitted that she took the money from the safe and gave it or part of it to her mother, and that she and her husband then joined in a mortgage to secure the repayment of \$500 of the amount taken to the brewery company, which had become security for that amount when her husband borrowed it. The court of common pleas directed a verdict of not guilty, to which the prosecuting attorney excepted. This is the whole case as it appears of record.

The state concedes that by the common law the indictment would not be sufficient; but it is contended that, by virtue of § 12,447 of the General Code, "whoever steals anything of value is guilty of larceny;" and also by virtue of the statutes defining the rights and liabilities of husband and wife (§§ 7995-8004, General Code), the legal unity of husband and wife, theretofore recognized as the foundation of the common-law rule, has been abrogated, so far, at least, as to make either spouse liable for larceny from the other.

We get very little aid in the solution of this phase of the question from decisions in other states, because so much depends upon the legislation peculiar to each state and its construction by the local courts. For example, in Arkansas, the Constitution of 1874 (article 9, § 7) provides as follows: "The real and personal property of any *feme covert* in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed, or conveyed by her the same as if she were a *feme sole*; and the same shall not be subject to the debts of her husband." The supreme court held that under that clause of the Constitution a husband might be guilty of larceny of his wife's personal property. *Hunt v. State*, 72 Ark. 241, 65 L.R.A. 71, 105 Am. St. Rep. 34, 79 S. W. 769, 2 Ann. Cas. 33. Although that judgment was reached by a course of reasoning which does not seem to us to be at all conclusive, it must be conceded that it is the law of that jurisdiction. In *Beasley v. State*, 138 Ind. 552, 46 Am. St. Rep. 418, 38 N. E. 35, the court said: "The learned judge below held the indictment good upon the ground that the recent statutes give the wife exclusive control and authority over her personal property, and have greatly enlarged her personal

rights as to the disposition thereof, making contracts and doing whatever a *feme sole* might do; and that the effect of such statutes is to sever the unity of person and community of property heretofore existing between husband and wife. There seems to be sound logic in this position." It was accordingly held that under the statutes of that state the husband's interest in his wife's property is abolished, and he may be convicted of the larceny of her money.

On the contrary, it was held by the supreme court of Michigan, in *Snyder v. People*, 26 Mich. 106, 12 Am. Rep. 302, in which case a husband was under indictment for burning his wife's dwelling house, that the statutes of that state for the protection of the rights of married women did not affect the marital unity of husband and wife, and did not change the common-law rule that such burning would not be arson. *Cooley, J.*, in delivering the opinion of the court, said: "As regards her individual property, the law has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies, and the unity of man and woman in the marriage relation is no more broken up by giving her a statutory ownership and control of property, than it would have been before the statute, by such family settlement as should give her the like ownership and control. At the common law, the power of independent action and judgment was in the husband alone; now it is in her also, for many purposes; but the authority in her to own and convey property, and to sue and be sued, is no more inconsistent with the marital unity, than the corresponding authority in him." Similar views are expressed in *Thomas v. Thomas*, 51 Ill. 162; *Walker v. Reamy*, 38 Pa. 410; *State v. Wincroft*, 76 N. C. 38; *State v. Matthews*, 76 N. C. 41.

Common-law rules have usually been founded upon sound reason and considerations of public policy, and out of this fact has grown the safe maxim that statutes derogating from the common law should be strictly construed. Keeping this maxim in mind, we have found nothing in the statutes of Ohio, and nothing has been pointed out to us, which would justify a conclusion that the general assembly expressly or impliedly abrogated the common-law rule that neither husband nor wife can be prosecuted for a larceny of the goods of the other; and much less an intention to do so. Indeed, we doubt that any member of that body had in contemplation such a result when he voted for the statutes which protect the individual rights of married people. The legislature was contemplating the expressed purpose of

the statutes, and that only. They were not at that time considering crimes and criminal procedure; and surely they cannot be presumed to have intended a thing which they did not clearly express and which is fraught with such far-reaching and radical consequences to the law of the domestic relations; for the abrogation of the doctrine of the legal unity of husband and wife, when pushed to its logical conclusion, would not only create crimes where there were none before, but would also authorize a husband and wife to maintain civil actions for tort against the other, such as actions for personal injuries, assault, false imprisonment, or slander (15 Am. & Eng. Enc. Law, 2d ed 857), thus multiplying a hundredfold the unhappy differences which have to be settled in the divorce courts. We cannot assume that the legislature intended this without very clear evidence of such an intention in the language of the statutes.

Since the foregoing was written, we have come upon a recent opinion of the Supreme Court of the United States (Thompson v. Thompson, 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A. (N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921) in which the court held that the common-law relation between husband and wife was not so far modified by § 1155 of the District of Columbia Code as to give to the wife a right of action to recover damages from her husband for an assault and battery committed by him upon her. The Code section referred to authorizes married women "to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried." The court's construction of this statute is that it was not intended to give to a married woman a right of action against her husband, but to allow the wife to maintain in her own name such actions in tort as at common law must be brought jointly to the husband and wife; and it was remarked within the power of the legislature to make this, by Justice Day, in the opinion: "Conceding it to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention."

Moreover, the unity of husband and wife, as recognized in the common law, is founded not merely on a community of goods, but upon the recognized obligation of both to the family and to society. The unit of society is not the individual, but the family; and whatever tends to undermine the family, by the irrepealable laws of nature will crumble and destroy the foundations of society and 40 L.R.A. (N.S.)

the state. So that the peace and sanctity of the home and family are the ultimate reason for the common-law rule. We do not think that we can safely hold by mere inference that the legislature has taken such a long step in the direction of destructive legislation.

The foregoing reasoning applies also to § 12,447, General Code.

Exceptions overruled.

Spear, Shauck, Price, Johnson, and Donahue, JJ., concur.

SOUTH DAKOTA SUPREME COURT.

STATE OF SOUTH DAKOTA EX REL.
FLORENCE PATTERSON, Resp't.,

v.

EMORY D. PICKERING, Appt.

(— S. D. —, 136 N. W. 105.)

Limitation of actions — bastardy proceedings.

An action to compel the father of a bastard to contribute to its support is civil, and not governed by the statute of limitations limiting the time for bringing proceedings of a quasi criminal or penal nature.

(May 7, 1912.)

Note. — *Limitation applicable to bastardy proceedings or action to compel support.*

"It is not the policy of the law to encourage prosecutions of this kind [bastardy proceedings], brought years after the event," said Maxwell, J., in Denham v. Watson, 24 Neb. 779, 40 N. W. 308, "and unless the testimony shows that the mother from the first had charged the offense upon the putative father, the claim could not be maintained. In other words, the charge made years afterwards must not rest on the mere assertions of the prosecutrix, then made and communicated to the putative father, but must show that from the conception or birth of the child he had been charged by the mother as being the child's father. The law is to be carefully guarded in this respect to prevent it from being used as a means of extorting money upon a false charge. Where, however, the fact of the paternity of the child is satisfactorily proved to charge the putative father, the statute of limitations will not run against a claim for its support during the time it requires the mother's care. The expenses in such case being continuous, the father must provide for them. In other words, he must support his own child, and the statute will not bar such claims."

It has been said that "the process is one of a peculiar character, existing only by statute, and any attempt to class it with

APPEAL by defendant from a judgment of the Circuit Court for Lawrence County in plaintiff's favor in a bastardy proceeding brought to require defendant to contribute to the support of his illegitimate child. Affirmed.

The facts are stated in the opinion.

Mr. John T. Milek, for appellant:

The action is, in its nature, quasi criminal.

Miller v. State, 110 Ala. 69, 20 So. 392; E. N. E. v. State, 25 Fla. 268, 6 So. 58;

People v. Phelan, 49 Mich. 492, 13 N. W. 830; Van Tassel v. State, 59 Wis. 351, 18 N. W. 328; State v. Scott, 7 S. D. 621, 65 N. W. 31; State v. Bunker, 7 S. D. 621, 65 N. W. 31.

Messrs. Eben W. Martin and Norman T. Mason also for appellant.

Messrs. Royal C. Johnson, Attorney General, and Samuel C. Polley, for respondent:

The proceeding is civil.

5 Cyc. 644.

actions or suits at common law of any description will afford little light. It is not comprehended under any term used in the statutes of limitation, nor does it appear to have been designed to be limited by any of them." Keniston v. Rowe, 16 Me. 38; Wheelwright v. Greer, 10 Allen, 389; 5 Cyc. 647.

"No statute of limitations," says the court in Wheelwright v. Greer, *supra*, "bars a mother's right to complain against the father of her bastard child."

So, in Denham v. Watson, *supra*, where the mother, at the first opportunity after the birth of the child, stated to the putative father and others that he was the father, and asked him to provide for its support, and continued so to insist to the time the proceedings were instituted, it was held that the statute of limitations—the exact period of which was not stated in the case—would not run against a claim for its support during the time it required the mother's care, notwithstanding more than four years had elapsed since the birth of the child.

And so, in State ex rel. Washington v. Hunter, 67 Ala. 81, it is held that a proceeding to charge a person as the reputed father of a bastard child is clearly not a misdemeanor, within the meaning of the statute, so as to be barred within twelve months after the commission of the offense, under § 4644 of the Code, since it is neither a civil suit nor a criminal prosecution, but quasi criminal, partaking of the nature of both. It was said: "We can see good reasons why no statute of limitations was prescribed to bar such proceedings. They are chiefly intended for the public indemnity, and to coerce the putative father to support and maintain the unfortunate child. 2 Kent, Com. 215. The duty of maintenance continues for a period of ten years, which, in no case, we apprehend, is to extend beyond the time of the child's minority, or legal infancy. We can see no reason why the statute should be so construed as to require such precipitation in the commencement of the proceedings, as, in many instances readily to be imagined, it would defeat the very purpose of the law."

Nor does a statute limiting actions for statutory penalties and other actions to two years have any application to a proceeding to charge the father of a bastard child with its maintenance. State v. Laughlin, 73 Iowa, 351, 35 N. W. 449; State v. 40 L.R.A. (N.S.)

Sarratt, 14 Rich. L. 29; State v. Compton (Mass. vol. 3, p. 611, May 1827), cited and set out in State v. Sarratt, *supra*.

So it has been held that a statute relating to crimes and punishments, and requiring the prosecution of certain offenses within one year after their commission, has no application to a prosecution for the support of an illegitimate child, but is confined to actions for forfeitures on penal statutes. State ex rel. Hagaman v. Stafford, 2 Blackf. 412.

But in Bake v. State, 21 Md. 422, it is held that a bastardy proceeding is a criminal proceeding, and is clearly within the provision of a statute requiring that prosecution of offenses must be instituted within one year from the time when the offense was committed.

So, the statute of limitations requiring the prosecution within a year from the commission of the offense begins to run from the birth of the child, and not from the time of the carnal intercourse between the parties. Neff v. State, 57 Md. 385.

Where the defendant flees to avoid arrest on the charge of fornication and bastardy, it is held that the statute of limitations requiring the prosecution to be brought within two years after the commission of such offense does not run until he returns to his customary residence, notwithstanding the fact that his hiding place has, all the while, been within the state. Com. v. Blackburn, 3 Pa. Co. Ct. 464.

Of course, a proceeding to charge a defendant as the father of a bastard child must appear to have been commenced within the period prescribed by the statute relating thereto. State v. Ledbetter, 26 N. C. (4 Ired. L.) 242, wherein three years was the prescribed limitation.

In State v. Perry, 122 N. C. 1043, 30 S. E. 139, while it is admitted that bastardy proceedings are quasi criminal in nature, it is held they are not governed by the statute of limitations requiring the prosecution of misdemeanors generally within two years, but are governed by the three years' statutory limitation, which is exclusively applicable to bastardy proceedings. "To the same effect is State v. Hedgepeth, 122 N. C. 1039, 30 S. E. 140.

An action under Rev. Code Civ. Proc. § 807, by the mother of a bastard child against the father, to compel him to support the child, is an action on a liability created by statute, other than a penalty

Ark.—Chambers v. State, 45 Ark. 56.
Ill.—Scharf v. People, 134 Ill. 240, 24 N. E. 761.

Ky.—Head v. Martin, 85 Ky. 480, 3 S. W. 622.

Mass.—Young v. Makepeace, 103 Mass. 50.

N. C.—State v. Addington, 143 N. C. 683, 57 S. E. 398, 11 Ann. Cas. 314.

S. D.—State v. Knowles, 10 S. D. 471, 74 N. W. 201; State ex rel. Berge v. Patterson, 18 S. D. 251, 100 N. W. 162.

Whiting, J., delivered the opinion of the court:

This was an action brought under chapter 37 of the Code of Civil Procedure, known as the bastardy statute, charging defendant

or forfeiture, and is not barred by limitations in two years, but, under § 60, may be brought at any time within six years. State ex rel. Berge v. Patterson, 18 S. D. 251, 100 N. W. 162.

After the lapse of three years from the birth of the child, no application having been made to the court for certain annuities for the support of the child, the court cannot order the putative father to pay the annuities to the mother, as in the nature of a debt of annuity for which he is in default. State v. Howard, 1 Swan, 133, wherein it is also held that notwithstanding the proceedings were not instituted until after the lapse of three years from the birth of the child, it is competent for the court to secure the public against any loss or injury which may ensue by reason of the child becoming a public charge upon the county, by requiring the putative father to give a bond of indemnity, with sureties for such purpose.

And where, as in Denham v. Watson, supra, there was a delay of more than four years after the birth of the bastard child in instituting the proceedings, it was held that expenses of the child, accruing prior to that time, would not be allowed against the father.

In Ex parte Currie, 26 N. B. 576, it was held that § 7 of the Consolidated Statutes, chap. 103, providing that a charge of bastardy shall be tried at the next term of the county court after the birth of the child, is imperative, unless the trial is postponed to a subsequent term, as provided by the statute; so that when, upon the hearing of such a charge, the jury disagreed and it was postponed to the next term, when, owing to the illness of the judge, no court was held, a writ of prohibition was held to be proper to restrain the judge of the county court from afterwards trying the information.

But in Ex parte Reid, 34 N. B. 133, which was an application for a writ of prohibition to restrain a proceeding to hear and determine an information charging one with being the father of a bastard child likely to become a charge on the parish, in which proceeding it appeared that the defendant was neither arrested nor the information entered until after the term of the county court next ensuing the birth of the child, when he denied his guilt, and entered into a recognizance to appear at the next ensuing term, the court was evenly divided on the question whether the writ should issue, and so the matter dropped. Three of the judges thought the writ should not issue because

the statute set out in Ex parte Currie, supra, is not applicable until the person charged has given the recognizance; and the Currie Case was distinguished on the ground that since the information in that case was tried and the jury disagreed, without any postponement of the trial at the next term of court, a writ of prohibition was warranted. The remaining judges, considering the Currie Case decisive of the question, thought the writ of prohibition should issue.

The infancy of the mother is no defense for her failure to comply with a specific statute requiring a prosecution for bastardy to be commenced within two years from the birth of the child, even though a general provision of the Code says that "any person being under legal disabilities when the cause accrues may bring his action within two years after the disability is removed." State ex rel. Ulen v. Pavey, 82 Ind. 543. But in this case it is to be observed that still another section of the Code provides that "in special cases, where a different limitation is prescribed by statute, the provisions of this act (the Code) shall not apply."

In Burt v. State, 79 Ind. 359, where the complaint and warrant in a prosecution for bastardy were issued within two years from the birth of the child, as required by the statute, but were lost before service, it was held that under the general rules applicable to lost pleadings and writs in civil cases, copies might be filed and used instead of the originals, and that the origin of the prosecution would date from the time of the original papers.

So, where the prosecution was begun within the two-year period, prescribed by the statute, but the defendant escaped after his arrest, but before trial, it was held that his re-arrest and prosecution nearly four years after the birth of the child was authorized. Patterson v. State, 91 Ind. 364, wherein it was said: "This provision [of the statute] applies to the institution of proceedings before the justice, and not to such proceedings as may be necessary to arrest a defendant who has escaped after the commencement of the suit."

In Warner v. Wheeler, 62 N. H. 385, it appears that the statute in New Hampshire does not allow the complaint to be made by the woman after the birth of the child, but that the town is allowed to sue for security when necessary, either before the birth of the child or "at any time before the expiration of one year from the birth of the child."

E. M. S.

with being the father of the illegitimate child of one Florence Patterson, and seeking a judgment requiring such defendant to contribute to the support of such child. The action was brought more than three years and less than six years after the birth of such child. The defendant pleaded the bar of the statute of limitations, claiming that § 86 of the Code of Criminal Procedure, as amended by chapter 129, Laws 1907, applies to an action under said chapter 37. Said section reads as follows: "Section 86. In all other cases an indictment or information for a public offense and all proceedings of a quasi criminal or penal nature, including the forfeiture of existing rights, shall be filed within three years after the commission of the offense or crime made the basis of the prosecution or proceeding; and be it further enacted that this act shall apply to all such offenses and crimes as have heretofore taken place and to all pending proceedings in any of the courts of this state." The trial court held that such section did not apply; that the action was not barred, and, upon the verdict of the jury, rendered judgment against defendant. From such judgment, defendant has appealed; the sole question presented upon the appeal being whether the above holding of the trial court was correct.

It is the contention of appellant that this action is, in its nature, quasi criminal; respondent insists that it is purely civil, and that therefore § 86, supra, has no application thereto. We are of the opinion that respondent is correct.

To determine the nature of an action, we should look, not so much to the method of procedure to be followed, as we should to the end to be attained. This action is one brought, not in any sense to punish the defendant for an offense, legal or moral, but to compel such defendant to furnish money "for the support, maintenance, and education of such child," if he be proven to be the father of same. Code Civ. Proc. § 811.

In fixing the place for trial, it makes no difference where the cause of action arose, where the child was born, or where the mother or child may be domiciled at time action is brought. *State ex rel. Berge v. Patterson*, 18 S. D. 251, 100 N. W. 162; *State v. Etter*, 24 S. D. 636, 140 Am. St. Rep. 801, 124 N. W. 957. Except when statutes forbid, the mother may make settlement with the putative father. The rules of evidence are those of a civil case. It is true that the method of procedure partakes, especially in connection with the inception of the action, very much of the nature of proceedings in a criminal action. This is not because the action is in any sense criminal in its nature, but rather because, from

the very necessity of the situation, it is necessary to secure the person of the defendant and compel the giving of security, in order to insure the value of any judgment that may eventually be found against the defendant. The proceedings under our statute are, outside of the original arrest, no more criminal in their nature than are those under our statute providing for arrest and bail in a civil action.

In the case of *Re Walker*, 61 Neb. 803, 86 N. W. 610, 12 Am. Crim. Rep. 343, under a statute very similar to our own, the court held, in accordance with a long line of decisions, that the action was civil in character; and the court quoted the following from the case of *Stokes v. Sanborn*, 45 N. H. 276: "Indeed, it is quite obvious that the object of the law is to redress a civil injury by compelling the putative father to aid the mother in the support of the child, and to indemnify the town chargeable with its support against the expenses which may be incurred thereby, giving to the court the power to require of the father or the mother, or both, security against this liability. . . . Some of the forms of this proceeding, it is true, are borrowed from the criminal law; but these are simply with the view of giving a more summary and stringent character to the process by which the respondent is brought into court and held to answer to the charge, leaving it in most other respects to stand upon the footing of ordinary civil causes. It is therefore held in *Marston v. Jenness*, 11 N. H. 156, and *Little v. Dickinson*, 29 N. H. 56, . . . that the respondent is not arraigned, but appears and pleads by attorney. Under a similar law in Massachusetts, this is held to be a civil proceeding. *Wilbur v. Crane*, 13 Pick. 284; *Williams v. Campbell*, 3 Met. 209. So in *Mariner v. Dyer*, 2 Me. 165; *Hinman v. Taylor*, 2 Conn. 357; *Robie v. McNiece*, 7 Vt. 419; *Gray v. Fulsome*, 7 Vt. 452; *Smith v. Lint*, 37 Me. 546. . . . The service in these cases is by arrest of the body, and security taken for the appearance of the respondent at the proper court, by bond; and, although the form of the proceeding in more summary, yet in substance it is like the cases of arrest and bail in ordinary civil process; and, upon a careful consideration of the question, we are of the opinion that a trial and judgment may be had without the personal attendance of the respondent, or that judgment may be rendered on default."

In some of the earlier decisions of this court, it was held that the action was quasi criminal in its nature; but in *State ex rel. Berge v. Patterson*, supra, which also involved the question of the bar of the statute of limitations, this court held the action to

be civil in character; and that it was not barred until the expiration of six years from time cause of action arose. Appellant insists that what was said in that case upon each of these points was mere *dictum* and unnecessary to the determination of the real question then before the court; and, furthermore, calls attention to the fact that § 86, supra, as it now reads, was not then in force. We are content to sustain the views of this court as expressed in that case; the same being sustained by the great weight of authority. 5 Cyc. 644; notes to State v. Addington, 11 Ann. Cas. 316. It follows that § 86 of the Code of Criminal Procedure has no application.

The judgment of the trial court is affirmed.

WASHINGTON SUPREME COURT.
(Department No. 2.)

JAMES J. CONWAY and Wife, Appts.,

v.

MINNESOTA MUTUAL LIFE INSURANCE COMPANY, Respt.

(62 Wash. 49, 112 Pac. 1106.)

Insurance — forfeiture — reinstatement — control of discretion.

1. The courts will not control the discretion of the officers of an insurance association in refusing to reinstate a member who has forfeited his rights by nonpayment of dues, where the contract provides

that any person in such circumstances may be reinstated "in the discretion of the officers," "upon his furnishing them satisfactory evidence that he is in good health;" at least, where there are facts bearing upon the question of his health which might influence the sound judgment and good conscience of an officer to decide against reinstatement.

Same — use of intoxicants — age.

2. The court cannot hold that a misrepresentation by an insured as to his age and the amount of intoxicants used during a day is not so material to the risk as to influence against reinstatement the sound judgment and good conscience of officers of the company in whom is vested the discretion as to his reinstatement after forfeiture of the policy for nonpayment of dues, upon his furnishing satisfactory evidence of health.

Same — waiver of provision — subordinate officer.

3. An insurance company which permits payments of overdue premiums without insisting on proof of good health on the part of insured, as provided by the contract, does not waive its right to require such proof before permitting reinstatement after a subsequent forfeiture; at least, where the first default was condoned by a subordinate officer who had no authority to bind the company without bringing it to the attention of the officers in whom was vested the power to enforce or waive the forfeiture.

(Dunbar, Ch. J., and Rudkin, J., dissent.)

(February 1, 1911.)

Note. — Insurance: judicial control of discretion as to reinstatement of insured.

For an extended treatment of the general question of conclusiveness of decisions of tribunals of associations or corporations, see note to Ryan v. Cudahy, 49 L.R.A. 353.

The decision in CONWAY v. MINNESOTA MUT. L. INS. CO. to the effect that the courts will not control the discretion of officers in whom is vested the right to determine as to whether or not the insured has furnished satisfactory evidence of good health, at least, where they have acted in evident good faith, is supported by the authorities. Thus, in Kennedy v. Grand Fraternity, 36 Mont. 325, 25 L.R.A.(N.S.) 78, 92 Pac. 971, it was held that an applicant for reinstatement in a mutual benefit society cannot complain of a decision adverse to him, made in the exercise of the discretion vested in an officer of the society authorized to pass upon the sufficiency of a certificate of health, required as a condition precedent to reinstatement to membership. And, continuing, the court said that granting that the officer in whom discretion as to the sufficiency of the certificate of health was vested could not arbitrarily refuse to approve the certificate if it was satisfactory to him, it could not be said as matter of law that he had abused 40 L.R.A.(N.S.)

the discretion by rejecting an applicant who had had pneumonia about two months prior to the making of the application, and had been confined in bed for several weeks, as serious after-effects sometimes follow pneumonia, although the applicant stated that he felt better "at the present time" than he had for years. And in Lane v. Fidelity Mut. L. Ins. Co. 142 N. C. 55, 115 Am. St. Rep. 729, 54 S. E. 854, in holding that the court could not control the discretion of the officers as to reinstatement of an insured, at least, in the absence of any showing that the action of the officers was fraudulent or arbitrary, it was said: "In the absence, certainly, of any showing that the approval of the officers has been fraudulently withheld and that their denial of the application is purely arbitrary, we do not see why their refusal to reinstate the plaintiff is not fatal to his right of recovery in this action. We are not called upon in this case to say under what circumstances, if any, we would decide that the action of the officers designated to pass upon the application of a delinquent member could be investigated, with a view to ascertain whether they have exercised their judgment properly, or have unreasonably deprived him of any right to which he is entitled under the terms of his contract and the by-laws of the company. Where there is no suggestion of fraud or

A PPEAL by plaintiffs from a judgment of the Superior Court for Pierce County dismissing an action brought to recover damages for the alleged wrongful refusal to reinstate a life insurance policy after forfeiture by nonpayment of dues. Affirmed.

The facts are stated in the opinion.

Messrs. Boyle, Warburton, & Brockway for appellants.

Messrs. Hudson & Holt, for respondent:

The officers of defendant company had the right, in the exercise of their discretion, to reject the application for readmission according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others.

9 Am. & Eng. Enc. Law, 2d ed. 473; Oneida C. P. Judges v. People, 18 Wend. 99; Graveson v. Cincinnati Life Asso. 8 Ohio C. C. 171, 3 Ohio C. D. 327.

There can be no waiver or estoppel unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which would enable him to take effectual action for the enforcement of his rights.

29 Am. & Eng. Enc. Law, 2d ed. 1093, 1094; 11 Am. & Eng. Enc. Law, 433, 434; Bennecke v. Connecticut Mut. L. Ins. Co. 105 U. S. 359, 26 L. ed. 991.

Morris, J., delivered the opinion of the court:

Appeal from a judgment of dismissal, in an action to recover damages for the alleged

wrongful refusal to reinstate a life insurance policy, after forfeiture by nonpayment of assessments and dues. There is no dispute as to the facts, from which it appears that on November 13, 1894, the Bankers' Life Association of St. Paul, Minnesota, which subsequently changed its corporate name to that of respondent, issued its policy of insurance upon the life of James J. Conway in the sum of \$2,000. This policy was upon the co-operative assessment plan, providing for annual dues and mortuary assessments according to the terms of the articles of incorporation, which by reference were made a part of the policy. In July, 1908, an assessment of \$40 became due under the policy, which Conway received notice of, but failed and neglected to pay, whereby his policy lapsed. On November 5, 1908, he applied for reinstatement, forwarding to the company the July assessment, with \$7.50 dues and a certificate from Dr. Libbey that he was then in good health. On November 11th the company acknowledged the receipt of \$47.50, and informed Conway that his certificate had lapsed, but that he might be reinstated upon furnishing satisfactory evidence of present good health; but that, in order to procure such reinstatement, it would be necessary for him to be examined by Dr. Dewey, the medical examiner of the company at Tacoma, and such examination must disclose a satisfactory condition of health. In the same letter Conway was informed the company would not accept the

other legal wrong, there can be no valid reason why the applicant should be permitted to attack the soundness of their judgment or the justness of their conclusion." And see Graveson v. Cincinnati Life Asso. 6 Ohio C. D. 327, 8 Ohio C. C. 171, affirming 11 Ohio Dec. Reprint 369, and affirmed without opinion in 56 Ohio St. 725, 49 N. E. 1110 (set out at length in CONWAY v. MINNESOTA MUT. L. INS. CO.), holding that the court will not disturb the decision of the association officers when made in good faith, and not arbitrary or capricious. And see Murray v. Supreme Hive, L. O. T. M. 112 Tenn. 664, 80 S. W. 827, wherein it was held that the only question to be considered by the court in a suit to reinstate an expelled member in a benefit association was whether the order had acted arbitrarily or unreasonably; and that when the charge was that it had acted arbitrarily, unjustly, and oppressively, it could not be prevented from disproving such allegations by marshaling the information upon which it acted.

But it seems that where the officer in whom is vested the authority to determine whether or not the applicant for reinstatement has satisfactorily complied with the conditions acts arbitrarily, or considers elements not properly entering into a consideration of the question presented, the courts will set aside a decision adverse to the ap-

plicant. Thus, in Van Houten v. Pine, 38 N. J. Eq. 72, where the by-laws of a mutual benefit society provided that a delinquent should be reinstated upon "rendering a satisfactory excuse" for the delinquency and paying the sum in arrear, it was held that the action of the board of directors in refusing to reinstate a delinquent would be set aside and the applicant declared reinstated, the excuse given having been considered satisfactory by the board, but the delinquent's physical condition having been taken into account adversely to him. In arriving at this conclusion the court said that "under such circumstances as this case presents it is proper for the court to determine the question whether the member was properly excluded or not; to decide whether the action of the trustees or agents to whom the management of the affairs of the association was intrusted was lawful or not; to judge whether the member, by the imputed misconduct or alleged delinquency, ought reasonably to be held to have forfeited his claim to the advantages which the society promised, and in view of which he had, up to the time of the alleged exclusion, discharged his duties to it." And in Leonard v. Prudential Ins. Co. 128 Wis. 348, 116 Am. St. Rep. 50, 107 N. W. 646, which involved a similar by-law under which the insurance company had refused to reinstate an ap-

\$47.50, and the same was returned. On November 17th Conway presented himself to Dr. Dewey for medical examination, and the doctor's certificate was mailed to the company. On December 11th Conway was informed by the company that his application for reinstatement was rejected.

The question now submitted is: Did Conway have such a legal right to reinstatement as can be enforced against the denial of such right by the company. It will readily be admitted, as stated in Cooley's Briefs on Insurance, at page 2395, that, after a forfeiture of a life insurance policy because of nonpayment of assessments, "the right to reinstatement depends on the provisions of the contract. Since the right is not absolute, the insurer may impose such conditions as it sees fit, not contrary to public policy, on which reinstatement may be had. *Saerwein v. Jamour*, 32 Misc. 701, 65 N. Y. Supp. 501." Upon the same page the rule is also laid down that compliance with the conditions gives the delinquent an absolute right to reinstatement, if the provisions of the contract do not make the reinstatement optional with the officers of the company. The provision of the contract in this instance is found in the articles of incorporation, and is as follows: "Any person, having once been a member of this company, may be readmitted in the discretion of the officers of this association, upon his furnish-

ing them satisfactory evidence that he is in good health, and upon his paying to said association all assessments due and other sums of money which he would have been called upon to pay to his association had he continued to be a member thereof." Respondent contends, which was also the theory upon which the court below made its order of dismissal, that this provision destroys the absolute right to reinstatement, and makes such reinstatement optional with the officers of the company in providing that readmission shall be in their discretion, and that the evidence of good health shall be such as is satisfactory to them, and, that having so acted, such discretion is not reviewable in the courts; while appellants contend that the word "discretion" is to be construed in the sense of judicial discretion, and may be reviewed when it appears to have been arbitrarily exercised, as they claim here. While it may be difficult to give a satisfactory definition of the term "judicial discretion," because of the wide difference of the authorities as to its nature, it may be said to be a discretion that is sound and guided by the fixed principles of law. 6 Enc. Pl. & Pr. 819. But, even in cases calling for the exercise of such discretion, it will not be reviewed except for its manifest abuse. Such is, we believe, the universal rule. Where, however, discretion is vested in a nonjudicial body, such as trus-

plicant, not because of any insufficiency or defect in the certificate furnished by him, but upon secret information obtained by defendants, the court, in holding that the rejection of the application must be set aside, said that the agreement to restore the policy upon specified conditions when they were satisfied according to the prescribed procedure, and wanting only insurer's judgment upon the record, carried with it by necessary implication the obligation to act reasonably and with fairness to the assured; that insurer had no right of arbitrary refusal, or right to act upon information secretly obtained without opportunity for assured to meet it; that the company was entitled to be satisfied as to the insurability of the applicant before restoring the policy, but that it had no right by proceeding outside of anything contemplated by the contract to court dissatisfaction. And in *McNeil v. Southern Tier Masonic Relief Asso.* 40 App. Div. 581, 58 N. Y. Supp. 119, under similar by-laws and circumstances as to satisfactory excuse, except that the applicant for reinstatement was considered too old, a similar conclusion was reached. So, in *Dennis v. Massachusetts Ben. Asso.* 120 N. Y. 496, 9 L.R.A. 189, 17 Am. St. Rep. 660, 24 N. E. 843, affirming 47 Hun, 338, under like circumstances it was held that what constituted "valid reasons" was not to be arbitrarily determined by officers of a benefit associa-

tion, but that their determination was subject to review in the courts. And see *Misell v. Globe Mut. L. Ins. Co.* 76 N. Y. 115, which is to the same effect. See also *Lovick v. Providence Life Asso.* 110 N. C. 93, 14 S. E. 506, wherein it was held that the officers of the benefit association could not arbitrarily and unjustly refuse to reinstate the member.

But in *Harrington v. Keystone Mut. Ben. Asso.* 190 Pa. 77, 42 Atl. 523, where the by-law provided that "the executive committee shall have power to reinstate a delinquent member at any time within a year upon satisfactory evidence of good health and upon payment of all delinquent premiums," it was held that the decision of the committee was final, the court saying: "Conceding, for the purpose of argument, that her application was in time, and that she complied or was ready and willing to fully comply with all the terms and conditions of the by-laws above quoted, it does not follow that the committee was bound to reinstate her to membership in the association. While the by-laws empowered them to grant her request, they were not bound nor could they be compelled to do so. It neither clothed her with any legal or equitable right, nor did it impose any duty or obligation on the association that would enable her, as a delinquent member, to maintain this action."

G. J. C.

tees or officers of a corporation, or other public functionaries, its exercise does not call for the application of any fixed rules or principles of law, and its meaning cannot be so limited nor restricted, since to do so would be to take such a discretion away from the body upon which it is conferred and bestow it upon some other body, and so on *ad infinitum*, so long as the right of appeal or review existed. In the case of *Oneida C. P. Judges v. People*, 18 Wend. 79, 99, Senator Tracy, in his opinion, while not clear in his mind as to the proper meaning of a discretion that is governed by legal principles, finds no difficulty in defining a discretion that is not so controlled, and says at p. 99: "It means, when applied to public functionaries, a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others." A like construction is adopted in *Brown v. State*, 109 Ala. 70, 83, 20 So. 103, 108, where, in reviewing the provisions of the statutes of Alabama in fixing the punishment for certain crimes by providing such punishment shall be "at the discretion of the jury," the court says at p. 83: "The words of the statute, 'at their discretion,' are peculiarly significant and expressive of the freedom in the exercise of judgment, of the liberty of action and decision, intrusted, and exclusively intrusted, to the jury. The discretion they are to exercise, and exercise in obedience to their own consciences only, is the choice of election between the alternative punishments. The discretion is legal in the sense that it is derived from and conferred by law. But it is not of the nature of judicial discretion, which is said to be controlled by fixed legal principles. . . . It must have been foreseen and anticipated that there would be jurors reluctant to inflict capital punishment, . . . that there would be some reluctant to convict on circumstantial evidence, and that not infrequently there would be some not so fully satisfied as others that the evidence of guilt reached the standard the law prescribes. These are considerations which will influence the jury in choosing between the alternative punishments,—a choice they must make according to the dictates of their own judgment and consciences, and which cannot be controlled or directed by the judgments or consciences of others."

We do not know the facts operating upon the minds of the officers of this company, inducing them to exercise their discretion against the reinstatement of this applicant, nor why his evidence of good health was not satisfactory to them, except as we read the record and find therein facts which might 40 L.R.A. (N.S.)

have influenced them in arriving at the conclusion they did. In his first application for membership Conway gave his age as about fifty years, and in response to an inquiry as to the extent of his use of ardent spirits, wine, or malt liquors, answered, "One glass a day." In his application for reinstatement he gave the date of his birth as March 22, 1842, which would have made his age fifty-two years, seven months, and nine days at the time of his first application. In both he stated that his father and mother both died from unknown causes when he was a child. In response to an inquiry as to his use of liquors each day, he answered, "Malt liquors, two or three glasses; wine, none; spirits, two or three drinks." In his first application the medical examiner rated him as a first-class risk. In his application for reinstatement he was rated as a first-class risk, "except for age and amount of stimulants taken." Statements as to age and habit as to use of liquors are statements material to the risk, and, while we do not hold as a matter of law that the discrepancies here noted would in themselves be sufficient to avoid the policy or to prevent reinstatement, if such question was purely one of law and properly submitted to us as such, we cannot say that they would not influence the sound judgment and good conscience of an officer of an insurance company in whom discretion is vested to pass upon such matters. Neither can we eliminate from this contract the fact that this medical examination upon application for reinstatement must disclose a condition of good health satisfactory, not to the applicant nor to the physician conducting the medical examination, but to the officers of this company in whom, by his contract, the applicant had placed the judgment and discretion to decide,—a decision they must arrive at "according to the dictates of their own judgment and consciences, and which cannot be controlled or directed by the judgment or conscience of others." To hold otherwise would be to destroy that element of individuality and personal judgment which must enter into any decision, and to substitute for the discretion and satisfaction of one body the discretion and satisfaction of other bodies, strangers to the contract and not within its contemplation, and making the contract read in effect that reinstatements may be had upon the applicant furnishing evidence of reasonably good health, instead of, as it does read, "in the discretion of the officers of this association, upon his furnishing them satisfactory evidence that he is in good health."

The nearest case in point we have found is *Graveson v. Cincinnati Life Asso.* 6 Ohio C. D. 327, 8 Ohio C. C. 171, where the policy

was forfeited on March 11th for failure to pay an assessment due March 1st. In September following the insured offered to pay all arrearages, and asked for reinstatement. The rules of the association provided for medical examiners whose duty it was to make all examinations, and who might accept or reject applications. The association having declared its willingness to reinstate the applicant upon his furnishing a satisfactory medical examination, he submitted to such examination, and, as a result thereof, was rejected; the only reason given by the medical examiner being that the applicant's pulse was between 76 and 100. The court, in touching upon this feature of the case, says: "This brings us to the only remaining question in the case, and that is, as to the medical examination,—was it satisfactory? In the first place, to whom was it to be satisfactory? The constitution and by-laws provided that as to all applications it should be within the discretion of the medical director to accept or decline any application; but, as to forfeiture, it provided that by 'furnishing a new and satisfactory application and medical examination' one might be restored, saying nothing as to whom this examination should be satisfactory. We are of the opinion, however, that this examination must be satisfactory to the medical director. It certainly could not have been intended that the examination should only be satisfactory to the applicant, or to anyone whom he might select to make the examination. Why should the defendant require the performance of these conditions if they were not to be satisfactory to the defendant?" This case was affirmed without opinion by the supreme court of Ohio in 56 Ohio St. 725, 49 N. E. 1110.

We will discuss one other feature, and that is appellants' contention that the company waived its right to reject the application in accepting dues and assessments from him on a prior occasion, after the time fixed for their payment, and also in writing him that his right to reinstatement was conditioned upon his "furnishing satisfactory evidence of present good health." What we have said disposes of the latter contention, such satisfactory evidence of good health meaning satisfactory to the company, and giving it the right of rejection if, in the exercise of the discretion vested in it, such evidence was not satisfactory. In support of the first feature of this contention, appellant testified that he knew the time for payment had passed, but thought he would be reinstated by showing he was in good health, "because it happened once before. I was behind once before in my delinquency, and had no trouble at all." This would not be sufficient to estop the company from now 40 L.R.A. (N.S.)

insisting upon the provisions of the contract. A party to a contract who does not take immediate steps to forfeit it because of a default in payment does not thereby lose his right to insist upon a forfeiture for subsequent nonpayments. *Cash v. Meisenheimer*, 53 Wash. 576, 102 Pac. 429; *Garvey v. Barkley*, 56 Wash. 24, 104 Pac. 1108; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500. This same contention was raised in *Graveson v. Cincinnati Life Asso.* supra, and it was there held that such a payment, being accepted by the secretary of the company (to whom the payments were also made in the case at bar), would not constitute a binding waiver; it not appearing that it was done with the knowledge and approval of the officers of the company in whom the power of forfeiture existed. Such is the case here. The secretary not having the right to forfeit, his unknown and unapproved act could not bind the company where the act of the company complained of is based, not alone on the failure to pay the assessment when due, but upon the failure to pass a satisfactory medical examination upon the application for reinstatement.

For these reasons, we are of the opinion that the judgment of dismissal was rightly entered, and the same is affirmed.

Chadwick and Crow, JJ., concur.

Dunbar, Ch. J., and Rudkin, J., dissent.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

L. P. SCOTT et al.

v.

DIXIE FIRE INSURANCE COMPANY,
Plff. in Err.

(— W. Va. —, 74 S. E. 659.)

Party — insurance — partnership property — administrator.

1. A partnership is composed of several members. One dies, but the partnership is

Headnotes by BRANNON, J.

Note. — Insurance, in name of partnership, of property the legal title of which is in the name of individuals.

The decision in *SCOTT v. DIXIE F. INS. Co.* to the effect that the fact that the title to property insured in the partnership name stood in the names of the individual members of the firm at the time it was insured did not constitute a breach of a condition providing for a forfeiture "if the interests of the assured in property be not truly stated. . . . or if the interests

not closed, and the share or assets of the decedent is not withdrawn, but the firm business goes on in the firm name as before, his administrator acting as a copartner. In this state of things, a fire insurance policy, after such death of a member, is issued in the name of the firm, insuring a house belonging to it, though the legal title is in the members as individuals. The administrator may join the other members, in a suit in the names of all, as partners, on the policy, to recover the loss from destruction of the house by fire. It is no misjoinder of plaintiffs.

of the assured be other than the unconditional and sole ownership," seems sound, as does the further decision that the partnership had an insurable interest in such property.

A search has disclosed little authority dealing with like questions.

In *Missouri Sav. Assn. v. German-American Ins. Co.* 73 Mo. App. 158, it was held that a stipulation of a policy providing that it should be void if the interest of the insured was other than the unconditional and sole ownership, or if the subject of the insurance was a building on ground not owned by the insured in fee simple, was not violated where the insured property before the formation of the partnership belonged to one member of the firm, and after the formation of the firm and before the issuance of the policy he executed a deed of the property to the partnership in its company name. The court said: "Whatever may be said as to the capacity of the lodge company to take a conveyance of the legal title to the property, it is nevertheless clear that the parties who were doing business under that name were the absolute, equitable owners of the property, and held the same free of all conditions or claims of other parties. And it has been repeatedly held that such ownership is sufficient to answer the demands of a policy such as we have here."

In *American Cent. Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. 235, it was held that the mere fact that property belonging to a person was insured in the firm name under which he carried on business did not avoid the policy, and the fact that the other member of the firm was a clerk in the store was held not to affect the case. The court said: "The property did in reality belong to a firm called Heath & Blackwell, was insured in the name of the firm, and there was no evidence of any misrepresentation as to the ownership of the property. As said by this court in the case of *Bonnet v. Merchants' Ins. Co.* — Tex. Civ. App. —, 42 S. W. 316: 'There is no statute of this state that prohibits the use of firm names which fail to indicate the members of the partnership, and appellant had the right to do business for himself under a firm name, if he so desired, and the right to insure his property in that firm name. His representation that the property belonged to Bonnet Brothers was correct, at the same time that he owned the 40 L.R.A. (N.S.)

Insurance — partnership property — death of partner — interest.

2. A lot of land is conveyed to a number of persons in their individual names, but with intention to be used in the business of a partnership, and by them put into the partnership business and used in it; the firm in possession of and using the lot and house on it in its business. One of the partners died; his share of the naked legal title being in his heirs. After his death, the house is insured against loss by fire in the name of the firm. There is here no violation of a clause in the policy that "if the

entire interest in the goods.' This principle would not be altered by the fact that Blackwell was clerking in the store. Heath did not make any representation as to who composed the firm of Heath & Blackwell, and his silence on that point did not mislead appellant. If it was solicitous as to who composed the firm, it should have interrogated Heath, and if he had then made statements contrary to the facts, appellant might have some basis for its contention. The allegation in the petition that the firm was composed of E. N. Heath and N. Blackwell was not evidence of misrepresentation, and the only question the pleading would present would be one of variance between pleading and proof, and that would not be tenable."

In *Bonnet v. Merchants' Ins. Co.* supra, referred to by the court in the preceding case, it was held that where one partner withdrew from a firm and the other continued business alone under the firm name, a provision of a policy that it should become void if the insured concealed or misrepresented any material fact, or if his interest was not fully stated, was not violated, although the policy was taken out by the insured in the firm name. To the same effect are *Delaware Ins. Co. v. Bonnet*, 20 Tex. Civ. App. 107, 48 S. W. 1104; and *Merchants' Ins. Co. v. Bonnet*, — Tex. Civ. App. —, 48 S. W. 1110.

In *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 504, 20 L. ed. 729, a policy issued in the name of a nominal partnership covering goods held by the nominal partner on commission, the legal title to which was in third parties, was sustained. The points, considered, however, were as to whether insurance could be effected in the name of a nominal partnership, and as to whether the omission to notify the insurer of the dissolution of the partnership avoided the policy.

It has been held, however, that a partnership has no insurable interest in the household ornamental and kitchen furniture of one of the partners and his wife, or in their wearing apparel. *Georgia Home Ins. Co. v. Hall*, 94 Ga. 630, 21 S. E. 828.

For a note on formation of partnership or change in personnel of firm as affecting a change of title or ownership, stipulated against in insurance policies, see *American Steam Laundry Co. v. Hamburg Bremen F. Ins. Co.* 21 L.R.A. (N.S.) 442. J. T. W.

interests of the assured in the property be not truly stated herein, . . . or if the interests of the assured be other than unconditional and sole ownership," the policy shall be void. And the firm has an insurable interest.

Same — insurable interest.

3. Real estate acquired for a partnership with partnership means, and used in its business, gives the partnership an "insurable interest" to warrant a policy insuring it against loss by fire.

Same — equitable title.

4. An equitable title to real estate gives an insurable interest to warrant a policy in the name of its owner, insuring it against loss by fire.

Same — denial of liability — waiver.

5. Denial by an insurance company of liability on other grounds, within the time allowed for furnishing preliminary proofs of loss, is, in law, a waiver of the conditions of the policy requiring such proof.

(March 19, 1912.)

ERROR to the Circuit Court for Fayette County to review a judgment in plaintiffs' favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. **Payne & Hamilton** for plaintiff in error.

Messrs. **Dillon & Nuckolls**, for defendants in error:

There was no misjoinder of plaintiffs.

4 Cooley, Briefs on Insurance, 3708; Crosswell, Exrs. & Admsrs. 454; Clarkson v. Booth, 17 Gratt. 490; Sheppard v. Peabody Ins. Co. 21 W. Va. 368; Hogg, Pleading & Forms, § 29; Harvey v. Skipwith, 16 Gratt. 393; Goshorn v. County Ct. 42 W. Va. 738, 26 S. E. 452; 3 Lomax, Dig. 371, 3 Rob. New Pr. 918.

The partnership had insurable interests.

Hogg, Pleading & Forms, § 29; Sheppard v. Peabody Ins. Co. 21 W. Va. 368; 16 Am. & Eng. Enc. Law, p. 845; 1 Cooley, Briefs on Insurance, p. 135; Security Ins. Co. v. Kuhn, 108 Ill. App. 1; Clarke v. Firemen's Ins. Co. 18 La. 431; Herkimer v. Rice, 27 N. Y. 163; Voison v. Commercial Mut. Ins. Co. 62 Hun, 4, 16 N. Y. Supp. 410; Cowan v. Iowa State Ins. Co. 40 Iowa, 551, 20 Am. Rep. 583; Manhattan Ins. Co. v. Webster, 59 Pa. 227, 98 Am. Dec. 332; Georgia Home Ins. Co. v. Hall, 94 Ga. 630, 21 S. E. 828; Castner v. Farmers' Mut. F. Ins. Co. 46 Mich. 15, 8 N. W. 554; Hoffman v. Aetna F. Ins. Co. 32 N. Y. 407, 88 Am. Dec. 337; Blackwell v. Miami Valley Ins. Co. 10 Ohio Dec. Reprint, 159; Phoenix Ins. Co. v. Hamilton, 14 Wall. 504, 20 L. ed. 729; Riggs v. Commercial Mut. Ins. Co. 19 Jones & S. 468; Blake Opera House Co. 40 L.R.A. (N.S.)

v. Home Ins. Co. 73 Wis. 667, 41 N. W. 968.

The provision that satisfactory proof of the loss should be furnished within sixty days was waived by the defendant.

Sheppard v. Peabody Ins. Co. 21 W. Va. 368; Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co. 34 Conn. 501; Deitz v. Providence Washington Ins. Co. 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50.

No representation was made by the insured that "Scott & Calloway" were the unconditional owners. In fact, no representation was made of the ownership of the property in any character whatever, and no representation being made, the true condition being known by the agent, this provision was also unquestionably waived.

Deitz v. Providence Washington Ins. Co. 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50; Wood, Ins. § 409; Sheppard v. Peabody Ins. Co. 21 W. Va. 368; Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 235, 20 L. ed. 623; Wolpert v. Northern Assur. Co. 44 W. Va. 734, 29 S. E. 1024; Manhattan F. Ins. Co. v. Weill, 28 Gratt. 389, 26 Am. Rep. 364; Morotock Ins. Co. v. Robefer Bros. 92 Va. 747, 53 Am. St. Rep. 846, 24 S. E. 393.

Brannon, J., delivered the opinion of the court:

Dixie Fire Insurance Company issued an insurance policy to Scott & Calloway, insuring a house. The house being destroyed by fire, an action was brought against that company in the names, as plaintiffs, of L. P. Scott, J. P. Calloway, A. B. Ellis, S. S. Boyd, Shedrick Hughes, in his own right and as administrator of Randolph Hughes, deceased, as partners in the name of Scott & Calloway, and a judgment having been rendered on a verdict for the plaintiffs for \$1,050, the company obtained a writ of error.

As one point of error, it is claimed that there could be no recovery because of a misjoinder of plaintiffs. Here it is said that the administrator cannot join with the other parties, and there could be no joint recovery. The facts are that the property was conveyed by one Smith to Scott, Calloway, and a number of others as individuals, the deed not indicating any partnership, but intended for such use. On its conveyance, the grantees formed a partnership, under the name of Thompson & Scott, to carry on the liquor business, using the house in such business, and treating the house as partnership property. By subsequent conveyance, the house came to be owned in the name of Scott, Calloway, Boyd, Ellis, Shedrick Hughes, and heirs of Randolph Hughes.

Such was the title when the policy of insurance issued. The partnership name was changed from Thompson & Scott to Scott & Calloway. The house was occupied and used in the partnership business of Scott & Calloway when the policy issued to them in that name. The property was, so far as legal title is concerned, in the name, as individuals of plaintiffs Scott, Calloway, Ellis, Boyd, Shedrick Hughes, and heirs of Randolph Hughes. Before the policy issued, Randolph Hughes had died, and Shedrick Hughes, as his administrator, still participated in the business; and it was carried on with him as a partner, individually and as administrator.

Realty purchased with partnership assets for partnership purposes, though deeded to individuals, is partnership property, and is personal property as to creditors and between partners. *Davis v. Christian*, 15 Gratt. 11; *Brooke v. Washington*, 8 Gratt. 248, 56 Am. Dec. 142; *Pierce v. Trigg*, 10 Leigh, 406. As held in *Miller v. Ferguson*, 107 Va. 251, 122 Am. St. Rep. 840, 57 S. E. 649, 13 Ann. Cas. 138, it is to every intent considered personal property not only as between the partners and their creditors, but also between the survivors and the representatives of the deceased.

It is so far personalty that a widow of a partner cannot have dower in the realty itself. *Parrish v. Parrish*, 88 Va. 529, 14 S. E. 325. I admit this is the rule in the court of equity, not law, and I do not say that such consideration alone would call for recovery; but I introduce that view to say that, though not technically at law the property of the firm, yet in equity it is, and that furnished right to the firm to take insurance in its name. In equity, partnership property, and in actual possession of the firm; the individuals holding title only for the firm, as a dry trustee holds for a *cestui que trust* in possession. The company chose to issue the policy thus; and it cannot raise this question, which at best is one between the other parties.

We cannot say the title was misrepresented, as the firm was substantial owner. It had substantial interest to be injured by the burning of the house. "Whoever may fairly be said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject of insurance, whether that advantage inures to him personally or as representative of rights of others, has insurable interest." *Hogg, Pleading & Forms*, § 29. If this firm had care and custody of the property for those holding legal title, though not expressed in the policy, it has an insurable interest. "In general, to give a party an insurable interest, . . . it is not necessary that he have

any actual right of property, either legal or equitable, in the subject insured; but it is sufficient if he, or those whom he represents, will suffer any sort of loss from its destruction." *Sheppard v. Peabody Ins. Co.* 21 W. Va. 368. There it was held that an administrator has an insurable interest in realty, if the personalty is not sufficient to pay debts. If we regard this firm as owner, of course, it has an interest; but say that the title is in the individuals. Then those individuals are trustees, holding for the firm; then the full equity is in the firm, and it is well settled that the owner of the equitable title may insure in his name. *Cooley's Briefs on Insurance*, vol. 1, 150, citing *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. ed. 335, and many other cases. This consideration clearly justifies insurance and recovery in the name of the firm. Moreover, it is seen in *Cooley's Briefs on Insurance* (vol. 1, 151), that "possession, though without title, is sufficient to give the possessor an insurable interest. And where the possession is coupled with a beneficial use, the possessor has an insurable interest." "The interest one must have in the property insured, in order to give him an insurable interest, need be only slight and contingent." 1 *Cooley, Briefs on Insurance*, 149. I stop to ask, How can the insurance company raise a question on this ground? If the firm had to account to the holder of the legal title, payment by it to the firm would be good. But it is owner. Its members own.

I have been considering the case as if the policy issued in Randolph Hughes' life. This being a money demand, the administrator could unite with the others in suit. In *Clarkson v. Booth*, 17 Gratt. 490, it is held that, where one of several tenants in common owned a slave and one died, his administrator must join in an action to recover the slave. The policy issued after his death. His administrator, as a matter of fact, continued his assets in the business; and while he was a partner the insurance was taken out. Here is a contract with the firm, the administrator a member,—a contract with him. A mere money demand comes from it. He, as administrator, has an interest. Under those facts, it is much plainer that the administrator could join. Legal title to the money was in him jointly with others. Again, if the administrator is not a proper party, as the right would be in the survivors, would not his presence be treated as surplusage? *Goshorn v. County Ct.* 42 W. Va. 735, 26 S. E. 452. So I conclude there was no misjoinder.

I opine that the defense most relied upon is a falsity under that clause of the policy saying that, "if the interest of the insured

in the property be not truthfully stated herein, . . . or if the interests of the insured be other than unconditional and sole ownership," the policy should be void. What is said above will largely apply under this head to show that the firm had insurable interests, equitable title,—was real owner in possession. This clause "is held to refer to character and quality of title,—to the actual and substantial ownership,—rather than the strictly legal title; in other words, the insured interest must be such that he would sustain the whole loss if the property is destroyed." Who but the firm would in this case? "If the insured has an equitable title, it is a sufficient compliance with the condition requiring sale and unconditional ownership in the insured." 2 Cooley, Briefs on Insurance, 1367. One in possession under oral contract of sale surely could insure, though he has no title or color of legal title. I have above shown that the firm was full equitable owner. Moreover, the agent who took the policy knew the state of title. No false statement as to title was made. There were no questions asked, no statement made; and, if the insured had stated that right to the property was in the firm, it would have been true, under the law of insurance, for reasons above given.

The policy contains a clause that loss should not be payable until sixty days after notice and proof of loss. No proof of loss was made; but it was waived. Soon after the loss, an adjuster examined the place of the fire, took measurements, and obtained full information. No objection made as to fact or extent of loss. The adjuster made objection only on the ground that plaintiffs were not sole owners, and admitted that the loss was greater than the amount of the insurance. He referred the matter to the general agent, who wrote, stating that the company resisted payment because the true ownership had not been stated in the policy. This was within sixty days. He did not demand proof of loss, or allege that as a ground of nonpayment. This was a waiver of that defense. *Medley v. German Alliance Ins. Co.* 55 W. Va. 342, 47 S. E. 101, 2 Ann. Cas. 99; *Morris v. Dutchess Ins. Co.* 67 W. Va. 368, 68 S. E. 22. If a company refuse to pay upon independent ground before proof of loss is made, and before the time within which proof is to be made, such denial is a waiver of proof. After such denial of liability, suit could be brought at once; but was not brought before five months after the fire. We see no just defense to the insurance claim,—no reason why the company should not make its policy good.

Judgment affirmed.

40 L.R.A. (N.S.)

WEST VIRGINIA SUPREME COURT OF APPEALS.

AMERICAN NATIONAL BANK OF BLUE-FIELD, Plff. in Err.,

v.

HAROLD A. RITZ.

(— W. Va. —, 74 S. E. 679.)

Corporation — knowledge of agent — notice — personal transactions.

Knowledge by one of the officials of a bank, acquired in a capacity other than as its representative, relating to infirmity in commercial paper offered for discount, is not notice to the bank, when that official is also an officer of the corporation seeking the discount, and has an interest in the transaction so adverse to the bank that the reasonable presumption is that he would not communicate the knowledge to it.

(February 27, 1912.)

ERROR to the Circuit Court for Mercer County to review a judgment in defendant's favor in an action brought to recover the amount of two certain negotiable notes indorsed by defendant. Reversed.

The facts are stated in the opinion.

Messrs. Sanders & Crockett, for plaintiff in error:

Notice to William E. Fowler of the alleged agreement, if such was made, was not notice to the bank, because he was not authorized to act for the bank, and, even if he had authority to act for the bank in the particular transaction, he was not acting for the plaintiff bank alone, but in a dual capacity.

Curtis v. Crawford County Bank, 110 Fed. 830; 4 *Thomp. Corp.* §§ 5204, 5206-5208, et seq.; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Re Marseilles Extension R. Co.* L. R. 7 Ch. 161, 41 L. J. Ch. N. S. 345, 25 L. T. N. S. 858, 20 Week. Rep. 254; *Re Contract Corporation*, L. R. 8 Eq. 14, 20 L. T. N. S. 964; *Levy & C. Mule Co. v. Kaufman*, 52 C. C. A. 126, 114 Fed. 170; *First Nat. Bank v. Tompkins*, 6 C. C. A. 237, 13 U. S. App. 300, 57 Fed. 20; *American Surety Co. v. Pauly*, 170 U. S. 136, 42 L. ed. 978, 18 Sup. Ct. Rep. 552; *Victor Gold & S. Min. Co. v. National Bank*, 15

Headnote by ROBINSON, J.

Note. — For imputation of knowledge of bank officers to bank, where officers are personally interested, see note to *Lilly v. Hamilton Bank*, 29 L.R.A. (N.S.) 558. And as to the effect of the fact that the interested officers was the sole representative of the bank in the transaction, see note to *Brookhouse v. Union Pub. House*, 2 L.R.A. (N.S.) 993.

Utah, 391, 49 Pac. 826; Corcoran v. Snow Cattle Co. 151 Mass. 74, 23 N. E. 727; Hatch v. Ferguson, 14 C. C. A. 41, 29 U. S. App. 547, 66 Fed. 668; Graham v. Orange County Nat. Bank, 59 N. J. L. 225, 35 Atl. 1053; Farmers' & C. Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Commercial Bank v. Cunningham, 24 Pick. 270, 35 Am. Dec. 322; Bank of Pittsburgh v. Whitehead, 10 Watts, 397, 36 Am. Dec. 186; Mechanic's Bank v. Schaumburg, 38 Mo. 228; Congar v. Chicago & N. W. R. Co. 24 Wis. 157, 1 Am. Rep. 164; Bank of Virginia v. Craig, 6 Leigh, 399; United States Ins. Co. v. Shriver, 3 Md. Ch. 381; Winchester v. Baltimore & S. R. Co. 4 Md. 231; Miller v. Illinois C. R. Co. 24 Barb. 312; Wickersham v. Chicago Zinc Co. 18 Kan. 481, 28 Am. Rep. 784, 5 Mor. Min. Rep. 536; Barnes v. Trenton Gaslight Co. 27 N. J. Eq. 33; La Farge F. Ins. Co. v. Bell, 22 Barb. 54; Lyne v. Bank of Kentucky, 5 J. J. Marsh, 545; First Nat. Bank v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Washington Bank v. Lewis, 22 Pick. 24; Louisiana State Bank v. Senecal, 13 La. 525; Seneca County Bank v. Neass, 5 Denio, 329; Re European Bank, L. R. 5 Ch. 358, 39 L. J. Ch. N. S. 588, 22 L. T. N. S. 422, 18 Week. Rep. 474; Westfield Bank v. Cornen, 37 N. Y. 320, 93 Am. Dec. 573.

Messrs. A. W. Reynolds, D. E. French, John M. McGrath, and Russell S. Ritz, for defendant in error:

Where the agent, although he acts adversely to his principal's interest, or even acts fraudulently for his own personal interests, if he finally acts for his principal in the very transaction which is the subject-matter of the suit, and the principal is represented by such agent solely and absolutely in the final consummation of the matter, then the principal takes the subject-matter with all the knowledge of the agent.

Lowndes v. City Nat. Bank, 82 Conn. 8, 22 L.R.A. (N. S.) 408, 72 Atl. 150; Cook v. American Tubing & Webbing Co. 28 R. I. 41, 9 L.R.A. (N.S.) 193, 65 Atl. 641; Morris v. Georgia Loan, Sav. & Bkg. Co. 109 Ga. 12, 46 L.R.A. 506, 34 S. E. 378; First Nat. Bank v. New Milford, 36 Conn. 93; 4 Thomp. Corp. § 5209; First Nat. Bank v. Dunbar, 118 Ill. 625, 9 N. E. 186; Barksdale v. Finney, 14 Gratt. 338, 14 Mor. Min. Rep. 541; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; Webb v. Graniteville Mfg. Co. 11 S. C. 396, 32 Am. Rep. 479; Waynesville Nat. Bank v. Irons, 8 Fed. 1; Second Nat. Bank v. Howe, 40 Minn. 390, 12 Am. St. Rep. 744, 42 N. W. 200; Niblack v. Cosler, 26 C. C. A. 16, 47 U. S. App. 637, 80 Fed. 596; Nation-40 L.R.A. (N.S.)

al Bank v. Munger, 36 C. C. A. 659, 95 Fed. 87; United States v. State Nat. Bank, 96 U. S. 30, 24 L. ed. 647; Anderson v. Kinley, 90 Iowa, 554, 58 N. W. 909; Black Hills Nat. Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071; Farmers' & T. Bank v. Kimball Mill. Co. 1 S. D. 388, 36 Am. St. Rep. 739, 47 N. W. 402; Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847; Bolles, Bkg. 393.

Robinson, J., delivered the opinion of the court:

By this action in debt, the plaintiff bank seeks to recover from defendant the amount of two negotiable notes which he indorsed. The notes were made by the Southern West Virginia Fuel Company, and were discounted by the plaintiff for the benefit of that company.

Fowler, at whose request defendant indorsed, was president of the fuel company, and also president of the bank,—a director in both corporations. Defendant also was a director in both corporations.

Defendant filed a special plea in which he avers, substantially, that he was merely an accommodation indorser of the notes at the request of Fowler as president of the fuel company; that Fowler represented to him that the company was sorely in need of funds and money must be raised for its use by discounting notes; that he signed the notes with a distinct agreement between himself and Fowler that the other directors of the company would indorse them before they were discounted; that it was also agreed that the notes should not be used until a writing was signed by all the indorsers, stipulating that the directors of the company, as indorsers, were liable only in proportion to their stock; that such a writing was prepared by defendant and was signed by him, Fowler, and Shands, that Fowler was to obtain the signatures of the other directors to this writing as well as to the notes; that, notwithstanding these agreements, Fowler had the notes discounted at the bank, indorsed only by himself, the defendant, and Shands, without the indorsement of the four other directors, and without securing these others to sign the writing relating to the extent of liability; and that, at the time the notes were discounted, the bank had notice of these agreements in the premises and was therefore advised of the infirmity of the paper in relation to defendant when it became the holder of the same.

A trial by jury resulted in a verdict and judgment for defendant. Plaintiff, by writ of error, comes seeking a reversal.

Defendant rests his case on the assertion that the bank had notice of the infirmity

in the paper through the knowledge of Fowler, its president and managing officer. That knowledge, it will be observed, Fowler obtained as an officer of the fuel company. It did not come to him as an officer of the bank.

An instruction was given on behalf of defendant over the objection of plaintiff. It is as follows: "The court instructs the jury that if they believe from the evidence in this case that William E. Fowler was president of the American National Bank, the plaintiff in this case, and that he agreed with the defendant that the notes sued on in this case, or the notes for which said notes, or either of them, is a renewal, should not be discounted at said bank until they had been indorsed by William E. Fowler, William Shands, J. Lee Harne, S. M. Smith, W. P. Hawley, F. L. Black, and the defendant, directors of the Southern West Virginia Fuel Company, and that said notes should not be discounted at said bank until the written agreement introduced in evidence in this case had been signed by all of said directors of the Southern West Virginia Fuel Company, and if the jury further believe from the evidence in this case that the said William E. Fowler violated the said agreement with the defendant by causing the said notes to be discounted and the amount thereof placed to the credit of the said Southern West Virginia Fuel Company without the indorsements of all the persons aforesaid, and without all of said persons having signed the said contract in accordance with the said agreement, then the jury shall find for the defendant." Plainly, this instruction assumes that the knowledge which Fowler had of the agreement that the notes were not to be delivered until the proposed indorsements and signatures were obtained was notice to the bank of which he was president. Was the trial court justified in thus virtually assuming as matter of law that notice to Fowler was notice to the bank?

It does not appear that the exclusive management of the bank had been committed to Fowler. No resolution of the directors or long-existing custom held out to the public establishes that he had the power to act absolutely in behalf of the bank. It is not shown that he alone was the bank, so that there could be no other channel of notice to it. On the other hand, it appears that the bank had a full board of directors. It is not proved that they were so derelict in their duties that those duties necessarily passed to Fowler. We must assume that they were managing the bank as the law required them to do, since it does not appear that they were not. Besides, the 40 L.R.A.(N.S.)

bank had an active cashier, who was also a director. We must assume that he exercised his powers as a director and as the cashier. The identity of Fowler and the bank were not the same. He was not the bank,—he was merely one of its agents. So there were others entitled to information in the affairs of the bank. There were other officers to whom it was Fowler's duty to communicate knowledge received by him affecting the bank, and to whom it must ordinarily be presumed he would communicate such knowledge. They had the power to disapprove his acts.

The general rule that knowledge or notice on the part of the agent is notice to the principal is based on the duty of the agent to communicate all material information to his principal, and the presumption that he has done so. In short, this rule rests on the presumption that the agent will do his duty to the principal by communicating material information to the latter. The rule cannot stand without this presumption. In this case, the presumption does not arise. It is not to be presumed that Fowler communicated to the other officers of the bank the knowledge which he had as to the infirmity in the notes. It was to his interest to remain silent. He was president of the corporation which needed the funds by a discount of the notes. He was acting for an interest which was adverse to the interest of the bank. So an exception to the general rule applies. That exception prevails "in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the agent acts for himself, in his own interest, and adversely to that of the principal." 1 Am. & Eng. Enc. Law, 1145. "No agent who is acting in his own antagonistic interest, or who is about to commit a fraud by which his principal will be affected, does in fact inform the latter, and any conclusion drawn from a presumption that he has done so is contrary to all experience of human nature." *Gunster v. Scranton Illuminating, H. & P. Co.* 181 Pa. 327, 59 Am. St. Rep. 650, 37 Atl. 550.

Defendant was a director of the bank, and of course knew that Fowler was also a director and the president. He also knew that Fowler, in the particular transaction of the discount of these notes, had an interest adverse to the bank. Defendant, therefore, could not rely on the mere knowledge which Fowler had received in a transaction outside of his line of duty as a bank official as being notice to the bank. He was bound to observe that this knowledge was not the kind of notice to an officer that is directly imputable to the bank in any event, but that to make it notice there must be a

presumption that Fowler would communicate it to the bank. He could not rely on such a presumption, for he well knew Fowler's adverse interest. Under such circumstances he should have given direct notice to the bank, if he desired to protect himself. He should have given notice that would be presumed to reach the bank. Instead, defendant in fact constituted Fowler as his agent to see the notes perfected and the writing fully signed, intrusting that agent with negotiable instruments which he could pass to an innocent holder and thereby bind defendant. If there is loss should it not fall on defendant? He should have observed that he placed Fowler in a position to have the bank innocently part with its funds on the faith of paper that appeared sound on its face. True, the best of men sometimes neglect. But duty to himself, as well as duty to the bank of which he was a director, demanded that he do more for the protection of both himself and the bank than he did. Applicable to this case are the following: "If the third person has notice of the agent's adverse interest in a former transaction in regard to which the agent was acting not for the bank, and the knowledge gained in such a transaction is such that needs to be communicated to the bank in order to bind it,—that is to say, if it is knowledge acquired by the officer outside of his duties,—there will be no presumption of a communication where the officer has an interest or a duty in concealing the matter." Zane, *Banks & Bkg.* § 112. "If the third party, C, knows that A has an adverse interest tending to cause him to withhold his knowledge from [B] the bank, C has no right to regard A and B as identical in the transaction, and cannot hold B." Morse, *Banks & Bkg.* § 106.

It is submitted that the evidence shows that the board of directors did not pass the discount of the notes, but that the same was done by Fowler alone. That cannot alter the case. They could have overthrown his act. Though Fowler took the paper from himself into the bank, it must be presumed that the other officials, who were disinterested and qualified to act on that paper, acquiesced in his action only because they had no notice of the infirmity in the notes. It is not reasonable to think that these disinterested officials would have silently approved his action if they had known what he knew about the paper. These disinterested officers of the bank received the paper as regular and valid. Defendant cannot rely, as he undertakes to do, on a conduit of notice that did not lead to the real entity,—the bank itself through its disinterested officers. To hold that Fow-

ler, as president, acted alone for the bank, and that he had absolute power to bind it for his own private interests or those of a company in which he was privately interested, notwithstanding there were other officials of the bank who naturally would have intervened in its behalf if the knowledge which he possessed had been known to them, would mean no regard for the interests of depositors and stockholders.

In the transaction of the discount of the notes, Fowler was acting really not for the bank, but for other interests,—those of the fuel company. The directors who permitted the paper to remain as the property of the bank acted for it. Fowler's interest was so adverse to the bank that he was disqualified from representing it. A reputable authority says: "When an agent of a corporation himself contracts with the company, or otherwise deals with it in a transaction in which his interests are opposed to the interests of the company, his knowledge will not be deemed the knowledge of the company as to matters connected with that transaction; for the agent could not represent the company in such a transaction. So, if a person is an officer of two companies, and these companies enter into dealings with each other, the knowledge of the common officer cannot be attributed to either company in a transaction in which he did not represent it." 1 Morawetz, *Priv. Corp.* 2d ed. § 540c. And says Mr. Justice Mitchell in *Gunster v. Scranton Illuminating H. & P. Co.* supra: "If it be urged, as in some cases, that the principal, having put the agent in his place, should, as a matter of public policy, be held answerable for all the latter does, a sound answer is suggested by the court in *Allen v. South Boston R. Co.* 150 Mass. 200, 206, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917, that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and bears analogy to a tort wilfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master."

By claiming the notes and suing on them, the bank did not adopt Fowler's act in discounting the notes with notice. All that the bank adopted of his act is what it knew of the act. As far as it appeared to the bank, the notes which Fowler passed into the bank as agent of the fuel company, and received as agent of the bank, were entirely regular and valid. The bank took the notes as paper of that character. Why should its insistence for payment charge it with an adoption it never intended to make,—one that in reason cannot be imputed to it?

The giving of the instruction for defendant was error. The instructions requested by plaintiff properly presented the law of the case, in view of the evidence. We deem it unnecessary to discuss plaintiff's objection to the special plea, based on the ground that proof under it violates the rule that parol evidence is not admissible to change a written contract. It suffices to say that proof of the plea is admissible.

The judgment will be reversed, the verdict set aside, and a new trial awarded. Plaintiff asks for judgment here, but it does not plainly appear that defendant cannot make a different case at another trial. He may be able to prove notice.

Petition for rehearing denied April 26, 1912.

IOWA SUPREME COURT.

LEVI MARTIN

v.

F. W. SCHWERTLEY et al., Appts.

(— Iowa, —, 136 N. W. 218.)

Surface water — opening drainage culvert after accumulation of water.

1. The owners of land on one side of a highway from which surface water naturally drains through culverts in the highway are liable for injury to property on the opposite side of the highway for reopening the culverts, which were closed in improving the highway, after surface water has accumulated in large quantities upon their property, and casting it in a body onto the lower land.

Appeal — defense — first suggestion.

2. The defense that some of several persons sued jointly for turning surface water onto another's property did not participate

Note. — Liability for reopening or cleaning out drain or natural water way after body of surface water has accumulated.

The general subject as to the rights with respect to the flow of surface water is treated in the note to Gray v. McWilliams, 21 L.R.A. 593.

As to right to hasten flow of surface water along natural drainways, see note to Manteufel v. Wetzel, 19 L.R.A. (N.S.) 167.

As practical as the point here presented seems to be, no case in addition to MARTIN v. SCHWERTLEY has been found that is squarely in point. Several cases are used in the note, however, as being somewhat analogous.

In 3 Farnham on Waters, § 889g, it is said: "A landowner has a right, in the interest of good husbandry, to fill in the cuts, sagholes, washouts, and other holes in his premises, and if he does in this regard no 40 L.R.A. (N.S.)

in the wrong cannot be raised for the first time on appeal.

Evidence — injury to crop — scope of testimony.

3. Upon the question of injury to a crop by turning surface water upon it early in July, witnesses may state its condition in June and in August, there being no question that the difference in condition, if any, was due to the water.

(May 15, 1912.)

APPPEAL by defendants from a judgment of the District Court for Harrison County in plaintiff's favor in an action brought to recover damages for injury to plaintiff's growing crops, alleged to have been caused by defendants' wrongful act. Affirmed.

Statement by McClain, Ch. J.:

Action to recover damages for the alleged wrongful act of defendants in cutting openings through a highway embankment, thus permitting surface water to flow upon and across the plaintiff's land, with the result that his growing crops were seriously injured. There was a verdict for plaintiff in the sum of \$625.27, and from a judgment on this verdict the defendants appeal.

Messrs. C. W. Kellogg and J. S. Dewell, for appellants:

The condition of the corn in August could, under no circumstances, be any ground for fixing the measure of damage; the flood occurred July 5, the rule being that the measure is the condition immediately before and immediately after the injury.

One may lawfully and properly exercise a right even though it amounts to a damage to others.

1 Cooley, Torts, 3d ed. 142, 144.

The upper owner is not liable for hasten-

more than is necessary and desirable for proper tillage of his land, he is not liable to a neighboring owner for obstructing the natural flow of the water."

In Overton v. Sawyer, 46 N. C. (1 Jones, L.) 308, 62 Am. Dec. 170, it was held that the upper owner of land has a right to remove an embankment constructed along his boundary line by the lower owner, which cuts off the natural flow of the surface water from his land. In this case the court, after observing that the upper owner had a cause of action against the lower owner for causing the obstruction, but that instead of bringing an action, he removed the obstruction, said: "We can see no ground upon which the plaintiff [lower owner] can maintain an action against him [upper owner], for merely undoing that which the plaintiff ought not to have done. If a man turns his hog into a cornfield of a neighbor, and the latter pulls down the

ing the flow of surface water onto the lower land, if it is made to follow the course of usual flow, even though he collects it into a ditch for such purpose.

Manteufel v. Wetzel, 133 Wis. 619, 19 L.R.A. (N.S.) 167, 114 N. W. 91.

This work was of a public nature, done in accordance with a plan adopted by the proper authorities, and therefore there can be no recovery.

Fitzgibbon v. Western Dredging Co. 141 Iowa, 328, 117 N. W. 878.

Measra. C. A. Bolter and H. H. Roadifer, for appellee:

The measure of damages is the difference in the reasonable market value of the crops before the land was flooded and the reasonable market value after the flooding.

Jefferis v. Chicago & N. W. R. Co. 147 Iowa, 124, 124 N. W. 367.

Surface water cannot be collected and thrown upon the lower estate in a different manner or in greater quantities than it would naturally flow.

Genesee v. Healy, 124 Iowa, 310, 100 N. W. 66; *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563; *Stinson v. Fishel*, 93 Iowa, 656, 61 N. W. 1063; *Holmes v. Calhoun County*, 97 Iowa, 360, 66 N. W. 146; *Wirds v. Vier Kandt*, 131 Iowa, 125, 108 N. W. 108.

McClain, Ch. J., delivered the opinion of the court:

During the summer of 1909, the plaintiff was in possession as tenant of a farm of 160 acres, situated in Harrison county, and had growing on such farm crops of wheat and corn. On the north side of this farm is a highway, and the natural course of the surface water is from higher ground to the north across such highway and upon and over the land occupied by plaintiff. There is evidence tending to show that

prior to the fall of 1908 the surface water from the north crossed the highway through culverts at different places, and flowed in the natural course of drainage across the farm, but that in the fall of that year, at the general request and instance of land-owners in the neighborhood, the highway was graded up, the culverts being removed so that the highway constituted a solid embankment, preventing the surface water from the north flowing upon and across the farm of plaintiff, and that the highway remained in this condition without openings through it along the entire north line of plaintiff's farm and for some distance beyond it, when, on July 5, 1909, very heavy rains caused an accumulation of water on the land north of the highway in some places to the depth of 2 or 3 feet, and that defendants on the 6th and 7th days of July, while the water was still thus standing north of the highway, cut openings in the highway embankment at places where there had formerly been culverts, allowing the surface water north of the highway grade to run through with great rapidity and in large volume upon plaintiff's land, with great damage to his crops. For the injury thus occasioned to his crops and to a garden adjacent to his dwelling house on the farm, plaintiff recovered a verdict and judgment against the defendants.

1. The sufficiency of the allegations in the pleadings and of the evidence to sustain this judgment is questioned by counsel for defendants in their complaints with reference to instructions given by the court. Their objections are not to specific portions of the instructions, but to the general theory on which the case was submitted. They contend that the court did not require plaintiff to prove that the construction of the highway embankment in the fall of 1908 was the wrongful act of de-

fence and drives the hog out, doing no unnecessary damage, can he be sued for doing so, upon the ground that he ought to have let the hog alone, and bring an action for the trespass?"

Article 656 of the Civil Code, imposing on the lower estate the servitude of suffering the waters falling on the upper estate to pass through its drains in the manner that will best conciliate the rights of the owner of the upper estate with the interests of agriculture, it was held in *Darby v. Miller*, 6 La. Ann. 645, where the defendant constructed causeways across his land, leaving gullies and natural channels for the flow of water open, throwing bridges over them, that the plaintiff, whose plantation was situated above that of the defendant, could not have the causeways removed, on the ground that they caused higher water, after heavy rains, to rise on his land, where he failed to prove this contention; but since 40 L.R.A. (N.S.)

it was also shown that the gullies and natural drains on the defendant's land, through which the water from the plaintiff's lands flowed, had become "partially filled up by fallen timber and the succession of time," and so grown up with flags that the water passed through them with great difficulty, it was held that the plaintiff was entitled to remove those impediments and restore the natural drains to their original depths.

And while land may be subject to the servitude of receiving the waters that flow naturally on, to, and through it from an adjoining estate above, the owner of the latter estate has no right to enter at will upon the land for the purpose of cleaning out or removing obstructions in order to enjoy the servitude, but is only entitled to ask the owner to remove the obstructions, when, upon his failure to do so, he may compel such action by legal process. *Landry v. McCall*, 3 La. Ann. 134. E. M. S.

fendants, but instructed the jury that, although this embankment was at that time constructed by lawful authority, the defendants acted wrongfully in cutting openings through it after the surface water had accumulated north of it on July 6 and 7, 1909, and allowing the surface water to flow through and on and over plaintiff's premises "substantially in a greater quantity and velocity and in a different manner than it would have done" if openings had been previously made in the highway embankment where the culverts had formerly been. There was a special finding of the jury that these cuts in the embankment were made at the points where the surface water, prior to the construction of the embankment, naturally flowed across the highway upon plaintiff's land, and we therefore have this question for consideration to wit: Was it wrongful on the part of defendants to thus open ways through the embankment for the immediate escape of water accumulated by it on the other land to the north, conceding that, if such openings had been made when the embankment was thrown up, or at any time before surface water had accumulated in great quantities on the land to the north, the construction of such openings would have been prior and fully warranted for the purpose of allowing surface water to flow across the highway in the usual course of drainage. Even though defendants had not constructed the embankment, they were aware of its existence and condition, and they were bound to know that, if it continued in that condition until large quantities of surface water had accumulated by reason of a heavy rainfall, the cutting of these openings would cause damage to the plaintiff, although they might be desirable for the purpose of relieving the land north of the highway of the accumulation of water. The evidence that they appreciated the effect of their action in thus attempting to relieve the land north of the highway of the sudden accumulation of surface water is undisputed. It is elementary law that one person has not the right to relieve his own property of a mischief by causing a similar mischief to the land of his neighbor. And this is not inconsistent with another rule that, if a danger of injury is common to two persons, one of them may avert the injury to himself, although in consequence of his doing so damage results to the other. Thus, in the case of *Whalley v. Lancashire & Y. R. Co.* (1884) L. R. 13 Q. B. Div. 131, 53 L. J. Q. B. N. S. 285, 50 L. T. N. S. 472, 32 Week. Rep. 711, 48 J. P. 500, it was held that a railroad company which had rightfully constructed an embankment which was imperiled by the accumulation

of surface water had no right to open a way for the water through such embankment, and thus cause it to be discharged on the adjoining land. And in *Pollock on Torts* (at page 150) the rule announced in the case just cited is approved in this general statement: "At all events, a man cannot justify doing for the protection of his own property a deliberate act whose evident tendency is to cause and which does cause damage to the property of an innocent neighbor. Thus, if flood water has come on my land by no fault of my own, this does not entitle me to let it off by means which, in the natural order of things, cause it to flood an adjoining owner's land." This is but an application of the well-recognized maxim, *Sic utere tuo ut alienum non laedas*. See *Broom's Legal Maxims*, 6th Am. ed. 1868, 275.

The rule announced in an early case in this state, that one person may not improve his land for the purpose of freeing it from surface water by throwing the water upon the land of another, to his injury, in a different manner from that in which it would naturally have flowed (*Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563), has been somewhat modified in the interest of agriculture, so that the upper proprietor may drain his land into a natural water course without liability to a lower proprietor for resulting damages, although the effect of such drainage is to throw the surface water in somewhat increased volume at times on the land of the lower proprietor (*Dorr v. Zimmerman*, 127 Iowa, 551, 103 N. W. 806; *Hull v. Harker*, 130 Iowa, 190, 106 N. W. 629). But the principle has still been maintained that the upper proprietor may not discharge collected water upon lower land, even though in a water course, in an unusual manner or in unusual quantities. *Tretter v. Chicago G. W. R. Co.* 147 Iowa, 375, 140 Am. St. Rep. 304, 126 N. W. 339; *Hume v. Des Moines*, 146 Iowa, 624, 29 L.R.A.(N.S.) 126, 125 N. W. 846, Ann. Cas. 1912 B, 904; *Baker v. Akron*, 145 Iowa, 485, 30 L.R.A.(N.S.) 619, 122 N. W. 926; *Sheker v. Machovec*, 139 Iowa, 1, 116 N. W. 1042. And this is the general rule in this country. 1 *Cooley, Torts*, 3d ed. 1906, 1189. It is to be noticed that the case before us does not involve the ordinary question of drainage. The common enemy, surface water, had been accumulated on the lands of defendants in large quantities so as to constitute an immediate menace and mischief, and the defendants had no right to free themselves of the natural consequence of this invasion by a hostile force by transferring the menace and mischief to the land of plaintiff, who was wholly innocent of any

wrong in the matter, so as to cause him the same kind and quantity of injury as that with which defendants were threatened. It would hardly be pretended that, if a herd of cattle were devastating the crops of one landowner, he would have the right, for the purpose of averting further damage to himself, to open a partition fence and drive them on the land of an adjoining proprietor who was in no way at fault, with the result of causing to him the same kind of injury which the former was seeking to avert. The accumulated surface water was not mere surface water in the ordinary sense, but it was a present, active foe, constrained for the time being on the lands of defendants, threatening unusual and extraordinary danger to someone, and, as turned loose upon the plaintiff's land, it was not ordinary surface water, but a body of water which, by its accumulation, had become an extraordinary menace.

Counsel argue that the highway embankment without proper openings was a nuisance which the defendants might rightfully abate by their own action; but we find no authority for so abating a nuisance as to throw the resulting injury upon someone else who is in no way at fault for its existence. The act of the defendants was not an instinctive and involuntary act in avoiding the injury threatened in a sudden emergency, as in the celebrated "squib case" of *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403, but it was a wilful and deliberate act, calculated to throw upon the plaintiff, an innocent party, the very injury with which defendants were threatened. This wilful and deliberate act, and not the original construction of the highway embankment, which might or might not be injurious to adjoining landowners, depending upon circumstances which should subsequently arise, was the proximate cause of the injury to the plaintiff. See 1 Cooley, Torts, 3d ed. 1906, 101. In the case before us the situation was simply this: Regardless of the responsibility for the original construction of the highway embankment without the openings through it which should have been placed there, the lands of defendants and others were covered with water which had accumulated as the result of a heavy rainfall. Defendant desired to relieve their land immediately of this water, and they cut openings in the embankment with the intention that the water should thereby be cast on the land of plaintiff otherwise than as it would have been cast upon his land if the openings had been previously made in the embankment, with a full knowledge that damage would result to him similar to that which they were seeking to avoid by making the openings. Under such

40 L.R.A. (N.S.)

circumstances, it seems to us there can be no question as to the wrongfulness of defendants' acts and their consequent liability for the damage resulting to the plaintiff.

2. The defendant Schwertley filed an answer in his own behalf, disclaiming any participation in the acts of the other defendants. But the other defendants filed a joint answer, denying their liability. No question was raised on the trial as to the liability of any one of the other defendants, if a wrong was done by any of them. Under these circumstances, the court did not err in submitting to the jury the issue as to the joint liability of all the defendants save Schwertley, and requiring them to find specifically only as to his participation in the wrong which occasioned the injury to plaintiff. The verdict was against Schwertley and all the other defendants as joint wrongdoers, and there is no specific complaint as to defendant Schwertley. The contention now made, that the evidence tended to show that some of the defendants other than Schwertley did not participate in the joint wrong, cannot now be considered. There was sufficient evidence to sustain a verdict against all, and no issue was raised as to the individual liability of the other defendants.

3. There is some contention on the part of counsel for appellants that the court erred in rulings relating to the admissibility of evidence as to measure of damages. There is no complaint as to the general rule recognized by the court, that plaintiff, a tenant with right of occupancy for only one year, should be allowed to recover, if anything, the difference in the value of his crops in the condition existing just before the flood and the condition which existed after the flood; and the only questions raised in this respect are as to whether the witnesses were sufficiently limited in the scope of their testimony.

One witness was allowed to state the condition of plaintiff's growing corn in the latter part of June and others to testify as to its condition about the middle of August. But such testimony was part only of the general description of the plaintiff's corn crop, which tended to show that, until it was submerged by water on the 6th and 7th of July, it was good crop, and that, as the result of being thus submerged, it was almost destroyed; the damaged condition in August being the natural consequence of the flood caused by defendants' acts. Witnesses might, therefore, properly testify as to what the value per acre of the crop was in June, and what its value per acre was in August; the diminution in value appearing plainly to have been due to the flood, and to no other cause. Such evidence would enable

the jury to say what the difference in value of the crop was immediately preceding and immediately following the damage by flood. The value per acre of the crop as it was just before the flood might properly be testified to by a witness familiar with the amount of grain which the usual crop would yield, and, as compared with this estimate, he might properly testify as to the actual yield of the portion of the crop which had been damaged; it appearing that the diminution was due to the flood. These suggestions are sufficient to meet the contentions of counsel for appellants without specifically setting out the questions and answers of the various witnesses. The rulings of the court as to the admissibility of the evidence relating to measure of damages are fully supported by the views expressed in *Jefferis v. Chicago & N. W. R. Co.* 147 Iowa, 124, 124 N. W. 367, if it is borne in mind that there was no controversy under the evidence as to the damaged condition of the crops as they existed after the flood being due to that cause.

We find no error in the record, and the judgment is affirmed.

KANSAS SUPREME COURT.

J. M. BOYER

v.

STATE FARMERS' MUTUAL HAIL INSURANCE COMPANY, Appt.

(86 Kan. 442, 121 Pac. 329.)

Insurance — hail — delay in policy — liability.

Under the facts of this case, it is held that a hail insurance company which issued a policy on a crop of growing corn the day after it was destroyed by a hail-

Headnote by BURCH, J.

Note. — Liability of insurance company for negligent delay in passing upon or issuing policy until after loss.

The question as to the effect of delay in passing upon applications for insurance is covered in the note to *Northwestern Mut. L. Ins. Co. v. Neafus*, 36 L.R.A.(N.S.) 1211. In the cases there dealt with the question presented was whether the insurer could be held liable as upon a contract of insurance; that is, whether a delay in passing upon the application would amount to an acceptance of the risk which would bind the insurer. In *BOYER v. STATE FARMERS' MUT. HAIL INS. CO.*, however, it was sought to hold the insurer liable, not upon a contract of insurance, but because of the negligence of its agent in failing to forward the application within a reasonable time. But 40 L.R.A.(N.S.)

storm is liable in damages for the amount of the insurance which would have been in force before the storm had its soliciting agent not delayed for an unreasonable length of time to forward the application on which the policy was issued.

(February 10, 1912.)

A PPEAL by defendant from a judgment of the District Court for Jewell County in plaintiff's favor in an action brought to recover damages alleged to have been caused by the negligence of defendant's agent in not forwarding plaintiff's application for hail insurance promptly. Affirmed.

Statement by Burch, J.:

The plaintiff sued the defendant for damages occasioned by the negligence of its soliciting agent in not forwarding the plaintiff's application for hail insurance promptly, in consequence of which the policy was not issued until after the property sought to be insured was destroyed.

The court made the following findings of fact and conclusions of law:

Findings of Fact.

"(1) The defendant was, at the time of the happenings mentioned below, a corporation existing under the laws of the state of Minnesota.

"(2) The defendant W. P. Woody was, at the time of the issuance of the policy of insurance hereinafter mentioned, an agent of the said company, authorized to solicit applications for insurance, to collect premiums, and to forward applications to the defendant insurance company at Waseca, Minnesota, for approval or rejection by said company.

"(3) On the 7th day of July, 1909, plaintiff, J. M. Boyer, was the owner of 100 acres of growing corn, 50 acres of which was situated in section 21, township 5 south, of range 9 west of the sixth prin-

one case dealing with that question has been disclosed.

In *Walker v. Farmers' Ins. Co.* 51 Iowa, 679, 2 N. W. 583, the trial court instructed the jury that if they found that the person who received the application for insurance was an agent with limited and restricted authority, having power only to receive and forward applications to the company for its approval or rejection, then, as such, he would be held to the use of ordinary diligence, and the company would be liable for his negligence in the performance of such duty, and if he neglected to forward the application within a reasonable time, considering all the circumstances, the company would be liable for any loss occasioned by such neglect. This instruction was held erroneous in that case on the ground that no issue of negligence was raised by the

cial meridian, and 50 acres situated in section 21, township 5 south, of range 9 west of the sixth principal meridian.

"(4) On the 7th day of July, 1909, said W. P. Woody went to the farm of the plaintiff, and took his application for the insurance of the corn, above mentioned, for the purpose of insuring it against damage from hail, the limit of the amount of such insurance being \$1,000; the premium for such insurance being the sum of \$60.

"(5) During the negotiations, the plaintiff informed Woody that he could pay cash or give his note; but it would be more convenient to give his note. This was agreed to by said Woody.

"(6) The crop of corn was exceptionally good, and plaintiff also informed said Woody, in effect, that he desired the application forwarded at once, as he had a fine crop of corn and did not wish to lose it.

"(7) The application was then drawn up and the note was executed, made payable to the order of W. P. Woody, which was done for the convenience of Woody in having it discounted.

"(8) Woody had never been expressly authorized to accept notes in payment of premiums; but it had been his habit to take them and have them discounted, and send in the cash with the application.

"(9) Woody's residence and place of business were in Cawker City, Mitchell county, Kansas. He arrived in Cawker City about 7 o'clock in the evening. On the 8th day of July, at about 9 o'clock in the morning, he took the note to a bank in Cawker City to sell it and have it discounted; but the bank declined to purchase it. He kept it in his possession all that day, and on the 9th day of July he drove over to the town of Glen Elder, situated in the same county, and there offered the note for sale and discount at two banks, and they

declined to purchase it. He returned to Cawker City, and on the 10th day of July he endeavored to dispose of it to other parties, who declined to purchase it, and on the night of the 10th day of July, 1909, he sent the note and the application to the defendant company, where it arrived on the 12th day of July, 1909. He had also taken the application of A. T. Boyer and Charles Boyer for insurance on growing crops owned by them separately, and had taken their notes in payment of the premiums thereon. He sent all three of these notes and the applications at the time of sending the application and note of plaintiff, and in his letter informed the company 'that he would stand for the collection' of the notes; that they owned 680 acres of very fine land in Jewell county, Kansas, but were in debt a good deal; and that they had given a first lien on 165 acres of as fine corn as could be seen in the county, and which was tasseling out in fine shape.

"(10) The note, application, and letter were received by the secretary of the company, who made no objection because the application was not accompanied by the cash, and on the 12th day of July, 1909, the policy of insurance, which is marked 'Exhibit A,' and appears as such in the petition of plaintiff, was issued to the plaintiff, and the other policies issued to A. T. Boyer and Charles Boyer.

"(11) The application of the plaintiff on which such policy was issued is the one marked 'Exhibit B' in plaintiff's petition. A copy of the by-laws was printed on the policy so issued, and forms a part of the contract under which said policy was to be so issued.

"(12) That had said application and note been forwarded on the night of the 7th, or on the morning or night of the 8th of July, which could have been done,

pleadings, the court saying: "It may be, but the point we do not decide, that defendant is liable for the neglect of its agent, as contemplated in this instruction; but in order to recover for such negligence the action must be based thereon and the petition must so declare. The petition in this case declares upon a contract for insurance. This instruction contemplates liability of defendant on account of the negligence of defendant's agent in not forwarding to defendant the application and other papers. No issue as to negligence was raised by the pleadings. The court, therefore, erred in submitting to the jury by this instruction the question of the agent's negligence."

Although the instruction in the foregoing case was there improper because no issue of negligence had been joined, it appears to be perfectly sound as a legal proposition. 40 L.R.A. (N.S.)

As there suggested, the question of what is a reasonable time for forwarding the application would vary with the particular circumstances of each case. For example, what might be found to be a reasonable time for forwarding an application for fire or life insurance might not be a reasonable time in a case involving an application for hail insurance which was made, as in *Boyer v. State Farmers' Mut. Hail Ins. Co.*, at a time when a loss might be expected momentarily. But whatever the decision of the jury may be on this question, it cannot be doubted that the proposition that an insurer should be held liable for a loss sustained by an applicant for insurance because of the negligence of the insured's agent in failing to forward the application within a reasonable time is sound.

J. T. W.

instead of on the 10th, they would have been received by the company and the policy would have been issued to plaintiff before the destruction of his crop of corn below mentioned. But, considering the critical situation of the corn, the danger of hail from [in] July and August, and the limited number of days the insurance was to run, together with all the other circumstances in this case, the court finds that the said agent held said application an unreasonable length of time, and on such account the application was not passed upon by the company until July 12, 1909.

"(13) On the 11th day of July, at 3:30 o'clock, A. M., a violent hailstorm swept over the country and totally destroyed the crop of 100 acres of corn described in the policy so issued to the plaintiff.

"(14) The value of the crop of corn so destroyed was at least \$1,200.

"(15) On the 12th day of July, 1909, the plaintiff made affidavit of his loss, which he sent by United States mail to the proper parties, as designated in the policy of insurance, and afterward, on the 15th day of July, 1909, he made further and formal proof of loss, as required by the policy of insurance, and deposited it in the United States mail, sending it by registered letter to said company, and within the time required by the policy of insurance.

"(16) The company has refused, and before the bringing of this action refused, and still refuses, to pay for the destruction of said crop or any part thereof.

"(17) Section 15 of the by-laws provided that 'the application and policy and the by-laws of this company now in force, or as hereafter enacted, constitute the entire contract between the company and its members, and no agent is authorized to enter into any agreement which alters said contract in any particular.'

"(18) While the company did not expressly authorize the agent, Woody, to accept notes in payment for premiums, yet they notified their agents, including Woody, that if they should find difficulty in discounting notes taken that the company would refer them to a bank that would, and it is apparent many such notes were taken, and in that way the company encouraged its agents to take notes in payment of premiums; and this is why Woody took the note payable to himself, instead of the company.

"(19) The company had cautioned the agent, Woody, never to send notes when they could be discounted.

"(20) The plaintiff believed the agent, Woody, had authority to accept the note in payment of the premium, and had no notice to the contrary, save and except 40 L.R.A.(N.S.)

such, if any, as is imparted by the matters contained in the application of the plaintiff and the policy issued to the plaintiff; and plaintiff had no notice that there would be any attempt to discount or sell the note before forwarding the application.

"(21) The policy issued to the plaintiff was so issued July 12, 1909, and for a term ending on the 15th day of September, 1909.

"(22) A bank in Waseca, Minnesota, in the same city wherein the home office of the company was situated, had sent a letter to the agent, Woody, informing him that when notes were taken for premiums for policies to be issued by the defendant company, that said bank would purchase said notes.

"(23) The plaintiff has necessarily been compelled to employ attorneys to prosecute this action, and a reasonable fee for such attorneys, the court finds, under the circumstances, should be \$200.

"(24) On the bottom of the paper upon which the application of the plaintiff for hail insurance is written, and occurring below and after the signature, appearing in large type, as large as that in which the body of the application is printed, the following: 'Notice.—All payments of premiums must be made by the assured by bank check or draft payable to the order of the State Farmers' Mutual Hail Insurance Company of Waseca, Minnesota, and be attached to and sent to the company with the application.'

"(25) The plaintiff has suffered damage to his property by reason of the destruction thereof in the sum of \$1,200, and for \$1,000 of which amount the defendant the State Farmers' Mutual Hail Insurance Company is liable to the plaintiff."

Conclusions of Law.

"1. The court therefore concludes that the plaintiff is entitled to recover of the defendant, the State Farmers' Mutual Hail Insurance Company, the sum of \$1,200; that this liability does not arise from any contract of insurance, but arises solely and on account of the failure of the agent, Woody, to forward the application within a reasonable time to the said company; and upon what the court in this case deems to be such negligence on the part of the said agent, the judgment to be rendered in this case is based."

Messrs. C. L. Kagey and R. M. Anderson for appellant.

Messrs. C. M. Higley, J. S. Boyer, and R. C. Postlethwaite for appellee.

Burch, J., delivered the opinion of the court:

The greater part of the brief for the de-

fendant is devoted to arguments which relate to the agent's lack of authority, under the restrictions placed upon him, to effect a contract of insurance, and to the necessity for an acceptance of the application as a condition precedent to the formation of a contract of insurance. Many authorities are cited upon these subjects, including those decisions which hold that unreasonable delay in acting upon an application does not constitute acceptance and does not warrant a presumption of acceptance. The course of the inquiry in this case lies in a different direction. This is not a suit on a contract of insurance, and the judgment does not rest upon the breach of such a contract. The position of the plaintiff and of the district court is that, under the peculiar conditions surrounding the transaction, the agent should have forwarded the plaintiff's application promptly for acceptance or rejection; that the application would have been accepted if he had done so, and a contract of insurance would have been consummated, protecting the plaintiff from the loss which occurred; that the negligence of the agent in not forwarding the application until it was too late for the acceptance of it to be of any benefit to the plaintiff was the negligence of the company; and consequently that the company wrongfully deprived the plaintiff of the indemnity he should have had, to his injury.

For all purposes of taking and forwarding the application, the agent was the company itself. He could negotiate an application for insurance, based upon cash, upon the applicant's note, or upon any other terms, precisely as the board of directors of the company might have done. The option exercised by the agent to take a note, instead of the cash, which he might have received (finding No. 5), was an option exercised by his principal. He could dispense with a bank check or draft (finding No. 24) as an essential feature of the application, and whatever the arrangement with the applicant might be, it was the agent's duty to present it for acceptance or rejection to the officer or officers holding the reserved power to determine whether or not a policy should be issued. The agency relation of insurance solicitors to the insurer and the person solicited, and the authority of such agents over the subject of the application, are fully discussed in the case of *Pflester v. Missouri State L. Ins. Co.* 85 Kan. 97, 116 Pac. 245, and the rules of law there stated are applicable here.

When the application was solicited by the agent, the danger period of the corn-growing season had been reached, and early action, whereby the risk of injury might

be shifted to the defendant, was a matter of much consequence to the plaintiff. The application was given for the purpose of transmission to the defendant's headquarters, and not that it might be retained by the agent and carried about in his pocket. The defendant itself recognized the necessity for expeditiousness in a letter of instructions to the agent, which was introduced in evidence, and which, no doubt, was regarded by the court as quite material, when considering the matters covered by finding No. 12. A portion of the letter reads as follows: "Special Notice.—Send all applications promptly, because there is no liability of the company until the application is received and approved by us." It is fair to presume that likelihood of the destruction of the plaintiff's corn by hail induced the very high rate of premium demanded for the brief term of the insurance, in this case 6 per. cent on \$1,000, or 5 per cent of the full value of the crop at the time of the negotiations. There was sufficient danger to the plaintiff to be apprehended from delay in closing the transaction that a reasonably prudent business man, guided by the considerations which ordinarily regulate conduct, would have acted with diligence. If the agent only be considered, it is clear enough that he would be liable if his negligent retention of the application prevented its timely acceptance. Since he was merely the arm of the defendant, the obligation resting upon him was the obligation of the defendant. Therefore the duty of the defendant to secure prompt transmission of the application from the solicitor's field to the central office is quite apparent. Whether or not the delay in this case was unreasonable was a question of fact for the trier of the facts, and as it is presented here is not one of law for this court.

It is claimed that the finding that a policy would have been issued before the corn was destroyed, had the application been forwarded promptly, is not sustained by the evidence. The finding is sufficiently sustained by the proof that the application was immediately approved upon its arrival at the defendant's office, and a policy was issued accordingly, taking effect at noon of the same day. The position of the defendant was that its hailstorm business was conducted on a cash basis only, and its witnesses supported this position by some interesting testimony. They stated that premiums must be paid in cash; that promissory notes are never accepted; that the defendant was not interested in the plaintiff's note, and did not know what became of it; and that the defendant was only interested in a cash settlement for

the policy,—all in face of the proof that three policies at least (finding No. 10) were issued on July 12th without cash, and without hesitation or objection.

It is said that the plaintiff invited delay by giving his note, instead of paying cash. Findings 5 and 6 dispose of this contention, and they are abundantly sustained by the evidence. It is further said there is no evidence that the plaintiff did not know the agent would attempt to sell the note before sending in the application. The plaintiff did not testify in so many words that he had no such knowledge; but the evidence is quite conclusive that he believed he had paid his premium, and that the application would go forward immediately. Other criticisms of the findings of fact are either invalid or immaterial. Certain evidence objected to was admissible under the decision in the case of Pflester v. Missouri State L. Ins. Co. supra.

The judgment of the District Court is affirmed.

MICHIGAN SUPREME COURT.

PEOPLE OF THE STATE OF MICHIGAN

v.

GEORGE A. OSBORNE.

(— Mich. —, 135 N. W. 921.)

Voter — residence — attendance at school.

1. A student is not prevented from gaining a residence for voting purposes at the place where he is attending school, by a

Note. — Acquiring residence as a voter while attending school or public institution.

Earlier cases on the point here annotated may be found in the note to Wolcott v. Holcomb, 23 L.R.A. 215.

As to whether residence as a qualification of voters means domicil, see note to Anderson v. Palmer Transfer Co. 19 L.R.A. (N.S.) 759.

Most of the states from which cases are cited in this note have a constitutional provision which reads: "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student at any seminary of learning; nor while kept at any almshouse or other asylum at public expense; nor while confined in any public prison." So that in this note, whenever a constitutional provision is referred to, the reference is to the one just quoted. 40 L.R.A. (N.S.)

constitutional provision that no elector shall be deemed to have gained or lost a residence while in attendance at any seminary of learning, if he goes to the college town for the purpose of establishing his residence there, although an incidental purpose is to take advantage of the educational resources of the town.

Same — illegal voting — necessity of criminal intent.

2. Criminal intent is a necessary element of conviction for violation of the statute against illegal voting.

(May 3, 1912.)

EXCEPTIONS by defendant, before sentence, to rulings of the Circuit Court for Calhoun County in a proceeding charging him with illegal voting, which resulted in his conviction. Sustained.

Statement by Ostrander, J.:

Respondent is unmarried, twenty-seven years of age, and, born in Canada, is a naturalized citizen of the United States. His father, an itinerant Methodist clergyman, is not a citizen of the United States, though living in Michigan. From Canada respondent came to Whittamore, Michigan, but just before going to Albion, Michigan, in September, 1905, he was teaching school in the township of Burley, Iosco county, Michigan, where he was registered as an elector and voted. He has not lived with his parents for twelve years and has supported himself since he was fifteen years of age. When he left Iosco county, he did so without expecting ever to return, and his name was stricken from the registration book. At Albion he registered at the

The courts, however, generally take the view that while the constitutional provision prevents one from acquiring a voting residence by reason of the circumstances named, it does not prevent one otherwise within its purview from acquiring such a residence by reason of other circumstances.

Inmates of soldiers' homes, or occupants of government posts.

In *Stewart v. Kyser*, 105 Cal. 459, 39 Pac. 19, it is held that such a constitutional provision as is stated supra does not prevent one who gives up a former residence and enters a veterans' home with the purpose of forever making it his home, from acquiring a voting residence in the precinct where the home is located.

And in *Cory v. Spencer*, 67 Kan. 648, 63 L.R.A. 275, 73 Pac. 920, which case squarely overrules *Lawrence v. Leidigh*, 58 Kan. 594, 62 Am. St. Rep. 631, 50 Pac. 600, it was held that such a provision does not prevent one in a soldiers' home from acquiring a voting residence there if such is his pur-

college as a resident of the city. He has lived there continuously, in the third ward, where he is registered as an elector and where he voted for five years. His permanent address since September, 1905, has been Albion, Michigan, and during that time he has earned his living in and about the city. He has no definite plans for the future. At the spring election in the year 1911, respondent's vote was challenged, but was received by the inspectors, whereupon he was arrested, and in an information filed in the circuit court for the county of Calhoun is charged with having voted illegally. The material facts are not in dispute. Respondent testified at the trial that his primary purpose in going to Albion was to attend college; that he had been

for six years fitting himself for the ministry, and went to Albion because he could there obtain an education and because there was offered there inducements to work his way through college. He said: "If after graduating I should receive a call to go to some other place, I expect I would go. I may receive a call to preach in a church in Calhoun county, but not in Albion. I don't expect to in Albion." He was asked by the court the following question: "Is there anything now, or has there been anything during the past two years, that has caused you to remain there except the fact that you are taking the course of instructions provided by Albion college?" To which he replied: "There is. In the first place, the ecclesiastical history of the college, and, in

pose. The court said: "He is as free as if he were not a recipient of this bounty."

The vote of a permanent inmate of a soldiers' home in a state other than that of the county where he voted and from which he is not permitted to go without a "furlough" is properly rejected, notwithstanding the testimony of the party that he has no intention of changing his residence from the place where he voted. *Lankford v. Gebhart*, 130 Mo. 621, 51 Am. St. Rep. 585, 32 S. W. 1127, wherein it was said: "The testimony . . . that he had no intention of changing his residence when he became a member of the home or afterward may be taken as a mere conclusion of the witness. A contrary intent may be gathered from all the circumstances."

But in *Powell v. Spackman*, 7 Idaho, 692, 54 L.R.A. 378, 65 Pac. 503, it is held that such a constitutional provision preserves the voting status of the inmates of a soldiers' home at the time of their entry thereto, and prevents such inmates from acquiring the right to vote in the county and precinct in which the home is located. To the same effect is *Re Smith*, 44 Misc. 384, 89 N. Y. Supp. 1006.

And "the fact that a member of the home (soldiers' and sailors') is detailed to perform certain services, for which he receives a compensation, does not change his status. He is still kept in the home at public expense; . . . and a member of the home, a part of whose pension is turned over to the commander . . . does not . . . occupy a relation to the home different from that of the other inmates." *Re Registration of Voters*, 21 Pa. Co. Ct. 473, wherein it was also said: "I do not hold that a member of the home may not acquire a residence, for voting purposes, in that district, but do hold that to do so he must acquire such residence aside from that which attaches as a member of the home. For instance, a member of the home who has a family may, by moving such family into the district, become a voter therein. So, if discharged from the home, by remaining in the district with proper intent, he may become a voter therein and remain such even 40 L.R.A. (N.S.)

if again a member of the home. For, if a voter in that district when entering the home, he would, of course, remain such."

And the inmates of a soldiers' home in Tennessee, the exclusive jurisdiction of which is vested in the United States government, are not entitled to vote at state elections notwithstanding that the state statute by which consent was given to the acquisition of the site for the home provides that nothing therein shall prevent the inmates from voting, as the legislature could not confer the right of suffrage upon persons whose legal status is fixed as nonresidents. *State ex rel. Lyle v. Willett*, 117 Tenn. 334, 97 S. W. 299. The court referred to the fact that there was no provision in the Constitution of Tennessee similar to that referred to at the beginning of the note.

But employees and inmates of the home, who work and eat both regularly and irregularly therein, but who have homes and families on the outside of the home grounds, with whom they spend their evenings and nights and irregularly take their meals, being residents of the state and otherwise qualified to vote, are entitled to vote in that place. *Ibid.*

Inmates of almshouses and hospitals.

In *Re Batterman*, 14 Misc. 213, 35 N. Y. Supp. 593, it was held that art. 2, § 3, of the Constitution of 1895, providing that "for the purpose of voting no person shall be deemed to have gained or lost a residence" while kept at any asylum or institution wholly or partly supported at public expense or charity, is prospective in its operation and effect, and if a residence has been already acquired in any institution of the kind described in the section, it will not be held to have been taken away by this provision of the Constitution. To the same effect is *Re Griffiths*, 16 Misc. 128, 38 N. Y. Supp. 953.

A constitutional provision against gaining a residence while confined in a public prison applies to a person committed to such prison, even if the commitment was ir-

the second place, the opportunity we get in supplying pulpits around the immediate vicinity and attending college also, and also the work we get during vacations in the city at various employments as the Employment Bureau suggests and discovers for us. Q. Those things which you have just enumerated are the only things that have caused you for the past year or so and are now causing you to continue your residence there in Albion. Is that true? A. Yes, the school advantages plus the opportunities of earning my way through." Respondent's motion for a directed verdict

was denied, and the court advised the jury that upon the undisputed evidence respondent could not have acquired a residence in Albion. *Pro forma* he submitted the question of respondent's guilt to the jury, which returned the following verdict: "Under the direction of the court only, we return a verdict of guilty." The cause is here on exceptions before sentence.

Messrs. Weeks & Cooper, for defendant:

A student is not compelled to maintain his residence at the place from whence he

regular or illegal, and was made up on his own application; and consequently he cannot vote in the district where the prison is located, and therefore has no right to register therein, notwithstanding the fact that he has no family and no home, and made application for commitment to get a home and work in the prison. *People v. Cady*, 143 N. Y. 100, 25 L.R.A. 399, 37 N. E. 673, affirming 78 Hun, 616, 28 N. Y. Supp. 1110.

And an unpaid helper in a public hospital, who is simply an inmate of the hospital under a bare license, that is, with mere permission to use it as an asylum, getting his board and lodging for work he would be required to do, is "kept" in the institution within the constitutional provision, and cannot acquire a residence for voting in the district where the hospital is situated. *People ex rel. McShane v. Hagen*, 164 N. Y. 570, 58 N. E. 1091, affirming 48 App. Div. 203, 62 N. Y. Supp. 816.

Neither does an inmate of a Samaritan Home for the Aged acquire a residence for the purpose of voting in the district where the home is located. *Re Olwell*, 165 N. Y. 642, 59 N. E. 1128, affirming 54 App. Div. 630, 66 N. Y. Supp. 859.

And in *Murray's Petition*, 5 W. N. C. 9, it was said of former paupers at an institution, who get no money compensation or wages, but do certain work at the institution, and are accorded certain privileges in return for their board, lodging, and clothing: "This class is very near the class of paupers among whom such distinctions as to employment and privileges may fairly be made as a reward for superior intelligence, industry, or good behavior. We think it more in accordance with the language and spirit of the Constitution to treat such persons as still in the class of paupers. They are not free and self-supporting citizens, and are therefore deprived, for the time, of their political privilege of voting."

Students.

The fact that one is a student in a university does not entitle him to vote where the university is situated, nor does it of itself prevent his voting there. He may vote at the seat of the university if he has his residence there and is otherwise qualified. 40 L.R.A. (N.S.)

Wickham v. Coyner, 30 Ohio C. C. 765; *Berry v. Wilcox*, 44 Neb. 82, 48 Am. St. Rep. 706, 62 N. W. 249, wherein it was said: "Persons otherwise qualified as voters, who come to the seat of a university mainly for the purpose of obtaining an education, who are not dependent upon their parents for support, who have not the intention of returning to their parental home upon the completion of their studies, who are accustomed to leave the seat of the university during vacation, going wherever they might find employment, and returning to the university when the term opens, regarding the seat of the university as their home, and having no purpose formed as to their movements after completing their studies, are entitled to vote at the seat of the university."

So, in *Hall v. Schoenecke*, 128 Mo. 661, 31 S. W. 97, it was held that a student may become a resident of the place where the college is located though he only went there for the purpose of attending school. Whether he has done so or not depends upon all the facts and circumstances. The facts that he is supported and maintained by his parents, and spends his vacations with them, are strong, but not necessarily conclusive, circumstances to prove that he has not changed his residence. The question is, as in other cases, largely one of intention, though as to this, the evidence of the party himself is not necessarily conclusive.

And where a student who is self-supporting gives up his former residence and comes to college with the intention of remaining in the county after his studies are over, he acquires a residence for the purpose of voting. *Wickham v. Coyner*, *supra*; *Re Lower Oxford Contested Election*, 2 Pa. Co. Ct. 323.

People ex rel. Saunders v. Hanna, 98 Mich. 515, 57 N. W. 738, is sufficiently set out in *PEOPLE V. OSBORNE*.

An active intent upon the part of the student to change his residence to the place where he is pursuing his studies must be shown. *Wickham v. Coyner*, *supra*.

In *Re Lower Merion Election*, 1 Chester Co. Rep. 257, it was said: "He [the student] may intend to go elsewhere when his studies are over, but, if he has no other home while present at the institution, if he has no fixed place to which he intends to

came, against his wishes and desires, but can abandon that residence and gain a residence in his college town.

Re Lower Oxford Contested Election, 11 Phila. 641; Cessna v. Meyers, Smith, Elect. Cas. 60; People ex rel. Budd v. Holden, 28 Cal. 136; Pedigo v. Grimes, 113 Ind. 148, 13 N. E. 700; Shaeffer v. Gilbert, 73 Md. 66, 20 Atl. 434; Paine, Elections, § 69; McCrary, Elections, 3d ed. 66; Putnam v. Johnson, 10 Mass. 488; Opinion of Justices, 5 Met. 587.

Messrs. R. H. Kirschman and Edward R. Loud for the People.

go when his undergraduate period is over, if he elects to become a citizen in the district of his *alma mater*, and does become such citizen, he has the right to vote—if the election board is satisfied as to the bona fides of his intent."

One who comes into the state for the sole purpose of attending school, and resides for six months in the county and precinct where the school is, or if he intends to reside until the school's four-year course is finished, but with no intention to reside there afterwards, is not a resident, within the constitutional provisions, of the precinct where the school is located, and therefore not a voter in that precinct, notwithstanding the fact that all the while he is in the school he has no intention as to where he will reside when his school is over. Parsons v. People, 30 Colo. 388, 70 Pac. 689.

Where there is no constitutional or statutory provision against a student at college acquiring a voting residence there, he may acquire one at the college if he supports himself entirely by his own efforts, is not subject to parental control, and regards the place where the college is situated as his home, even though he may at some future time intend to remove, but has the intention of making it his present abiding place, and has no positive and fixed intention as to where he will locate when he leaves; but his presence in the college town must be an actual, bona fide one, with no intention of returning to the parental home upon the completion of his studies. Welsh v. Shumway, 232 Ill. 54, 83 N. E. 549.

Notwithstanding the constitutional provisions in New York, it is held that a voter may change his legal residence into a new district in spite of the fact that he becomes a student in the institution of learning therein; but the facts to establish such a change must be wholly independent and outside of his presence in the new district as a student, and should be very clear and convincing to overcome the natural presumption. Re Goodman, 146 N. Y. 284, 40 N. E. 769, affirming 84 Hun, 53, 31 N. Y. Supp. 1043, wherein it was held that the mere fact of taking a room at a seminary for the sole purpose of studying did not constitute one a voter in the district in which the seminary was located. To the same effect is Re Garvey, 147 N. Y. 117, 41 40 L.R.A. (N.S.)

Ostrander, J., delivered the opinion of the court:

In the Constitution of 1850, § 5 of article 7 reads as follows: "No elector shall be deemed to have gained or lost a residence by reason of his being employed in the service of the United States or of this state; nor while engaged in the navigation of the waters of this state or of the United States; or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse or other asylum at public expense; nor while confined in any public prison, except that honorably

N. E. 439, affirming 84 Hun, 611, 32 N. Y. Supp. 689.

So, where one settles in a town with the sworn intent of becoming a resident of that town, he does not effect a change of residence from that town to a seminary in another city by the fact that he sells books in the latter city and acts as a lay reader incidentally to pursuing his studies in a theological seminary. Re Garvey, supra.

And the letters of a student who enters a seminary, addressed to the mayor of the city and to the board of registration of the election district in which the seminary is located, informing them that he intends to make the seminary his residence for all purposes, but places no additional facts before the court bearing upon the change of residence, are not sufficient to effect such change of residence, since nothing independent of his temporary residence at the seminary as a student is shown. Re McCormack, 86 App. Div. 362, 83 N. Y. Supp. 847.

So, the inability of students to acquire a residence for voting purposes merely by attending an institution of learning, under Const. art. 2, § 3, extends to students in a Roman Catholic seminary, studying for the priesthood, although each of them has renounced all other residence or home, and on admission to the priesthood will continue in the seminary until assigned elsewhere by his ecclesiastical superiors. Re Barry, 164 N. Y. 18, 52 L.R.A. 831, 58 N. E. 12, 8 N. Y. Ann. Cas. 148, affirming 61 N. Y. Supp. 124.

On the other hand, in Re Garvey, supra, reversing 84 Hun, 611, 32 N. Y. Supp. 689, where one who gave up his residence in Virginia, and took up his permanent residence at a seminary in New York, notified the registrar of the former state to erase his name from the registered voters there, wrote the bishop of the New York diocese, informing him that he had given up his legal residence in Virginia and intended to reside and vote in New York, and requested that he be received by the bishop as a postulant by reason of his residence in the diocese of New York, it was held that the intent to change his legal residence was clearly disclosed by acts which were independent of his presence as a student in the seminary, and that his name is improperly stricken from the registry list.

E. M. S.

discharged soldiers, sailors, and marines who have served in the military or naval forces of the United States or of this state, and who reside in soldiers' homes established by the state, may acquire a residence where such home is located." Construing this provision, it was said, in *Wolcott v. Holcomb*, 97 Mich. 361, 367, 23 L.R.A. 215, 56 N. W. 837, 839: "We are of the opinion that the terms 'by reason of' and 'while' were understood by the framers of the Constitution to have a different meaning. In the former case the intention would very largely, if not entirely, govern the question of domicile, while in the latter it would not. It was clearly the intention of the former provision to give the citizen the right, if he chose, to carry his residence with him to the place where he was employed in the service of the United States or of the state, and in the latter case it seems equally clear that it was the intention not to give that right." It was also said, by way of illustration and argument: "Furthermore, students in all institutions of learning, although they are in attendance there for the sole purpose of obtaining an education, might, at their own will, become electors in the places where such institutions are located. We think the Constitution prohibits a change of residence under such circumstances, and that, when one's presence in any of the institutions named is due to the sole purpose of receiving the benefits conferred, his former residence must be considered his domicile for citizenship." While this decision was rendered by a divided court, it was followed, without dissent, in *People ex rel. Saunders v. Hanna*, 98 Mich. 515, 57 N. W. 738. In the Constitution of 1908 the same provision appears as § 2 of article 3. The punctuation is not the same as that employed in the earlier Constitution, and there is some slight change in the words used. There is nothing upon which a change of meaning may be reasonably predicated. It will be assumed, therefore, that the convention which framed the last Constitution included therein the provision in question with the meaning given to it in the decisions which have been referred to. That portion of the opinion of the court in *Wolcott v. Holcomb* to which we have alluded was not, as respondent intimates, mere *dictum*. The right of a student attending an institution of learning was not involved in that case, but the right of one placed by the Constitution in the same class with such a student, in respect to a change of domicile, was involved. We think the his-

tory of the constitutional provision requires the decision to be followed in like cases. Is the case before us a like case?

It is said in the majority opinion delivered in *Wolcott v. Holcomb* that no question of disfranchisement was involved, and in the portion of the opinion above quoted the language implies a limitation of application of the rule announced to such persons as attend institutions of learning "for the sole purpose" of receiving the benefits conferred. It is clear, too, from the facts stated in the opinions, that the inmate of the Soldiers' Home whose rights were considered was, at the time he applied for admission to the Home, a resident of Woodstock township, Lenawee county. He presented the certificate of the supervisor of the township that he was then an actual resident of the township. The inmate later declared that "he always intended, and in fact made, the township of Grand Rapids, and that part of it in which said Soldiers' Home is located, his home, subsequent to his entry therein." The respondent in the case at bar appears to have had no residence, in fact or by intention, when he went to Albion. If we eliminate from the circumstances to be considered the fact of his presence at the college, the inference may still be drawn that he adopted in fact and by intention a residence in Albion before entering college, having at the time, and intending to have, no other residence. I apprehend that if a young man of full age was sent to college by his father, never having acquired a residence apart from that of his father, and if his father and family should, in good faith, for the purpose of establishing their family domicile there, take up a residence in the college town while he was a student there, he would thereby gain a residence as an elector. In such a case he would gain a residence "while a student at an institution of learning;" but the fact that he was a student would be a circumstance of no importance in determining residence. So, if the family of such a young man should remove from one place to another in the state, I apprehend that he might register and vote as an elector in the community in which his father lived. In such a case, he would both lose and gain a residence "while a student at an institution of learning." A construction of the Constitution which would deny him the right to reside where his father resided, and the right to gain a residence elsewhere, "while a student," would involve disfranchisement. The law will not permit students at institutions of learning

by any declaration of intention to become electors in the communities in which such institutions are situated. But if respondent, having no domicile, in good faith made a domicile at Albion, entering college as a resident citizen of Albion, he was entitled to vote there. Whether he did so is a question of fact.

It is charged in the information that respondent, "not being then and there a resident of the third ward of the said city of Albion, did . . . wilfully vote at the said third ward voting place in the said city of Albion at the election held in the said ward and city." I assume that the prosecution is under and by virtue of 3 Comp. Laws, § 11,439, which provides a punishment for the voting by a qualified elector in any township or ward in which he does not reside. It does not appear that the attention of the court was directed to a question stated rather than argued in the brief for respondent, *viz.*, that a criminal intent must be found to violate the law. The court was requested to instruct that a verdict of not guilty must be returned. The jury was instructed that respondent was presumed to be innocent and that the people must establish guilt beyond a reasonable doubt. The question of respondent's good faith in voting was not mentioned in the charge. Counsel for neither party refer to authority upon the subject. The statute in respect to a qualified elector voting at a place not his residence does not use the words "wilfully" or "intentionally," or any other word qualifying the act. In terms, the act of voting in a place where the elector does not reside is made a misdemeanor. In the same connection, it is declared to be a misdemeanor if an elector gives in two or more votes folded together, or votes, or offers to vote, more than once at the same election, in the same or different voting places. As a rule, there can be no crime without criminal intent; this is not a rule without exceptions. *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365; *People v. Rice*, 161 Mich. 657, 664, 126 N. W. 981; and cases cited in opinion. There appears to be no reason for saying that criminal intent is not a necessary element of the offense with which respondent is charged, and upon a new trial the jury should be so instructed.

It will be certified to the Circuit Court for the County of Calhoun that the exception to the charge delivered is sustained, and that the verdict should be set aside and a new trial ordered.

40 L.R.A. (N.S.)

MINNESOTA SUPREME COURT.

FRED H. MURRAY, Appt.,

v.

WALTER J. SMITH, State Treasurer, et al.

(117 Minn. 490, 136 N. W. 5.)

Tax — highway — special assessment.

Chapter 254, Laws 1911, providing for the establishment and maintenance of highways outside of cities and villages, and for the assessment of one fourth the cost thereof on land specially benefited, is valid, under § 1, art. 9, of the state Constitution, which requires taxes to be uniform upon the same class of subjects, but permits the legislature to authorize municipal corporations to lay and collect assessments for local improvements upon property benefited thereby, without regard to cash valuation.

(May 17, 1912.)

APPEAL by complainant from an order of the District Court for Ramsey County sustaining a demurrer to the complaint in a suit to enjoin payment of state funds for the construction of a rural highway. Affirmed.

The facts are stated in the opinion.

Mr. Thomas McDermott, for appellant:

The law under which the state officers were attempting to act is unconstitutional. *Sperry v. Flygare*, 80 Minn. 325, 49 L.R.A. 757, 81 Am. St. Rep. 261, 83 N. W. 177.

The owners owed no duty to the public to construct this roadway, and under the law an assessment cannot lie.

State ex rel. Stateler v. Reis, 38 Minn. 371, 38 N. W. 97.

Headnote by BUNN, J.

Note. — Rural highway as a local improvement the cost of which may be assessed against tributary property upon the basis of special benefit.

This note does not include the question whether the legislature, under its general power of taxation, as distinguished from the power of local assessment, may create a special tax district consisting of property tributary to a rural highway, and authorize a uniform tax on all property within the district, according to its value, to cover the cost of such highway; but it is confined to the question whether, under its power to authorize local assessments with reference to peculiar and special benefits to property, the legislature may authorize the assessment of all or a part of the cost of a rural highway against the tributary property benefited thereby upon the basis of special benefits conferred, and without reference to the value of the property.

Messrs. Lyndon A. Smith, Attorney General, and William J. Stevenson, Assistant Attorney General, for respondents:

Land is enhanced in value from 30 to 50 per cent by the opening up and substantial improving of highways.

Benefits are special when they increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value.

Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; *Allen v. Charlestown*, 109 Mass. 243; *Milwaukee & M. R. Co. v. Eble*, 3 Pinney (Wis.) 334; *Illinois C. R. Co. v. Decatur*, 154 Ill. 173, 38 N. E. 626; *Butte v. School Dist. No. 1*, 29 Mont. 336, 74 Pac. 869.

The benefits of a highway can be offset against the damages accruing to the adjacent owner. This deduction of benefits is an indirect form of assessment.

Page & J. Taxation by Assessment, § 62.

The practice of assessing benefits of country highways is common.

Page & J. Taxation by Assessment, § 322; *Bauman v. Ross*, 167 U. S. 548, 588, 42

L. ed. 270, 287, 17 Sup. Ct. Rep. 966; *Law v. Madison, S. & G. Turnp. Co.* 30 Ind. 79; *Monroe County v. Harrell*, 147 Ind. 505, 46 N. E. 124; *Spaulding v. Mott*, 167 Ind. 58, 76 N. E. 620; *Jones v. Tona-wanda*, 158 N. Y. 449, 53 N. E. 280; *Seano-r v. Whatcom County*, 13 Wash. 57, 42 Pac. 552; *Rounds v. Whatcom County*, 22 Wash. 106, 60 Pac. 139; *Holton v. Milwaukee*, 31 Wis. 27; *Wyandotte County v. Abbott*, 52 Kan. 148, 34 Pac. 416; *McGee v. Henne-pin County*, 84 Minn. 481, 88 N. W. 6.

A local assessment for a highway can be sustained on the taxing-district theory.

Maltby v. Tautges, 50 Minn. 248, 52 N. W. 858; *Steiner v. Sullivan*, 74 Minn. 498, 77 N. W. 286; *State ex rel. Skyllingstad v. Gunn*, 92 Minn. 436, 100 N. W. 97; *Van Pelt v. Bertilrud*, 117 Minn. 50, 134 N. W. 226; *Cooley, Const. Lim.* 479.

Bunn, J., delivered the opinion of the court:

This action was brought by plaintiff, a taxpayer, to enjoin defendants, as state officers, from paying out funds of the

The distinction between these two questions is pointed out in *Bowles v. State*, 37 Ohio St. 35, a case involving the former question, in which the court said: "Much has been said in argument against the validity of this statute, on the assumption that it was intended as an exercise of the power of local assessment. . . . We do not think the legislature intended to exercise the power of local assessment according to benefits. . . . The intent of the legislature, we think, was to establish special taxing districts for the purpose of defraying the expenses of the construction of free turnpikes therein, and to impose the burden thereof by taxation upon all the property within the district by a uniform rate, according to its true value in money. And in so far as that purpose can be accomplished under the statute, without an infraction of the Constitution, we see no objection to its operation."

But while rural highways, as well as city streets, may be constructed by taxation, as distinguished from an assessment, and while it seems clear that the cost of opening or improving a city street may be defrayed by local assessments against the abutting property, on the basis of special benefits conferred thereon, there has been a difference of opinion as to whether a rural highway is a local improvement, such that the cost, or a part of the cost, thereof may be specially assessed against the abutting or tributary property on the basis of special benefits conferred, and without regard to value.

On the one hand, it has been said, in accord with *MURRAY v. SMITH*, that "they both [streets and highways] seem equally proper subjects for the application of the principal of assessment, on the ground of local benefit to property. They are con-

structed along the line or through the lands of a proprietor; they become a part of the improvement, or betterment, of the land itself; they are outlets required for its full enjoyment and use." *Law v. Madison, S. & G. Turnp. Co.* 30 Ind. 77.

So, an act authorizing the assessment, to the extent of the benefit received, of all lands within 1½ miles on either side, or within 1½ miles of the terminus, of any road authorized by a certain prior act, for the purpose of the construction and completion of the road, is not in conflict with a constitutional provision that the legislature shall provide by law for a uniform and equal rate of assessment and taxation, or a provision that it shall not pass local or special laws for the assessment and collection of taxes for state, county, township, or road purposes. *Ibid.*

And the assessment of the costs and expenses of the improvement of a county road against real estate adjacent thereto and benefited thereby, within 2 miles on either side and 1 mile beyond the terminus of such improvement, according to the benefits derived therefrom, is not a taking of property without due process of law, nor is a road act authorizing such assessment a violation of a constitutional provision that taxation shall be equal and uniform. *St. Benedict's Abbey v. Marion County*, 50 Or. 411, 93 Pac. 231.

Likewise, an act providing for the assessment of benefits, to the extent of certain proportions of the cost of the improvement of county highways, against the county, against all property within certain cities within the county, against the lots and lands lying within the proposed improvement boundaries, and against the road districts or townships through which or into which the im-

state in constructing a rural highway in Pennington county under the provisions of chapter 254, p. 352, Laws 1911. A demurrer to the complaint was sustained, and plaintiff appealed.

The sole question involved is the constitutionality of the law under which defendants propose to pay the money of the state in aid of the construction of the highway. The only feature of the law that is assailed is that providing for the assessment of lands benefited by the highway for one fourth of the cost thereof. Section 1 of chapter 254 provides for the construction or improvement of highways by county boards, to be known as "state rural highways," upon the approval of a petition for the same by the county board and the state highway commission, and that "the expense therefor shall be borne one fourth by local assessment, one fourth by the county, and one half by the state." Section 2 provides that such highways shall be constructed or improved by a procedure identical with the proceeding prescribed by §§ 3 to 52, inclusive, of chapter 230, pp. 305-337,

Laws 1905 (Rev. Laws Supp. 1909, §§ 2651-45 to 2651-95), the drainage law, so far as the same may be made applicable to the construction or improvement of highways, to the raising of money therefor, and to the assessment of benefits, one fourth only of the cost of "state rural highways" to be met by assessment. These sections of the drainage law, in so far as applicable, are made a part of this act. By turning to these provisions in chapter 230, Laws 1905, we find that the county board can act only upon a petition signed by six or more of the landowners whose land is liable to be assessed for the highway, setting forth the necessity thereof and that it will be of public benefit or promote the public health. The county board must approve the petition, as must the state highway commission. The assessment district is not limited, but the viewers determine the amount of benefits to the lands, to the aggregate of not more than one fourth of the cost of the highway. Their report is made to the board, and after notice and hearing it rests with the board to determine

whether the improvement is located, to cover the cost of the improvement, is not in violation of a constitutional provision that the legislature shall have no power to impose taxes upon municipal corporations or upon the inhabitants or property thereof, for municipal purposes, as such assessment for benefits is not a "tax," within the meaning of the provision, but is a special assessment for a local improvement. *Seaton v. Whatcom County*, 13 Wash. 48, 42 Pac. 552.

And in *State ex rel. Eastman v. Warren County*, 17 Ohio St. 558, it was held that a statute authorizing county commissioners to construct roads on the petition of a majority of the resident landowners along and adjacent to the line of the road, and authorizing the apportionment of the estimated cost of the work upon the land and lots that will be benefited thereby, and which are situated within 2 miles of the road, according to the benefit to be derived therefrom, authorizes an "assessment," and not a "tax," and does not violate either a constitutional provision that counties shall have such power of local taxation as may be prescribed by law, or a constitutional requirement that laws be passed taxing all money, credits, property, etc., by uniform rule, according to their value in money.

On the other hand, in the earlier Minnesota case of *Sperry v. Flygare*, 80 Minn. 325, 49 L.R.A. 757, 81 Am. St. Rep. 261, 83 N. W. 177, referred to at length in the opinion in *MURRAY v. SMITH*, it was held that a rural highway is not "a local improvement," within the meaning of a constitutional exemption of assessment by municipal corporations for local improvements, from a constitutional requirement that all taxes shall be as nearly equal as may be; and that a statute authorizing county commissioners to

lay out and establish county highways, and to charge and assess the cost and expense thereof to all lands lying within 1 mile of the highway, with certain exceptions, according to the benefits received, is accordingly a violation of such constitutional requirement and invalid.

And in *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327, and *Conger v. Bergman*, 10 Ky. L. Rep. 899, 11 S. W. 84, it was held that the mode of assessments for street improvements cannot be applied to the improvement of highways in the country; and that an act authorizing the assessment of the whole cost of improving and macadamizing a rural highway upon the owners of land lying between two lines parallel to the center of the road and distant on each side 800 feet therefrom, is unconstitutional, as imposing unequal taxation, and taking private property for public use without compensation.

And upon a second appeal in the case of *Graham v. Conger*, supra, this was held to be true, although the land embraced in the assessment district created by the act receives special and peculiar benefits from the improvement by reason of its peculiar situation, as the road, after being improved at the cost of a few citizens, remains a public highway for the use of all, and thus the burden is imposed upon a few for the benefit of the public. 11 Ky. L. Rep. 12, 11 S. W. 467.

And a public highway, 7 miles long, mainly through agricultural land, has been held not to be a local improvement, to pay for which a local assessment may be levied, by the acre, upon the land lying within 1 mile on each side thereof. *Re Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255. A. C. W.

whether the benefits have been duly assessed, and to confirm the report and to establish the highway. The assessments are payable in ten annual equal instalments, with 6 per cent interest. An appeal lies to the district court.

We have stated so much of the law for the purpose of making clear the precise question involved, and to show that the rights of landowners are well safeguarded. Does the fact that one fourth of the cost of the highway is assessed upon lands deemed specially benefited make the law in violation of § 1 of article 9 of the Constitution of this state, which provides that taxes shall be uniform upon the same class of subjects ". . . provided that the legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to a cash valuation?" We have held that counties are municipal corporations, within the meaning of the constitutional provision, for the purpose of levying and collecting the assessments provided for by drainage laws. *Dowlan v. Sibley County*, 36 Minn. 430, 31 N. W. 517; *Lien v. Norman County*, 80 Minn. 58, 82 N. W. 1094; *McGee v. Hennepin County*, 84 Minn. 472, 88 N. W. 6. There is no difficulty in extending this ruling to the present case. The crucial question here is whether a rural highway is or may be a special benefit to neighboring lands, as distinguished from a general benefit to the public. Plaintiff relies upon *Sperry v. Flygare*, 80 Minn. 325, 49 L.R.A. 757, 81 Am. St. Rep. 261, 83 N. W. 177, as answering this question conclusively in the negative. The law held unconstitutional in the *Sperry Case* was clearly vicious. The entire cost of the highway was assessed upon lands within the prescribed limit of 1 mile on either side, whether the costs exceeded the benefits or not. The present law assesses one fourth of the cost upon lands deemed specially benefited, without defining the limits of the assessment district. The 1895 law (Laws 1895, chap. 302) worked a great hardship upon the farmers of the state; it might easily be confiscatory. The present law is not burdensome; but one fourth of the cost is assessed, and that is payable in ten instalments. We have no hesitation in saying that the law under attack in this case is meritorious, and that it should be sustained, unless it is entirely clear that lands outside of cities and villages can receive no special benefit by the construction and maintenance of good roads.

Though *Sperry v. Flygare* dealt with a statute vitally different from the one before us, and though particular stress is in 40 L.R.A. (N.S.)

that case laid on the fact that the law imposed the entire cost on adjoining lands, without regard to the lands benefited by the highway, yet it may well be considered as authority for the proposition that rural highways are not local improvements. This is perfectly true in the sense that lands bordering on the highway are not benefited in the way lots bordering on a city street are benefited. It is not the fact that the road is in front of or along the border of the farm which creates the special benefit, but the fact that the farmer is given a good road to use in going to and from his markets. But we do not consider the *Sperry Case* controlling on the proposition that lands tributary to a rural highway may not receive a special benefit therefrom different in character and extent from the benefit received by the public. The land of the farmer who is given a good road to market, where before he had a poor one, is certainly enhanced in value by the improvement. So is the land of every other owner who is thus given easy access to the cities or towns where he sells his produce and makes his purchases. The general public receive a benefit wholly different in character. The benefit to the motorist of the cities in having good roads for his pleasure runs is an example of the general benefit. Lands not in the territory reached by the highway and whose owners cannot use it, receive no special benefit.

The law in question does not attempt to say what lands are benefited, but leaves the determination of the district, as well as the distribution of the assessment, to the viewers, and ultimately to the court. It is right that lands tributary to the highway should pay a part of the cost thereof, over and above what the public pays, for they receive a benefit over and above what the general public receives. The principles applied to the spreading of assessments for parks, for paving city streets, or laying sidewalks would be entirely erroneous, if applied to fixing the district or spreading the assessment for rural highways. But this is a question that does not concern the validity of the law, but rather the validity of the action that the viewers and the board of county commissioners may take in the matter. If they proceed upon an erroneous principle, or make a demonstrable mistake of fact, there is a remedy by appeal.

It is twelve years since the decision in *Sperry v. Flygare*. The Constitution has been amended. The value of good roads is better understood. The farmer now has his automobile, his traction engines, and his telephone. He has all the facilities for reaching the best markets at the right time, except the good road. We think it can

fairly be said that the establishment and maintenance of a rural highway, that gives the owner of land easy and convenient access to his markets, enhances the value of his land and constitutes a special benefit, different in character from the public or general benefit. It is true that at no time have farm lands been assessed for roads, except that, in assessing damages, benefits to the land have been deducted from the amount awarded to the landowner. This is a recognition of the fact that a highway may be a special benefit to land outside of cities and villages. See *Swenson v. Hallock*, 95 Minn. 163, 103 N. W. 895, quoting with approval *Trinity College v. Hartford*, 32 Conn. 452. It would seem that, if there are local benefits that can be set off against the damages awarded to a landowner by the establishment of a highway, the same local benefits are sufficient to warrant an assessment. The weight of authority to-day seems to be to the effect that a highway may be a local improvement, and that an assessment of lands specially benefited may be unsustained. *Page & J. Taxation by Assessment*, § 322; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Law v. Madison*, S. & G. Turnp. Co. 30 Ind. 77; *Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124; *Spaulding v. Mott*, 167 Ind. 58, 76 N. E. 620; *Jones v. Tonawanda*, 158 N. Y. 438, 53 N. E. 280; *Seanor v. Whatcom County*, 13 Wash. 48, 42 Pac. 552.

The case of *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327, is opposed to this view, and the *Washington Ave. Case*, 69 Pa. 352, 8 Am. Rep. 255, seemingly so, though in the *Pennsylvania* case the real vice was charging the cost of the highway at a fixed sum per acre against adjacent lands, which the court held was so obviously unreasonable and erroneous as not to constitute on any fair principle of reasoning a valuation according to benefits. This may properly be said of any law that attempts to impose a front-foot assessment on lands adjacent to the highway, or that attempts to say that only farms that border on the road are specially benefited by it. This was practically the vice in the 1895 law. Lands that do not border on the highway, even though they are quite distant therefrom, receive a special benefit, if the owner has access to the highway, and can use it to go to and from his market.

We do not think the law can be upheld on the ground that the construction of a particular highway may involve drainage features. We place our decision on the ground that a public rural highway is or may be a special benefit to lands in the territory tributary to the same, as distinguished 40 L.R.A. (N.S.)

from the general benefit accruing to the general public. We hold that the provision of the act assessing one fourth of the cost of the highway upon lands specially benefited is not obnoxious to article 9, § 1, of the Constitution.

Order affirmed.

OKLAHOMA SUPREME COURT. (Division No. 1.)

FARMERS' LOAN & TRUST COMPANY,
Plff. in Err.,

v.

MCCOY & SPIVEY BROTHERS.

(— Okla. —, 122 Pac. 125.)

Bills and notes — definition.

1. As defined by §§ 4626 and 4627, Comp. Laws 1909, a "negotiable instrument" is a written promise or request for the payment of a certain sum of money to order or bearer, and must be made payable in money only, and without any condition not certain of fulfillment.

Same — negotiability — discount for prompt payment.

2. A note given December 16, 1908, payable in instalments three months apart, which contains a stipulation that, if it is paid within fifteen days from date, a discount of 5 per cent will be allowed, being uncertain as to the amount necessary to satisfy it at the time of its execution, is non-negotiable.

(March 12, 1912.)

ERROR to the County Court for Oklahoma County to review a judgment in defendants' favor in an action on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. Dumars & Vaught and R. E. Gish for plaintiff in error.

Messrs. Welty & Price and Berry H. Randolph for defendants in error.

Headnotes by SHARP, C.

Note. — Bills and notes: negotiability as affected by provision for discount in event of payment before maturity.

The weight of authority is with *FARMERS' LOAN & T. Co. v. McCoy*, in holding that a provision in a note for a discount if it is paid before maturity, renders it non-negotiable.

Thus, in *Way v. Smith*, 111 Mass. 525, a note providing that it might be paid at any time before maturity, and that interest at the rate of 18 per cent should be deducted till due, was held to be non-negotiable, because uncertain both as to time and amount.

In *Fralick v. Norton*, 2 Mich. 130, 55 Am.

Sharp, C., filed the following opinion:

The sole question necessary for determination of this case is whether or not the note sued on is a negotiable instrument. Omitting indorsements, the note is as follows:

Oklahoma City P. O. Chicago, Ill., Dec. 16, '08.

For value received we promise to pay to the order of the Equitable Manufacturing Company (Not Incorporated), Chicago, Ill., three hundred seventy-four dollars and forty cents (\$374.40), at Chicago, Ill., in four instalments, payable as below:

A discount of 5	
per cent will be	8 months after date 8 \$93.60
allowed if paid	6 months after date 6 93.60
within fifteen	9 months after date 9 93.60
days from date.	12 months after date 12 93.60
Instalments	
after maturity	
draw 6 per cent	
interest.	

It is agreed that default in the payment of any of the above instalments shall, at the option of the payee herein, render the whole unpaid balance immediately due and payable.

[Signed] McCoy & Spivey Bros.

The question was before the supreme court of the territory in *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946, in which it was held that a note in the following language was non-negotiable:

\$275.

Enid, O. T., May 15, 1894.

Thirty days after date I promise to pay to the order of J. H. Thomas two hundred and seventy-five dollars (\$275), with interest at the rate of 12 per cent from date if not paid at maturity. Value received.

N. Randolph.

The opinion is by Irwin, J., and a number of authorities were there reviewed, including cases from California and South

Dakota, decided under statutes the same as here, and, after reviewing these authorities and considering the statute, the court used this language: "From a careful consideration of all the authorities, we think the true rule as to negotiable paper is that certainty as to payor and payee, the amount to be paid, and the terms of payment, is an essential quality of a negotiable promissory note; and that it is not sufficient that the amount necessary to liquidate the note on the day when due can be determined, but certainly must continue until the obligation is discharged."

The court proceeded to cite various authorities, including the Supreme Court of the United States, in *Stutsman County v. Wallace*, 142 U. S. 312, 35 L. ed. 1025, 12 Sup. Ct. Rep. 227, on the question of the binding effect of the construction of an adopted statute, arriving at the conclusion that the court was bound, in that instance, by the construction of the supreme court of the state of South Dakota of the statute then under consideration. The decision of the supreme court of that state deemed binding on the court was *Hegeler v. Comstock*, 1 S. D. 138, 8 L.R.A. 393, 45 N. W. 331. To this case we may add *Merrill v. Hurley*, 6 S. D. 592, 56 Am. St. Rep. 859, 62 N. W. 958; *National Bank v. Feeney*, 12 S. D. 156, 46 L.R.A. 732, 76 Am. St. Rep. 594, 80 N. W. 186. While a different result was reached in the first-mentioned case, the result adopted in *Hegeler v. Comstock*, supra, was followed. The court there observed, in both *Merrill v. Hurley* and *National Bank v. Feeney*, supra, that the court of that state had placed itself in line with the class of authorities which require such a degree of certainty that the exact amount to become due and payable at any future time could be clearly ascer-

Dec. 56, a note for \$60, payable on a certain date, which provided that payment of \$50 on a certain earlier date would cancel the note, was held to be non-negotiable because indefinite as to the amount due.

In *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248 (a former appeal of which is reported in 45 Mich. 488, 8 N. W. 87), a note payable on or before two years, with interest, but without interest if paid within one year, was held to be non-negotiable because being indefinite as to both time and amount.

And in *National Bank v. Feeney*, 12 S. D. 156, 46 L.R.A. 732, 76 Am. St. Rep. 594, 80 N. W. 186, it is held that a stipulation for a discount of 12 per cent if a note is paid before maturity renders it non-negotiable because of the uncertainty as to the amount to be paid.

But in *Loring v. Anderson*, 95 Minn. 101, 103 N. W. 722, a note for a certain sum, with interest payable on a certain date, with a discount of 6 per cent if paid on or

before maturity, was held not to be uncertain as to amount, and therefore to be negotiable.

And in *Mansfield Sav. Bank v. Miller*, 2 Ohio C. C. 96, 1 Ohio C. D. 383, a note for a certain amount, due upon a fixed date, was held to be negotiable though it contained a provision for a discount of a certain sum if paid in full when due.

And in *Smith v. Crane*, 33 Minn. 144, 53 Am. Rep. 20, 22 N. W. 633, a note for a specified amount, payable on or before a certain date, with interest at 10 per cent until paid, with a provision for 7 per cent only if paid when due, was held to be negotiable the court taking the position that the note in effect provided for 7 per cent interest; with a penalty of larger interest if it was not paid when due.

For provision accelerating maturity as affecting negotiability, see note to *Halladay State Bank v. Hoffman*, 3 L.R.A. (N.S.) 390.

R. L. S.

tainable at the date of the note, uninfluenced by any conditions not certain of fulfillment.

In *National Bank v. Feeney*, supra, the provision in the note destroying its negotiability was: "This note to be discounted at 12 per cent if paid before maturity." True, this case was decided after the adoption of the statute by the legislature; but it will be noted that it is based upon the former decision of the court in *Hegeler v. Comstock*, decided before the adoption of the statute by the territory of Oklahoma.

This court has repeatedly held that a stipulation in a promissory note, providing for attorneys' fees, etc., destroyed the negotiable character of the instrument, and thereby made it non-negotiable. *Cotton v. John Deere Plow Co.* 14 Okla. 605, 78 Pac. 321, in which it was held that the instrument must not contain any condition that is not capable of certainty of fulfillment. Other cases are *Dickerson v. Higgins*, 15 Okla. 588, 82 Pac. 649; *Clevenger v. Lewis*, 20 Okla. 837, 16 L.R.A. (N.S.) 410, 16 Ann. Cas. 56, 95 Pac. 230; *Clowers v. Snowden*, 21 Okla. 476, 96 Pac. 596; *Adams v. Seaman*, 82 Cal. 636, 7 L.R.A. 224, 23 Pac. 53; *Findlay v. Pott*, 131 Cal. 385, 63 Pac. 694. On the authority of the foregoing opinions and the principle announced therein, we are of the opinion that the note in question was non-negotiable.

It should be kept in mind that the present negotiable instrument act of June 11, 1909, is not involved in the present consideration having been enacted subsequent to the date of the note in question.

We find no error in the record, and conclude that the judgment of the trial court should be affirmed.

Per curiam:

Adopted in whole.

TEXAS COURT OF CRIMINAL APPEALS.

EX PARTE J. C. AXSOM.

(— Tex. Crim. Rep. —, 141 S. W. 793.)

Sunday — running pool room — liability.

Running a pool room on Sunday in which a charge is made for the use of the tables

Note.— There seems to be no other case on the question whether keeping a pool or billiard room on Sunday is a violation of Sunday laws.

Generally as to what amusements are prohibited by Sunday laws, see note to *Re Hull*, 30 L.R.A. (N.S.) 465, and other notes there referred to.

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is prohibited by a statute providing for the punishment of anyone who shall labor on Sunday, except certain specified works of necessity, among which running such a place is not included.

(Davidson, P. J., dissents.)

(November 22, 1911.)

A PPEAL by petitioner from a judgment of the County Court for Cameron County denying a writ of habeas corpus to secure the release of petitioner from custody to which he had been committed because of alleged violation of the Sunday law. Affirmed.

The facts are stated in the opinion.

Mr. A. I. Hudson for appellant.

Mr. C. E. Lane, Assistant Attorney General, for the State.

Harper, J., delivered the opinion of the court:

The relator in this case applied for, and obtained, a writ of habeas corpus before the county judge of Cameron county, asking release from arrest on a complaint charging him with violating the Sunday law.

The contention was made that it was not a violation of the law to operate a pool room on Sunday. The county judge held it was a violation of the law, and remanded the relator to the custody of the sheriff. The complaint charged: "On or about the 27th day of February, 1910, in the county of Cameron and state of Texas, it being Sunday, one J. C. Axsom, of said county and state, was a trader in a lawful business, to wit, keeper of a pool room, did unlawfully and wilfully open and permit his place of business to be open for the purpose of traffic, and the said J. C. Axsom did unlawfully and wilfully labor and do and perform the labor, work, and business of keeping a pool room, the same not then and there being a work of necessity or charity." The relator himself testified: "My name is J. C. Axsom. I live in Brownsville, Texas. I keep a pool room in the city of Brownsville, Texas, on Elizabeth street. I was so engaged on Sunday the 27th day of February. I was at my place of business on said day, managing and operating my pool room. I dusted off the pool and billiard tables, and did such other work as I am accustomed to do. A number of people played pool and billiards at my said place of business. Among them were Graham Mason, Jesse Mason, and William Tate. I made a charge for the games played, and collected from said above-named parties the sum of 30 cents for two games of pool played. I personally opened my said place

of business on Sunday, February 27, 1910, and kept the same open all day. I made no charge for admission to the pool room. The only charge I made was for the use of the cues and games played."

The evidence thus appears undisputed that relator opened and run his pool room on the Sabbath; and the sole question to be decided is, Do the statutes of this state prohibit the running of a pool room on Sunday? Article 196 of the Penal Code provides: "Any person who shall labor on Sunday shall be fined not less than ten nor more than fifty dollars." And article 197 exempts from the provisions of the preceding articles ferrymen, keepers of toll bridges, keepers of hotels, boarding houses, restaurants, and keepers of livery stables, etc., evidently showing that the legislature intended that the word "labor" should be given its broadest signification; and this court in the case of *Ex parte Kennedy*, 42 Tex. Crim. Rep. 148, 51 L.R.A. 270, 58 S. W. 129, holds that "the ordinary vocation of a barber comes within the statute prohibiting all persons from laboring on Sunday." In *Quarles v. State*, 55 Ark. 10, 14 L.R.A. 194, 17 S. W. 269, it is held that selling theater tickets was labor within the meaning of a similar statute. It was held in *Cortsey v. Territory*, 6 N. M. 682, 19 L.R.A. 349, 30 Pac. 947, that a person selling intoxicating liquors on Sunday was engaged in "labor" within the meaning of the Sunday act. In *State v. Frederick*, 45 Ark. 348, 55 Am. Rep. 555, it was held that a barber within the meaning of the Sunday law was a laborer, and in *Stewart v. Davis*, 31 Ark. 518, 25 Am. Rep. 576, a livery-stable keeper is held to be a laborer. In *Cincinnati v. Rice*, 15 Ohio, 225, the prohibition of common labor was held to embrace the selling and buying of any goods, wares, and merchandise under their statute. The word "labor" has been given a broad meaning when construing the laws relative to the observance of Sunday; and when we read the statutes of the state relative to what is prohibited in specific language, and what excepted from the operation of the law, no other conclusion can be drawn than that the intent of the legislature was to prohibit running a pool hall on the Sabbath, and such construction should be given their language as to effectuate that purpose. One who in his language managed and operated the pool room, dusted the pool and billiard tables, set the balls, furnished the cues, and did such other work as is necessary in a pool room, is within the definition of "laborer," if a barber, livery-stable keeper, and bartender come within the meaning of that word. The legislature intended to exempt only such labor and vocations as

are necessary for the welfare of mankind, recognizing that human experience had demonstrated that days of rest were necessary for the best interest of the human race. In the case of *Ex parte Newman*, 9 Cal. 502, Judge Field has well expressed this thought, saying: "In its enactment the legislature has given the sanction of law to a rule of conduct which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists, and statesmen of all nations, as on the necessity of periodical cessations from labor. One day in seven is the rule, founded in experience and sustained by science. There is no nation possessing any degree of civilization where the rule is not observed, either from the sanctions of the law or the sanctions of religion. This fact has not escaped the observation of men of science, and distinguished philosophers have not hesitated to pronounce the rule founded upon a law of our race." Again: The same authority quotes with approval the following from the supreme court of Pennsylvania (*Specht v. Com.* 8 Pa. 312, 49 Am. Dec. 518): "All agree that to the well-being of society periods of rest are absolutely necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed may enjoy a respite from labor at the same time. They may be established by common consent, or, as is conceded, the legislative power of the state may, without impropriety, interfere to fix the time of their stated return, and enforce obedience to the direction. When this happens, some one day must be selected, and it has been said the round of the week presents none which, being preferred, might not be regarded as favoring some one of the numerous religious sects into which mankind are divided. In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have received the legislative sanction."

We are of the opinion that the complaint charged an offense against the laws of this state, and judgment is affirmed.

Davidson, P. J., dissenting:

I feel constrained to dissent in this case from the conclusion reached by my brethren that the opening of a pool room or the operation of a pool room or billiard hall on Sunday is a violation of the Sunday law. Especially do I disagree with this on the ground upon which they place it: that is, that the man who opens his pool room or

operates it on Sunday is a laborer within the terms of our statute.

Article 196 of the Penal Code which relator was charged with violating, reads as follows: "Any person who shall hereafter labor or compel, force, or oblige his employees, workmen, or apprentices to labor on Sunday, etc., shall be fined not less than ten nor more than fifty dollars." Relator, if guilty, is to be so adjudged under the first clause, "Any person who shall hereafter labor on Sunday shall be fined." From the evidence relator was the proprietor of an ordinary pool parlor or hall, and kept his pool tables for the purpose or remuneration, for which he charged a fee, not for admittance to the hall, but charged those who played games on his tables at a stipulated price. Billiard halls or parlors and pool halls or parlors have at all times and under all circumstances, so far as I am aware, been classed as places of amusements, where people go to entertain themselves by playing games on the tables for pleasure, amusement, or to while away the odd hours for pleasure, but it has never been held or regarded as a place where people labor or work. It would hardly be considered a machine shop or factory, or a planing mill, or any of those various places where people congregate as laborers and employ their time in such service. 22 Am. & Eng. Enc. Law, 943; 4 Am. & Eng. Enc. Law, 54.

Keepers of billiard halls and pool halls are required to pay an occupation tax usually to pursue such character of business. The legislature has further provided that, if such character of tables are exhibited for the purpose of securing betters or gaming, the owner or keeper of the table would be guilty of exhibiting the same under the gambling act, and this although it may be a licensed occupation; and it has been further held in this state that, if the players of the game of pool should bet or wager on the game, they would be guilty of betting. It has also been held that the betting of the table fees would constitute gambling; and, if the owner of the table was aware of the fact and permitted the parties to bet the table fees, this would constitute him the keeper of the gaming table. It would hardly be contended under these circumstances, at least ought not to be, that the keeper of such a place would be what is commonly known as a laborer. Article 196, quoted, does not include pool parlors within its terms, and, if it be so held under the terms of the article, it would be by the most strained construction. It cannot be held to be a place of amusement under article 199, because of the fact that entrance fees are not paid and other reasons as well, and it is not to be classed as amusement 40 L.R.A. (N.S.)

under the terms of that statute. My brethren evidently believe that it is not within the terms of article 199. That article interdicts traders, merchants, and those who carry on a lawful trading business opening their business on Sunday for the purpose of traffic. It is more than difficult to comprehend how the proprietor of a pool hall could be held to be a laborer under the terms of our statute. It does not include him; and, if the statute is not susceptible of the construction under the ordinary language as commonly understood, he would not be within the terms of the statute. No man can be held to violate a law in Texas unless the legislature has made it an offense in plain language. Penal Code, arts. 1, 9. If we take the definition of what constitutes a laborer, then it is clear that relator cannot be brought within the definition of the term as commonly understood. A "laborer," as defined by Mr. Webster, is one who works at a toilsome occupation. A laborer is one who performs manual labor. *Re Ho King* (D. C.) 8 Sawy. 438, 14 Fed. 724, 725; *Wildner v. Ferguson*, 42 Minn. 112, 6 L.R.A. 338, 18 Am. St. Rep. 495, 43 N. W. 794; *Milligan v. San Antonio & G. S. R. Co.* — Tex. Civ. App. —, 46 S. W. 918, 919; *McPherson v. Stroup*, 100 Ga. 228, 28 S. E. 157; *Weatherby v. Saxony Woolen Co.* — N. J. Eq. —, 29 Atl. 326; *Coffin v. Reynolds*, 37 N. Y. 640; *Whitaker v. Smith*, 81 N. C. 340, 31 Am. Rep. 503; *Wentroth's Appeal*, 82 Pa. 469; *Boyle v. Mountain Key Min. Co.* 9 N. M. 237, 50 Pac. 347; *Stuart v. Poole*, 112 Ga. 818, 81 Am. St. Rep. 81, 38 S. E. 41; *St. Louis Southwestern R. Co. v. Lyle*, 6 Tex. Civ. App. 753, 26 S. W. 264. It is useless to multiply these authorities. They are very numerous in the United States. I have searched the authorities with some degree of interest to ascertain if it has been held by any court that a pool hall would be construed to be a laboring establishment, or the keeper or employee of the keeper of such hall would constitute either a laborer as that term is usually understood. *Judge Brooks in Benson v. State*, 47 Tex. Crim. Rep. 609, 85 S. W. 800, held that a bartender who sold beer on Sunday could not be held to be a laborer. In fact, under our statute, he would not be a laborer, but, if guilty of selling on Sunday would come within the terms of article 199 by all of our decisions, which prohibit merchants, grocers, and dealers in wares and merchandise and traders in business from opening their places on Sunday. It was thought, however, by my brethren that pool halls were not within the terms of that statute. If pool halls are to be included within the terms of the Sunday law, the legislature has not seen proper to do so.

This court by construction cannot create offenses or make acts criminal within the terms of the law when not included by the legislature. *Murray v. State*, 21 Tex. App. 620, 57 Am. Rep. 623, 2 S. W. 757.

I do not care to pursue this subject further. I am clearly of the opinion that my brethren are in error, and that by their opinion they have construed into existence a violation of law which has not been created by the legislature. I therefore respectfully dissent.

WASHINGTON SUPREME COURT.
(Department No. 2.)

H. O. BLANKENSHIP, Appt.,
v.
KING COUNTY, Respnt.

(68 Wash. 84, 122 Pac. 616.)

Highway — permitting obstruction —
liability of county.

1. A county which permits granite blocks,

Note.—*Liability of county, town, or municipality for obstruction or defect outside of traveled portion of highway.*

Earlier cases discussing this subject may be found in a note to *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 592-598.

As to the liability of townships for accidents off the traveled part of highway, see note to *James v. Wellston Twp.* 13 L.R.A.(N.S.) 1219.

For other cases closely related to the subject presented here for discussion, see the following notes: Liability for injury to pedestrian by defect or obstruction in space between sidewalk and carriage way. *Barnesville v. Ward*, ante, 94.

Duty of town or municipality to provide barriers to protect travelers from obstructions outside the highway. *Shea v. Whitman*, 20 L.R.A.(N.S.) 980, and *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 604.

Liability of municipality for injuries by trees. *Dyer v. Danbury*, 39 L.R.A.(N.S.) 405.

Hitching posts or stepping blocks in public streets as unlawful obstructions or nuisances, *Lacey v. Oskaloosa*, 31 L.R.A.(N.S.) 853.

Duty toward children as to obstructions or defects in street. *Townley v. Huntington*, 34 L.R.A.(N.S.) 118.

Liability for placing near highway object calculated to frighten horse. *Davis v. Pennsylvania R. Co.* 12 L.R.A.(N.S.) 1153, and *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 652.

Generally municipalities are held to have fully performed their duty when they have constructed highways of reasonable width and smoothness; and if a traveler chooses, without reasonable cause, to travel outside 40 L.R.A.(N.S.)

which have been placed by a citizen on the graded part of a highway, but outside the macadamized part, to remain there for five months, may be held liable for injury to a traveler on the highway whose vehicle comes into collision with them in the dark.

Same — knowledge of obstruction —
contributory negligence.

2. The mere fact that one attempting to drive along a highway on a dark rainy night knew that granite blocks had been left lying adjacent to the macadamized portion of the way, at a certain point, does not establish contributory negligence on his part as matter of law, in coming into collision with them.

(Mount and Morris, JJ., dissent.)

(April 8, 1912.)

APPEAL by plaintiff from a judgment of the Superior Court for King County dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

such way, he assumes the risk. 37 Cyc. 294.

Thus no liability attached to a town where a traveler voluntarily left the traveled highway and was injured by walking or driving into a hole or ditch located within the limits, but outside of the traveled portion, of the highway (*Burr v. Plymouth*, 48 Conn. 460; *Morse v. Belfast*, 77 Me. 44; *Brown v. Skowhegan*, 82 Me. 273, 19 Atl. 399; *Orr v. Oldtown*, 99 Me. 190, 58 Atl. 914; *Hunt v. Douglass Twp.* 165 Mich. 187, 130 N. W. 648; *King v. Ft. Ann*, 180 N. Y. 496, 73 N. E. 481; *Hammacher v. New Berlin*, 124 Wis. 249, 102 N. W. 489); or where the injury was caused by carriage wheel falling off a bridge which was not a part of the traveled path, but outside of it, and constructed solely to facilitate access between the traveled path and a private way which opened into the highway on one side, and from which plaintiff was driving (*Felch v. West Brookfield*, 184 Mass. 309, 68 N. E. 227 [As to duty respecting conditions of highway to persons entering or leaving private property, see note in 37 L.R.A.(N.S.) 357]); or by driving against a stone (*Moran v. Palmer*, 162 Mass. 196, 38 N. E. 442; *Carey v. Hubbardston*, 172 Mass. 106, 51 N. E. 521; *Hall v. Unity*, 57 Me. 529; *Blake v. Newfield*, 68 Me. 365; *Perkins v. Fayette*, 68 Me. 152, 28 Am. Rep. 84); or by pedestrian striking foot against stump (*Lowe v. Clinton*, 136 Mass. 24); or by defect in rough and dangerous ground between two roads while attempting to go from one to the other (*Shepardson v. Colerain*, 13 Met. 55; *Cleveland v. Pittsford*, 72 Hun, 552, 25 N. Y. Supp. 630, affirmed without opinion in 146 N. Y. 384, 42 N. E. 543; *Ozier v. Hainesburgh*, 44 Vt. 220).

So, where plaintiff was injured by step-

Messrs. George F. Hannan and Richard G. Hutchinson, for appellant:

Appellant's knowledge of the defect and his failure to have it in mind at the time of the happening of the injury was not negligence *per se*.

McQuillan v. Seattle, 10 Wash. 464, 45 Am. St. Rep. 799, 38 Pac. 1119; Cowie v. Seattle, 22 Wash. 659, 62 Pac. 121; Crites v. New Richmond, 98 Wis. 60, 73 N. W. 322; Steele v. Northern P. R. Co. 21 Wash. 299, 57 Pac. 820.

Messrs. John F. Murphy and Robert H. Evans, for respondent:

The county was free from negligence.

Rust v. Essex, 182 Mass. 313, 65 N. E. 397; Carey v. Hubbardston, 172 Mass. 106, 51 N. E. 521; Stricker v. Reedsburg, 101

Wis. 457, 77 N. W. 897; Goeltz v. Ashland, 75 Wis. 642, 44 N. W. 770.

Fullerton, J., delivered the opinion of the court:

The appellant sought in this action to recover for personal injuries received by him from an accident happening while he was driving a team upon a county road in King county. The roadbed at the place of the accident was some 24 feet in width, and had been macadamized for a width of 16 feet along its center. The road, so the appellant testified, was traveled throughout its entire width, although the heavy traffic passed over the macadamized portion of the way. At the place of the accident, and for some distance on each side thereof, the road had

ping upon a culvert made of plank and covered with earth within the limits of the highway, the court said: "To render a verdict for the plaintiff, the jury must have found that the place where the accident happened was within the limits of that part of the highway wrought and prepared by the defendants for public travel." Kellogg v. Northampton, 8 Gray, 504.

So, where a horse which a traveler was leading became frightened, and she was injured by being dragged over a pile of stones which had been scraped out of and left beside the road, the town was held not guilty of negligence in leaving the stones there for a few days while the men were busy in another part of the town. Stedman v. Osceola, 147 App. Div. 220, 132 N. Y. Supp. 28.

So, where a traveler chose to leave the traveled highway, the city was held not liable for injury sustained:

—by falling off end of culvert. Scranton v. Hill, 102 Pa. 378, 48 Am. Rep. 211; Monongahela City v. Fischer, 111 Pa. 9, 56 Am. Rep. 241, 2 Atl. 87.

—by pedestrian falling into ditch within located limits, but out of the traveled part of highway, she not being a traveler within the meaning of the statute providing for recovery of damages arising from defects in streets and highways. Leslie v. Lewiston, 62 Me. 468.

—by falling into a hole 5 feet outside of street, the defect not being in the highway within the meaning of the statute, so as to render the village liable. Keyes v. Marcellus, 50 Mich. 439, 45 Am. Rep. 52, 15 N. W. 542.

—by falling over scantling lying in the road, the court stating that if the pedestrian chose to use that portion of the street designated for vehicles, instead of the portion designated for pedestrians, it was his duty to exercise sufficient care to avoid an obstacle of that character. Brown v. Chicago, 135 Ill. App. 126.

But, notwithstanding the general rule that municipalities are not liable for accidents outside of the traveled portion of a highway, they may, under certain circumstances, be held liable, as where the obstruction

tion or defect is near the traveled portion, and the traveler accidentally or by necessity deviates from the traveled way.

Thus, a town was held liable for personal injury sustained where a horse shied and the wagon struck a post near the traveled highway (Fowler v. Linquist, 138 Ind. 566, 37 N. E. 133), or a log outside of but within close proximity to the traveled part (Snow v. Adams, 1 Cush. 443), or where a horse suddenly swerved to avoid a mud puddle, causing the wheel to strike a stump standing a few inches outside of the traveled track (Boltz v. Sullivan, 101 Wis. 608, 77 N. W. 870).

And where a horse became restive and plaintiff reined him out of the traveled part of the road, sustaining injury by the chaise running over a log beside the traveled part of the highway, the city was held liable. Cobb v. Standish, 14 Me. 198.

So, a town was held liable where a blind man on a dark night left the traveled portion of the road to avoid an approaching team, and by so doing was injured by stepping over a bank wall, such deviation being, by law, deemed a necessity. Glidden v. Reading, 38 Vt. 52, 88 Am. Dec. 639.

So, where the wrought way was impassable by reason of snow drifting, and for that reason a traveler drove outside of the usually traveled path, and was injured by reason of a defect, the city was held liable, in Savage v. Bangor, 40 Me. 176, 63 Am. Dec. 658, it having constructive notice that the highway was defective.

So, where a highway became impassable because of snow, and a traveler, to avoid the drift, took a side track and was injured by a horse while assisting it out of the deep snow, the town, under its statutory duty to keep the highway in repair, was held liable for failure to render the highway passable when it had notice of its defective condition. Hogg v. Brooke, 7 Ont. L. Rep. 273.

But where plaintiff reined her horse out of the road on the opposite side from an electric car, and her carriage dropped down over the end of a culvert, causing her injury, a verdict for plaintiff was set aside on the ground that her thoughtless inatten-

been graded out from the side of a hill, and lay in the shape of a curve; the point of the curve extending towards the summit of the hill. On the other side it broke off abruptly, owing to the fact that the roadbed was built up from the natural slope of the hill. Some five months or more before the accident one Barret, for purposes of his own, in no way connected with the affairs of the county, hauled and placed on the roadbed between the macadamized portion of the way and the hill two blocks of granite 2 feet by 2 feet by 4 feet in size, laying them diagonally to the course of the road, so that their ends reached within a foot and a half or 2 feet of the macadamized part of the road. On the evening of September 16, 1909, the appellant drove along the highway towards his home with a team of well-brok-

en horses and a light wagon, traveling in a trot at a speed of perhaps 6 miles an hour. As he reached the point in the road where the granite blocks were placed, he collided with them. The collision broke the right front wheel of his wagon to pieces, and caused the right hind wheel to loosen from the axle and to roll off. The team thereupon started to run away, dragging the appellant, and before they were stopped he received the injuries for which he sues in this action.

In his direct as well as his cross-examination the appellant admitted that he was familiar with the road over which he was traveling; that he had traveled it many times in the nighttime as well as the daytime; that he knew the exact location thereon of the granite blocks; and that his team

tion, the very essence of negligence, was the cause of the accident. *Tasker v. Farmingdale*, 85 Me. 523, 27 Atl. 464, motion for new trial sustained on ground supporting former ruling, 88 Me. 103, 33 Atl. 785.

And see the subdivision, "Loitering, deviation," in note to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 751.

So, a municipality has been held liable for injury sustained by reason of defect or obstruction in close proximity or so connected with the traveled portion of the highway as to be dangerous to the people traveling thereon, and it is upon this rule that the decision of the reported case, *BLANKENSHIP v. KING COUNTY*, rests.

Thus, under this rule, a town was held liable where a pedestrian injured himself by stumbling over boulders lying alongside of the traveled part of the road (*Wheeler v. Westport*, 30 Wis. 392); or by driving upon scales set in the highway margin which, by long use, had become part of a road which the town was bound to keep in repair (*Potter v. Castleton*, 53 Vt. 435); or by driving into a stump allowed to remain at the edge of the traveled part of the highway (*Foley v. East Flamborough Twp.* 26 Ont. App. Rep. 43).

And where an apparently safe but in fact deep and dangerous watering place was located within the limits of a highway, but outside of and connected with the traveled highway by a well-beaten path, the town was held liable for loss of a horse, occasioned by his falling into the water while attempting to drink. *Cobb v. Standish*, 14 Me. 108. In the above case the court said: "The traveled part of the road was of sufficient width and well made for ordinary accommodation, but a portion of the space in which the public have an easement was unsafe; and the danger, being concealed, was calculated to deceive and entrap a traveler. Towns are not obliged to provide watering places for the public convenience, but when they are provided by nature in the highway, they ought not to be suffered to become pitfalls first to allure and then to destroy horses or other animals turned aside to par-

take [of] the refreshment to which they are thus invited."

So in *Wakeham v. St. Clair Twp.* 91 Mich. 15, 51 N. W. 696, where plaintiff was thrown from his horse by the horse stepping into an existing hole in the highway, or by the ground sinking beneath the horse's feet as a result of water action under ground, the court said that if the hole was so near the traveled way, or way intended for travel, that a person would be likely to get into it in seeking to avoid a mud hole, the township was guilty of negligence in allowing it to remain there for an unreasonable time. If, however, the hole was so open and notorious that a person using ordinary care would have observed and avoided it, the plaintiff was guilty of negligence in riding into it. These questions were for the jury under the testimony as to the condition of the road at this point and the state of the weather at the time.

And where a person was killed by coming into contact with a broken highly charged fire alarm wire lying in the road just outside of the macadamized portion, which accident would not have occurred had the deceased kept to the macadamized part, the city was, in *Emery v. Philadelphia*, 208 Pa. 492, 57 Atl. 977, held liable on the ground that a city or even a borough or township may not with impunity leave a highly dangerous and insidious obstruction, such as a heavily charged and exposed electric wire, on any part of a public highway, so near it that a traveler accidentally or intentionally deviating a few feet from the beaten track may encounter it to the risk of life.

So, when a private way leading from a public way has been opened and dedicated to a public use, a city is liable for a defect between the part wrought for public travel and the entrance of the private way, unless it has cautioned the public against entering upon such private way. *Paine v. Brocton*, 138 Mass. 564.

See also note to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 684, as to liability of municipality for defects or obstructions in proximity to highway.

J. D. C.

was under control at the time of the accident. But he also testified, in excuse of his act of driving upon the blocks, that the macadamized part of the road was covered over with more or less dust and dirt, especially on its edges, and that one driving over it could not always tell by the mere sound the team and wagon made whether or not they were entirely on this part of the way; that, as he approached the blocks, he was keeping well to the right of the way, so as to avoid collision with possible approaching teams and automobiles; that but a short time before the collision his team had become frightened and increased their speed somewhat, and that it took more than his usual attention to keep them under control; that the night was dark and rainy, and that the blocks could not be readily seen; and that he "was cold and wet" and "bent on getting home." At the trial, before the appellant had concluded his testimony, the court took the case from the jury and entered a judgment of dismissal, basing his action on the grounds that no negligence was shown on the part of the county, and that the defendant was guilty of negligence in driving upon the granite blocks after he had knowledge of their location in the highway. This appeal is from the judgment of dismissal.

This court has heretofore held, and it is the general rule, that counties are not obligated to open highways to travel for their full located width; but that their duty in this regard is accomplished by opening the way for a sufficient width to make it reasonably safe and convenient for ordinary travel, that it is not compelled to keep the sides of the prepared way free from obstructions, nor is it obliged to erect barriers where there is no unusual danger to be encountered. These rules are pressed upon us as sustaining the court's judgment in the present case, but it seems to us that they do not meet the question suggested by the facts in the record. The appellant in the case before us was not injured because he passed out of the part of the highway that had been opened by the public authorities for travel; on the contrary, he was injured by an obstruction placed in the very part of the way that had been so opened. If, therefore, the county was responsible for the obstruction, and the appellant was not guilty of contributory negligence, the county cannot escape liability on the ground that there was a sufficient way left open by the use of which travelers along the road could avoid collision with the blocks of granite. To place them there was to invite injury.

A traveler along a highway expects to keep within the way prepared for him, and anticipates meeting with obstructions if he

departs therefrom, but he does not expect to meet with obstructions in that part of the way over which he is invited to travel, and consequently he is not to be held to as strict an accountability if he is injured by such an obstruction as he would be were he injured by an obstruction outside of the place of travel.

We have not overlooked the contention of the county to the effect that it had extended no invitation to the public to travel off the macadamized part of the highway, and that those blocks were not placed on the part that had been macadamized; that 4 feet of graded space on each side of the macadam was so graded in order to protect the macadam from breaking and spreading out with the weight of loads, and were not intended as places upon which to travel. But the record furnishes no support for these contentions. The county offered no evidence at the trial, and the evidence of the appellant is that all parts of the highway were used by the public for the purposes of travel, the dirt sides as well as the macadamized center. This is sufficient to carry to the jury the question whether the county intended that all parts of the way should be so used by the public.

It was not shown that the county permitted the granite blocks to be placed in the highway, or that any officer of the county had knowledge that they had been so placed, and it is insisted that the county cannot be held liable because of these facts. But the plaintiff did show that the blocks had been suffered to remain in the highway for a period of five months, and this is sufficient to warrant a jury in finding that the county officials knew or ought to have known of their placement therein.

The further contention that the appellant was guilty of contributory negligence as a matter of law, because he was familiar with the highway, and had previous knowledge of the fact that the granite blocks had been placed therein, is equally without foundation. The appellant was not bound at all times, by day and by night, to keep in mind the fact that some person had placed obstructions in the way. The human mind is not so constituted that it can recall at all times things with which it is familiar, and we know from experience and observation that reasonably prudent persons receive injuries from defects and obstructions in streets and highways of the existence of which they had previous knowledge. The law does not therefore in all cases hold a person injured by a defect in a highway guilty of contributory negligence merely because he had previous knowledge of the defect, but generally treats the matter of knowledge as a fact or circumstance bearing

upon the question of contributory negligence, to be submitted to the jury along with the other facts and circumstances surrounding the accident, leaving it for them to say whether, under the facts shown, the injured person was or was not guilty of contributory negligence. *Benson v. Hamilton*, 34 Wash. 201, 75 Pac. 805; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121; *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357; *McQuillan v. Seattle*, 10 Wash. 464, 45 Am. St. Rep. 799, 38 Pac. 1119.

The facts in the case before us do not show conclusively that the appellant was guilty of contributory negligence. The court should not therefore have taken the case from the jury.

The judgment is reversed, and the cause remanded for a new trial.

Dunbar, Ch. J., and Ellis, J., concur.

Mount and Morris, JJ., dissent.

KENTUCKY COURT OF APPEALS.

SMITH BALL et al., Appts.,
v.

COMMONWEALTH OF KENTUCKY.

(149 Ky. 260, 147 S. W. 953.)

Breach of peace — bond — forfeiture — shooting dog.

A conviction and fine for being disorderly, shooting a dog in a street, and insulting a citizen, does not forfeit a peace bond under statutory provisions that such bond

shall be required upon apprehension that the obligor will commit violence endangering human life, or a felony, or an offense against the person or property of another, and will be forfeited by conviction of a felony or an offense constituting a breach of the peace.

(June 21, 1912.)

A PPEAL by defendants from a judgment of the Circuit Court for Harlan County in plaintiff's favor in an action brought to recover the penalty of a peace bond. Reversed.

The facts are stated in the opinion.

Mr. H. C. Faulkner & Sons, for appellants:

The warrant upon which Smith Ball was tried does not necessarily contain or involve a breach of the peace.

22 Cyc. 487; *Simons v. State*, 25 Ind. 331; *Sturgeon v. Com.* 18 Ky. L. Rep. 668, 37 S. W. 679; *State v. Leavitt*, 87 Me. 72, 32 Atl. 787.

Judicial conviction of defendant of an offense not amounting to or involving a breach of the peace is not a breach of the peace bond under § 391, subsec. 2 of the Criminal Code.

1 Words & Phrases, 861; *Black's Law Dict.* 2d ed. 149; 2 *Sutherland, Stat. Constr.* § 520; *Black, Interpretation of Laws*, 2d ed. p. 451; *Smith v. Com.* 9 Ky. L. Rep. 720; *Rankin v. Com.* 9 Bush, 553; *Cornett v. Com.* 25 Ky. L. Rep. 1769, 78 S. W. 858.

Mr. W. F. Hall also for appellants.

Messrs. James Garnett, Attorney General, J. G. Forester, and Clay & Carter for the Commonwealth.

Note. — *What conduct will work a forfeiture of a peace bond.*

For cases defining a breach of the peace, see the note to *People v. Johnson*, 13 L.R.A. 163.

For disorderly language as disturbance of the public peace, see the note to *Stewart v. State*, 32 L.R.A. (N.S.) 505.

It will be seen that in *BALL v. COM.* it is held that, in the absence of a conviction for a felony, nothing less than "violence or injury to an individual or his property" will breach the bond.

It may be noted that in *Cornett v. Com.*, quoted from in the *BALL CASE*, the bond contained an undertaking not to engage in the unlawful sale of spirituous, vinous, or malt liquors, and the defendant was convicted of such sale, and the decision of the court is that there was no authority for taking a bond which undertook to abstain from offenses not amounting to a breach of the peace.

The subject of peace bonds and of those for "good behavior" cannot well be separated, although it has been suggested that the latter is more easily breached.

40 L.R.A. (N.S.)

In *Com. v. Duane*, 1 Binn. 99, Tilghman, Ch. J., said, as to surety for good behavior: "Surety for good behavior may be considered in two points of view. It is either required after conviction of some indictable offense, in which case it forms part of the judgment of the court, and is founded on a power incident to courts of record by the common law, or it is demanded by judges or justices of the peace out of court, before the trial of the person charged with an offense, in pursuance of authority derived from a statute made in the 34th year of Edward III. It is this last kind of surety we are now to consider. The statute 34 Edward III. authorizes justices of the peace to take surety for good behavior of all those that are not of good fame, to the intent that the public may not be troubled by such persons. It is supposed that this statute was made to prevent the disorders which were introduced by the soldiers of Edward the Third, numbers of whom, after serving in his armies in France, were discharged in England. The natural meaning of the words 'persons not of good fame' seems to be, those who, by their general evil course and habits of life, had acquired

Miller, J., delivered the opinion of the court:

Appellant Smith Ball, being in custody under a charge of having confederated with other persons for the purpose of intimidating and alarming others, and for having cruelly and inhumanly beaten and bruised one J. T. Farley, was, upon the motion of the commonwealth's attorney, required to give a bond in the sum of \$5,000 to keep the peace and be of good behavior for a period of twelve months. He executed this bond on February 11, 1911, with his coappellants, W. M. Smith and Allen Ball, as his sureties. By the terms of his bond, Ball undertook to keep the peace and be of good behavior towards all citizens in this commonwealth for a period of twelve months,

"and that he would not be guilty of a felony, or any offense involving a breach of the peace during said time."

On July 11, 1911, Ball was tried upon a warrant issued against him by the judge of the Harlan county court, which contained the following charge: "Smith Ball has committed the offense of a breach of the peace by being disorderly, insulting Marion Etling and wife, Lidia Etling, discharging deadly weapons, and shooting a dog." Ball was tried by a jury and fined \$25, which he paid. On July 25, 1911, the commonwealth instituted this action upon Ball's peace bond, seeking to recover from him and his sureties the penalty of \$5,000 therein stipulated, upon the ground that it had been broken by Ball's conviction above

a bad reputation, and were supposed to be dangerous to the community. In process of time, however, the construction of these expressions has been extended far beyond their original meaning, and persons are now commonly held to find surety for their good behavior who are not generally of ill fame, but have only been charged with some particular offense."

There are very few reported cases upon breaches of "peace bonds" or those for good behavior. It has been held that the bond has been breached—where there is a condition to appear—by a failure to appear (*Lawton v. State*, 5 Tex. 272); where there has been assault with intent to murder (*State v. San Miguel*, 4 Tex. Civ. App. 182, 23 S. W. 389); assault and battery (*State v. Rudowsky*, 65 Ind. 389; *Com. v. Braynard*, 6 Pick. 113); where the one bound was guilty of an affray (*State v. Sanders*, 153 N. C. 624, 69 S. E. 272).

But it seems to have been thought in at least one case that an assault on a third person would not necessarily breach the bond. Thus, in *Rex v. Stanley*, Sayer, 139, the report was that "upon a rule to shew cause why the proceedings upon a scire facias should not be stayed, it appeared, that the scire facias was brought upon a recognizance entered into by Stanley and his bail, for Stanley's keeping the peace; that the recognizance was entered into in consequence of articles of peace having been exhibited by J. S. against Stanley; and that Stanley had been guilty of assaulting J. S. The rule was discharged. And by Ryder, Ch. J., if the peace have not been broken by an assault upon the person who exhibited articles of the peace, the court will not permit a proceeding by scire facias upon a recognizance for keeping the peace, if the proceeding appear clearly to be vexatious: yet, as such recognizance is for keeping the peace to all the King's subjects, as well as to the person who exhibited the articles, the court will not, in a doubtful case, stay the proceedings upon a scire facias; because the question whether the breach of the peace by assaulting another person did amount to a forfeiture of the recognizance

may be determined upon the plea of not guilty to the scire facias."

But, on the other hand, see *Reg. v. Howard*, 11 Mod. 109, where Lady Howard exhibited articles of the peace against her husband, whereupon he was bound to keep the peace for a year. On a motion for a discharge, upon a suggestion that she was consenting, Holt, Chief Justice, said: "How can we discharge it before the condition is performed? Besides, if my lord breaks the peace upon anyone else, it is a forfeiture of his recognizance."

In *Lawton v. State*, 5 Tex. 272, it was held that a bond to keep the peace and appear in answer to a charge of assault and battery is breached by a failure to appear.

In *Respublica v. Cobbet*, *infra*, it was held where a bond for good behavior was taken of one charged with libel, a libel might breach the bond.

But in *State v. Sanders*, 153 N. C. 624, 69 S. E. 272, it was held that convictions of C for publishing, selling, and having in possession obscene and indecent literature could not be a violation of a bond conditioned in showing that C kept the peace towards A and B.

In this connection reference may be made to *Randolph v. Brown*, 2 Va. Cas. 351, where the condition was that one Brown should keep the peace, and be of good behavior towards all the citizens of the commonwealth, and particularly towards Samuel Jackson. Upon this recognizance a scire facias issued against the cognizors, assigning for cause of issuing it, that said Brown had failed to perform the condition of the said recognizance, without stating how or in what he had broken it, and it was held: "That the said sci. fa. is defective in this, that it does not set forth nor aver in what particular the said Isom L. Brown had broken the condition of the said recognizance, and that for this reason it was rightfully quashed."

Where the condition of the bond was "to keep the peace as against the person, family, and property," it was held that it was error to hold that it was no breach of the bond to call A a liar, and contemporaneous-

set forth. A demurrer to the petition was overruled. In the first paragraph of their answer, appellants traversed the alleged breach of the bond, and in a second paragraph they alleged affirmatively that, while Ball was walking along one of the streets of the town of Harlan in a quiet, civil, and orderly manner, he was attacked in a violent way by a vicious dog belonging to Marion Etling; that neither Marion Etling nor Lidia Etling, his wife, nor any other person, was present, or took any part or interest whatever in what then occurred; and that when the dog was about to bite Ball, he, in order to protect his person from injury, shot the dog, but did not kill it. Appellants further alleged that the shooting of the dog was the only charge upon which

proof was offered or heard upon the trial; that Ball was found guilty only of having shot a dog, which did not constitute a breach of the peace nor any violation of the terms of the bond; and that Ball had not provoked the dog, in any way, to make the attack upon him. By an amended answer, appellants alleged there was no evidence introduced showing that Ball was guilty of or had committed any additional offense, or any of the offenses charged in the warrant upon which he was tried, except that of "discharging deadly weapons" and "shooting a dog," neither of which was done in the presence of any other person, or in such a way or manner as to commit a breach of the peace. The circuit judge sustained a demurrer to the answer as amend-

ly raise a stick to strike him, and that these things, if done in anger, were "a menace of violence," and were "calculated to excite alarm or to provoke a breach of the peace," and constituted a breach of a bond to keep the peace, under §§ 1238, 1239, Penal Code 1895 of Georgia. *Rumsey v. Bullard*, 5 Ga. App. 802, 63 S. E. 921.

In *Reg. v. Harmer*, 17 U. C. Q. B. 555, a sci. fa. was brought on a recognizance (with sureties) with condition that Harmer "should keep the peace, and be of good behavior towards her Majesty and all her liege subjects, and specially towards Henry Muma, of the township of Blenheim, for the term of one year," an assault and threatening language and manner being alleged as a breach. On the trial it was shown by record that Harmer was convicted of the charge that he did "assault Henry Muma, of, etc., by using insulting and abusive language to him in his own office and in the public street, and by using his fist in a threatening and menacing manner to the face and head of the said Henry Muma." The court stated that the using his fist in a threatening manner to the head and face amounted to an assault, and said: "The sci. fa. charges that the defendant broke the peace by assaulting Muma, and also that he did not observe the condition to be of good behavior, which is a more comprehensive engagement than the other. The defendant pleaded in answer that he did not assault Muma, and did not break the peace; taking no notice of that charge against him by which, if proved, the recognizance would equally have been forfeited: namely, the not being of good behavior. This plea was therefore not a good bar. Still the Crown has taken issue upon what is pleaded, and we must determine upon this rule whether the verdict should be for the Crown or for the defendant, upon the issue joined and the evidence given at the trial. It was unquestionably proved on the part of the Crown that the defendant did, after entering into the recognizance, break the peace towards Muma, for he has been convicted by a jury of using threatening language to Muma in his presence, accompanying it by

threatening gestures, all which tended to a breach of the peace, and was also a breach of the condition to be of good behavior." (It was also held in this case that the statute, relieving the defendant, who had been summarily convicted and punished, from being afterwards convicted and punished in any proceeding, civil or criminal, for the same offense, was no bar to the sci. fa. on the recognizance.)

But not mere unseemly words will breach a bond for good behavior. Thus in *Rex v. Heyward*, Cro. Car. 498, it is reported that upon a recognizance "of the good behavior, the breach was assigned first, because Heyward said to a constable, in executing his office, 'Thou art a lying rascal.' Secondly, because he said to another who threw down his hedges, 'One of you is dead of the plague, and I hope I shall see more of you to die of the plague.' Thirdly, because he said to a woman that 'she was a whore and jade,' and other foul words concerning her incontinency. Fourthly, because he said to one in the churchyard, after evening prayer, that 'he was a foresworn knave,' and 'a perjured knave.' The defendant pleaded not guilty. And upon evidence at the Bar, it appeared by one witness that he spake to the constable, because he affirmed that the defendant used to carry picklocks about him, 'Thou art a lying rascal.' And the other witnesses on the behalf of the King did not prove that these words were in disturbance of the execution of his office, or for any act about the executing of his office. And for all the other words, they were words of heat and intemperance: but none of them tended to the breach of peace, or to the terror of any; nor was there any act done, but only evil words, and of those words the persons against whom he spake them gave the occasion. And although the manner of speaking may be good cause in discretion to bind one to his good behavior yet one being bound, words only which tend not to the breach of peace, or terrifying others, or unto sedition, etc., shall not be sufficient cause of forfeiture of a recognizance, for then by such pretense of words a man should be in danger of his recogni-

ed, and, the appellants having failed to further amend their answer, the trial court gave judgment for the commonwealth against Ball and his sureties for the sum of \$5,000; and from that judgment they prosecute this appeal.

The sufficiency of the petition is the first question to be determined; and if it be found to be insufficient it will be unnecessary to consider the matters of defense set forth in the answer. A sufficient petition must show upon its face a state of facts which, in law, constitute a breach of the terms of the peace bond by which appellants covenanted that Ball "would not be guilty of a felony, or any offense involving a breach of the peace" during the year.

Section 382 of the Criminal Code of Prac-

zance, which would be inconvenient. Wherefore it was left to the jury to consider of the verity and validity of the evidence, and of the manner of speaking them; whereupon they, being a substantial jury, considering thereof, gave their verdict for the defendant, that he was not guilty."

In Crabbell's Case, Leon. pt. 2, p. 166, Crabbell was bound by recognizance to his good behavior; upon which the Queen brought a scire facias, and surmised that after the recognizance acknowledged, the said Crabbell was arrested and taken by the constable for suspicion of felony, and of his own wrong escaped. It was objected on the part of Crabbell, because it is not alleged by matter in fact, that a felony was committed. But the whole court was of a contrary opinion; for it is not material if the felony were committed or not; for if a subject be arrested by a lawful officer, it is not lawful for him to escape; but he ought to stand to the law, and to answer unto the matter with which he is charged. And so Crabbell was forced to answer.

In King's Case, Cro. Eliz. pt. 1, p. 86, while nothing was decided, there is an interesting discussion on breaches of "good behavior." King was indicted for that whereas he was bound by recognizance to be of good behavior, he had said to one Kirton, that "he was a pelter, and a teller of lies, and a drunkard; and that he would make him a poor Kirton; and that he had entered and broke the close of Kirton;" for which an action of trespass *vi et armis* lieth. And the question was moved by Coke, if these be causes of the breach of his recognizance? for it is a common course in such cases to indict men, which will be evidence in a scire facias upon the recognizance. Wray and Gawdy conceived at first that they are no causes of the breach of the recognizance; for the party doth not break his good behavior except he doth something in act or shew which tends to the breach of the peace; as if he goeth in warlike manner with weapons, or is in company of riotous malefactors, although nothing be done; or threatens another to beat him, or to fight with him. These (although nothing be done) are

tice provides as follows: "A person may be arrested for the purpose of requiring of him security to keep the peace, or for his good behavior, in the following cases:

"1. Upon the complaint on oath, of a person threatened, to a magistrate, that the defendant has threatened to commit an offense against his person or property, and upon the magistrate being satisfied, by examination on oath of the complainant or others, that there are reasonable grounds to fear the commission of the offense threatened.

"2. Upon information given on oath to a magistrate, by any person, that the defendant is about to commit violence endangering human life, or is about to commit an offense amounting to a felony, and the

breaches of the good behavior. But when he speaks only words of reproach, which may procure another to break the peace, this is no breach of the good behavior. And they held clearly, that the entry into the close was no breach, being done peaceably; and he might pretend title to it; although in an action it is supposed to be *vi et armis*, and *contra pacem*. And Wray said that nothing shall be said a breach of the recognizance but that which sounds to the hurt of another, and by intentment may be a breach of the peace; as assault, menace, etc. And he said, if one be leading of his horse, and he that is bound to his good behavior doth take it from him, this peradventure may be a breach of the good behavior; for it is an assault upon his person, although he take it peaceably. Clench, *contra*. For the words being spoken in disdain and reproach shall be said a breach of the recognizance; for it may be cause of the breach of the peace, as well as carrying of weapons, or having a great company following him, as 2 Hen. VII. is; and the words, being malicious and opprobrious, gave occasion of blows; but the entry into the close is no breach. Schute doubted of the words, because they were opprobrious and spoken in malice, and do provoke another to break the peace.

It may be noted that in Crump v. People, 2 Colo. 316, the question as to what would have been a breach of the peace in the bond was not reached, owing to a default in filing papers.

A breach of the peace without the jurisdiction will not breach the bond. Key v. Com. 3 Bibb, 495, where the obligor undertook that a certain person should appear on a certain day, and that he should in the meantime be of good behavior towards all the citizens of the commonwealth, particularly towards A and B; and it appeared that the person whose good behavior was thus vouched for went with B across the border into the state of Ohio, and there fought a duel with him, and then both returned the same day, and it was held that an act of violence in another state was no breach of the peace bond.

magistrate being satisfied, by an examination on oath of the informant or others, that there are reasonable grounds for apprehending the commission of such violence or felony.

"3. If a magistrate or court be satisfied, by the conduct or words of a person in the presence of such magistrate or court, or from proof given before such magistrate or court, that there are reasonable grounds for apprehending that such person will commit an offense against the person or property of another."

And § 391 of the Criminal Code of Practice specifies breaches of the bond as follows:

"The following are breaches of the bond required in this chapter:

"1. The failure of the defendant to appear in the circuit court, if the bond require such appearance, or departing therefrom before he is lawfully discharged.

"2. A judicial conviction of the defendant of an offense involving a breach of the peace, within the period specified in the bond.

"3. A judicial conviction of the defendant of a felony within the time specified in the bond, if the bond be for his good behavior."

It will be noticed, while § 382, which

specifies the grounds upon which a bond may be required, seems to rest that requirement upon violence, the endangering of human life, or some offense against the person or property of another, subsection 2 of § 391, supra, makes a judicial conviction of the defendant of an offense involving the mere breach of the peace an infraction of the bond. It is insisted, therefore, by appellee, that a conviction of any offense which amounts to a mere breach of the peace, in its broadest sense, is sufficient to sustain a forfeiture of the bond. This broad interpretation of the statute has not, however, been adopted by this court.

In *Rankin v. Com.* 9 Bush, 553, Rankin was tried and fined on the double accusation of "drunkenness" and "disorderly conduct," and upon the strength of that conviction his former recognizance to keep the peace was forfeited by the trial court. Rankin insisted, however, that a conviction for drunkenness and disorderly conduct did not amount to a breach of the obligation of his bond, and, the trial court having ruled against him, he appealed. In construing § 387 of the old Code, which is identical in terms with subsec. 2 of § 391 of the present Criminal Code of Practice, above quoted, we said: "We are of the opinion that, if the order of forfeiture can be sus-

As to whether a conviction for breach of the peace must precede action on the bond, this is sometimes covered or deemed to be covered by the statute. Thus, in *Com. v. Williams*, 104 Ky. 308, 47 S. W. 214, where it was alleged in a petition to recover the penalty upon a recognizance to keep the peace that the principal committed a breach of the peace, and when forcibly resisting arrest therefor was shot and killed by the sheriff, it was held that a demurrer to the petition was properly sustained, inasmuch as, under the statute, it was a prerequisite of the petition that there must have been a judicial conviction of the defendant of an offense involving a breach of the peace or of a felony within the period specified by the bond.

But compare *State v. Dismukes*, 101 Tenn. 694, 49 S. W. 756, where the statute provided: "An undertaking to keep the peace is forfeited by the commission by the defendant of any offense upon the person or property of another, which may be ascertained by a jury without the conviction of the defendant therefor in the circuit court, upon ten days' notice to the parties against whom the forfeiture is sought. The court said: "We think it clear that under this section the court may proceed to determine whether the terms of the bond have been breached by the defendants, whether they have been tried or convicted of any offense or not, and without waiting for such trial. There is more difficulty as to the manner in which the court may proceed. The defendant is clearly entitled to a trial

by jury of the question as to whether he has breached his bond or not, and is also entitled to ten days' notice that a forfeiture will be sought. . . . We are of opinion that the statute contemplates a formal proceeding before a forfeiture can be declared, at which the defendant is allowed to present all his defenses, and have a jury for their determination, if he desires. The proper practice is therefore to require a suggestion, made in open court and entered upon the minutes of the court, that the bond has been given and returned into court and has been breached; and, upon this suggestion, which should be made at the instance of the district attorney general, the court will, if it think proper, direct a scire facias to issue, returnable after ten days, requiring the defendant to appear and show cause why the forfeiture should not be taken."

In *Respublica v. Cobbet*, 3 Yeates, 93, the condition of the recognizance was that the principal "shall be of good behavior towards the aforesaid commonwealth and all the liege people until the next court," etc., and it had been taken in a case of libel before conviction; the breach alleged was for libel, and it was held that the conviction of the defendant on these libels need not precede an action on recognizance, or on peace bonds, or good behavior bonds, and that the jury might find whether he was guilty of libel or not.

The following cases, while not strictly within the scope of the note, are of interest in this connection:

The people cannot be required to defer

tained at all in this case, it is by virtue of the second subdivision of § 387 of the Criminal Code of Practice, which declares substantially that 'a judicial conviction of the defendant of an offense involving a breach of the peace within the period specified in the bond' shall be a breach of the bond. And the city court was not authorized, as a consequence of its last judgment convicting Rankin, to order a forfeiture of his recognizance previously taken, unless that conviction imported with reasonable certainty a breach of the condition to 'keep the peace and be of good behavior toward all good citizens.' It does not appear whether the conviction in the second proceeding against Rankin was for drunkenness merely, or for some form of disorderly conduct, or for both offenses, which, under particular and distinct ordinances, are separately punishable in the city of Louisville; but certainly either or both offenses might have been committed without violence or injury to any individual, without which the undertaking of the appellant could not have been broken, as we construe the recognizance."

The same rule was applied in *Com. v. Mahoney*, 2 Ky. L. Rep. 314. And in *Cornett v. Com.* 25 Ky. L. Rep. 1769, 78 S. W. 858, where it was attempted to forfeit Cor-

nett's peace bond, upon the ground that he had been convicted of selling spirituous, vinous, and malt liquors in a local-option territory, this court said: "By § 382 of the Criminal Code, if the defendant had threatened to commit an offense against the person or property of another, and there are reasonable grounds to fear the commission of the offense threatened, or if he is about to commit violence endangering human life, or is about to commit an offense amounting to a felony, and there are reasonable grounds for apprehending such violence or felony, the defendant may be required to give surety to keep the peace or for his good behavior. By § 391 a judicial conviction of the defendant for an offense involving a breach of the peace, or for a felony within the time specified in the bond, is a breach of the bond. Under these provisions it has been held that a conviction of the defendant of an offense not amounting to felony, and not involving a breach of the peace, is not a breach of the bond. *Rankin v. Com.* and *Com. v. Mahoney*, *supra*. The conviction, therefore, for selling spirituous, vinous, and malt liquors in violation of the local prohibitory law was not a breach of the bond."

That a breach of the peace implies the

proceeding upon the bond until the expiration of the time during which the peace is to be kept. *Crump v. People*, 2 Colo. 316.

A punishment suffered for the breach of the peace is no bar to a prosecution on the bond. Thus, in *Com. v. Braynard*, 6 Pick. 113, upon a case stated it appeared that the defendant was indicted and convicted of an assault and battery on one Rice, and sentenced to pay a fine and costs, and to give security by recognizance to keep the peace as to all citizens, and especially Rice, for one year; and that he complied with the sentence. Within the year he committed another assault and battery upon Rice, for which he was again indicted and convicted, and sentenced to pay a fine and costs, and he complied with this sentence. And it was held that an action to recover the amount of the recognizance was sustainable.

More, together with Turner and Smith, enter into a recognizance to the King, upon condition for the good behavior of More; then More is indicted, for that he, being so bound, did assault J. S., and so he hath forfeited his recognizance; and on motion the indictment was quashed because More ought to have been prosecuted by scire facias, and not by indictment. *Rex v. More*, T. Raym. 196.

In *Crump v. People*, 2 Colo. 316, it was held that in an action upon a peace bond the amount of the entire penalty was recoverable, and no computation or assessment was required.

See also to the same effect, *Shirley v. Terrell*, 134 Ga. 61, 67 S. E. 436. 40 L.R.A. (N.S.)

In *Com. v. McNeill*, 19 Pick. 127, where the peace bond bound the principal defendant to appear, and his appearance was only by attorney, by whom he asked leave to answer, it was held that the bond was properly forfeited. But the court having power under the statute to remit, it was held on the petition of the sureties that the recognizance should be reduced from \$5,000 to \$1,000, the purpose of it in the first place having been to prevent the fighting of a duel, the principal having left the state, and no duel having been fought.

In *State v. San Miguel*, 4 Tex. Civ. App. 182, 23 S. W. 389, the court held that no error unless it was an error of substance in a peace bond would be available to the obligors under the statute providing: "No error of form shall vitiate such bond, and no error in the proceedings prior to the execution of the bond shall be available as a defense in an action thereon."

In *Hutchins v. Periam*, 3 Bulstr. 220, after a verdict against the defendant in scire facias upon a recognizance to keep the peace, the defendant moved in arrest of judgment that there was no *vi et armis* charged, although a battery was laid; but the court said that there was *contra pacem*, and the allegation that he did beat such a man, and so had broken his recognizance, and that this was well enough without *vi et armis*.

But in *Rex v. Hutchings*, Cro. Jac. 412, which may be another report of the same case, the contrary result is reported as to a recognizance for good behavior. B. B. B.

use of physical force against another was also expressly held in *Embry v. Com.* 79 Ky. 440. In that case *Embry* was indicted, as *Ball* was first indicted, for having unlawfully confederated with others for the purpose of intimidating another; the offense specified in *Embry's Case* being a threat to prosecute *Pearson* for selling whisky without a license. In holding that there was no offense charged, the court said: "The mischief the legislature intended, by the statute, to provide a remedy against, was the confederating and banding together of disorderly and evil-disposed persons for the purpose of unlawfully, and by the use of physical force, or threats of force and violence, overawing and injuring the persons and property of obnoxious and defenseless individuals, to the disturbance of public tranquillity and order. 'Intimidating,' 'alarming,' and 'disturbing,' in the sense the words are obviously used by the legislature, as well as according to their legal signification, imply the use of physical force or menace, and involve a breach of the peace." See also *Johnson v. Clem*, 82 Ky. 86.

This court is therefore committed to the doctrine that before a peace bond can be forfeited there must have been a conviction of an offense which is either a felony, or a breach of the peace which imports violence or injury to an individual or his property; a mere breach of the public peace and order is not sufficient. This construction conforms to the earlier view upon the subject, rather than the later view, which would make any act of public indecorum or disorder a breach of the peace.

In treating of the Anglo-Saxon law, in *Pollock & Maitland's History of English Law*, it is said: "All criminal offenses have long been said to be committed against the king's peace; and this phrase, along with the 'king's highway' has passed into common use as a kind of ornament of speech, without any clear sense of its historical meaning. The two phrases are, indeed, intimately connected; they come from the time when the king's protection was not universal, but particular, when the king's peace was not for all men or all places, and the king's highway was in a special manner protected by it. Breach of the king's peace was an act of personal disobedience, and a much greater matter than an ordinary breach of public order; it made the wrongdoer the king's enemy." Vol. I., p. 44.

And, in speaking of the same subject under the law after it had become settled and known as the common law, the same work says:

"We may think that every crime can be esteemed a breach of the king's peace; but 40 L.R.A. (N.S.)

breach of the king's grid or mund had no such extensive meaning. It only covered deeds of violence done to persons, or at places, or in short seasons that were specially protected by royal power." Vol. II., p. 453.

"The words about the king's peace have had a definite meaning; they point to a breach of the king's grid or mund,—a crime which at all events deserves the heavy wite of a hundred shillings, and which, when coupled with homicide, has been unemendable." Vol. II., p. 463.

We conclude, therefore, that under § 391 of the Criminal Code, *supra*, a conviction of a felony, or of an offense involving a breach of the peace, is a prerequisite to the forfeiting of a peace bond; and, under § 382, the breach of the peace contemplated by § 391 must be an offense against the person or property of another. Following this construction, it was held, in *Rankin v. Com.* *supra*, that drunkenness was not a breach of the bond, and in *Cornett v. Com.* *supra*, that illegally selling liquor was not a breach of the bond, since neither act amounted to a felony, or an offense against the person or property of another.

From this it follows that if appellant was tried and convicted merely for some public disorder, like the shooting of a dog, he is not within the rule which requires that he should have committed some act of violence or injury to an individual or his property before he can be said to have committed a breach of the peace which would forfeit his peace bond.

The petition alleges that *Ball* was convicted of the offense of a breach of the peace by (1) being disorderly, (2) insulting to *Marion Etling* and his wife, (3) discharging deadly weapons, and (4) shooting a dog. Conceding that *Ball* was tried and convicted upon each of these four specifications, it is, nevertheless, apparent that he has not been convicted of such a breach of the peace that could, under the definition above given, sustain a forfeiture of his peace bond, since no one of the offenses includes a charge of violence or injury to persons or property. Either of them might have been committed without violence or injury to the person or property of anyone. The nearest approach to a sufficient charge is the second, which alleges that *Ball* was insulting to *Etling* and his wife; but that language is too general in its terms to carry the idea of violence or injury to either of them upon *Ball's* part. And, if it be urged that the fourth charge is sufficient, because a dog is property under our law, it is a sufficient answer to say that it is not charged that the dog belonged to anyone. From this view of the authorities, we con-

clude that the circuit judge erred in overruling the demurrer to the petition.

Judgment reversed, with instructions to sustain the demurrer to the petition.

MARYLAND COURT OF APPEALS.

STATE OF MARYLAND EX REL. FRANK M. EBERT, Appt.,
v.

DANIEL J. LODEN, Justice of the Peace.

(— Md. —, 83 Atl. 564.)

Moving picture operator — license — validity.

1. Requiring one to secure a license after

Note. — Regulation affecting moving pictures.

As to whether operation of moving pictures is prohibited by Sunday laws, see note in 30 L.R.A. (N.S.) 465.

The power to regulate places of amusement and shows extends to moving picture shows. 38 Cyc. 258.

In *People v. Samwick*, 127 App. Div. 209, 111 N. Y. Supp. 11, in construing a section of the Penal Code which provides that one shall be guilty of a misdemeanor who admits to, or allows to remain in, any place of entertainment injurious to health or morals, any child under sixteen unless accompanied by parent or guardian, the court said: "The word 'guardian' does not there mean a guardian appointed by a court. If children be sent or taken to the theater by a person other than one of their parents or their legal guardian,—by their elder brother or sister, or by a neighbor or friend, for instance—he or she is their guardian for the time being within the meaning of the said statute, if not excluded in some way or for some reason by law. Courts and police officials should not strain criminal statutes, or try to be better in the administration of the law than the law itself is."

License.

Moving pictures are within the contemplation of a municipal ordinance regulating a license fee for a kinetoscope. *Laurelle v. Bush*, 17 Cal. App. 409, 119 Pac. 953.

Under city ordinances which enact that certain businesses must be duly licensed, and name among such "common shows," and which provide that a "common show" shall be deemed to include Ferris wheel, gravity steeple chase, chute . . . and all other shows of like character," a license may be required for a free moving picture show in an ice cream saloon and candy store to draw trade. *Weistblatt v. Bingham*, 58 Misc. 328, 109 N. Y. Supp. 545. The court said that while moving picture was not within term "other shows of like character," it is included in words "common shows."

But under a section of a city charter 40 L.R.A. (N.S.)

examination before operating a moving picture machine in a large city does not deprive him of his liberty or property without due process of law.

Same — discrimination — allowing time to secure license.

2. A statute requiring any person desiring to engage in the business of moving picture machine operator to secure a license is not rendered discriminatory and invalid because it gives those engaged in the business at the passage of the statute sixty days in which to secure their licenses.

Statute — construction — meaning of language.

3. That a section of a statute requiring any "such person" desiring to engage in the business of moving picture machine operator follows a section dealing with persons engaged in the business at the passage

that "it shall not be lawful to exhibit to the public in any building, garden, or grounds, concert room, or other place or room within the city of New York, any interlude, tragedy, comedy, opera, ballet, play, farce, minstrelsy, or dancing, or any other entertainment of the stage, or any part or parts therein, or any equestrian circus or dramatic performance, or any performance of jugglers or rope dancing, or acrobats, until a license for the place of such exhibition for such purpose shall have been first had and obtained as hereinafter provided," a license is not required for a free moving picture show in an ice-cream saloon and candy store to draw trade. *Ibid*.

The power of a mayor to grant a license to maintain a moving picture show is discretionary, and not mandatory, under an ordinance which requires that common shows, etc., must be licensed, and which provides that all licenses shall be granted on authority of the mayor. *People ex rel. Moses v. Gaynor*, 137 N. Y. Supp. 196.

In *State v. Morris*, — Del. —, 76 Atl. 479, it was held that one who operates a moving picture show is required to procure a license under a statute which provides that "no person or persons, firm, company, or corporation, without having first obtained a proper license therefor . . . shall . . . be engaged in, prosecute, follow, or carry on any trade . . . that is to say . . . exhibiting circuses . . .," and which further provides that "every building, tent, space, or area where feats of horsemanship or acrobatic sports or theatrical performances are exhibited shall be deemed a circus within the meaning of this act."

Where an ordinance designates all the conditions under which a permit for a license shall be issued, a requirement that a license shall issue only after a permit therefor has been granted is not invalid as delegating legislative powers. *Laurelle v. Bush*, *supra*.

An ordinance which requires a permit for exhibition of moving pictures is not unconstitutional because none is required for stereopticon or other stationary pictures.

of the act does not confine the operation of the statute to such persons and thereby make it discriminatory, where the introductory language of the statute shows that it is to apply to all who wish to engage in such business.

Block v. Chicago, 239, Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011.

Because of possibilities in moving picture shows to degenerate and require policing, it was held in *Higgins v. Lacroix*, — Minn. —, 137 N. W. 417, that a license fee of \$200 for a permanent moving picture show in a growing village of 1,000 was not so unreasonably high as to manifestly show an abuse of power or any unlawful purpose or result.

Nor was the ordinance imposing such a fee a prohibition under the guise of license or regulation, because of the fact that one was unable to make any particular profit out of the venture, as that fact did not prove that others might not be able to make a success thereof. *Ibid*.

Place of exhibition.

An ordinance making it unlawful to operate a moving picture show within a certain district of a city is a valid exercise of an express power conferred upon cities by the legislature to license, tax, regulate, restrain, or prohibit theatrical and other amusements. *Dreyfus v. Montgomery*, — Ala. —, 58 So. 730.

An ordinance prohibiting the operation of moving picture shows in a certain section of a city is valid and operative as against one who at the time is operating such a show under a license from a city. *Ibid*.

Because of manifest menace by fire and panic likely to result to school children and church congregations, it was held in *Laurelle v. Bush*, *supra*, that prohibiting the location of moving pictures within a distance of 200 feet from the front line of any church or school, or within 100 feet of the property line of the sides or rear of any church or school, is not invalid as prescribing unreasonable or unnecessary conditions.

And in *People ex rel. Moses v. Gaynor*, *supra*, it was held that there was no abuse of discretion under a city ordinance requiring common shows to be licensed, in denying a license to maintain a moving picture show on premises which immediately adjoin a large public school and is opposite the parish and other buildings of a church.

Requirement that applicant for a new permit to conduct moving picture exhibitions shall specify by street and number the place where the proposed moving picture exhibition is to be located is a reasonable and necessary expedient, intended to aid in a competent and effective enforcement of an ordinance. *Laurelle v. Bush*, *supra*.

Character of pictures.

A city may by ordinance forbid exhibitions of immoral, obscene, or otherwise 40 L.R.A. (N.S.)

Same — title — sufficiency — moving picture machine operator.

4. A title, "An Act to Add a New Article to the Code of Public Local Laws to Be Known as 'Moving Picture Machine Operators,' Subtitle 'Baltimore City,' and Be

criminal moving or stationary pictures. 33 Cyc. 258.

An ordinance which provides that a permit shall not issue for the exhibition of any immoral or obscene moving pictures is within the police power of a city. *Block v. Chicago*, *supra*. The court said: "The ordinance applies to 5 and 10-cent theaters such as the complainants operate, and which on account of the low price of admission are frequented and patronized by a large number of children as well as by those of limited means who do not attend the production of plays and dramas given in the regular theaters. The audiences include those classes whose age, education, and station in life especially entitle them to protection against the evil influence of obscene and immoral representations. The welfare of society demands that every effort of the municipal authorities to afford such protection shall be sustained, unless it is clear that some constitutional right is interfered with."

Moving pictures, such as "James Boys," "Midnight Riders," which portray exhibitions of crime, are immoral though illustrating experiences connected with the history of the country, within the meaning of an ordinance prohibiting the exhibition of obscene and immoral pictures. *Ibid*.

Censorship of films.

An ordinance which gives to the chief of police power to determine whether a picture or series of pictures is immoral or obscene is not unconstitutional as delegating to him legislative and judicial powers. *Block v. Chicago*, *supra*.

Nor is such ordinance unconstitutional as discriminating, because some of the same scenes displayed by the moving pictures are shown in theaters, where the scenes are enacted upon the stage, and there is no requirement that the show shall be given before the chief of police and a permit obtained. *Ibid*.

Revocation of license.

A license to maintain a moving picture show is revocable at pleasure of authorities granting same. *Dreyfus v. Montgomery*, *supra*.

But the exercise of power must be reasonable, and so the fact that many placed had inadequate fire protection, and many of the pictures shown were vulgar and licentious and representations of lawlessness and crime, did not warrant a general order revoking all licenses granted to moving picture shows. *William Fox Amusement Co. v. McClellan*, 62 Misc. 100, 114 N. Y. Supp. 594 J. H. B.

Numbered," is sufficient to cover matter providing for the appointment of examiners to license persons wishing to engage in the business of moving picture machine operators, and the fixing of their compensation.

Legislature — delegation of power — license of moving picture machine operator.

5. The legislature may delegate to a board power to license moving picture machine operators, and provide for the revocation of their licenses.

Justice of the peace — jurisdiction — absence of jury.

6. The legislature may confer upon justices of the peace final jurisdiction to hear and determine, without a jury, prosecutions for violation of a statute forbidding the operation of moving picture machines without a license.

(February 9, 1912.)

APPEAL by relator from an order of the Baltimore City Court quashing a writ of certiorari directing appellee, police justice, to send and certify to said court the record of the proceedings had before him in an action in which relator was the defendant for an alleged violation of the moving picture statute. Affirmed in part.

The facts are stated in the opinion.

Messrs. J. Wallace Bryan and Watson E. Sherwood, with Messrs. Lemmon & Clotworthy, for appellant:

The act of 1910, chapter 693, is unconstitutional in that it arbitrarily and unreasonably discriminates against the relator and all other persons in like situation with him who were engaged in the vocation of moving picture machine operator in Baltimore city at the time the act was passed, and thus deprives him and them of life, liberty, and property without due process of law, and denies him and them the equal protection of the law.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; State v. Caspare, 115 Md. 7, 80 Atl. 606; State v. Rice, 115 Md. 317, 36 L.R.A. (N.S.) 344, 80 Atl. 1026; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; State v. Broadbelt, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; State v. Hyman, 98 Md. 596, 64 L.R.A. 637, 57 Atl. 6, 1 Ann. Cas. 742; Singer v. State, 72 Md. 464, 8 L.R.A. 551, 19 Atl. 1044; Luman v. Hitchens Bros. Co. 90 Md. 14, 46 L.R.A. 393, 44 Atl. 1051; State v. Knowles, 90 Md. 646, 49 L.R.A. 695, 45 Atl. 877; Scholle v. State, 90 Md. 729, 50 L.R.A. (N.S.)

L.R.A. 411, 46 Atl. 326; Watson v. State, 105 Md. 650, 66 Atl. 635; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Smith v. State, 66 Md. 215, 7 Atl. 49; Alexander v. Worthington, 5 Md. 471; United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; Ct. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168.

The act is in further violation of the 14th Amendment to the Constitution of the United States, in that it unjustly discriminates against operators in Baltimore city in favor of those in the rest of the state, and denies to the former the equal protection of the law.

8 Cyc. 1054; State v. Broadbelt, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; Cooley, Const. Law, 249; Singer v. State, 72 Md. 464, 8 L.R.A. 551, 19 Atl. 1044.

If the act be interpreted as vesting complete summary jurisdiction in police magistrates to try and punish violations, it denies the right of trial by jury guaranteed by the Constitution of the state.

Pierce v. Pierce, 46 Ind. 86; 12 Cyc. 321; State v. Glenn, 54 Md. 601; Danner v. State, 89 Md. 220, 42 Atl. 965; State ex rel. Baum v. Warden, 110 Md. 579, 73 Atl. 294.

Messrs. Emory L. Stinchcomb and Isaac Lobe Straus for appellee.

Pattison, J., delivered the opinion of the court:

In this case the relator, Frank M. Ebert, on the 22d day of October, 1910, was arrested upon a warrant charging him with having unlawfully operated a moving picture machine in the city of Baltimore without having first secured a license in accordance with the provisions of chapter 693 of the Acts of 1910 of the general assembly of Maryland, and when carried before the respondent, a police magistrate of that city, he protested against and denied the jurisdiction and authority of the magistrate to find him guilty of any punishable offense upon the facts alleged in the warrant, for the reason that said alleged act of assembly which he was charged with having violated was unconstitutional and void. The case was from time to time postponed until on the 6th day of December, 1910, the relator, after unsuccessfully protesting against the jurisdiction of the magistrate for the reason stated above, asked for a jury trial, which was refused him; but the justice took his recognizance for his appearance before him at a later day therein named. Before the

case was heard, however, the relator filed his petition in the Baltimore city court, alleging the facts as we have stated, and further alleging therein: First. That the said act of 1910 violates the 14th Amendment to the Constitution of the United States by unjustly, arbitrarily, and unreasonably discriminating against the petitioner and all others in like situation with him, who were engaged in the vocation of moving picture machine operator in the city of Baltimore at the time of the passage of said act, by depriving him and all others in like situation with him of his and their liberties and property without due process of law, and denying to him and them the equal protection of the laws. Second. That the said act is also void for the reason that it violates the Constitution of Maryland: (1) For the reasons assigned above, by which it is alleged it contravenes the Federal Constitution. (2) "Because it embraces more than one subject, and its subject-matter is not sufficiently described in its title." (3) It assumes unlawfully to delegate to a certain board of examiners attempted to be created therein legislative powers and discretion, contrary to article 8 of the Bill of Rights of the state of Maryland. (4) Because as interpreted it vests complete summary jurisdiction in police magistrates and justices of the peace of Baltimore city to try and punish violations under it, without providing for trial by jury or for any appeal to a higher court.

The petition then prays the court to issue its writ of certiorari commanding the justice, Daniel J. Loden, to send and certify to such court the record of the proceeding in the case, together with the writ that the jurisdiction of the magistrate might be inquired into. The writ was issued as prayed, to which a return was made and filed by the justice of the peace termed the defendant in the certiorari proceedings, and by him a motion was made to quash the writ. The court after hearing argument held that the petitioner having prayed a jury trial was, under the act, entitled to a trial by jury, and thus passed an order quashing the writ and remanding the case to the justice of the peace for further proceedings to be had in conformity with his opinion therein expressed. It is from this order that the relator has appealed.

The title of the act of 1910, chap. 693, is: "An Act to Add a New Article to the Code of Public Local Laws, to Be Known as 'Moving Picture Machine Operators,' Subtitle 'Baltimore City,' and Be Numbered." Following the title are several "whereas" clauses in which attention is called to the danger to life and property incident to the use of explosives in the op-

eration and management of moving picture machines by careless and incompetent operators, and to the necessity for the enactment of a law "by which none but persons who are skilled in the avocation of operating moving picture machines or electrical projecting apparatus should be allowed to pursue that calling, and to that end a board of examining moving picture machine operators should be created, whose duty it shall be to examine moving picture machine operators desiring to follow that trade, and give such as may possess the proper requisites a proper certificate of proficiency." Thereafter follow the seven sections of the act. The first section is the enacting clause. The second section defines the meaning of the term "moving picture machine."

The third section provides that the governor "shall biennially appoint in and for Baltimore city three persons, one from the board of fire underwriters' association, one master electrician to represent the building inspector's office of the city of Baltimore, and one moving picture machine operator, all of whom have had not less than five years' experience at the business and who have resided in Baltimore city, state of Maryland, for a period of not less than two years next preceding their appointment, who shall be known as 'the board of examining moving picture machine operators.'"

Section 4 provides that "all persons who at the time of the enactment of this act are engaged in the business of a 'moving picture machine operator' in the city of Baltimore, as described in § 2 of this act, shall within sixty days after the first day of May, 1910, comply with all the provisions of this act; otherwise they shall be guilty of a misdemeanor, and, upon conviction before a justice of the peace or a police justice, be fined a sum not less than \$10, nor more than \$50, for each day or fraction thereof that they shall pursue the business 'moving picture machine operator' in the city of Baltimore, and, if said fine is not paid, he shall be subject to imprisonment for ninety days, or both, at the discretion of the judge."

By § 5 it is provided that "if any such person desires to engage or continue in said business of 'moving picture machine operator' after the passage of this act, he shall apply to the board provided for in § 3 of this act for a license, and submit to an examination as to his qualification before said board; and . . . if the said board shall find after due examination, that the said applicant for a license possesses a reasonable knowledge of the 'moving picture machine operator' business and electricity, then the said board shall, upon the payment of the fee herein provided for, issue to said

applicant a license for a term of not more than one year, and shall keep a record of all licenses so issued; and no person shall be granted a license who has not reached the age of twenty-one years and makes oath to such fact, and has served at least one year with a licensed moving picture machine operator in the business. . . . No person granted a license under the provisions of this act shall operate a moving picture machine or electrical projecting apparatus after the expiration of said license or after said license shall have been suspended or revoked as herein provided, unless the said license or renewal of same shall have been received as herein provided. This action also names an original as well as the renewal fee to be paid for licenses so granted."

Section 6 vests in the board of examining moving picture operators the power to suspend or revoke the license of any operator who is negligent in the operation of his machine, or who operates it in a manner dangerous to the safety of life or property, but this power is to be exercised only after full opportunity is afforded the party charged to be present in person, or by counsel, and make any defense he may have, and then only subject to the restriction and limitation therein named.

Section 7 states the amount to be paid to the board of examiners for their services, and directs that it, together with certain expenses therein named, be paid out of the funds received from the issuance of licenses; and further directing that the surplus, if any, from such source be paid over to the state treasurer. It also provides for the times of meeting of said board and the notice to be given by them of such meeting.

Taking up the objections urged against the validity of this statute, which the defendant is here charged with having violated, we will first consider the objection that it contravenes the 14th Amendment to the Federal Constitution, and the twenty-third article of the Bill of Rights of this state, both of which declare that no person shall be deprived of his life, liberty, or property without due process of law. These constitutional safeguards have been so fully considered and discussed not only by the Supreme Court of the United States, but by this court as well, that the proper construction to be placed thereon when attempted to be applied in cases of this character seems to be well settled and established. *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Powell* 40 L.R.A. (N.S.)

v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Singer v. State*, 72 Md. 464, 8 L.R.A. 551, 19 Atl. 1044; *State v. Broadbelt*, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; *Scholle v. State*, 90 Md. 729, 50 L.R.A. 411, 46 Atl. 326; *State v. Hyman*, 98 Md. 596, 64 L.R.A. 637, 57 Atl. 6, 1 Ann. Cas. 742; *Watson v. State*, 105 Md. 650, 66 Atl. 635.

It is plain that the act in question was passed for the purpose of protecting the public from the consequent injury and loss to life and property resulting from the operation of moving picture machines by incompetent persons.

In the case of *Singer v. State*, 72 Md. 464, 8 L.R.A. 551, 19 Atl. 1044, similar requirements and restrictions were by statute imposed upon plumbers of Baltimore city. There the court said: "As to the common and ordinary occupations of life, little or no legislation may be necessary; but if the occupation or calling be of such a character as to require a special course of study or training or experience, to qualify one to pursue such occupation or calling with safety to the public interests, no one questions the power of the legislature to impose such restraints and prescribe such requirements as it may deem proper for the protection of the public against the evils resulting from incapacity and ignorance. And neither the 14th Amendment of the Federal Constitution, nor article 23 of the Bill of Rights of the Constitution of this state, was designed to limit or restrain the exercise of this power. . . . We all know that in a large city like Baltimore, with its extensive system of drainage and sewerage, the public health largely depends upon the proper and efficient manner in which the plumbing work is executed. And, this being so, the legislature not only has the power, but it is eminently wise and proper that it should provide some mode by which the qualification of persons engaged in that business shall be determined. . . . Such an act is but the ordinary exercise of the police power of the state, and does not violate in any sense the constitutional rights of the traverser."

The danger to life and property incident to the use of moving picture machines when operated by incompetent persons is known to all. The films used in connection with the machine are highly explosive and dangerous in their character, and if not properly managed and cared for are liable to explode.

In large cities compactly built like Baltimore, there exist possibilities of immense loss of property by fire, as was shown by the great fire of 1904, which swept the business section of the city and destroyed property

worth many millions of dollars. Moreover, in large cities moving picture machines are usually operated in large, crowded rooms or halls filled with a constantly changing assemblage, largely composed of women and children, and where, in the event of explosion or fire, excitement and panic usually follow, resulting in great loss of life. Therefore every reasonable and proper precaution and safeguard should be taken to prevent or lessen the possibilities of fires so destructive and disastrous in their consequences. It was to prevent or lessen explosions and fires, and to avoid the consequences mentioned, that this act was passed, providing a mode by which the qualification of moving picture machine operators operating machines in the city of Baltimore shall be determined. The act was to protect the people of Baltimore city against the consequences resulting from the work of incompetent moving picture machine operators, and was passed in the exercise of the police power of the state, and does not in our opinion violate either the Federal or state Constitution. *Singer v. State*, supra; *State v. Broadbelt*, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771.

It is contended, however, by the relator, that the act complained of, as construed by him, applies only to those persons who were at the time of the passage of the act engaged in the business of moving picture machine operators of Baltimore city, and not to those who were not at the time of its passage engaged in said business, but who have since become engaged therein, or who may now or hereafter wish to engage in said business; and by reason of this alleged discrimination between the classes mentioned, which classification he alleges is unreasonable and arbitrary, the act is in violation of both the Federal Constitution and the Bill of Rights of this state. We cannot adopt the contentions of the relator, for in our opinion he improperly construes the statute in holding that it does not apply to both classes of persons mentioned by him.

It is true that § 4 of the act applies only to those persons who were engaged in the business of moving picture machine operators at the time of its enactment, and by its provisions they were given sixty days after the 1st day of May 1910 (from and after which date the statute became effective), within which to procure the license required by the succeeding section of the act. These persons were permitted to continue in said business, without violating the statute, if they at any time before the expiration of the said sixty days procured such license. It was only upon their failure to obtain the license within that time that their continuance in business thereafter, without such

license, was made a misdemeanor by the statute, subjecting them upon conviction to the payment of a fine of not less than \$10 nor more than \$50 for each day or fraction thereof that they thereafter pursued said business.

Before a license could be procured, it was made necessary by the statute that the applicant should submit to an examination to be made by the board of examiners. The applicant therefore was subject to all the necessary delays incident to such examination before a license could be obtained by him, if successful in his examination. Thus a provision such as is found in § 4 of this act would seem to be necessary, for without it places of amusement where moving picture machines were operated at the time of the enactment of the statute would have to be closed immediately upon the act becoming effective and before a license could be procured under the act. It was to prevent this, no doubt, that this provision was inserted in the statute, and thus it had application only to those persons who were in the business at the time of the enactment of the statute. But, as we construe the statute, § 5 applies to both classes; that is, to those that were in business at the time of its enactment as well as to those not at that time in business, but who thereafter wished to engage therein.

Section 5 provides that "if any such person desires to engage or continue in said business of 'moving picture machine operator' after the passage of this act he shall apply to the board provided for in § 3 of this act, for a license, and submit to an examination as to his qualification before said board," etc. The relator in construing the language of this section contends that by "such person" is meant such persons only as are included within the provisions of the immediately preceding section of the act, or § 4, and, as that section applies only to those persons who were in business at the time of the enactment of the statute, this section likewise applies only to that class of persons, and not to those who should thereafter desire to engage in said business and who were not in such business at the time of the enactment of the statute. This, we think, is not a proper construction of this section of the act.

The preamble or "whereas" clauses of the act point out the danger to life and property resulting from the use of moving picture machines when operated by careless and incompetent persons, and then declares, as we have said before, "that a law (should) be enacted by which none but persons who are skilled in the avocation of operating moving picture machines or electrical projecting apparatus should be allowed to pur-

sue that calling, and to that end a board of examining moving picture machine operators should be created, whose duty it shall be to examine moving picture machine operators desiring to follow that trade, and give such as may possess the proper requisites a proper certificate of proficiency." From this language it is shown that all classes of moving picture machine operators were intended to be included within the provisions of the act. "None but persons skilled in the avocation" were by it permitted to pursue that calling, and all operators are required to submit to the examination provided for by this statute, and to obtain a license before engaging or continuing in such avocation. Moreover, the language is: "If any such person desire to engage or continue in said business" he shall apply for license as the statute directs. It will thus be seen that it embraces within its provisions, not only those that desire to continue in the business, but includes as well those who desire to engage in such business. In our opinion this language is sufficiently comprehensive to include all classes of moving picture machine operators, and is not confined to that class of operators who were in business at the time of the enactment of the statute, as claimed by the relator.

It is also urged against the statute that its title is insufficient because (1) it embraces more than one subject, and (2) that the subject-matter of the act is not sufficiently described in the title. We have already in this opinion set out the title in full, and have given at least the substance of the provisions of the statute, and therefore it is unnecessary for us to do so again. The requirement of the constitution (art. 3, § 29) in respect to this objection is that "every law enacted by the general assembly [of Maryland] shall embrace but one subject, and that shall be described in its title."

In *Baltimore v. Reitz*, 50 Md. 574, this court in construing this section of the Constitution said: "If several sections of the law refer to and are germane to the same subject-matter which is described in its title, it is considered as embracing but a single subject and as satisfying the requirements the Constitution in this respect. While the title must indicate the subject of the act, it need not give an abstract of its contents, nor need it mention the means and method by which the general purpose is to be accomplished." Applying this rule of construction to the title of the act here involved, we do not find it defective for either of the reasons urged against it

As to the third objection made against the act, which objection is not referred to or mentioned in the brief of the appellant, we think it unnecessary to do more than refer to the case of *Downs v. Swann*, 111 Md. 53, 23 L.R.A. (N.S.) 739, 134 Am. St. Rep. 586, 73 Atl. 653, and the cases there cited. In that case the court, speaking through the late Judge Schmucker, said: "It has been also settled by numerous decisions that the state may delegate the police power to subordinate boards and commissions, and that the reasonable and just exercise by them of the delegated power will be upheld." *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Singer v. State*, 72 Md. 464, 8 L.R.A. 551, 19 Atl. 1044; *State v. Broadbelt*, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; *State v. Knowles*, 90 Md. 646, 49 L.R.A. 695, 45 Atl. 877; *Scholle v. State*, 90 Md. 729, 50 L.R.A. 411, 46 Atl. 326; *Watson v. State*, 105 Md. 650, 66 Atl. 635.

We have now reached the fourth and last objection urged against the act, which is, that it vests summary jurisdiction in the police magistrates and justices of the peace of Baltimore city to try and punish violations under it, without providing for trial by jury or for an appeal to a higher court. We find this subject fully discussed in the case of *State v. Glenn*, 54 Md. 572. In that case the defendant was, by a justice of the peace of this state, convicted upon the charge of being a vagrant, habitually disorderly person, and was by the justice sentenced to the Maryland House of Correction for the period of six months. The defendant was afterwards discharged from the institution to which she had been sentenced, under a writ of habeas corpus; the judge discharging her, holding that the jurisdiction under which she had been convicted was unconstitutionally conferred, and therefore the conviction was a nullity. When the case reached this court, one of the questions presented was whether the legislature could confer upon the justices of the peace of this state summary jurisdiction to try and convict a party of an offense such as that with which the prisoner was charged. Judge Alvey in discussing the question thus presented, after referring to similar statutes in England by which summary jurisdiction was given to justices of peace to try like offenses, and where the punishment prescribed by such statute was imprisonment and hard labor, said: That "the exercise of the summary jurisdiction, therefore, is not, in England at least, regarded as being in violation of the fundamental guaranties of

the rights and liberties of the people; and the personal liberty of the subject at this day is as well and jealously protected in England as in any other country where the principles of Magna Charta and of the common law are enforced." The judge then, after naming a number of the English statutes that conferred summary jurisdiction upon justices of the peace, stated that "these statutes have been in force here from our earliest history and are still in force, and we are not aware that it has even been supposed that their provisions were in any way restrained or controlled by the declaratory provisions in the Declaration of Rights. There are a great many statutes upon the statute book relating to a great variety of subjects, prescribing fines, penalties, and forfeitures as punishment, for doing or omitting to do certain things, and by many of those statutes jurisdiction has been given to justices of the peace, from whose judgments no appeal was provided for until within a comparatively recent period." The opinion also refers to the act of 1777, chap. 6, known as the "fines and penalties act," which was passed at the first session of the state legislature after the adoption of the Declaration of Rights and the Constitution of 1776; and also the statutes of 1781, chap. 13, and 1785, chap. 47, in regard to bastardy, and in which reference it says of them that "these statutes have all coexisted with the several Constitutions of the state; and in the various cases that have occurred, involving their provisions, we have never heard it contended that the proceedings thereby authorized were not constitutional, because the trial by jury was not provided for, either in the first instance or by an appeal."

In *State v. Ward*, 95 Md. 121, 51 Atl. 848, the defendant was convicted before a justice of the peace for violation of certain sections of the public local laws of Anne Arundel county, amended by chapter 582 of the Acts of 1892, which regulated the shooting of wild fowl in said county. The statute provided for the obtaining of licenses to place blinds and shoot therefrom, and also made it unlawful to establish blinds nearer to other blinds than the distance therein given, and, upon conviction before a justice of the peace for the violation of any of the foregoing provisions, the statute imposed a fine of not less than \$5 nor more than \$25 for each offense, with the additional fine upon the owner of the blind placed nearer to the already established blind than the distance allowed in the statute, the sum of \$5 for each week such blind remained, after due

notice given to such owner by the owner of the previously established blind to remove the same. No right of appeal was given by the statute, and this court in that case said: "Where the jurisdiction has been conferred by special statute, the alleged offender has no legal right to call for a jury . . . unless there is something in the act directing to the contrary. There being nothing in the act . . . that confers upon the party charged the right to demand of the justice a jury trial, it follows that the justice has jurisdiction to hear and finally determine the charge set out in the warrant."

Upon the authority of the cases cited we are unable to find that the jurisdiction conferred upon justices of the peace by the statute here questioned violates the constitutional provisions mentioned by the relator in this his fourth contention. The justice of the peace before whom the relator was carried had jurisdiction to finally hear and determine the charge under which he was arrested, but we do not think the relator was entitled to a jury trial as prayed by him. Therefore the learned court below, in our opinion, erred in holding that he was so entitled, and in remanding the case to the justice, with directions to him that he "grant unto the petitioner his prayer for a trial by jury."

The counsel of the relator have urged other objections to the validity of this statute, and have pointed out a number of alleged defects and omissions therein, all of which we have carefully considered, but we do not think they go to the extent of rendering the statute void, although they show a great want of thought and skill in the drafting of the bill. We therefore suggest, inasmuch as the legislature is now in session, that the statute be amended by supplying the omissions and by removing therefrom the uncertain features or provisions of the act so that it may be more easily understood and enforced.

As the order of the court below not only quashes the writ of certiorari and remands the case to the justice of the peace, but also directs him to grant unto the petitioner his prayer for a trial by jury, we will affirm in part and reverse in part the order of the lower court and remand the case.

Order affirmed in part and reversed in part, and case remanded. The appellant, Frank M. Ebert, to pay the costs above and below.

Petition for rehearing denied.

MICHIGAN SUPREME COURT.

LIZZIE SWAINE et al., Appts.,

v.

ROBERT W. HEMPHILL.

(165 Mich. 561, 131 N. W. 68.)

Administrator — continuing testator's business — consent — loss — liability.

Consent by all interested in a decedent's estate, that his business shall be continued by the administrator, will relieve the ad-

ministrator from liability for losses resulting therefrom, although he failed to inform them that his operations were not profitable.

(May 8, 1911.)

A PPEAL by complainants from a decree of the Circuit Court for Washtenaw County, in Chancery, dismissing a bill filed to set aside defendant's discharge as administrator and the allowance of his final account, to reinstate his bond, and for an accounting and other relief. Affirmed.

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Statement by Brooke, J.:

Complainants are, respectively, the widow and daughters of Frederick J. Swaine, who died intestate on April 14, 1897. Deceased had for many years prior to his death been engaged in the malting business in the city of Ypsilanti. Defendant, who was at that time cashier of the Ypsilanti Savings Bank, was appointed, first special, and later general, administrator of the estate. As such administrator, he continued the business of the deceased from April, 1897, to November, 1903, when his final account was allowed and his bond canceled. Complainants signed a waiver of notice of hearing upon defendant's final account, and at the same time executed a power of attorney authorizing him to continue the business, which he did until November, 1904, when it was

closed out. At that time there remained due from the estate to the Ypsilanti Savings Bank the sum of \$4,000. The bill of complaint sets out at length the dealings of defendant with the estate, and avers that it was complainants' expressed desire that the business should be continued only so long as it was profitable; that defendant, without informing them, continued to run it at loss, and that he fraudulently secured their consent to his discharge as administrator and the cancellation of his bond as such. Complainants pray that the order allowing the final account and discharging defendant as administrator be set aside because procured by fraud, and that his bond be reinstated; that defendant be held liable for all losses occasioned by the conduct of the business, and ordered to reimburse com-

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I. Introduction,

The general question covered by this note is that of the right of an executor, administrator, testamentary trustee, or guardian to carry on, after the death of the person he represents, a trade or business belonging to him, or to embark the funds of the estate in trade or business, as well as the question of the individual liability of the personal representative, etc., and that of the estate he represents, where he does carry on such a business. The investment by a personal representative, etc., or a guardian, of the funds of an estate in shares of a mercantile corporation, as well as in the personal representative's own business, or the completion of building contracts, etc., held by a decedent at the time of his death, are questions not covered by this note.

It is a general rule, widely recognized, that it is not within the ordinary duties of an executor, administrator, testamentary trustee or guardian, to carry on a trade or business on behalf of the estate he represents, unless expressly empowered to do so by will, or by the commands of articles of copartnership, except speedily to wind up the business in order to settle the estate.

If a personal representative or guardian does carry on such a trade or business, he becomes answerable to those interested in the estate for all losses sustained; while the profits, if any, belong to the estate. In some states there are statutes that permit the carrying on of a trade or business by a personal representative or guardian; or continuing farming operations in order to mature and harvest crops growing at the

plainants therefor. Defendant answered, denying all material averments of the bill. From a decree dismissing the bill, complainants have appealed.

Mr. William Lucking, with Mr. Allen Campbell, for appellants:

Defendant is liable for and must account to complainants for all assets and for all profits and losses of the business, less disbursements made to complainants for living expenses.

11 Am. & Eng. Enc. Law, 2d ed. 973-975; Schouler, Exrs. & Admsrs. § 325, p. 385; Perry, Tr. § 429; Woerner, Am. Law of Administration, pp. 688, 732; Hill, Tr. § 379; Re Rose, 80 Cal. 166, 22 Pac. 86; Fleming v. Kelly, 18 Colo. App. 23, 69 Pac. 272; Mathews v. Sheehan, 76 Conn. 654,

100 Am. St. Rep. 1017, 57 Atl. 694; Peterman v. United States Rubber Co. 211 Ill. 581, 77 N. E. 1108; Grace v. Seibert, 235 Ill. 190, 22 L.R.A.(N.S.) 301, 85 N. E. 308; Frey v. Eisenhardt, 116 Mich. 160, 74 N. W. 501; Re Peck, 79 App. Div. 296, 80 N. Y. Supp. 76, affirmed in 177 N. Y. 538, 69 N. E. 1129; Warren v. Union Bank, 157 N. Y. 259, 43 L.R.A. 256, 68 Am. St. Rep. 777, 51 N. E. 1036; Hooper v. Hooper, 29 W. Va. 276, 1 S. E. 280.

Mr. John P. Kirk, for appellee:

Where all of the interested parties consent to the carrying on of decedent's business, such consent authorizes the personal representative to carry on the business of the decedent in good faith.

18 Cyc. 242, 243; 11 Am. & Eng. Enc. Law, 2d ed. 975; 1 Perry, Tr. § 454; Poole

time of the death of the person he represents. It is also held in some cases that a court of chancery, or a court having jurisdiction of the administration, has power to direct a personal representative or guardian to engage in trade or business on behalf of the estate he represents. Although there are other decisions to the contrary.

In the absence of authority from a court duly empowered, an executor, administrator, testamentary trustee, or guardian who carries on a business belonging to an estate without being specially authorized by will or articles of copartnership is individually liable for all the debts contracted by him while engaged in such trade or business. In some cases debts contracted, as well as the expenses of conducting the business, have been allowed from the estate, especially where the business resulted in a profit. Where a trade or business is carried on without express authority, those beneficially interested in the estate may, at their election, hold the personal representative answerable for the value of the assets embarked in the trade, together with interest thereon; or they may claim the profits of the business; or they may charge the personal representative with the rental of real estate used in carrying on the business.

But where there is clear and express testamentary authority for carrying on a trade or business, or it is conferred by articles of partnership (a parol direction made before the death of a trader to the person who becomes his executor or administrator being insufficient), the personal representative will be relieved from individual liability for losses sustained from carrying on the business, excepting from such as are the result of his own negligence.

There is some conflict upon the question whether testamentary power conferred upon an executor to carry on a trade or business on behalf of an estate passes to an administrator *cum testamento annexo* or *de bonis non*.
40 L.R.A.(N.S.)

The weight of authority is to the effect that the executor, even though he carries on a trade or business pursuant to testamentary authority, is individually liable to creditors for all debts contracted by him while so engaged; and that the creditors cannot proceed against the estate in order to satisfy their claims. But the executor will be indemnified for such personal liability from the assets embarked by his testator in the trade or business, or from the income therefrom; the general assets of the estate not being bound by such debts unless the testator has evinced such an intention by clear and unequivocal language. However, there are a few decisions which hold that the general assets of an estate are answerable for such debts. But in order that an executor may be indemnified for such individual liability, he must not be indebted or in default to the estate, or conduct the business for a longer time, than may be specified in the will.

Persons who become creditors while an executor is carrying on a trade or business may be subrogated to the former's right of indemnity. Some courts also hold that creditors may, in the first instance, proceed in equity to collect their claims from the trade assets, especially when the executor is insolvent or not responsible.

Where a business or trade is carried on by virtue of a statute permitting it, or by an order of a competent court a personal representative, etc., is relieved from individual liability for losses, or for debts contracted by him while so engaged.

The heirs or those beneficially interested in an estate, as well as such creditors of the intestate as expressly consent thereto, may estop themselves from questioning the conduct of a personal representative in carrying on a trade or business, or from holding him answerable for resulting losses, where the business was carried on at their request or solicitation, or with their knowledge, no objection to his conduct being made by them.

v. Munday, 103 Mass. 174; French v. Davis, 38 Miss. 167; Merritt v. Merritt, 62 Mo. 150; Frey v. Eisenhardt, 116 Mich. 160, 74 N. W. 501; Brown v. Forsche, 43 Mich. 501, 5 N. W. 1011; Pearson v. Gillenwaters, 99 Tenn. 446, 63 Am. St. Rep. 844, 42 S. W. 9, 199; Schouler, Exrs. & Adms. 2d ed. § 332, p. 406; Poole v. Munday, 103 Mass. 176; Mathews v. Sheehan, 76 Conn. 654, 100 Am. St. Rep. 1017, 57 Atl. 694; Duffield v. Brainerd, 45 Conn. 424, 11 Mor. Min. Rep. 526; Re Ring, 132 Iowa, 216, 109 N. W. 713.

Brooke, J., delivered the opinion of the court:

The record conclusively shows that at the death of Frederick J. Swaine his personal

estate amounted to \$16,261.01, and that included in this sum were notes of the Ann Arbor Brewing Company for \$4,485.79 and note and account of Kolb Brothers for \$7,300. Swaine at that time was indebted in the sum of \$16,132.14, \$10,500 of which he owed to the Ypsilanti Savings Bank. If all the assets of the personal estate had been collectable, they would barely have equalled the liabilities. By carrying on the business for nearly eight years, the Kolb Brothers account was collected in full and the Ann Arbor Brewing Company account was reduced so that the final loss upon it was less than \$2,500. The personal estate in the hands of defendant was increased shortly after Swaine's death by the payment to him by the widow of \$5,450, which she had re-

II. Power of personal representative, testamentary trustee, or guardian to carry on business on behalf of estate.

a. In general.

1. Executor, or administrator, or testamentary trustee.

The doctrine that it is no part of an administrator's duty to carry on a business belonging to an intestate is recognized and applied in the following cases: Steele v. Knox, 10 Ala. 608; Foxworth v. White, 72 Ala. 224; Eufaula Nat. Bank v. Manassas, 124 Ala. 379, 27 So. 258; Re Moore, 72 Cal. 335, 13 Pac. 880; Hallock v. Smith, 50 Conn. 127; Grace v. Seibert, 235 Ill. 190, 22 L.R.A. (N.S.) 301, 85 N. E. 308; Campbell v. Faxon, 73 Kan. 676, 5 L.R.A. (N.S.) 1002, 85 Pac. 760; Willis v. Sharp, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705 affirming 43 Hun. 434; Billingslea v. Young, 33 Miss. 95; Re Sharp, 5 Dem. 516; Western Newspaper Union v. Thurmond, 27 Okla. 261, 111 Pac. 204, Ann. Cas. 1912 B. 727; Robinett's Appeal, 36 Pa. 174; Shinn's Estate, 166 Pa. 121, 30 Atl. 1026, 1030; Merkel's Estate, 131 Pa. 584, 18 Atl. 931; Morrow v. Morrow, 2 Tenn. Ch. 549; Hooper v. Hooper, 29 W. Va. 276, 1 S. E. 280.

And the same rule applies to an executor who is not expressly empowered by will to carry on a trade or business. Steele v. Knox, 10 Ala. 608; Eufaula Nat. Bank v. Manassas, 124 Ala. 379, 27 So. 258; Smith v. Preston, 170 Ill. 179, 48 N. E. 688, affirming 67 Ill. App. 613; Grace v. Seibert, 235 Ill. 190, 22 L.R.A. (N.S.) 301, 85 N. E. 308; Gilligan v. Daly, — N. J. Eq. —, 80 Atl. 994; Re Sharp, 5 Dem. 516; Re Tisdale, 110 App. Div. 857, 97 N. Y. Supp. 494; Morrow v. Morrow, 2 Tenn. Ch. 549; Collinson v. Lister, 20 Beav. 356; Kirkman v. Booth, 11 Beav. 273, 18 L. J. Ch. N. S. 25, 13 Jur. 525, 12 Eng. Rul. Cas. 29.

And the same rule applies to a testamentary trustee who is not empowered by will to carry on a business. Re United States 40 L.R.A. (N.S.)

Mortg. & T. Co. 114 App. Div. 532, 100 N. Y. Supp. 12; Re Hutchinson, 27 N. Y. Week. Dig. 218, 10 N. Y. S. R. 10.

So, the personal representative of a decedent has no authority to invest the assets of an estate in trade on its behalf. Ward v. Tinkham, 65 Mich. 695, 32 N. W. 901.

And it was said in Alexander v. Herring, — Miss. —, 55 So. 360, and Billingslea v. Young, 33 Miss. 95, that in order to justify the carrying on of a business by an administrator there must be statutory authority therefor.

So, an administrator cannot, without an order of a proper court, carry on the business of a warehouseman in a building owned by his decedent, notwithstanding he is entitled to the possession thereof for the payment of debts. Griffin v. Bland, 43 Ala. 542.

As to the power of courts in general to permit a personal representative or guardian to carry on a trade or business on behalf of an estate, see *infra*, II. h.

It has been said that it is a breach of trust for an executor or administrator to carry on a trade or business on behalf of an estate in the absence of express testamentary power to do so. Grace v. Seibert, 235 Ill. 190, 22 L.R.A. (N.S.) 301, 85 N. E. 308; Butler v. Butler, 164 Ill. 171, 45 N. E. 426, affirming 61 Ill. App. 51; Warren v. Union Bank, 157 N. Y. 259, 43 L.R.A. 256, 68 Am. St. Rep. 777, 51 N. E. 1036, reversing 28 App. Div. 7, 51 N. Y. Supp. 27.

So, an administrator who continues the interest of his intestate in a partnership of which he was a member commits a breach of trust. *Ex parte Watson*, 2 Ves. & B. 414; Foxworth v. White, 72 Ala. 224; Morrow v. Morrow, 2 Tenn. Ch. 549.

And a testamentary trustee may be removed from his trust if, without express direction contained in a will, he continues a business belonging to his testator. Re Hutchinson, 27 N. Y. Week. Dig. 218, 10 N. Y. S. R. 10.

As to statutory power to carry on a trade or business belonging to an estate, see *infra*, II. g.

ceived as insurance on her husband's life, and as a legacy from a brother. This money was used by defendant to liquidate, in part, the obligations of the estate. During the entire time defendant ran the business he paid to complainants the sum of \$9,493.88. He likewise paid for improvements to the real estate at complainant's request the sum of \$1,578.66, and during the whole period the residence of complainants was heated at the expense of the business, and one of the men employed at the plant did various odd jobs about complainant's home. According to a statement from defendant's books, conceded to be correct by complainants, it appears that the net loss on manufacturing account for the whole period of eight years was \$1,685.65, or a little over

\$200 per year. The continuation of the business probably facilitated the collection of doubtful or slow assets of the estate. We do not think it can be said that complainants would have been better off than they are had the entire matter been closed up at once upon the death of Swaine. Some profit appears to have been realized in each of the first three years. Thereafter the statement shows losses in three of the years and profits in two. The losses during the latter part of the operation appear to have been caused in part, if not wholly, by competition with large manufacturers of malt, who sold at prices so low that this small plant could not make a profit if it met them. We think the record shows with sufficient certainty that the business was

As to the power of a court of chancery, or the court having jurisdiction of the administration of an estate, to authorize an administrator to carry on a trade or business on behalf of an estate, see *infra*, II. h.

2. Guardian.

Some courts hold that a guardian cannot carry on a business belonging to his ward. *Re Neasmith*, 77 C. C. A. 402, 147 Fed. 160; *Harter v. Miller*, 67 Kan. 468, 73 Pac. 74; *Warren v. Union Bank*, 157 N. Y. 259, 43 L.R.A. 256, 68 Am. St. Rep. 777, 51 N. E. 1036, reversing 28 App. Div. 7, 51 N. Y. Supp. 27; *Corcoran v. Allen*, 11 R. I. 567; *Eichelberger's Appeal*, 4 Watts, 84.

For a guardian to carry on a business or trade for the benefit of his ward is illegal, and amounts to a devastavit. *Warren v. Union Bank*, 157 N. Y. 259, 43 L.R.A. 256, 68 Am. St. Rep. 777, 51 N. E. 1036, reversing 28 App. Div. 7, 51 N. Y. Supp. 27.

So, the conservator of an incompetent person cannot, without an order of the probate court, borrow money with which to purchase an interest in a business for the benefit of his ward. *Church v. Rosenstein*, 85 Conn. 279, 82 Atl. 568.

But it was held in *Remington v. Field*, 16 R. I. 509, 17 Atl. 551, that a guardian might work a farm belonging to his ward, where it was provided by statute that guardians might improve a ward's estate, and apply the profit and income to the support of the latter.

And the right of a guardian to continue the business of his ward was recognized in *Racouillat v. Requena*, 36 Cal. 651.

As to the power of a court having jurisdiction of a guardian to empower him to carry on a trade or business on behalf of his ward, see *infra* II. h.

As to the power of a guardian to carry on a trade or business under statutory power, see *infra*, II. g.

As to the liability of a guardian for profits where he continues the interest of his ward in a partnership business beyond 40 L.R.A. (N.S.)

the time he was permitted to do so by articles of partnership, see *Wedderburn v. Wedderburn*, 2 Keen, 722, affirmed in 4 Myl. & C. 42, 8 L. J. Ch. N. S. 177, 3 Jur. 596. See *infra*, IV. a.

As to the personal liability of a guardian for debts contracted by him, or for losses sustained while carrying on a business on behalf of his ward, see *infra*, IV.

b. To wind up business.

The personal representative of a deceased person may, however, in order speedily to settle an estate, continue a business for a reasonable time and sell the stock in the ordinary course of trade, *Merritt v. Merritt*, 62 Mo. 150; *Willis v. Sharp*, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434; *Re United States Mortg. & T. Co.* 114 App. Div. 532, 100 N. Y. Supp. 12; *Re Benedict*, 13 Abb. N. C. 67, 1 Dem. 547; *Cornwell v. Deck*, 2 Redf. 87, affirmed on other points in 8 Hun, 122; *Re Sharp*, 5 Dem. 516; *Warren v. Union Bank*, 157 N. Y. 259, 43 L.R.A. 256, 68 Am. St. Rep. 777, 51 N. E. 1036, reversing 28 App. Div. 7; *Re Semple*, 189 Pa. 385, 42 Atl. 28, reversing 28 Pittsb. L. J. N. S. 431; *Greiner's Estate*, 14 Pa. Dist. R. 348; *Orne's Estate*, 7 Pa. Dist. R. 337; *Garrett v. Noble*, 6 Sim. 504, 3 L. J. Ch. N. S. 159; *Chancellor v. Brown*, L. R. 26 Ch. Div. 42, 53 L. J. Ch. N. S. 443, 51 L. T. N. S. 33, 32 Week. Rep. 465; *Ex parte Yates*, 72 L. T. 823; *Wright v. Beatty*, 2 Alberta L. Rep. 89; *Re Vida*, 1 Haw. 89; *Collinson v. Lister*, 20 Beav. 356; *Kirkman v. Booth*, 11 Beav. 273, 18 L. J. Ch. N. S. 25, 13 Jur. 625, 12 Eng. Rul. Cas. 29.

It was said in *Campbell v. Faxon*, 73 Kan. 675, 5 L.R.A. (N.S.) 1002, 85 Pac. 760, that, in the absence of a testamentary authority to continue a trade or business, it was the duty of an administrator to wind it up.

But it is not within the power of a personal representative to continue a farming business belonging to a decedent longer than necessary to care for and harvest the crops sown at the time of his death. See *Harrison v. Harrison*, 39 Ala. 489; *Hallock v.*

continued with the consent and at the solicitation of all of the complainants. Lizzie Swaine, the widow, seems to have taken an active and somewhat unusual interest in its prosecution. There is no claim made that defendant has not kept a proper and correct account of his dealings with the estate, nor that he has failed to account for every dollar which has come into his possession as administrator. The continuation of the business after the third year was probably an error of judgment, but it was one for which defendant should not alone be held responsible. Mrs. Swaine's brother, a business man of Kansas City, frequently visited with and advised the complainants.

Upon this question, the testimony of F. B. Worden, who was foreman of the malt

house, under Mr. Swaine in his lifetime, and who occupied the same position under the administrator, is in part as follows:

The malt house is about a mile from Mr. Hemphill's office. At Mr. Swaine's death, I told Mrs. Swaine I would not run the business if I was in her place. She said her brother thought it ought to be run, and she thought he knew. Her daughters were not present at this conversation. Mrs. Swaine came quite often to the malt house. Her daughters came also, every few days. Mr. George came from Kansas City every fall. We started buying barley to be manufactured into malt in the fall.

Q. And about every fall Mr. George would come from Kansas City?

A. I think nearly every fall. I would not say sure every fall.

Smith, 50 Conn. 127; Florsheim Bros. v. Holt, 32 La. Ann. 133; Carroll v. Davidson, 23 La. Ann. 428; Miltenberger v. Taylor, 23 La. Ann. 188; Sparrow's Succession, 39 La. Ann. 696, 2 So. 501; Maxwell-Yerger Co. v. Rogan, 125 La. 1, 51 So. 48; Billingslea v. Young, 33 Miss. 95; Jaquett's Estate, 13 Lanc. Bar. 13; Casner's Estate, 2 Kulp, 474; McMahan v. Harbert, 35 Tex. 451; Rich v. Sowles, 64 Vt. 408, 15 L.R.A. 850, 23 Atl. 723.

It was said in Steele v. Knox, 10 Ala. 608, that a personal representative of a deceased person did not represent the latter in respect to a trade or business, except in so far as necessary to wind it up, unless empowered to do so by will, or an order of a court of chancery.

So, a testamentary trustee who is not empowered by will to continue a business must close it with reasonable despatch. Re United States Mortg. & T. Co. 114 App. Div. 532, 100 N. Y. Supp. 12.

Where it is impossible immediately to sell a business, it has been held that a year is a reasonable time for an executor to close it up, where he was directed by will to collect the testator's personal property with all convenient speed. Garrett v. Noble, 6 Sim. 504, 3 L. J. Ch. N. S. 159.

And in Fleming v. Kelly, 18 Colo. App. 23, 69 Pac. 272, it was held that it could not be assumed that a business was not run for the purpose of closing it up, from the fact that an administrator carried it on for three years under an order of the probate court.

But an executor cannot continue a business for the purpose of profit to the estate. Chancellor v. Brown, L. R. 26 Ch. Div. 42, 53 L. J. Ch. N. S. 443, 51 L. T. N. S. 33, 32 Week. Rep. 465.

Thus, it cannot be said that a business was being wound up where it appeared that an executor left the funds of an estate therein because larger returns were probable. Re McCollum, 80 App. Div. 362, 80 N. Y. Supp. 755.

But an executor who purchases wine to mix with a stock belonging to his testator, 40 L.R.A. (N.S.)

tor, in order to render it merchantable, does not thereby become a trader, so as to render him liable as such. Ex parte Nutt, 1 Atk. 102.

As to the personal liability of a personal representative for losses sustained or debts contracted by him while carrying on a business belonging to an estate in order to close it up, see *infra*. III. c, 4.

As to the power of a court of chancery to permit an executor to carry on a trade or business for two years, where he was directed by will to dispose of it with all convenient speed, see *Arnold v. Smith*, *infra*, II. h, 1.

c. Testamentary power.

An executor is without authority to continue a mercantile business belonging to a testator unless expressly and unequivocally empowered by will to do so, since the death of a trader puts an end to any business in which he was engaged at the time of his death. Steele v. Knox, 10 Ala. 608; Foxworth v. White, 72 Ala. 224; Eufaula Nat. Bank v. Manassas, 124 Ala. 379, 27 So. 258; Smith v. Preston, 170 Ill. 179, 48 N. E. 688, affirming 67 Ill. App. 613; Grace v. Seibert, 235 Ill. 190, 22 L.R.A. (N.S.) 301, 85 N. E. 308; Michels Co. v. Young, 150 Ill. App. 442, Campbell v. Faxon, 73 Fla. 675, 5 L.R.A. (N.S.) 1002, 85 Pac. 760; Billingslea v. Young, 33 Miss. 95; Gilligan v. Daly, — N. J. Eq. —, 80 Atl. 994; Willis v. Sharp, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434; Re Tisdale, 110 App. Div. 857, 97 N. Y. Supp. 494; Re Hutchinson, 27 N. Y. Week. Dig. 218, 10 N. Y. S. R. 10; Re Sharp, 5 Dem. 516; Re Dillenkofer, 34 Pittsb. L. J. N. S. 303; Laughlin v. Lorenz, 48 Pa. 275, 86 Am. Dec. 502; Morrow v. Morrow, 2 Tenn. Ch. 549; Kirkman v. Booth, 11 Beav. 273, 18 L. J. Ch. N. S. 25, 13 Jur. 525, 12 Eng. Rul. Cas. 29; Collinson v. Lister, 20 Beav. 356.

In order to authorize an executor to carry on a trade or business on behalf of an estate, power must be conferred upon

Q. Would Mr. George advise with you and Mr. Hemphill when he came down?

A. He always advised me to run it as heavy as I could.

Q. Did Mrs. Swaine ever say she was being advised and governed by her brother, Mr. George?

A. I don't know as she said those words. She always seemed to me to be depending upon him to come over. I think we both looked for him to come over before we started.

Q. When Mr. George came, do you know about his coming to Ann Arbor to look after the account with the A. A. Brewing Company?

A. Yes; I came with him.

As to the effect of competition and Mrs.

him by will in distinct and positive terms. *Eufaula Nat. Bank v. Manassas*, 124 Ala. 379, 27 So. 258; *Willis v. Sharp*, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705 affirming 43 Hun, 434.

It was said in *Campbell v. Faxon*, 73 Kan. 675, 5 L.R.A. (N.S.) 1002, 85 Pac. 760, that an executor who was empowered by will to continue a trade or business belonging to a testator might do so for a time under the direction of the court of probate.

As to the power of an executor to continue a trade for the purpose of closing it up, see *supra*, II. b.

In the following cases, the language indicated has been held to be insufficient to permit an executor to carry on a trade or business on behalf of an estate.

—a devise of an estate, including a business, to an executor in trust, in order to pay "the interest, dividends, and annual income" to the testator's sons. *Kirkman v. Booth*, 11 Beav. 273, 18 L. J. Ch. N. S. 25, 13 Jur. 525, 12 Eng. Rul. Cas. 29.

—power to sell, if deemed necessary or expedient, any or all of the testator's estate, and to invest the proceeds at the discretion of the executor. *Eufaula Nat. Bank v. Manassas*, 124 Ala. 379, 27 So. 258.

—power to terminate any business connection of the testator's, existing at his death, or which should continue by virtue of any arrangement made during his lifetime. *Re Hutchinson*, 27 N. Y. Week. Dig. 218, 10 N. Y. S. R. 10.

So, power to invest and keep a trust fund invested, in the discretion of a testamentary trustee, is not sufficient to permit him to open and operate a coal mine on behalf of the estate, and such conduct constitutes a breach of trust. *Butler v. Butler*, 164 Ill. 171, 45 N. E. 426, affirming 61 Ill. App. 51.

And a testamentary command to the effect that a certain portion of a testator's estate which was invested in a partnership business should remain therein after his death is not sufficient to justify an executor becoming interested in the business and 40 L.R.A. (N.S.)

Swaine's knowledge of the business, this witness further testified: "The trust had a bad effect on the business and on some of our customers. I think we received one or two letters asking us to join the trust. Kolb Brothers, of West Bay City, was one of our best customers. We never lost a customer by the trusts. We had to sell cheaper. Kolb Brothers informed us they could buy their malt from Milwaukee at 4 or 5 cents less a bushel than they could buy it of us. The last few years we had to meet that price in order to sell, and I presume that had something to do with the loss the last year or two. In the fall we go and buy barley, and then if you had a competitor that would sell it cheaper than you could afford to sell it, you couldn't help but make a loss out of it. We certain-

carrying it on. *Travis v. Milne*, 9 Hare, 141, 20 L. J. Ch. N. S. 665.

So, testamentary directions to manage the testator's estate, and to convey it at discretion, are not sufficient to permit an executor to join in carrying on a particular business of which the deceased was a member. *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305.

And testamentary power to manage and dispose of a testator's property until a child became of age, as the executor deemed best, will not permit the executor to continue a partnership trade or business. *Malone v. Kelley*, 54 Ala. 532.

But a testamentary direction to carry on a legitimate trade or business for the benefit of a son of the testator is sufficient to permit the executor to embark a portion of an estate in trade. *Willis v. Sharp*, 113 N. Y. 586, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434.

d. Under express power in articles of partnership.

A personal representative may continue a partnership trade or business of which a testator was a member where the articles of partnership expressly provided that he might do so upon the death of a partner. *Blodgett v. American Nat. Bank*, 49 Conn. 9; *Merritt v. Merritt*, 62 Mo. 150; *Laughlin v. Lorenz*, 48 Pa. 275, 86 Am. Dec. 592; *Re Dillenkofer*, 34 Pittsb. L. J. N. S. 303.

And it was held in *Blodgett v. American Nat. Bank*, *supra*, that an executor who was the testator's surviving partner might carry on the business under a provision in the articles to the effect that the partnership should not be dissolved by the death of the testator, but that his executor should act in his stead, and perform his stipulations contained therein.

But an executor who was also the testator's surviving partner is not empowered to continue the latter's interest in the partnership business by a provision of the articles of partnership to the effect that, on the death of either partner, the survivor should

ly had to sell at the price made by the Milwaukee concern, or could not sell. We had to compete with Milwaukee the last few years. We had to meet this competition. Malt sold for 50 cents a bushel, and some we would get at 54 and 55. We never lost a bushel of malt through its being damaged or having it returned to us. Mrs. Swaine kept a book showing what we paid for the barley and all the prices. She never passed two or three days without coming to the plant. In the fall she inquired as to how much barley was bought, and took my book and checked it off as it was drawn in, and knew how much was bought. She kept an account of the malt that was sold. She would get that out of the book by the scales.

This book showed how much was being sold and to whom, and the price obtained, and she knew this during the time the business was conducted. The home was heated from the malt house. One of the men from the malt house would hitch up the carriage for Mrs. Swaine. The men in the malt house fixed up the yard. The residence was not more than 100 feet from the malt house, and complainants must have known the number of men employed at the malt house. Always four employed."

Defendant is charged with fraud in procuring the consent of complainants to the allowance of his final account. We think the method he pursued while thus dealing with three women, who were not advised by counsel, is not to be commended, but, as

settle the business as soon as convenient, either by selling or continuing it, as might be mutually agreed between the survivor and the personal representative of the deceased. *Leavitt's Case*, 28 Abb. N. C. 457, 20 N. Y. Supp. 58.

And where it was provided by articles of partnership that if A., a skilled brewer, should live for nine years after the formation of the business, it should continue for twenty-one years thereafter, and that upon the death of the other partner his executor might carry it on, upon A's death after the beginning of the twenty-one-year term, his executor, who was not skilled as a brewer, was not entitled to join in carrying on the business. *Pearce v. Chamberlain*, 2 Ves. Sr. 33.

e. Under parol power.

A parol direction made before his death by a person to his executor, or the one who becomes his administrator, to continue a business after his decease for the benefit of his family or estate, will not justify such personal representative in doing so. *Malone v. Kelley*, 54 Ala. 532; *Raynes v. Raynes*, 54 N. H. 201; *Re McCollum*, 80 App. Div. 362, 80 N. Y. Supp. 755; *Re Corbin*, 101 App. Div. 25, 91 N. Y. Supp. 797; *Re Tisdale*, 110 App. Div. 857, 97 N. Y. Supp. 494.

The continuance of the funds of an estate in a partnership of which a deceased person was a member cannot be justified by a parol direction given by the latter before his death, to the person named as his executor. *Malone v. Kelley*, supra.

f. Right of administrator c. t. a. or d. b. n. to carry on business under testamentary power.

Testamentary power conferred upon an executor to carry on a trade or business belonging to a testator has been held to be a personal power that cannot be exercised by an administrator *c. t. a.* or *d. b. n.* *Hinson v. Williamson*, 74 Ala. 180; *Schlickman v. Citizens' Nat. Bank*, 139 Ky. 268, 29 L.R.A. (N.S.) 264, 129 S. W. 823; *Creech* 40 L.R.A. (N.S.)

v. Grainger, 106 N. C. 213, 10 S. E. 1032; *Best's Estate*, 22 Lanc. L. Rev. 6; *Lambert v. Rendle*, 3 New Rep. 247.

Thus, testamentary power conferred on an executor to carry on a testator's business for a certain number of years, at the end of which the executor had an option of purchasing it, is a personal power, and such business cannot be carried on thereunder by an administrator *d. b. n.* *Best's Estate*, 22 Lanc. L. Rev. 6.

Nor can an administrator *c. t. a.* carry on a trade or business under power conferred upon an executor, notwithstanding it was provided by statute that such an administrator should be clothed with the same powers and duties as the executor. *Creech v. Grainger*, 106 N. C. 213, 10 S. E. 1032.

And it was held in *Schlickman v. Citizens' Nat. Bank*, 139 Ky. 268, 29 L.R.A. (N.S.) 264, 129 S. W. 823, that an administrator *de bonis non* cannot carry on a decedent's business by virtue of a purely personal power conferred upon the executor to manage the testator's business and do all things concerning his estate which he might do if living, without giving bond, leaving it to his discretion whether the business should be continued and how his estate should be managed, and vesting him with power to sell and convey any or all of the estate if, in his judgment, desirable to do so.

But, on the other hand, it has been held in some cases that such a testamentary power might be exercised by an administrator *c. t. a.* or *d. b. n.*

Thus, it was said in *Palmer v. Moore*, 82 Ga. 177, 14 Am. St. Rep. 147, 8 S. E. 180, that such a power was not a personal trust, but one that could be performed by an administrator *c. t. a.* under a statute conferring upon the latter all of the powers belonging to an executor, except those manifestly arising from a personal trust and confidence.

And it was held in *King v. Talbert*, 36 Miss. 367, and *Brannon v. Ober & Sons Co.* 106 Ga. 168, 32 S. E. 16, that an administrator *c. t. a.* might carry on a farm-

the account itself has in this proceeding been subjected to scrutiny and found to be correct, we are unable to see how complainants were injured by its allowance and the discharge of the bond, unless it should be held that defendant is liable for the losses sustained by reason of continuing the business.

No reason is apparent or indicated by complainants why defendants should have wished to continue the business at a loss. By a forced liquidation of the entire estate at the time of Swaine's death it is probable that the debt due to the bank of which he was cashier would have been paid. His compensation as administrator was small and the labor connected with the office considerable. It is said the bank profited

largely through the discount of the paper of the estate during the period. It does not appear that the bank charged more than the usual rate of discount. Moreover, the bank accepted some \$3,000 worth of bonds of the Ann Arbor Brewing Company, in lieu of notes for that amount upon which the estate was indorser, reducing the contingent liability of the estate to that extent. These bonds, if not entirely worthless, are of little value.

We are of opinion that it was the conviction of all the complainants, as well as of Mr. George, the widow's brother, in whose judgment the family had confidence, that it was best to continue the business in the hope that it might be disposed of as a going concern. Changes and improve-

ing business under testamentary power conferred upon an executor.

So, in *Hagan v. Barksdale*, 44 Miss. 186, an administrator *d. b. n.* was permitted to exercise a testamentary power conferred upon an executor to keep all of a testator's property together until the latter's youngest child became of age, and to carry on a farming business belonging to the estate, and to apply the proceeds in the purchase of slaves and other property necessary for the business.

As to the personal liability of an administrator *de bonis non* for debts contracted while carrying on a business under a power conferred on an executor, see *infra*, III. b.

g. Statutory power to carry on business.

There are statutes in a number of states permitting the personal representative of a deceased person to continue the mercantile or farming business belonging to his estate.

Thus, it is provided by statute in Texas that the personal representative may, if for the best interests of the estate, carry on the plantation, manufactory, or business of a decedent when not specifically disposed of by will, or required immediately to pay debts, in the same manner as the deceased had done. See *Reinstein v. Smith*, 65 Tex. 247; *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 78; *Altgelt v. Sullivan*, — Tex. Civ. App. —, 79 S. W. 333; *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 83 S. W. 6, reversing — Tex. Civ. App. —, 79 S. W. 582; *Altgelt v. Oliver Bros.* — Tex. Civ. App. —, 86 S. W. 28.

And the statute has been held to embrace a mercantile business. *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 78.

It was assumed in *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75, that such statute would not prevail over an express direction in the will to discontinue the business permanently; but in view of the circumstances, the direction in the will that the testator's "mercantile affair shall be immediately brought to a stop" was construed to mean 40 L.R.A. (N.S.)

merely a temporary stoppage of the business until the executrix could arrive from abroad and therefore not to interfere with her power under the statute to carry on the business.

But such statute does authorize a personal representative to carry on a partnership business in which a deceased person was interested. *Altgelt v. Sullivan*, — Tex. Civ. App. —, 79 S. W. 333; *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 83 S. W. 6, reversing — Tex. Civ. App. —, 79 S. W. 582.

By statute it is provided in Alabama and Georgia, the personal representative of one who dies after January 1st may continue his servants and slaves on a plantation until December 31 next, for the purpose of completing the crops. See *Loeb v. Richardson*, 74 Ala. 311; *Pinckard v. Pinckard*, 24 Ala. 250; *Taylor v. Bush*, 75 Ala. 432; *Eubank v. Clark*, 78 Ala. 73; *Naftel v. Osborn*, 96 Ala. 623, 12 So. 182; *Harding v. Evans*, 3 Port. (Ala.) 221, 29 Am. Dec. 256; *Stephens v. James*, 77 Ga. 139, 3 S. E. 160; *King v. Johnson*, 96 Ga. 497, 23 S. E. 500.

By the terms of some statutes, the personal representative of a deceased person, in order to carry on a business belonging to his estate, must first obtain an order from the court having jurisdiction of the administration. See *Steele v. Knox*, 10 Ala. 608; *Craig v. McGehee*, 16 Ala. 41; *Gerald v. Bunkley*, 17 Ala. 170; *Pickens v. Pickens*, 35 Ala. 442; *Hinson v. Williamson*, 74 Ala. 194; *Fleming v. Kelly*, 18 Colo. App. 23, 69 Pac. 272; *Poullain v. Brown*, 82 Ga. 412, 9 S. E. 1131; *Farley v. Hord*, 45 Miss. 102; *Emanuel v. Norcum*, 7 How. (Miss.) 150; *Re Osborn*, 36 Or. 8, 58 Pac. 521.

By statute the court of probate in Mississippi may authorize a personal representative to cultivate the lands of a decedent from year to year until the settlement of the estate. *Farley v. Hord*, 45 Miss. 102; *Emanuel v. Norcum*, 7 How. (Miss.) 150.

So, it was held in *Remington v. Field*, 16 R. I. 509, 17 Atl. 551, under a statute permitting a guardian to improve his ward's estate and to apply the profits and income to the latter's support, that the guardian

ments in the method of manufacturing malt and large combinations of malting interests made it impossible to realize this hope. It would be unjust and inequitable to now compel this defendant to bear the loss occasioned by this course of action.

The duty of administrators generally to liquidate estates without undue delay is not questioned, nor can it be doubted that they cannot leave estates at the risk of business disaster by continuing without authority to operate business ventures in which the estates are invested when they come into their hands. The authorities cited by complainants clearly establish this doctrine, and executors or administrators who violate the rule, even if acting in the utmost good faith, are held strictly liable for all

losses incurred, and are not even permitted to offset the profits against the losses. *Ward v. Tinkham*, 65 Mich. 695, 32 N. W. 901; *Warren v. Union Bank*, 167 N. Y. 259, 43 L.R.A. 256, 68 Am. St. Rep. 777, 51 N. E. 1036; *Mattocks v. Moulton*, 84 Me. 545, 24 Atl. 1004; *Lucht v. Behrens*, 28 Ohio St. 238, 22 Am. Rep. 378; *Guthrie v. Wheeler*, 51 Conn. 207.

There seems to be no doubt, however, that, when all those interested in an estate agree that a certain course should be followed, the executor or administrator will be relieved from personal liability if disaster follows. *Schouler on Executors*, p. 422, lays down the rule as follows: "We may presume that the personal representative can never be strictly justified in

might carry on a farming business for the benefit of the ward.

Under the Oregon statute providing that the court may order an administrator to sell all the personal property or any article thereof at private sale, it may, at its discretion, order a stock of merchandise belonging to a decedent to be sold in the usual course of trade. *Re Osburn*, 36 Or. 8, 58 Pac. 521.

But the court under such statute has no authority to permit the administrator to purchase goods to replenish such stock. *Ibid*.

And in *Tell City Furniture Co. v. Stiles*, 60 Miss. 849, it was held, under a similar statute, that the court cannot permit the sale of a stock of merchandise in the usual course of trade by an administrator, since the statute authorized only a sale in bulk.

Statutory power permitting an administrator to deal with growing crops and cultivate the land of an intestate will not justify an order by a court of chancery, permitting an administrator to operate a sawmill belonging to an estate. *Alexander v. Herring*, — Miss. —, 55 So. 360.

And a court of probate does not acquire power to permit a guardian to carry on a trade or business on behalf of his ward from a statute providing that guardians may manage their wards' estates under the direction of such court, and lease their lands and loan their money, and do all other acts which the court may deem for the benefit of their wards. *Harter v. Miller*, 67 Kan. 468, 73 Pac. 74.

h. Power of court to permit carrying on business.

1. Courts of chancery.

Some cases hold that a court of chancery may empower the carrying on of a business by the personal representative of a decedent. See *Foxworth v. White*, 72 Ala. 224; *Merritt v. Merritt*, 62 Mo. 150; *Carroll v. Davidson*, 23 La. Ann. 428; *Morrow v. Morrow*, 2 Tenn. Ch. 549; *Arnold v. Smith* 40 L.R.A.(N.S.)

[1896] 1 Ch. 171, 65 L. J. Ch. N. S. 269, 74 L. T. N. S. 14, 44 Week. Rep. 280; *Tinkler v. Hindmarsh*, 2 Beav. 348; *Barker v. Parker*, 1 T. R. 295, 1 Revised Rep. 201, *Perry v. Perry*, Ir. Rep. 3 Eq. 452.

It was said in *Steele v. Knox*, 10 Ala. 608, that the personal representative of a decedent did not represent the latter in respect to a trade or business belonging to him, except in so far as necessary to wind it up, unless empowered to do so by will or an order of a court of chancery.

And it was held in *Arnold v. Smith* [1896] 1 Ch. 171, 65 L. J. Ch. N. S. 269, 74 L. T. N. S. 14, 44 Week. Rep. 280, that the court would permit an executor to continue a business for two years, where a will permitted him to dispose of it with all convenient speed.

But the power of a court of chancery to empower a personal representative of a decedent to carry on a business belonging to his estate was denied in *Alexander v. Herring*, — Miss. —, 55 So. 360.

And it was held in *Field v. Colton*, 7 Ill. App. 379, that a court of equity could not, without the consent of the *cestui que trust*, confer power upon an executor to invest the funds of the estate in goods necessary to continue a commercial business of a decedent.

So, a court of chancery will not permit an administrator to carry on a business belonging to an estate where infants are interested therein. *Land v. Land*, 43 N. J. Ch. N. S. 311; but see *contra*, *Perry v. Perry*, — Ir. Rep. 3 Eq. 542.

2. Courts having jurisdiction of administration.

In *Fleming v. Kelly*, 18 Colo. App. 23, 69 Pac. 272, it is held that among the incidental powers of county courts by virtue of their express power to regulate and control the settlement of estates is the power, in a proper case, to order the continuance of the business by the administrator temporarily, at least, so as to dispose of stock on hand to the best advantage; and in such cases the purchase of some goods may be

deviating from the line of bailment or fiduciary duty. But in case of doubt as to his proper course, he may protect himself by prudently pursuing in advance one of two courses: (1) He may procure the advice and assent of all the parties in interest; or (2) he may take the direction of the court. . . . He may prosecute or defend suits. Compromise claims upon the estate, or deal with the estate in a peculiar way, not usual or strictly legal, as by continuing the property in business; and those parties in interest by whose request or assent it has been done will not be permitted to impute it as maladministration,"—citing *Pool v. Munday*, 103 Mass. 174; *Perry v. Wooton*, 5 Humph. 524; and *Watkins v. Stewart*, 78 Va. 111.

necessary for the purpose of aiding in the sale of the goods on hand.

And such power is apparently assumed in *Gordon-Tiger Min. & Reduction Co. v. Loomer*, 50 Colo. 409, 115 Pac. 717.

So it was held in *State use of Lancaster v. Jones*, 89 Mo. 470, 1 S. W. 355 (one justice dissenting), overruling *Michael v. Locke*, 80 Mo. 548, s. c. 10 Mo. App. 582; and *Western Cement Co. v. Jones*, 8 Mo. App. 373, that under power to make orders for the "management of" the estate of an insane person, the probate court was vested with large discretion, and could empower a guardian to carry on a commercial business belonging to his ward.

By express statute in Alabama, the orphans' court may empower a personal representative to keep together the assets of a decedent, and manage the same for a term not exceeding ten years. See *Steele v. Knox*, 10 Ala. 608; *Craig v. McGehee*, 16 Ala. 41; *Gerald v. Bunkley*, 17 Ala. 170; *Pickens v. Pickens*, 35 Ala. 442; *Foxworth v. White*, 72 Ala. 224; *Hinson v. Williamson*, 74 Ala. 194.

And the power of courts having jurisdiction of decedents' estates, to carry on a business belonging to the estate, is apparently assumed in *Roberts v. Weimer*, 227 Ill. 138, 81 N. E. 40; *Miller v. Didisheim*, 95 Ill. App. 321; *Starling v. Wyatt*, — Miss. —, 27 So. 526; and *Re Hodges* [1899] 1 I. R. 480; but whether this is by virtue of their inherent or implied power, or is the result of an express statute, does not appear from a report of the cases.

On the other hand, it has been held that courts of probate are without jurisdiction to empower a personal representative to carry on a business on behalf of an estate. *Alzheimer v. Hunter*, 55 Ark. 159, 19 S. W. 496; *Tompkins v. Weeks*, 26 Cal. 50.

So, it was held in *Harter v. Miller*, 67 Kan. 468, 73 Pac. 74, that a court of probate did not acquire power to permit a guardian to carry on a trade or business on behalf of his ward from a statute providing that guardians might manage the estates of their wards under the direction of such court, lease their lands, loan their

1 *Perry on Trusts*, 5th ed. § 454, contains the following: "So trustees are not bound to continue the capital in such trade, and they ought not to do so against their judgment. But if all the *cestuæ que trust* are *sui juris*, and capable of acting for themselves, and they desire an executor, administrator, or trustee to continue the business of the testator a few months, in order to preserve it for his son, and the executor acts in accordance with their request, and uses his best skill and judgment in the conduct of the trade, he will be allowed for the loss in his accounts." In *French v. Davis*, 38 Miss. 167, it is said: "It is certainly true that it is competent for adult heirs at law to consent or agree that the property of the intestate should

money, and do all other acts which the court might deem for the benefit of their wards.

And in *Jones's Estate*, 23 Pa. Co. Ct. 513, it was held that the orphans' court was without authority to permit an administrator to operate mines belonging to an estate, except with the consent of the intestate's creditors.

As to the power of a court of probate, under statutory authority, to permit a personal representative to carry on a farming business belonging to an estate, see *supra*, II. g.

And *Powell v. North*, 3 Ind. 392, 56 Am. Dec. 513, is authority for the rule that a court of probate, possessing equitable powers, may empower a guardian to carry on a business of his ward.

In order to protect a personal representative from individual liability while carrying on a trade or business under statutory authority, it is necessary, under some enactments, that he receive authority from the court to do so. See *Steele v. Knox*, 10 Ala. 608; *Craig v. McGehee*, 16 Ala. 41; *Gerald v. Bunkley*, 17 Ala. 170; *Pickens v. Pickens*, 35 Ala. 442; *Hinson v. Williamson*, 74 Ala. 194; *Fleming v. Kelly*, 18 Colo. App. 23, 69 Pac. 272; *Poullain v. Brown*, 82 Ga. 412, 9 S. E. 1131; *Farley v. Hord*, 45 Miss. 102; *Emanuel v. Norcum*, 7 How. (Miss.) 150; *Re Osburn*, 36 Or. 8, 58 Pac. 521.

III. Individual Liability of personal representative or testamentary trustee for carrying on business on behalf of estate.

* a. When done under testamentary power.

1. In general.

And a testamentary trustee who continues a business according to the command of a will is not liable for losses sustained, where the business was honestly managed. *Bennett v. Rhodes*, 58 Md. 78.

An executor who carries on a farming

be kept together for the support of their mother, or for any lawful purpose, and such consent will justify the administrator, in the absence of creditors, or so far as the distributees are concerned, in conforming his action to their wishes on this subject." The case of *Mathews v. Sheehan*, 76 Conn. 654, 100 Am. St. Rep. 1017, 57 Atl. 694, cited by complainants, reiterates the familiar rule as to the duty of administrators generally, but adds: "Where an administrator or an executor, acting in good faith and with ordinary care and prudence for the good of the beneficiaries of the estate, deviates, with their consent

and approbation, from the strict line of his duty, and loss results therefrom,—as, for instance, by continuing the property in business without authority,—the consenting beneficiaries cannot charge the representative of the estate with such loss." See also *Pearson v. Gillenwaters*, 99 Tenn. 446, 63 Am. St. Rep. 844, 42 S. W. 9, 199, and 18 Cyc. p. 243, note 75. In *Brown v. Forsche*, 43 Mich. 492, 5 N. W. 1011, Mr. Justice Cooley said: "Formal proceedings for the settlement of an estate are never necessary if all parties concerned can agree to dispense with them [citing cases]. Family arrangements for this purpose, it is said,

business under a testamentary direction to do so until a child of the testator becomes of age will be charged with the proceeds received, less the expenses incurred, notwithstanding the farm was operated at a loss during a time of great depression. *Allen v. Shanks*, 90 Tenn. 359, 16 S. W. 715.

As to the allowance in general from an estate, as a cost of administration, of expenses incurred by an executor while carrying on a trade or business on behalf of an estate, under testamentary authority, see *infra*, V. f, 7.

An executor is answerable for the profits of a business which he carries on in behalf of an estate, pursuant to a testamentary direction. See *Re Rumsey*, 45 N. Y. S. R. 453, 18 N. Y. Supp. 402; *Merritt v. Merritt*, 62 Mo. 150.

And the same rule will be applied where the business is carried on by virtue of the provisions of articles of partnership, or the order of a court of chancery. *Merritt v. Merritt*, *supra*.

So, what an executor should have made from a farming business had it been prudently managed, which he conducted on behalf of an estate under a testamentary direction, will be charged against him, after allowing him the value of his services. *Burgess v. Green*, 7 Bush, 263.

And an executor who joins in carrying on a partnership business in which his testator was a member is answerable for the portion of the estate so invested, notwithstanding he was empowered by the will to permit a certain portion of the estate to remain in such business, since such power did not justify his conduct. *Travis v. Milne*, 9 Hare, 141, 20 L. J. Ch. N. S. 665.

As to the liability in general of a personal representative for the rental or value of property embarked in trade, or interest, or the profits of the business, see *infra*, III c, 3.

2. For losses sustained.

(a) In general.

Where, by the express terms of a will, an executor is empowered to continue a testator's business, he will not be answerable for resulting losses if the business is

prudently managed. *Merritt v. Merritt*, 62 Mo. 150; *Willis v. Sharp*, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434; *Re Froelich*, 50 Misc. 103, 100 N. Y. Supp. 436, affirmed in 122 App. Div. 440, 107 N. Y. Supp. 173, which was affirmed in 192 N. Y. 566, 85 N. E. 110; *Boulle v. Tompkins*, 5 Redf. 472; *Cline's Appeal*, 106 Pa. 617; *Allen v. Shanks*, 90 Tenn. 359, 16 S. W. 715.

It was said in *Willis v. Sharp*, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434, that the authorization of an executor by will to continue a trade or business belonging to a testator, or to employ the assets of his estate therein, if strictly pursued, is a protection to the executor from individual liability to those claiming under the will.

This doctrine has been applied where, without the fault or negligence of an executor, but as the result of competition, a loss of \$2,000 was sustained while carrying on a business under a testamentary direction to do so as long as a yearly profit of \$5,000 could be made, since the executor was entitled to a reasonable latitude in order to determine whether the business would produce the profit specified. *Re Froelich*, 122 App. Div. 440, 107 N. Y. Supp. 173 (affirming 50 Misc. 103, 100 N. Y. Supp. 436), and affirmed without opinion in 192 N. Y. 566, 85 N. E. 1110.

And an executor is not answerable for the loss sustained, where he carried on a business under a testamentary direction to do so for two years if it could be done at a profit, but to be closed as soon as practicable at the expiration of that time, or sooner, if conducted at a loss, where for eighteen months a profit was realized, and the last six months a small loss was sustained, but a substantial profit was realized as the net result of his management, since he had the right to continue the business until a loss became apparent and the business was not to be closed at the first appearance of loss, but as soon as practicable thereafter. *Re Moore*, 69 Misc. 535, 127 N. Y. Supp. 884.

So, a loss of \$1,100 will not be charged to an executor who carried on a business under a testamentary direction to do so for the life of the testator's widow, where he col-

are favorites of the law, and, when fairly made, are never allowed to be disturbed by the parties, or by any others for them. . . . Such an arrangement may be made after an administrator is appointed as well as before, and if the administrator is afterwards summoned to render his accounts, the court will accept as satisfactory, so far as it goes, the settlement the parties concerned have made." It is to be noted that no complaint is made of the continuation of the business during the first three years, while it was making a profit. During these years the youngest daughter attained her majority, and had then a right, as well

as her mother and elder sister, to demand its discontinuance. This neither she nor they did. The brother of the widow went over the books of the estate from time to time and advised with complainants.

We think it must be held that complainants themselves authorized defendant's acts, and that, if the estate is a loser thereby (which is not at all certain), they must bear the loss.

The decree is affirmed, with costs to defendant.

Ostrander, Ch. J., and McAlvay, Blair, and Stone, JJ., concur.

lected money due at the death of the testator and used it in the business, which could not be successfully carried on without cash, and during the time he continued the business the profits, as well as interest on the money collected, were paid the widow, since it was apparently the testator's intention that the outstanding accounts should be used in carrying on the business. *Boulle v. Tompkins*, 5 Redf. 472.

And an executor who was directed by will to continue a business with a designated person as manager will not be charged with a loss arising from a sale made in good faith, on credit, without security, to a person who had been a customer during the lifetime of the testator, and whose credit did not appear to be impaired at the time of sale, and it was not shown that the executor, who did not actively control the business, was negligent, or whether he or the manager extended the credit. *Cline's Appeal*, 106 Pa. 617.

So, bad debts of a business will not be charged against an executor who continued a business under testamentary directions to the effect that he should pay all necessary expenses and charges of the business. *Re Jones*, 103 N. Y. 621, 57 Am. Rep. 775, 9 N. E. 493, affirming 37 Hun, 430, and 2 Dem. 602.

As to the allowance of the expenses of a business from an estate as costs of administration, see *infra*, V. f, 7.

So, a loss sustained in opening a mining shaft will not be charged an executor who, in good faith, completed it, where the testator, who was an experienced owner and operator of coal lands, in opening it before his death, had discovered a "fault" that would require a large sum of money to overcome, and by will directed his executor to continue, until they could be sold to advantage, his colliery interests in the same manner as he might have done if living and managing and conducting the same. *Waddell's Estate*, 196 Pa. 294, 46 Atl. 304.

And an executor is not answerable for a loss sustained by him while working a farm in a prudent manner during a period of great depression, under a testamentary direction to operate it until the testator's child became of age. *Allen v. Shanks*, 90 Tenn. 359, 16 S. W. 715.
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So, an executor will not be surcharged with a loss who carried on a manufacturing business, where, during an unprosperous time which was the result of a business depression, when unexpected difficulties arose, at the urgent solicitation of those interested in the estate, in good faith, and as an exercise of ordinary discretion, he borrowed money for use in the business, the beneficiaries receiving the profits of the business so long as there were any. *Whitman's Estate*, 195 Pa. 144, 45 Atl. 673.

The personal representative of a deceased copartner may carry on the business without assuming personal liability where the articles of copartnership provide that in the event of the death of one of the parties to the agreement, his personal representative may continue the business. *Merritt v. Merritt*, 62 Mo. 150; *Re Dillenkofer*, 34 Pittsb. L. J. N. S. 303.

Where a widow, upon her husband's death, agreed with his surviving partner to continue the former's interest in the business, and that the survivor should pay for it as soon as possible, with interest, and nine years later, upon the former becoming insolvent, she was appointed administratrix of her husband's estate, she will not be charged, at the instance of a daughter of the deceased, to whose support the interest paid was devoted, as it appeared that her course was prudent, and that the allowance for the daughter's support absorbed all of her share in the estate. *Browne v. Bedford*, 4 Dem. 304.

Where a contract of partnership provided that the interest of one partner should, at his death, be divided among the survivors, upon their giving indemnity to his estate to secure the payment therefor in instalments, the executors, who were the surviving partners, upon a beneficiary becoming of age, are not answerable for not taking such indemnity, or for permitting the instalments to remain in the business, where an accurate account thereof was kept. *Vyse v. Foster*, L. R. 7 H. L. 318, 44 L. J. Ch. N. S. 37, 31 L. T. N. S. 177, 23 Week. Rep. 355, 19 Eng. Rul. Cas. 693.

But it was held in *Bennett v. Rhodes*, 58 Md. 78, that an executor or testamentary trustee was answerable for resulting losses, where by will it was directed that the mon-

ey invested in a business should be continued therein for three years after testator's death, and then wound up and the capital returned to his estate, since it was clearly the testator's intention that the original capital should remain unimpaired.

(b) When due to negligent management.

An executor, however, is personally answerable for losses sustained when the result of his fault or negligence in carrying on a business under authority conferred by will. *Burgess v. Green*, 7 Bush, 263; *Luers v. Brumjes*, 5 Redf. 32; *Re Rumsey*, 45 N. Y. S. R. 453, 18 N. Y. Supp. 402.

So, an executor who, although empowered by will to carry on a farm of decedent's, does so in an imprudent manner, will be charged with what should have been made by prudent management thereof, although he will be allowed the true value of his services. *Burgess v. Green*, 7 Bush, 263.

And executors are personally answerable for losses growing out of their neglect of duty where by will they were directed to cause the value of the testator's interest in a partnership to be ascertained and transferred to the surviving partners, upon security being given for the payment of the value thereof to the testator's son when he became of age, and the executors, who were the surviving partners, neglected to take such security until the firm became insolvent, when they received a mortgage upon property already encumbered. *Luers v. Brunjes*, 5 Redf. 32.

But where a surviving partner, who, by will, was given the sole management of the partnership business until the testator's youngest child became of age, and two others became the executors, the latter are not liable for losses due to the reckless management of the business by the surviving partner, he alone being responsible therefor. *Walker v. Walker*, 88 Ky. 615, 11 S. W. 718.

(c) Where business carried on beyond period fixed by will.

Losses sustained in carrying on a business after the expiration of the period prescribed by will fall upon the executor individually. *Allen v. Shanks*, 90 Tenn. 359, 16 S. W. 715.

3. For debts contracted.

(a) In general.

The weight of authority sustains the rule that the indebtedness contracted by an executor while carrying on a trade or business on behalf of an estate by virtue of a testamentary direction is the individual liability of the executor, rather than of the estate he represents. *Wade v. Pope*, 44 Ala. 690; *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Vann v. Vann*, 71 Ala. 154; *Foxworth v. White*, 72 Ala. 224; *Alzheimer v. Hunter*, 56 Ark. 159, 19 S. W. 496; 40 L.R.A. (N.S.)

Sterrett v. Barker, 119 Cal. 492, 51 Pac. 695; *Pitkin v. Pitkin*, 7 Conn. 307, 18 Am. Dec. 111; *Fridenburg v. Wilson*, 20 Fla. 359; *Willis v. Sharp*, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434; *Willis v. Sharp*, 115 N. Y. 396, 5 L.R.A. 636, 22 N. E. 149; *Saperstein v. Ullman*, 49 App. Div. 446, 63 N. Y. Supp. 626, affirmed in 168 N. Y. 636, 61 N. E. 553; *Delaware, L. & W. R. Co. v. Gilbert*, 44 Hun, 201, rehearing denied in 45 Hun, 589; affirmed without opinion in 112 N. Y. 673, 20 N. E. 416; *Boulle v. Tompkins*, 5 Redf. 472; *Froelich v. Froelich Trading Co.* 120 N. C. 39, 26 S. E. 647; *Morrow v. Morrow*, 2 Tenn. Ch. 559; *Cutbush v. Cutbush*, 1 Beav. 184, 8 L. J. Ch. N. S. 175, 3 Jur. 142; *Barker v. Parker*, 1 T. R. 295, 1 Revised Rep. 201; *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24; *Ex parte Garland*, 10 Ves. Jr. 110, 1 Smith, 220, 7 Revised Rep. 352; *Fairland v. Percy*, L. R. 3 Prob. & Div. 217, 32 L. T. N. S. 405, 44 L. J. Prob. N. S. 11, 23 Week. Rep. 597; *Re Johnson*, L. R. 15 Ch. Div. 548, 49 L. J. Ch. N. S. 745, 43 L. T. N. S. 372, 29 Week. Rep. 168; *Re Morgan*, L. R. 18 Ch. Div. 93, 50 L. J. Ch. N. S. 834, 45 L. T. N. S. 183, 30 Week. Rep. 223; *Owen v. Delamere*, L. R. 15 Eq. 134, 27 L. T. N. S. 847, 42 L. J. Ch. N. S. 232, 21 Week. Rep. 218; *Re Frith* [1902] 1 Ch. 342, 71 L. J. Ch. N. S. 199, 86 L. T. N. S. 212; *Braun v. Braun*, 14 Manitoba L. Rep. 346; *Moore v. McGlynn* [1904] 1 I. R. 334.

But the executor is entitled to be indemnified by the estate for such liability. See *infra*, VI.

As to the right of creditors to proceed in equity where an executor is insolvent, see *infra*, VII.

Lord Eldon, in *Ex parte Garland*, 10 Ves. Jr. 110, 1 Smith, 220, 7 Revised Rep. 352, in speaking of the liability of an executor who carried on, by a testamentary direction, a business which proved a losing venture, said that the executor became personally responsible, to the extent of all his own property, for all debts contracted by him, and that he might be proceeded against as a bankrupt.

And it was said in *Willis v. Sharp*, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434, that it is the settled doctrine of the courts of common law that a debt contracted by an executor after the death of his testator, while carrying on a trade or business belonging to the latter, although contracted as executor, binds him individually, and does not bind the estate which he represents.

So, those who become creditors while an executor is carrying on a trade or business under a testamentary direction to do so cannot proceed directly against the estate to collect their claims: they must proceed against the executor individually. *Foxworth v. White*, 72 Ala. 224.

As to the right of creditors to proceed against the estate in order to collect such debts, see *infra*, VII.

But it was held in *Eisenstadt Mfg. Co. v.*

Copeland, — Tex. Civ. App. —, 149 S. W. 713, that an executor who carried on a trade or business pursuant to a testamentary command, and who devoted the profits of the business to the payment of the trade debts contracted by him, as well as the support of the testator's family, was not individually liable at the suit of a creditor from whom he purchased goods for the business, for a misappropriation of the funds of the estate.

So, it was held in *Re Morgan*, L. R. 18 Ch. Div. 93, 50 L. J. Ch. N. S. 834, 45 L. T. N. S. 183, 30 Week. Rep. 223, that an executor who carried on a business under a will, but in his own name, ostensibly as his own, could not be proceeded against as executor by one who gave him credit.

And an executor who was directed by the will of his wife to continue a business belonging to her for so long as he should remain sober and of good habits, so as to conduct it properly, becomes personally liable for debts contracted by him. *Saperstein v. Ullman*, 49 App. Div. 446, 63 N. Y. Supp. 626, affirmed in 168 N. Y. 636, 61 N. E. 553.

So, executors who carry on a business by directions of a will are personally liable upon a draft discounted by them in their official capacity, the proceeds of which were used in the business. *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24. The court said in substance that if executors choose to carry on a business, it must be held that, as between them and the world at large, they carry on the business in the ordinary character of mere traders, whose contracts will bind them personally only.

So, an executor who carries on a business under the terms of a will permitting him to do so or to close it out becomes personally liable for debts contracted by him, and may be sued upon a note given by him as manager in the name under which the business was carried on. *Froelich v. Froelich Trading Co.* 120 N. C. 39, 26 S. E. 647.

It was said in substance in *Wild y. Davenport*, 48 N. J. L. 129, 57 Am. Rep. 552, 7 Atl. 295, that a personal representative who engaged in a partnership business becomes individually answerable for debts created while so engaged, notwithstanding he carried on the business in conformity with the articles of copartnership, or directions contained in a will.

And in *Pitkin v. Pitkin*, 7 Conn. 307, 18 Am. Dec. 111, it was said in effect that notwithstanding a provision of a will that a copartnership business should be continued after the testator's death, a creditor must pursue the executor for a debt arising after he began managing the business.

But it was held in *Bantz v. Bantz*, 52 Md. 686, and *Clapp v. Clapp*, 10 N. Y. S. R. 733, that an executor who carried on a trade or business by virtue of a testamentary command was not answerable for trade debts contracted by him, but that the estate was liable therefor.

A testamentary trustee who was authorized by will to continue a testator's interest 40. L.R.A. (N.S.)

in a partnership business under the management of the surviving partner is not liable for debts subsequently contracted, where he did not in any manner join in the management of the business, nor exercise any control or supervision over it, nor receive any of the profits. *Owens v. Mackall*, 33 Md. 382.

So, where a brother of a testator took possession of a business devised to him, the executor, who did not take part in the management thereof, is not answerable for debts contracted by the former. *Fleming v. Fleming*, 204 Pa. 648, 54 Atl. 473.

Where a son to whom a business was bequeathed took possession thereof without guarantying the payment of the testator's outstanding debts, as the will required, and with the consent of the executor carried on the business on his own account, transacting all business in his own name as attorney, under power given him by the executor, the latter is not liable to one who gave credit to the son without knowledge of the facts, as a finding that the executor was not carrying on the business was warranted. *American Tube Works v. Tucker*, 185 Mass. 236, 70 N. E. 59.

So, where, by will, an interest in a business was given one who was to make designated monthly payments to the executor, the latter, who took no part in the management of the business other than to receive such payments, is not liable as a partner for debts contracted by the former in carrying on the business. *McArdle v. West Philadelphia Title & T. Co.* 7 Pa. Super. Ct. 328.

As to the allowance from an estate of expenses incurred by an executor while carrying on a trade or business on behalf of an estate under testamentary power, see *infra*, V. f, 7.

(b) Liability of executor for debts contracted by coexecutor where former did not participate in management of business.

It was held in *Noyes v. Turnbull*, 54 Hun, 26, 7 N. Y. Supp. 114, affirmed without opinion in 130 N. Y. 639, 29 N. E. 145, where a business was carried on by testamentary trustees under authority conferred by a testator, that one of the trustees was not liable, after his release by the court, for a debt contracted by the other, to whom credit was extended with knowledge of the fact that he was the sole trustee.

And an executor who did not join with his coexecutor in carrying on a business pursuant to the commands of a will is not liable for trade debts contracted by the latter. *Eisenstadt Mfg. Co. v. Copeland*, — Tex. Civ. App. —, 149 S. W. 713.

4. For debts contracted after expiration of time fixed by will for carrying on business.

An executor who was empowered by will to carry on a trade or business until a designated person became of age cannot,

after that event, bind the estate for trade debts. *Crooke v. Hume*, 139 Ky. 834, 109 S. W. 364.

As to the allowance from an estate of expenses incurred by an executor in carrying on a trade or business after the period fixed by will for doing so, see *Allen v. Shanks*, *infra*, V. 1, 7.

b. Liability of administrator c. t. a. or d. b. n. for debts contracted while carrying on business under testamentary power.

In Georgia it has been held that an administrator *de bonis non* who conducts a business under a power conferred by will upon an executor is not personally liable for debts necessarily contracted by him. *Brannon v. Ober & Sons Co.* 106 Ga. 168, 32 S. E. 16; *Palmer v. Moore*, 82 Ga. 177, 14 Am. St. Rep. 147, 8 S. E. 180.

But it was held in *Fairland v. Percy*, L. R. 3 Prob. & Div. 217, 32 L. T. N. S. 405, 44 L. J. Prob. N. S. 11, 23 Week Rep. 597, that where a will gave property to an executor in trust, for the benefit of the widow of the testator, with power to carry on a business during her widowhood, and upon the executor declining to act, she became administrator *de bonis non*, she was individually answerable for debts contracted by her while conducting such business.

As to the binding effect of debts contracted by an administrator c. t. a. or d. b. n. upon the trade assets, see *infra*, V. a, 3.

c. When business carried on without testamentary authority.

1. Liability for losses sustained.

(a) In general.

An executor is bound at his absolute risk to see that an estate shall not suffer loss or diminution by reason of his carrying on a trade or business in its behalf without testamentary authority. *Gilligan v. Daly*, — N. J. Eq. —, 80 Atl. 994.

And it was said in *Smith v. Preston*, 170 Ill. 179, 48 N. E. 688, affirming 67 Ill. App. 613, that an administrator who carries on a trade or business without testamentary authority does so at his own risk.

So it was said in *Tompkins v. Weeks*, 26 Cal. 50, that an administrator who carries on a trade or business on behalf of an estate is answerable for resulting losses.

A testamentary trustee who permits the funds of an estate to remain in a partnership of which the testator was a member, as was also his cotrustee, instead of withdrawing them and investing them, as directed by will to do, becomes individually liable to those beneficially interested in the estate, upon the failure of the co-partnership, for permitting the funds to accumulate therein, notwithstanding he did not have actual knowledge of the fact that the funds were being used by the firm, 40 L.R.A.(N.S.)

which he might easily have discovered, however, by making inquiry. *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665.

And since a testamentary direction to keep a certain portion of an estate invested in a partnership business in which the testator was interested does not empower an executor to become a partner by so doing, he becomes liable to answer for the portion of the estate so invested. *Travis v. Milne*, 9 Hare, 141, 20 L. J. Ch. N. S. 665.

So, an administrator who carries on a business belonging to an estate for eleven months, apparently for his own benefit, will be deemed to have elected to take it at its appraised value; and the creditors of the deceased may compel him to answer for the difference between it and what it brought at a sale. *Wood's Estate*, 1 Ashm. (Pa.) 314.

As to liability of a personal representative for losses where a trade or business was carried on in order to wind it up, see *infra*, III. c, 4 (b).

Or where a trade or business is carried on under statutory authority, see *infra*, III. c, 5 (a).

Or when carried on under an order of court, see *infra*, III. c, 6 (a).

As to liability of a guardian for losses sustained while carrying on a trade or business, see *infra*, IV. b.

(b) In mercantile business.

As an administrator or an executor who is not empowered by will to do so is not justified in carrying on a business belonging to an intestate, he becomes personally liable for resulting losses. *Re Rose*, 80 Cal. 166, 22 Pac. 86; *Re Broome*, — Cal. —, 122 Pac. 470; *Poullain v. Brown*, 82 Ga. 412, 9 S. E. 1131; *Smith v. Preston*, 170 Ill. 179, 48 N. E. 688, affirming 67 Ill. App. 613; *Michels Co. v. Young*, 150 Ill. App. 442; *Campbell v. Faxon*, 73 Kan. 675, 5 L.R.A.(N.S.) 1002, 85 Pac. 760; *Frey v. Eisenhardt*, 116 Mich. 160, 74 N. W. 501; *Gilligan v. Daly*, — N. J. Eq. —, 80 Atl. 994; *Thompson v. Brown*, 4 Johns. Ch. 619; *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665; *Re Prescott, Tucker*, 430; *Re McGovern*, 118 N. Y. Supp. 378; *Munzor's Estate*, 4 Misc. 374, 25 N. Y. Supp. 818; *Re United States Mortg. & T. Co.* 114 App. Div. 532, 100 N. Y. Supp. 12; *Peterman v. United States Rubber Co.* 221 Ill. 581, 77 N. E. 1108; *Callaghan v. Hall*, 1 Serg. & R. 241; *Western Newspaper Union v. Thurmond*, 27 Okla. 261, 111 Pac. 204, Ann. Cas. 1912 B. 727; *Merkel's Estate*, 131 Pa. 584, 18 Atl. 931; *Shinn's Estate*, 166 Pa. 121, 30 Atl. 1026, 1030; *Allam's Estate*, 199 Pa. 573, 49 Atl. 252; *Re Dillenkofer*, 34 Pittsb. L. J. N. S. 303; *Oram's Estate*, 9 Phila. 358; *Bowker's Estate*, 12 Phila. 88; *Huson v. Wallace*, 1 Rich. Eq. 1; *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280; *Gum v. Frost*, 4 Fed. 745; *Fidelity & D. Co. v. Moshier*, 151 Fed. 806; *Labouchere v. Tupper*, 11 Moore, P. C. C. 198, 5 Week.

Rep. 597; *Heathcote v. Hulme*, 1 Jac. & W. 122, 20 Revised Rep. 248.

Thus, in *Merkel's Estate*, 131 Pa. 584, 18 Atl. 931, an administrator was surcharged with a loss due to his continuance of a business where the estate was insolvent.

And in *Callaghan v. Hall*, 1 Serg. & R. 241, an administrator was surcharged where he shipped merchandise to a foreign port, where it was sold at a loss.

So, testamentary trustees are personally liable for losses sustained where, in violation of the commands of a will as to the investment of the funds of an estate, they permitted it to remain for many years in a mercantile business. *Kirkman v. Booth*, 11 Beav. 273, 18 L. J. Ch. N. S. 25, 13 Jur. 525, 12 Eng. Rul. Cas. 29.

And an administrator who continues a business belonging to his intestate is liable for losses sustained beyond the value of the assets embarked in the business at the latter's death. *Allam's Estate*, 199 Pa. 573, 49 Atl. 252.

So, an administrator is answerable for a loss sustained where, without an order of court, he expended a large sum of money in mining operations of a highly speculative character, notwithstanding they were begun by his intestate in his lifetime. *Shinn's Estate*, 166 Pa. 121, 30 Atl. 1026, 1030.

And an executor is personally liable for losses sustained by making sales on credit without security, as required by statute, although in good faith he continued to operate a manufacturing business belonging to the estate. *Peterman v. United States Rubber Co.* 221 Ill. 581, 77 N. E. 1108.

And the executor is not relieved from liability for such losses by reason of the fact that his management of the business resulted in a net profit, since it was his duty to save the estate from such losses. *Ibid.*

And a sister of an intestate is chargeable with losses sustained both before and after her appointment as administratrix, where, at the request of the other heirs, she took possession of and ran a business belonging to the estate for four months before her appointment as administratrix. *Re McGovern*, 118 N. Y. Supp. 378.

As to the liability of a personal representative for losses where a trade or business is carried on in order to wind it up, see *infra*, III. c. 4 (b).

Or where a trade or business is carried on under statutory authority, see *infra*, III. c. 5 (a).

Or when carried on under an order of court, see *infra*, III. c. 6 (a).

As to the liability of a guardian for losses sustained while carrying on a trade or business, see *infra*, IV. b.

(c) In partnership business.

An administrator or executor, unless authorized by will to do so, who actively participates in conducting a partnership business of which deceased was a member, be-
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comes personally liable for losses sustained. *Thompson v. Brown*, 4 Johns. Ch. 619; *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665; *Gibson v. Stevens*, 7 N. H. 357.

In *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665, the liability of an executor, who was also a testamentary trustee, for losses sustained, was conceded, where he continued the funds of the estate in a partnership business in which the testator was interested.

So, where testamentary trustees contrary to command of a will that the estate should be invested in good securities, permitted it to remain for a number of years in a partnership business which had been carried on by the testator and his brother, who was also one of the two trustees, during the former's lifetime, the other trustee is answerable to the estate for losses sustained, where, notwithstanding he did not actively participate in the management of the business, he was frequently about the establishment, and was aware of the manner in which the business was conducted. *Booth v. Booth*, 1 Beav. 125, 8 L. J. Ch. N. S. 39, 2 Jur. 938.

As to the liability of a personal representative for losses where a trade or business was carried on in order to wind it up, see *infra*, III. c. 4 (b).

Or where a trade or business is carried on under statutory authority, see *infra*, III. c. 5 (a).

Or when carried on under an order of court, see *infra*, III. c. 6 (a).

As to the liability of a guardian for losses sustained while carrying on a trade or business, see *infra*, IV. b.

(d) In farming business.

A personal representative is answerable for losses resulting from continuing a farming business belonging to an estate where he was not empowered to do so. *Sparrow's Succession*, 39 La. Ann. 696, 2 So. 501.

And an administrator is personally liable for losses sustained where he carried on a plantation for the year in which his intestate died, notwithstanding he would have been relieved by statute had he first obtained leave of court to continue such business. *Poullain v. Brown*, 82 Ga. 412, 9 S. E. 1131.

But the contrary was held in *Lawton v. Fish*, 51 Ga. 647, where an executor, without an order from the court, cultivated a crop planted by his testator, and a resulting loss was due to an unpropitious season.

As to the liability of a personal representative for losses sustained while carrying on a farming business under statutory authority, see *infra*, III. c. 5 (a).

And in *Huson v. Wallace*, 1 Rich. Eq. 1, it was said that an administrator who worked the farm of an intestate would not be liable except for losses due to gross neglect, where he fairly accounted for the proceeds.

So, where an administrator, in the exercise of good discretion, worked his de-

cedent's farm for four months, he will not be chargeable with losses sustained. *Walker's Estate*, 6 Pa. Co. Ct. 515.

And an administrator is not liable for failure to make adequate crops on a plantation belonging to the succession, which was not due to his fault or negligence. *Myrick's Succession*, 38 La. Ann. 611.

Nor is he liable for the value of domestic animals that died without his fault, while working such plantation. *Ibid*.

Nor will he be charged with the value of horses that died without his fault or negligence, where he is chargeable with their hire, at the election of those interested in the estate. *Harrison v. Harrison*, 39 Ala. 489.

2. Liability for debts contracted.

(a) In mercantile business.

An executor or administrator who carries on a trade or business on behalf of an estate without being empowered by will to do so becomes individually answerable for all debts contracted by him while so engaged.

Eufaula Nat. Bank v. Manassas, 124 Ala. 379, 27 So. 258; *Re Rose*, 80 Cal. 166, 22 Pac. 86; *Hallock v. Smith*, 50 Conn. 127; *Campbell v. Faxon*, 73 Kan. 675, 5 L.R.A. (N.S.) 1002, 85 Pac. 760; *Carroll v. Davidson*, 23 La. Ann. 428; *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305; *Avery v. Myers*, 60 Miss. 367; *Doolittle v. Willet*, 57 N. J. L. 398, 31 Atl. 385; *Willis v. Sharp*, 113 N. Y. 586, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun. 434; *Keynon v. Olney*, 31 N. Y. S. R. 839, 15 N. Y. Supp. 416; *Re Sharp*, 5 Dem. 516; *Re Tisdale*, 110 App. 857, 97 N. Y. Supp. 494; *Western Newspaper Union v. Thurmond*, 27 Okla. 261, 111 Pac. 204, Ann. Cas. 1912 B, 727; *Re United States Mortg. & T. Co.* 114 App. Div. 532, 100 N. Y. Supp. 12; *Corr's Estate*, 8 Pa. Dist. R. 209; *Morrow v. Morrow*, 2 Tenn. Ch. 549; *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280; *Rich v. Sowles*, 64 Vt. 408, 15 L.R.A. 850, 23 Atl. 723; *Labouchere v. Tupper*, 11 Moore P. C. C. 198, 5 Week. Rep. 597; *Re Evans*, L. R. 34 Ch. Div. 597, 56 L. T. N. S. 768, 35 Week. Rep. 586; *M'Aloon v. M'Aloon* [1900] 1 I. R. 367.

It was said in *Morrow v. Morrow*, 2 Tenn. Ch. 549, that a personal representative who carried on a trade or business on behalf of an estate, when not empowered by will or an order of a court of chancery, becomes individually answerable for all debts contracted by him while so engaged.

And it was held in *Corr's Estate*, 8 Pa. Dist. R. 209, that an administrator who carried on a business belonging to an estate, as well as the beneficiaries thereof, who had knowledge thereof, and assented to his so doing, are answerable for goods purchased therefor.

So, an executor who, without authority, for five years, operated a mill belonging to his decedent, will be charged with the cost of extensive permanent repairs 40 L.R.A. (N.S.)

made by him, as well as with the cost of new machinery installed in the mill. *Re Tisdale*, 110 App. Div. 857, 97 N. Y. Supp. 494.

And an administrator is answerable for such debts, although contracted by an agent employed by him to run the business. *Campbell v. Faxon*, 73 Kan. 675, 5 L.R.A. (N.S.) 1002, 85 Pac. 760.

But it was said in *Re Rose*, 80 Cal. 166, 22 Pac. 86, that debts contracted by an administrator while carrying on a trade or business belonging to an estate might be paid from the income of the business if the estate did not suffer a loss therefrom.

As to the liability of a personal representative for debts contracted while carrying on a trade or business in order to wind it up, see *infra*, III, c, 4 (c).

Or while carrying on a trade or business under statutory authority, see *infra*, III, c, 5 (b).

Or under an order of court, see *infra*, III, c, 6 (b).

As to the liability of a guardian for debts contracted while carrying on a trade or business, see *infra*, IV, c.

(b) In partnership business.

The personal representative of a decedent, who, without testamentary authority, actively participates in the management of a partnership business of which the decedent was a member, becomes personally liable as a partner for all debts subsequently contracted. *Edgar v. Cook*, 4 Ala. 588; *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703; *Frey v. Eisenhardt*, 116 Mich. 160, 74 N. W. 501; *City Nat. Bank v. Stone*, 131 Mich. 588, 92 N. W. 99; *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305; *Avery v. Myers*, 60 Miss. 367; *Thompson v. Brown*, 4 Johns. Ch. 619; *Wightman v. Townroe*, 1 Maule & S. 412, 14 Revised Rep. 475.

It was said *obiter* in substance in *Gibson v. Stevens*, 7 N. H. 357, that if an executor, without testamentary authority, undertakes the joint management of a partnership business in which a testator was a member, he lays the foundation for a personal liability.

And this rule will be applied where the executor actively participates in the management of the partnership affairs through the agency of the surviving partner. *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305.

So, an administrator is liable as a partner for debts incurred in carrying on a partnership business under an agreement with the surviving partner, whereby the latter continued the business for the benefit of himself and the estate. *City Nat. Bank v. Stone*, 131 Mich. 588, 92 N. W. 99.

And it was held in *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703, that an executor of a deceased partner, who carried on a business with the surviving partner, became individually liable as a partner for all debts subsequently contracted in the business.

So, an executor and his partner are not justified in sending a vessel belonging to the estate, which had been partitioned among the distributees, upon a voyage, and they are personally liable for necessary repairs made during the voyage. *Muntz v. Broom*, 11 La. Ann. 472.

And an executor who was not empowered by will to carry on a business is personally liable for money borrowed by him for the use of a partnership of which his testator was a member. *Johnson v. Kellogg*, 26 N. Y. Week. Dig. 467, 8 N. Y. S. R. 413.

So, it was held in *Edgar v. Cook*, 4 Ala. 588, that a clause in articles of copartnership, to the effect that it should continue for a definite time after the death of a partner, rendered an executor individually liable for debts contracted by the surviving partner, where the former joined in carrying on the business.

As to the allowance as an expense of administration for money advanced by an administrator for the use of a partnership of which his testator was a member, see *Tompkins v. Weeks*, *infra*, V. f, 1.

But an executor is not personally liable for debts created, notwithstanding he permitted the assets of the testator to remain in a partnership for more than two years, where he did not take part in the management thereof, but repeatedly demanded that the surviving partner should wind up the business, and neither he nor the estate derived any benefit from the business, and he did not hold himself out as a partner, nor was he so regarded by the surviving partner. *Avery v. Myers*, 60 Miss. 367.

And an administrator of a part owner of a vessel, who took no part in its operation after the death of his intestate, is not personally liable for debts contracted by the surviving owners for necessary supplies therefor. *Gum v. Frost*, 4 Fed. 745; *Stedman v. Feidler*, 20 N. Y. 437, affirming 25 Barb. 605.

So, an executor who did not personally engage in carrying on a partnership business after the death of his testator is not liable as a partner for debts subsequently contracted, notwithstanding the articles of copartnership provide that upon the death of one of the partners his capital shall remain in the business until the expiration of the partnership. *Wild v. Davenport*, 48 N. J. L. 129, 57 Am. Rep. 552, 7 Atl. 295.

And an executor who permits the capital of a testator to remain in a banking business in which he was interested in his lifetime is not, upon the subsequent insolvency of the bank, liable as a partner, although he had received as executor profits on the investment. *Tisch v. Rockafellow*, 209 Pa. 419, 58 Atl. 805.

So, an executor does not become liable as a partner for the debts of a partnership of which his testator was a member, created after his death, merely because he lent money to the surviving partner for the benefit of the business, notwithstanding the will of the deceased partner declared that such business should be continued by the 40 L.R.A. (N.S.)

survivor for five years after the death of either of the members. *Stewart v. Robinson*, 115 N. Y. 328, 5 L.R.A. 410, 22 N. E. 160, 163.

And where articles of copartnership provide that the business should be continued by the survivor for five years after the death of either, the executor of one of them, who lends money to the survivor for the benefit of the business, is not liable as a partner for debts contracted by the latter, the estate embarked in the business only being liable. *Ibid*.

As to the liability of a personal representative for debts contracted while carrying on a trade or business in order to wind it up, see *infra*, III. c, 4 (c).

Or while carrying it on under statutory authority, see *infra*, III. c, 5 (b).

Or under an order of court, see *infra*, III. c, 6 (b).

As to the liability of a guardian for debts contracted while carrying on a business, see *infra*, IV. c.

(c) *In farming business.*

A personal representative who, without being empowered by will, works a plantation or farm belonging to an estate long after harvesting the crops growing at the death of his intestate, becomes personally liable for all expenses incurred. *Hallock v. Smith*, 50 Conn. 127; *Florsheim Bros. v. Holt*, 32 La. Ann. 133; *Carroll v. Davidson*, 23 La. Ann. 428; *Miltenerberger v. Taylor*, 23 La. Ann. 188; *Sparrow's Succession*, 39 La. Ann. 696, 2 So. 501; *Jaquett's Estate*, 13 Lanc. Bar. 13; *Rich v. Sowles*, 64 Vt. 408, 15 L.R.A. 850, 23 Atl. 723.

And an administrator who, without an order of the court, but with the concurrence of the widow and majority of the heirs continues a plantation business long after the crop thereon at the time of the death of his intestate had been harvested, becomes personally liable for debts incurred. *Maxwell-Yerger Co. v. Rogan*, 125 La. 1, 51 So. 48.

So, an administrator who operates a farm belonging to an estate is personally liable for a horse purchased by him for use thereon. *Rich v. Sowles*, 64 Vt. 408, 15 L.R.A. 850, 23 Atl. 723.

Or for a yoke of oxen purchased, notwithstanding they were afterwards sold and the proceeds used in the employment of necessary labor for carrying on the farm business. *Hallock v. Smith*, 50 Conn. 127.

As to the liability of a personal representative for debts contracted while carrying on a farming business in order to wind it up, see *infra*, III. c, 4 (c).

Or while carrying on such business under statutory authority, see *infra*, III. c, 5 (b).

Or under an order of court, see *infra*, III. c, 6 (b).

As to the liability of a guardian for debts so contracted, see *infra*, IV. c.

As to the payment from an estate of the expenses incurred by an administrator in

carrying on a farming business without authority, see *infra*, V. 1, 2.

As to the right of a personal representative to indemnity from an estate for liability incurred while carrying on a trade or business without authority, see *infra*, VI.

(d) By executor *de son tort* in carrying on business.

An administrator *de son tort* who continues a banking business of a decedent is personally liable on certificates of deposit issued by him. *Kelley v. Kelley*, 84 Fed. 420.

And a parent who took possession of and conducted a business belonging to his deceased son for a year before becoming administrator of his estate will not be allowed an accounting for money advanced by him for the purchase of goods for such business; "although," said the court, "had the estate been benefited by it, the administrator would be allowed therefor." *McKee v. Mobley*, 3 S. C. 242.

3. Liability for rental or value of property embarked or used in business; interest; profits.

An administrator is not answerable to those beneficially interested in an estate for the net profits of a trade or business carried on by him, when done with their tacit consent. *French v. Davis*, 38 Miss. 167.

But interest will be charged a testamentary trustee on losses sustained where he left funds of an estate in a partnership business in which his testator was interested, instead of withdrawing them and investing them as the testator directed. *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665.

So, an executor to whom a business was devised subject to the payment of the debts of the testator in the event of the balance of the estate proving insufficient, who took possession of the business and carried it on for his own benefit, will be required, upon a deficiency of assets, to account for the property embarked in such business, or its value, including the good will and interest, as well as for the rental of the premises in which the business was carried on, which belonged to the estate. *Re Van Houten*, 18 App. Div. 301, 46 N. Y. Supp. 190.

And an executor or administrator who carries on a trade or business on behalf of an estate without being empowered to do so by will is answerable to those beneficially interested in the estate for the value of the assets employed in the business, together with interest thereon. *Steele v. Knox*, 10 Ala. 608; *Campbell v. Faxon*, 73 Kan. 675, 5 L.R.A. (N.S.) 1002, 85 Pac. 760; *Gilligan v. Daly*, — N. J. Eq. —, 80 Atl. 994; *Re United States Mortg. & T. Co.* 114 App. Div. 532, 100 N. Y. Supp. 12; *Robinett's Appeal*, 36 Pa. 174; *McDonald v. Richardson*, 5 Jur. N. S. 9, 1 Giff. 81; *Heathcote v. Hulme*, 1 Jac. & W. 122, 20 Revised Rep. 248.

So, the same rule is applicable to a tes-

tamentary trustee, who continues a business without testamentary authority. *Re United States Mortg. & T. Co.* 114 App. Div. 532, 100 N. Y. Supp. 12.

And an administrator will be held answerable for the value of a business, as well as the profits, which he carried on under an order of a court, where he sold it to a corporation of which he was the largest stockholder, paying the legatees therefor in the worthless stock thereof. *Roberts v. Weimer*, 227 Ill. 138, 81 N. E. 40.

And an executor to whom property was devised in trust, who carries on a business for the period prescribed by will, at a loss, is answerable for the profits of the business, or, at the election of those interested in the estate, for interest on the sum embarked therein. *Docker v. Somes*, 2 Myl. & K. 655, 3 L. J. Ch. N. S. 200.

And, when moved by special circumstances, annual rests will be made. *Ibid.*

Or, at the election of those beneficially interested in an estate, a personal representative who carries on a trade or business on behalf of an estate may be charged with the net profits of the business. *Steele v. Knox*, 10 Ala. 608; *McCreelias v. Hinkle*, 17 Ala. 459; *Harrison v. Harrison*, 39 Ala. 489; *Hinson v. Williamson*, 74 Ala. 180; *French v. Davis*, 38 Miss. 167; *Merchant v. Comback*, 41 N. J. Eq. 349, 7 Atl. 633, affirming 39 N. J. Eq. 506; *Gilligan v. Daly*, — N. J. Eq. —, 80 Atl. 994; *Re Sues*, 37 Misc. 459, 75 N. Y. Supp. 938; *Robinett's Appeal*, 36 Pa. 174; *Halloway's Estate*, 13 Phila. 317; *Huson v. Wallace*, 1 Rich. Eq. 1.

And an administratrix who permits her husband to continue a business belonging to an intestate is liable for the net profits thereof. *Re Sues*, 37 Misc. 459, 75 N. Y. Supp. 938.

While other cases say he shall be charged with the "profits" of the business. *Re Rose*, 80 Cal. 166, 22 Pac. 86; *Re McGovern*, 118 N. Y. Supp. 378; *Munzor's Estate*, 4 Misc. 374, 25 N. Y. Supp. 818; *Re Maloney*, 233 Pa. 614, 82 Atl. 958; *Oram's Estate*, 9 Phila. 358; *Nivens v. Nivens*, 66 C. C. A. 145, 133 Fed. 39; *Heathcote v. Hulme*, 1 Jac. & W. 122, 20 Revised Rep. 248; *Palmer v. Mitchell*, 2 Myl. & K. 672, note; *McDonald v. Richardson*, 5 Jur. N. S. 9, 1 Giff. 81.

Thus, an executor is liable for profits where he continues a partnership business of which the testator was a member, until the expiration of the term fixed by the articles of copartnership. *Re Maloney*, 233 Pa. 614, 82 Atl. 958.

And in *Re United States Mortg. & T. Co.* 114 App. Div. 532, 100 N. Y. Supp. 12, it was held that a testamentary trustee who carried on a business without authority was answerable for the profits.

So, in *Walker v. Woodward*, 1 Russ. Ch. 107, 25 Revised Rep. 9, an administrator who carried on decedent's farm was charged with the profits therefrom, with interest at annual rests, where he did not keep an account of the business.

And an administrator who carries on a trade or business at a profit will be charged therewith, less the reasonable expenses of the business. *Robinett's Appeal*, 36 Pa. 174.

But an administrator who carried on a blacksmithing business pending the settlement of an estate is not answerable for the profits thereof to one to whom a subsequently discovered will devised such business. *Flannigan's Estate*, 28 Pa. Super. Ct. 487.

And the net profits of a business will not be charged an administrator who carries on a business at a loss, in order to close it out. *Re Sharp*, 5 Dem. 516.

But where an executor, who was invested with absolute discretion to postpone the sale of the property of an estate, for twenty-two years paid to a life tenant the income from a business carried on by him, as directed by will, he is not answerable to a remote legatee for the profits of such business. *Re Crowther* [1895] 2 Ch. 56, 64 L. J. Ch. N. S. 537, 13 Reports, 496, 72 L. T. N. S. 762, 43 Week. Rep. 571.

Where an administrator is chargeable with the profits of a business, in establishing them, only those resulting from the capital of the estate should be included, due allowance being made for the business skill of the administrator in carrying on the business. *Gilligan v. Daly*, — N. J. Eq. —, 80 Atl. 994.

Where a farming business was carried on without authority, the beneficiaries may, after deducting the expense of the business, elect to charge the administrator with the hire of a slave belonging to the estate, which he employed thereon. *McCreeliss v. Hinkle*, 17 Ala. 459.

And where a plantation was operated without authority, the beneficiaries may elect to charge the administrator with the rental thereof, or the profits; and if the latter are taken, the administrator is entitled to a deduction for his reasonable expenses of carrying on the business. *Hinson v. Williamson*, 74 Ala. 180.

Circumstances may arise which will justify taking profits for one period and interest for another. But notice of the dissolution of a partnership, unaccompanied by a settlement of the accounts or a transfer of the property, is not sufficient. *Heathcote v. Hulme*, 1 Jac. & W. 122, 20 Revised Rep. 248.

Where profits of a business are claimed, burden of showing there were any rests upon the claimants. *Re Suess*, 37 Misc. 459, 75 N. Y. Supp. 938; *Munzor's Estate*, 4 Misc. 374, 25 N. Y. Supp. 818; *Re United States Mortg. & T. Co.* 114 App. Div. 532, 100 N. Y. Supp. 12.

And the burden rests on the claimants to show that greater profits were earned than accounted for by the personal representative. *Re Peck*, 79 App. Div. 296, 80 N. Y. Supp. 76, affirmed without opinion in 177 N. Y. 538, 69 N. E. 1129.

Where an executor or administrator without authority carries on a farming business belonging to an estate, he may be charged, 40 L.R.A. (N.S.)

at the option of those beneficially interested in the estate, with the rental of the property used by him in the business. *Harrison v. Harrison*, 39 Ala. 489; *Hinson v. Williamson*, 74 Ala. 180; *Sparrow's Succession*, 39 La. Ann. 696, 2 So. 501.

An administrator who, without authority, continues planting operations for several years, without attempting to lease the plantation, becomes liable for the rental value thereof during such time. *Sparrow's Succession*, 39 La. Ann. 696, 2 So. 501.

So, an administrator is answerable, at the election of the beneficiaries, either for the profits or the rental of a plantation belonging to a decedent, which he carried on without having obtained an order from the court, as the statute required. *Steele v. Knox*, 10 Ala. 608.

And an administrator *de bonis non* who continues the plantation business of an intestate is personally answerable to distributees for the net profits or the rent of the property employed, with interest. *Hinson v. Williamson*, 74 Ala. 180.

So, an administrator who keeps an estate together without an order of court, as required by statute, and works a plantation belonging to an estate for a number of years, is liable, at the election of the distributees, either for the rental of the land and hire of the slaves of the estate, employed thereon, and interest, or they may take the net proceeds of the crops raised. *Harrison v. Harrison*, 39 Ala. 489.

Or, he may be charged, at the election of those interested in the estate, with the value of the services of slaves belonging to the estate, which he employed in working the plantation. *Ibid*; *McCreeliss v. Hinkle*, 17 Ala. 459.

So, an executor who, without authority, keeps an estate together and works a plantation of the decedent, is liable, at the election of the distributees, for the crops raised thereon, or for the hire of the slaves of the estate employed thereon. *Billingslea v. Young*, 33 Miss. 95.

And after the death of a widow, who, as administratrix of her husband's estate, formed a copartnership with the children of full age and others, and employed the slaves of the estate in working a plantation, the minor heirs may recover from the surviving partners for the services of the slaves. *Guille v. Gassen*, 14 La. Ann. 5.

But an administrator who improperly carried on a farming business, upon being charged by the distributees with the hire of slaves belonging to the estate, which he worked on the farm, will be allowed compensation for caring for those who were helpless. *Steele v. Knox*, 10 Ala. 608.

And an administrator will be charged with the value of the services of domestic animals belonging to the estate, which he employed on such plantation. *Harrison v. Harrison*, *supra*.

So, in *Huson v. Wallace*, 1 Rich. Eq. 1, an administrator who re-chartered a ferry belonging to his intestate was charged with the rents and profits thereof.

While the personal representative may, at the election of those interested in the estate, be charged with either such rental or the net profits realized by him, they cannot have both. *McCreeless v. Hinkle*, 17 Ala. 459.

As to the liability of a guardian for the profits of a business or rental of the property employed therein, see *infra*, IV. d.

4. *Liability incurred in winding up business.*

(a) *In general.*

As to the allowance from an estate of the expenses incurred by a personal representative while winding up a trade or business, see *infra*, V. f, 3.

An administrator is not answerable for the net profits of a business which he carried on at a loss, in order to wind it up. *Re Sharp*, 5 Dem. 516.

(b) *For losses sustained.*

Losses sustained as a result of a personal representative's continuing a mercantile business in order to dispose of it will not fall upon him. *Merritt v. Merritt*, 62 Mo. 150; *Re Semple*, 189 Pa. 385, 42 Atl. 28, reversing 28 Pittsb. L. J. N. S. 431; *Orne's Estate*, 7 Pa. Dist. R. 337; *Greiner's Estate*, 14 Pa. Dist. R. 348; *Wright v. Beatty*, 2 Alberta L. Rep. 89; *Garrett v. Noble*, 6 Sim. 504, 3 L. J. Ch. N. S. 159.

This doctrine has been applied where an executor, to whom was bequeathed a half interest in personal property used in a hotel business, without an order of the court, in good faith, carried on the business for a year or more at a loss, until it could be sold to advantage, the business having been a losing one during the lifetime of the testator. *Merritt v. Merritt*, 62 Mo. 150.

And it has been applied where a personal representative at a loss conducted a hotel business in order to affect a sale and preserve its lease, continually advertising it for sale, since the loss will be considered an expense of administration, even against creditors of the testator who assented to and acquiesced in the conduct of the executor. *Wright v. Beatty*, 2 Alberta L. Rep. 89.

So, it has been applied where an administrator, in the exercise of that degree of care and caution that a prudent man would have employed, continued a manufacturing business for about six months during a period not propitious for a sale, and then disposed of it for less than its inventory value. *Orne's Estate*, 7 Pa. Dist. R. 337.

And an administrator who, in good faith, continued a business belonging to an estate, continually advertising it for sale, will not be charged with a loss resulting therefrom. *Greiner's Estate*, 14 Pa. Dist. R. 348.

So, executors are not answerable for a loss sustained by the operation for a year of a business belonging to an estate, where it was impossible to sell it sooner, and 10 L.R.A. (N.S.)

they acted in good faith, under a direction of the will to collect the personal property of the testator with all convenient speed. *Garrett v. Noble*, 6 Sim. 504, 3 L. J. Ch. N. S. 159.

And an administrator is not answerable for a loss, where he carried on a business for several years, paying from the proceeds about a quarter of a million dollars in debts of the decedent, and afterwards selling the business for \$48,000 less than its appraised value, it appearing that the stock was old, and that the administrator tried repeatedly to sell it, and also that it would have been impossible to obtain a better price than he did. *Re Semple*, 189 Pa. 385, 42 Atl. 28, reversing 28 Pittsb. L. J. N. S. 431.

So, an executor is not answerable for a loss where, in good faith, he continued a boarding school, which the testator had carried on for many years, for the balance of the term in which the testator died, where there were many contracts for tuition for the full term. *Re Benedict*, 13 Abb. N. C. 67, 1 Dem. 547.

An executor who, without testamentary authority, continued in good faith, for three years, in order to wind it up, a business which required skill and judgment in its management, and from the proceeds he paid all of the testator's debts, will not be charged with the difference between the appraised value of the business and the price he obtained therefor, where an immediate sale would have resulted in a heavy loss. *Bowker's Estate*, 12 Phila. 88.

So, an administrator who, in good faith, carried on a business, continually advertising it for sale, will not be charged with a resulting loss. *Greimer's Estate*, 14 Pa. Dist. R. 348.

As to the right of a personal representative to indemnity from an estate for losses sustained while carrying on a trade or business without authority, in order to wind it up, see *Wright v. Beatty*, *infra*, VI.

(c) *For debts contracted.*

As to the allowance as cost of administration of expenses incurred by personal representative in winding up a trade or business, see *infra*, V. f, 3.

Or when done under statute, see *infra*, V. f, 5.

And when done under an order of court, see *infra*, V. f, 6.

Within reasonable limits, the personal representative may, if for the best interests of the estate, purchase goods to replenish the stock and incur liabilities without incurring individual responsibility therefor. *Re Sharp*, 5 Dem. 516.

But for a case holding the contrary, see *Re Osburn*, *infra*, III. c, 5 (b).

5. *Liability when acting under statute.*

(a) *For losses sustained.*

A personal representative who works a farm belonging to his decedent under a

statutory provision permitting it is not answerable for a loss sustained, unless the result of his own mismanagement or negligence. *Harding v. Evans*, 3 Port. (Ala.) 221, 29 Am. Dec. 255; *Taylor v. Bush*, 75 Ala. 432; *Stephens v. James*, 77 Ga. 139, 3 S. E. 160; *King v. Johnson*, 96 Ga. 497, 23 S. E. 500; *Lawton v. Fish*, 51 Ga. 650.

And an executor who, under a statute permitting him to do so, continued a business belonging to his testator, does not become liable for resulting losses unless due to a failure to exercise reasonable discretion, notwithstanding the will directed that such business should be closed immediately upon the death of the testator. *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 78.

But an administrator is personally liable for resulting losses where he carried on a plantation business for the year in which his intestate died without a necessary order from the court, as required by statute. *Poullain v. Brown*, 82 Ga. 412, 9 S. E. 1131.

And he will not be answerable for losses sustained as the result of an unpropitious season, where, without such an order of court, a plantation was cultivated by him for the season in which his intestate died. *Lawton v. Fish*, 51 Ga. 647.

(b) For debts contracted.

As to the right of a personal representative to indemnity from an estate under such circumstances, see *infra*, VI.

Notwithstanding that an executor may, by statute, where his intestate dies after January 1st, cultivate his plantation for the current year, he becomes personally liable for debts contracted in so doing. *Stephens v. James*, 77 Ga. 139, 3 S. E. 160; *Harding v. Evans*, 3 Port. (Ala.) 221, 29 Am. Dec. 255.

However, if such indebtedness was properly incurred, it may be allowed by the court against the estate, and retained by the executor, notwithstanding the business resulted in a loss, unless due to his own mismanagement or fault. *Ibid*.

But if a personal representative continues to carry on a plantation after the expiration of the year provided by statute, he becomes personally liable for all expenses thereafter incurred. *Eubank v. Clark*, 78 Ala. 73; *Johnson v. Parnell*, 60 Ga. 661; *King v. Johnson*, 96 Ga. 497, 23 S. E. 500.

Since a statute permitting the personal representative to carry on the business of a decedent does not include a partnership business, the former becomes personally liable on a note given by him for purchases made in behalf of such partnership, where his conduct led the payee to believe that he was a partner. *Altgelt v. Sullivan*, — Tex. Civ. App. —, 79 S. W. 333.

So, he may bind himself by paying interest on such a note. *Altgelt v. Alamo Nat. Bank*, — Tex. Civ. App. —, 79 S. W. 582.

An administrator becomes individually liable for merchandise purchased for a 40 L.R.A. (N.S.)

trade or business he is closing up under an order of a court, granted pursuant to a statute, since his power under such order did not extend to the purchasing of goods to replenish the stock. *Re Osburn*, 36 Or. 8, 58 Pac. 521.

As to the allowance as a cost of administration, from an estate, of expenses incurred by an administrator while carrying on a trade or business under statutory authority, see *infra*, V. f, 5.

6. Liability when acting under order of court.

(a) For losses sustained.

It was said in *Merritt v. Merritt*, 62 Mo. 150, that an executor who carries on a trade of the testator by a decree of a court of chancery is not answerable for losses sustained.

The selling by an administrator of a stock of goods at private sales at retail, according to the ordinary course of merchandising, under the orders of the court, though not a regular proceeding by law, is not fraudulent *per se*, but any resulting loss to the estate will authorize an inquiry into the bona fides of the transaction. *McLeod v. Griffiths*, 45 Ark. 505.

(b) For debts contracted.

It is perhaps intimated in *Fleming v. Kelly*, 18 Colo. App. 23, 69 Pac. 272, and *Carroll v. Davidson*, 23 La. Ann. 428, that a personal representative would not be even primarily personally liable for debts properly contracted while carrying on a business under order of the court, though neither is full authority to that effect.

In *Alexander v. Herring*, — Miss. —, 55 So. 360, it was said that if there was any liability under a contract made by the administrator while operating a sawmill under an order of the court which it had no power to make, it was a personal liability, and not a liability of the estate.

As to the allowance from an estate of the expenses incurred by a personal representative while carrying on a trade or business under an order of court, see *infra*, V. f, 6.

IV. Liability of guardian for carrying on business for benefit of ward.

a. In general.

Where, with the consent of all persons interested in the estate, a guardian carried on a manufacturing business belonging to his ward at a profit, building a necessary warehouse upon land belonging to the wife of his ward, upon the court refusing to allow the guardian the cost thereof, he was allowed rent from the estate for the use of the building. *Murphy v. Walker*, 131 Mass. 341.

b. For losses sustained.

And a guardian who neglects his ward's farm, and does not cultivate it as a pru-

dent farmer would his own, will be required to make good the loss, as well as the depreciation, where his conduct impoverished the land. *Willis v. Fox*, 25 Wis. 646.

So, the guardian of an insane person, having no right to carry on a mercantile business belonging to his ward, is individually liable for all losses incurred. *Corcoran v. Allen*, 11 R. I. 567. But, said the court, had the business been conducted at a profit, undoubtedly the ward would not have been permitted to reap the benefit without discharging the burden.

c. For debts contracted.

It was held in *Re Neasmith*, 77 C. C. A. 402, 147 Fed. 160, that conceding, for the sake of the argument, that a guardian had no power to involve her ward's estate in a copartnership, she might become individually liable as a partner for the debts of the concern.

So, the conservator of an incompetent person, having no authority to purchase a business for the benefit of his ward, is individually liable for money expended by him for that purpose. *Church v. Rosenstein*, 85 Conn. 279, 82 Atl. 568.

And debts contracted by a guardian while carrying on a trade or business on behalf of his ward, without authority so to do, are binding upon the former individually, and not upon the estate of the ward. *Warren v. Union Bank*, 167 N. Y. 259, 43 L.R.A. 256, 68 Am. St. Rep. 777, 51 N. E. 1036, reversing 28 App. Div. 7, 51 N. Y. Supp. 27.

But the committee of a lunatic, when authorized by the court to carry on the latter's business, is not personally liable for supplies purchased, which were not charged to the committee, but in the name under which the lunatic did business, it not appearing that credit was given to the committee, or that he made any false representations as to the position he occupied. *Isaacs v. Chinery*, 74 L. T. N. S. 320.

As to the allowance from an estate of the expenses incurred by a guardian while carrying on a trade or business for his ward's benefit, see *infra*, V. f, 4.

d. For profits of business or rental of property embarked or used in business.

A guardian who works a farm belonging to his ward without obtaining a necessary order from the court under a statute permitting it, and who appropriates the proceeds to his own uses, is liable to the ward for the reasonable rental of the land. *Parlin v. Webster*, 17 Tex. Civ. App. 631, 43 S. W. 569.

Where an executor and the guardian of minor heirs, after the expiration of a partnership in which the testator was a partner, in accordance with the stipulation of the articles of partnership, continue the property of the estate therein, the executor is answerable to the heirs for the profits thereof. *Wedderburn v. Wedderburn*, 240 L.R.A. (N.S.)

Keen, 722, affirmed in 4 Myl. & C. 42, 8 L. J. Ch. N. S. 177, 3 Jur. 596.

V. Liability of estate for debts contracted and expenses incurred by personal representative or testamentary trustee in carrying on business.

a. When business carried on under testamentary power or that in articles of partnership.

1. Liability of general assets of estate.

A mere testamentary direction to an executor to continue a business belonging to his testator is insufficient to bind the general assets of his estate for trade debts contracted by the former. *Alzheimer v. Hunter*, 56 Ark. 159, 19 S. W. 496; *Fridenburg v. Wilson*, 20 Fla. 359; *Delaware, L. & W. R. Co. v. Gilbert*, 44 Hun, 201, rehearing denied in 45 Hun, 589, affirmed without opinion in 112 N. Y. 673, 20 N. E. 416; *Willis v. Sharp*, 113 N. Y. 586, 4 L.R.A. 493, 21 N. E. 705.

The creditors in such case can only pursue the assets embarked in the trade at the death of the testatrix. *Willis v. Sharp*, *supra*.

Thus, executors who carry on a business by direction of a will cannot bind the estate for money lent them for use therein by a delivery of the title deeds to realty not used in such business. *M'Neillie v. Acton*, 4 DeG. M. & G. 744, 23 L. J. Ch. N. S. 11, 17 Jur. 1041, 2 Eq. Rep. 21.

But such mortgage will be valid as to the interest in the realty belonging to one of the executors. *Ibid*.

An executor, although directed by will to continue a business of the testator, cannot charge the trust estate for debts created by him, unless express power to do so is conferred by will. *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15.

And directions to an executor to carry on a trade belonging to the testator do not authorize the embarking therein of additional property of the estate. *M'Neillie v. Acton*, *supra*.

So, a testamentary direction to continue an interest of a testator in a partnership will not permit the investment by an executor of other funds of the estate therein. *Smith v. Ayer*, 101 U. S. 320, 25 L. ed. 955.

So, the fact that executors delay the disposal of a testator's interest in a partnership does not warrant an inference of an election by them to continue the estate in trade, as the will permitted them to do, so as to make the testator's estate liable for partnership debts subsequently contracted. *Bacon v. Pomeroy*, 104 Mass. 577.

While an executor who was empowered by will to conduct a business until a designated person arrived at a certain age might, during such period, bind the estate for money borrowed for use in the business, he could not do so thereafter, since his right to carry on the business terminated when

the former became of age. *Crooke v. Hume*, 139 Ky. 834, 109 S. W. 364.

And the general assets of an estate are not liable for debts contracted by an executor while carrying on a business pursuant to a testamentary direction to conduct some legitimate business for the benefit of the testator's son. *Re Sharp*, 5 Dem. 518.

But the rule sustained by the weight of authority is that the general assets of an estate will be subject to the payment of debts contracted by an administrator while carrying on a business in behalf of an estate, pursuant to a testamentary direction, where the will shows clearly and unequivocally that it was the intention of the testator that his general assets should be bound therefor. *Dimmock v. Dimmock*, 52 L. T. N. S. 494; *Ferris v. Van Ingen*, 110 Ga. 102, 35 S. E. 347; *Morrow v. Morrow*, 2 Tenn. Ch. 549; *Lambert v. Rendle*, 3 New Reports, 247; *Burwell v. Cawood*, 2 How. 572, 11 L. ed. 383; *Davis v. Christian*, 15 Gratt. 11; *Furst v. Armstrong*, 202 Pa. 348, 90 Am. St. Rep. 653, 51 Atl. 996; *Waddell's Estate*, 196 Pa. 294, 46 Atl. 304; *Willis v. Sharp*, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434; *Fridenburg v. Wilson*, 20 Fla. 359; *Alzheimer v. Hunter*, 56 Ark. 159, 19 S. W. 496; *Cutbush v. Cutbush*, 1 Beav. 184, 8 L. J. Ch. N. S. 175, 3 Jur. 142.

Such a clear and unequivocal intention to charge the general assets of an estate is shown by a testamentary direction to an executor to sell all of an estate in order to carry on a trade or business (*Davis v. Christian*, 15 Gratt. 11); or to hold all of a testator's property in trust, in order to apply the income to the support and education of his children, and also to carry on some legitimate business for their benefit, with power to sell or make such other disposition of the real and personal property as the safe conduct of the business should require (*Willis v. Sharp*, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434).

And a testator's entire estate will be bound for trade debts where an executor was given power to conduct a business for such time as he might deem fit. *Furst v. Armstrong*, 202 Pa. 348, 90 Am. St. Rep. 653, 51 Atl. 996.

And in *Morrow v. Morrow*, 2 Tenn. Ch. 549, an estate was held liable for debts contracted by an executor who conducted a business under the terms of a will which declared that all of the testator's property should be responsible for debts contracted by his executor.

So, in *Waddell's Estate*, 196 Pa. 294, 46 Atl. 304, it was held that an executor might embark the general assets in a business, where he was directed by will to continue a testator's trade of business interests until they could be sold to advantage, in the same manner as the testator might do if living and managing the business.

So, the whole of an estate is bound by debts contracted by an executor, who was the testator's surviving partner, in con-

tinuing a partnership business under power to continue such business, make sales, purchase goods, negotiate loans, employ labor, renew and extend existing commercial obligations, make notes and contracts, and to do and perform all other acts necessary to the successful conduct thereof. *Ferris v. Van Ingen*, 110 Ga. 102, 35 S. E. 347.

And it was held in *Blodgett v. American Nat. Bank*, 49 Conn. 9, that the general assets of an estate were bound by trade debts contracted after the death of the testator by his executor, who was his surviving partner, and who carried on the partnership business under the provisions of the articles of partnership to the effect that the business should not be dissolved on the testator's death, but that his executor should continue it and act in his stead, and perform all of his stipulations contained in the articles.

And the assets of an estate are answerable for debts contracted by an executor while carrying on a trade or business under testamentary power, where the beneficiaries of the estate did not object to his conduct. *Levi's Estate*, 224 Pa. 233, 73 Atl. 334.

So, in *Crawford v. Hays*, 27 Pittab. L. J. 226, it was held that a judgment was properly rendered against an executor, who carried on a business by direction of a will, on a contract made by him, pertaining to the business.

And in *Bantz v. Bantz*, 52 Md. 686; and *Clapp v. Clapp*, 10 N. Y. S. R. 733, it was held that the estate, and not an executor who carries on a business by virtue of the terms of a will, is answerable for the trade debts contracted by him.

So, it was held in *Reakirt v. Flanagan*, 6 Pa. Dist. R. 402, that a creditor might have execution against an estate which had been benefited by goods sold an executor, who was directed by will to carry on a business and who was unable to pay such debts.

And it was held in *Hankey v. Hammond*, Buck, Bankr. 210, that if the trade assets were insufficient to pay the debts created by an executor who carried on a business under authority conferred by will, they were payable from the general assets of the estate.

It was held in *Laughlin v. Lorenz*, 48 Pa. 275, 86 Am. Dec. 592, that where neither the covenants of articles of copartnership nor the provisions of a will permitting an executor to continue a trade or business limited the fund to be made liable for the contracts of the executor in carrying on the business, the testator's general estate was liable therefor.

But the general assets of an estate are not bound by trade debts contracted by an executor who carried on a business under a testamentary direction contained in the will of a married woman, to the effect that the executor, her husband, should, after her death, continue a mercantile business belonging to her, so long as he should remain sober and of good habits, so as properly to conduct it. *Saperstein v. Ullman*, 49 App.

Div. 446, 63 N. Y. Supp. 626 (two judges dissenting, however, on the ground that the will was sufficient to render the assets embarked in the business liable at least), affirmed in 168 N. Y. 636, 61 N. E. 553, Vann, J., dissenting for the same reason.

And an executor cannot bind an estate for supplies furnished for working a plantation which he carried on under testamentary authority to retain all of the testator's property in his hands until the former's youngest child became of age, and also to cultivate the lands of the estate, and to apply the proceeds, after the payment of the necessary expenses, to the support and education of the children of the testator, and to devote the surplus to the purchasing of negroes and other property, since the power conferred upon the executor justified the use of the income only for the purposes specified. *Hagan v. Barksdale*, 44 Miss. 186.

So, a mortgage cannot be enforced where given by executors on lands of their testator, in order to obtain money with which to pay a judgment rendered against them personally for goods purchased by them while carrying on a business under testamentary authority to do so as long as they should judge it best for the estate, notwithstanding the mortgage was authorized by a court of chancery. *Fridenburg v. Wilson*, 20 Fla. 359.

And an executor cannot be held liable in his representative capacity for coal furnished him for the operation of a manufacturing plant he managed under testamentary power to continue it for ten years from the death of the testator, and to use the capital then invested as well as the proceeds and profits of the business, since no authority to bind the general assets of the estate was thereby conferred upon him. *Delaware, L. & W. R. Co. v. Gilbert*, 44 Hun, 201, rehearing denied in 45 Hun, 589, affirmed without opinion in 112 N. Y. 673, 20 N. E. 416.

Nor may a judgment for goods purchased by an executor for use in a business carried on by him under the terms of a will be rendered against him in his representative capacity, under a statute permitting actions to be maintained against executors and administrators as such except it is sought to charge them personally, since the executor is personally liable. *Ibid*.

Nor are the general assets of an estate liable for the payment of trade debts created by an executor who was empowered by will to continue a partnership business after the death of the testator. *Pitkin v. Pitkin*, 7 Conn. 307, 18 Am. Dec. 111.

And the general assets of an estate are not bound by debts contracted by an executor who joined in the management of a partnership business with the surviving partner, since testamentary directions to manage the testator's estate and to convey it at discretion, without reference to such partnership, was insufficient to permit him to join in carrying on such business. *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305, 40 L.R.A. (N.S.)

So, securities belonging to an estate cannot be pledged by an executor who was authorized by will to retain the testator's interest in a partnership, for debts created subsequent to the death of the testator. *Smith v. Ayer*, 101 U. S. 320, 25 L. ed. 955.

And directions in a will to carry on a business with the testator's surviving partner do not authorize the executor to borrow money therefor, and mortgage the realty of the estate to secure its payment. *Smith v. Smith*, 13 Grant, Ch. (U. C.) 81.

As to the liability of the general assets of an estate for debts contracted by a personal representative while carrying on a trade or business without testamentary authority, see *infra*, V. b.

And as to the liability of the assets of an estate where a trade or business is carried on under a statutory power, or by virtue of an order of court, see *infra*, V. c, d, e; or by a guardian, *supra*, IV.

As to the power of a personal representative to mortgage trade assets, see *infra*, V. a, 2.

2. Liability of assets embarked in trade.

A person who extends credit to an executor while carrying on a trade or business on behalf of an estate is entitled to satisfaction of his claim from the assets embarked by the testator in such trade or business, which is a remedy in addition to the individual liability of the executor. *Altheimer v. Hunter*, 56 Ark. 159, 19 S. W. 496; *Fridenburg v. Wilson*, 20 Fla. 359; *Barber v. Murphy*, 23 Ky. L. Rep. 236, 62 S. W. 894; *Delaware, L. & W. R. Co. v. Gilbert*, 44 Hun, 201, rehearing denied in 45 Hun, 589, affirmed without opinion in 112 N. Y. 673, 20 N. E. 416; *Boulle v. Tompkins*, 5 Redf. 472; *Re Hickey*, 34 Misc. 360, 69 N. Y. Supp. 844; *Re Sharp*, 5 Dem. 516; *Froelich v. Froelich Trading Co.* 120 N. C. 39, 26 S. E. 647; *Wadsworth, H. & Co. v. Arnold*, 24 R. I. 32, 51 Atl. 1041; *Morrow v. Morrow*, 2 Tenn. Ch. 559; *Burwell v. Cawood*, 2 How. 572, 11 L. ed. 383; *Jones v. Walker*, 103 U. S. 444, 26 L. ed. 404; *Owens v. Delamere L. R.* 15 Eq. 134, 27 L. T. N. S. 647, 42 L. J. Ch. N. S. 232, 21 Week. Rep. 219; *Thompson v. Andrews*, 2 L. J. Ch. N. S. 46, 1 Myl. & K. 116; *Ex parte Richardson*, 3 Madd. Ch. 138, *Buck, Bankr.* 202, 18 Revised Rep. 204; *Ex parte Garland*, 10 Ves. Jr. 110, 1 Smith, 220, 7 Revised Rep. 352; *Cutbush v. Cutbush*, 1 Beav. 184, 8 L. J. Ch. N. S. 175, 3 Jur. 142.

Thus, it was said in *Willis v. Sharp*, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434, that a testamentary power to carry on a trade or business belonging to a testator, or to continue his interest in a firm of which he was a member, without anything more, amounts to authority to do so with the fund already invested at the time of the death of the testator, and to subject such fund only, and not the gen-

eral assets of his estate, to the hazards of the trade.

The expenses of cultivating a crop are a charge upon the income therefrom, where an executor carries on a farming business by virtue of a testamentary command. *Hardee v. Cheatham*, 52 Miss. 41.

So, only the assets embarked in the trade at the testator's death are answerable for trade debts contracted by an executor who was directed by will to conduct some legitimate business for the benefit of the testator's sons. *Re Sharp*, 5 Dem. 516.

And the assets embarked in a business may be bound by an executor who was also a surviving partner, for money borrowed for use therein, where he was empowered by will to continue such business not exceeding three years, until it could be sold to advantage. *Barber v. Murphy*, 23 Ky. L. Rep. 286, 62 S. W. 894.

So, it has been held that realty upon which a business is carried on under a testamentary power may be mortgaged by an executor to secure the payment of money borrowed for use in such business, since such realty is to be regarded as a trade asset. *Devitt v. Kearney*, Ir. L. R. 13 Eq. 45.

And such a mortgage has been sustained under testamentary direction to an executor to carry on the testator's business, and to employ therein all the capital invested, and to increase the capital, if necessary, as if he were absolutely entitled thereto. *Dimmock v. Dimmock*, 52 L. T. N. S. 494.

So, a testamentary trustee may mortgage the realty upon which a commercial business is conducted in order to secure the payment of money borrowed by him for use therein, where he was empowered by will to conduct, manage, and control the business and investments of an estate as he might see fit. *Roberts v. Hale*, 124 Iowa, 296, 99 N. W. 1075, 1 Ann. Cas. 940.

As to the power of a personal representative to mortgage the general assets of an estate to secure trade debts, see *supra*, V. a, 1.

Where an executor, who carried on a business under the terms of a will, gave a note to one who extended him credit in the name of the concern, signed by him as manager, the executor, as well as the trade assets, is liable therefor. *Froelich v. Froelich Trading Co.* 120 N. C. 39, 26 S. E. 647.

But it was held in *Fairland v. Percy* L. R. 3 Prob. & Div. 217, 32 L. T. N. S. 405, 44 L. J. Prob. N. S. 11, 23 Week. Rep. 597, that a creditor must proceed against an executor individually to collect such a trade debt before resorting to the trade assets.

In some cases it is held that a creditor must resort to an equitable action in order to subject the trade assets to the satisfaction of an indebtedness contracted by an executor who carries on a business under a testamentary direction. See *infra*, VII.

As to the liability of the assets embarked in trade or business for debts contracted by a personal representative while carrying 40 L.R.A.(N.S.)

on a business without testamentary authority, see *infra*, V. b, 1.

3. Liability where business is carried on by administrator *c. t. a. or d. b. n.*

It was held on *Schlickman v. Citizens' Nat. Bank*, 139 Ky. 268, 29 L.R.A.(N.S.) 264, 129 S. W. 823, that an administrator *de bonis non* could not bind an estate for money borrowed for use in a business carried on by him under power conferred on an executor to manage, without giving bond, the testator's business in the same manner as if he were living, and leaving to the executor's discretion whether he should continue the business.

But, on the other hand, it was held in *Palmer v. Moore*, 82 Ga. 177, 14 Am. St. Rep. 147, 8 S. E. 180, that an estate could be bound by an administrator *de bonis non* for necessary farm supplies, where he worked it under power directing an executor to keep an estate together and manage it so long as profitable or advantageous to do so, since by statute, an administrator *de bonis non* was clothed with all the powers of an executor, excepting those manifestly arising from a purely personal trust and confidence.

And in *Brannon v. Ober & Sons Co.* 106 Ga. 168, 32 S. E. 16, it was held that an administrator *d. b. n.* was relieved from personal liability for debts contracted while conducting the testator's plantation under a will providing that the executor should keep together his property during the widowhood of his wife, and purchase any property deemed necessary for the estate.

In *Fairland v. Percy*, *supra*, it was held that creditors must first proceed against a widow, who became administrator *de bonis non* of her husband's estate, for the collection of trade debts contracted by her while carrying on a business under testamentary power conferred on the executor to carry on a business during the lifetime of the testator's widow, for her benefit.

b. When personal representative or guardian not empowered to carry on business.

1. Liability of general assets of estate.

The general assets of an estate are not answerable for debts contracted by a personal representative while carrying on a trade or business belonging to an estate without authority to do so. *Re Rose*, 80 Cal. 166, 22 Pac. 86; *Florsheim Bros. v. Holt*, 32 La. Ann. 133; *Miltnerberger v. Taylor*, 23 La. Ann. 188; *Carroll v. Davidson*, 23 La. Ann. 428; *Frey v. Eisenhardt*, 116 Mich. 160, 74 N. W. 501; *Avery v. Myers*, 60 Miss. 367; *Hardee v. Cheatham*, 52 Miss. 41; *Re United States Mortg. & T. Co.* 114 App. Div. 532, 100 N. Y. Supp. 12; *Farrelly v. Schaettler*, 121 App. Div. 678, 106 N. Y. Supp. 445; *Re Tisdale*, 110 App. Div. 857, 97 N. Y. Supp. 494; *Re Sharp*, 5 Dem. 516; *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378; *Corr's Es-*

tate, 8 Pa. Dist. R. 209; McMahan v. Harbert, 35 Tex. 451; Labouchere v. Tupper, 11 Moore, P. C. C. 108, 5 Week. Rep. 797, Lovell v. Gibson, 19 Grant, Ch. (U. C.) 280.

Thus, an executor who operates a mill without being empowered by will to do so cannot bind the estate for permanent repairs and new machinery necessary in order to carry it on at a profit. *Re Tisdale*, 110 App. Div. 857, 97 N. Y. Supp. 494.

So, the general estate of a decedent is not answerable for money borrowed by the executor to carry on, without authority, a business belonging to it. *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378.

And the general assets of an estate are not answerable for expenses incurred in carrying on a farming business by a personal representative, without authority. *Sparrow's Succession*, 39 La. Ann. 690, 2 So. 501; *Florsheim Bros. v. Holt*, 32 La. Ann. 133; *Hardee v. Cheatham*, 52 Miss. 41; *McMahon v. Harbert*, 35 Tex. 451.

So, an estate is not bound by debts created by a partnership of which a decedent was a member, where his executor, without authority, participated in the management thereof. *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305; *Avery v. Myers*, 60 Miss. 367.

And an estate is not liable for money borrowed by an executor, who was not empowered to continue the business, for the benefit of a partnership of which the testator was a member. *Johnson v. Kellogg*, 26 N. Y. Week. Dig. 467, 8 N. Y. S. R. 413.

So, the request of an executor that goods be furnished a partnership in which his testator was a member does not bind the latter's estate, notwithstanding the executor promised that they should be paid for as soon as the estate was settled. *Richter v. Poppenhausen*, 42 N. Y. 373, affirming 57 Barb. 309.

And it was held in *Citizens' Mut. Ins. Co. v. Ligon*, supra, that the interest of a deceased partner in firm property was not liable for debts created by an administrator while carrying on such business.

So, debts contracted by a partnership after the death of a member are not binding on his estate, where the business was carried on without authority, jointly by his executor and the surviving partner. *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703.

So, an executor, *de son tort* who took possession of a business belonging to a deceased person and carried it on, cannot bind the estate by a lease made by him for a building in which the business was conducted. *Grace v. Seibert*, 235 Ill. 190, 22 L.R.A. (N.S.) 301, 85 N. E. 308.

And a testamentary trustee who was empowered by will to invest and keep invested, in his discretion, a trust fund, by purchasing, opening, and operating a coal mine commits a breach of trust; and a person who, with notice of such perversion of the trust fund, loans the former money with which to carry on such business, cannot recover from such fund. *Butler v.* 40 L.R.A. (N.S.)

Butler, 164 Ill. 171, 45 N. E. 426, affirming 61 Ill. App. 51.

As to the allowance as a cost of administration, from an estate, of expenses incurred by a personal representative or guardian while carrying on a trade or business, see *infra*, V. f.

2. Liability of assets embarked in business.

Only the assets embarked in a trade or business, or those resulting therefrom, are answerable for debts contracted by an administrator in carrying on the business. *Frey v. Eisenhardt*, 116 Mich. 160, 74 N. W. 501. The court said that this is so even when the executor or administrator is authorized to carry on the business, though in that case there was no such authority.

And one who furnished supplies to an administrator so that he was able to sow a crop upon a plantation belonging to an estate may enforce a claim therefor on the crop when grown, where such business was carried on with the concurrence of the widow of the deceased and a majority of heirs interested in the estate. *Maxwell-Yerger Co. v. Rogan*, 125 La. 1, 51 So. 48.

Notwithstanding an estate is not liable for debts created by an administrator in conducting a business belonging to the estate, yet he may pay them from the income thereof, although he will be answerable if by so doing a loss results to the estate. *Re Rose*, 80 Cal. 166, 22 Pac. 86.

It was held in *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305, that the trade assets of a business were not answerable for debts contracted by an executor who carried on a partnership business without authority.

As to the allowance as a cost of administration, from an estate, of expenses incurred by a personal representative or guardian in carrying on a business, see *infra*, V. f.

c. When business carried on under statute.

In Texas, it has been held that an estate would be liable for debts contracted by an executor in carrying on a business under the terms of a will, where by statute an executor or administrator is permitted to continue a business belonging to a decedent, and bind the estate by contracts pertaining thereto. *Primm v. Mensing Bros.* 14 Tex. Civ. App. 395, 38 S. W. 382; *McMillan v. Hendricks*, — Tex. Civ. App. —, 46 S. W. 859.

So, the expense of caring for and gathering a copy by a personal representative is by statute in Alabama a charge upon the general estate of a decedent who dies after the beginning of a year. *Pinckard v. Pinckard*, 24 Ala. 250.

And where a statute permits an administrator to procure indispensable labor for care of live stock belonging to an estate, he may bind the estate by a contract for their board until the ensuing term of the

probate court, and no longer, unless empowered by such court to do so. *Powell v. Powell*, 23 Mo. App. 365.

So, an estate may be bound for supplies purchased to carry on a business belonging to it where a personal representative conducted it under a statute permitting him to carry on a plantation, manufactory, or business of a deceased person when not disposed of by will, or required for the immediate payment of debts. *Reinstein v. Smith*, 65 Tex. 247; *Altgelt v. Oliver Bros.* — Tex. Civ. App. —, 86 S. W. 28.

And the estate is bound for necessary services rendered by a person in carrying on such business. *Altgelt v. Oliver Bros.* supra.

But since an executor is not permitted by such statute to carry on a partnership business in which his testator was interested, he cannot bind the estate for debts contracted after the death of the testator while carrying on such business. *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 83 S. W. 6.

So, the general assets of an estate are not bound for debts for supplies furnished a personal representative in order to make a farm crop, notwithstanding he was duly empowered by the court to cultivate a decedent's land under a statute permitting it, since the creditor's only remedy was a lien on the crops and their proceeds. *Farley v. Hord*, 45 Miss. 102; *Emanuel v. Norcum*, 7 How. (Miss.) 150.

But where the proceeds of the crop have been appropriated for the payment of the debts of the deceased, such creditors are entitled to payment from other funds of the estate, even though the estate is insolvent, since it was benefited by a fund which rightfully belonged to such creditors. *Emanuel v. Norcum*, supra.

And an estate is chargeable for the amount of a note given by an executor, while carrying on a farming business belonging to his testator for feed for live stock, where a subsequently enacted statute validated all contracts made in good faith by executors for labor or services rendered for the benefit of an estate. *Brightwell v. Jordan*, 74 Ga. 486.

As to the allowance from an estate as a cost of administration, of the expenses incurred by a personal representative while carrying on a trade or business under statutory authority, see *infra*, V. f, 5.

d. When business carried on under order of court.

An administrator who, under an order of court, for the purpose of paying the debts of his intestate, carried on a plantation business for the year in which the latter died, may pledge the crops for advances made him in order to carry on the work. *Starling v. Wyatt*, — Miss. —, 27 So. 526.

But it was held in *Altheimer v. Hunter*, 56 Ark. 159, 19 S. W. 496, that an administrator who continued a mercantile business under an order of the probate court could not bind the assets of the

estate for goods purchased, since such order, if the court had authority to make it, amounted only to a power equal to that contained in a will, which would permit creditors to resort only to the assets embarked in trade.

And it was held in *Gordon-Tiger Min. & Reduction Co. v. Loomer*, 50 Colo. 409, 115 Pac. 717, that an administrator who, under authority from the probate court to continue a business and replenish a stock of merchandise as necessity might require in order to make the whole stock more salable, carried it on more than four years, could not borrow money for use in the business and bind the estate therefor, since the power conferred on the administrator was not sufficient for that purpose.

As to the allowance as a cost of administration, of expenses incurred by a personal representative while carrying on a trade or business under an order of court, see *infra*, V. f, 6.

e. When business carried on by guardian.

A mortgage upon the real property of a ward to secure debts contracted by a guardian while carrying on a business belonging to the former cannot be authorized under a statute permitting the court to authorize such a mortgage where the personality and income from the real estate of a ward are insufficient for the payment of his debts or the maintenance or education of the ward or his family. *Warren v. Union Bank*, 157 N. Y. 259, 43 L.R.A. 256, 68 Am. St. Rep. 777, 51 N. E. 1036, reversing 28 App. Div. 7, 51 N. Y. Supp. 27.

And as a court of probate is without authority to authorize a guardian to embark his ward's estate in a mercantile business, the estate is not responsible for goods furnished the guardian for use therein. *Harter v. Miller*, 67 Kan. 468, 73 Pac. 74.

As to the allowance from an estate as costs of administration, of expenses incurred by a guardian while carrying on a trade or business, see *infra*, V. f, 4.

f. Allowance of expenses of business as costs of administration.

1. In general.

It was held in *Newton v. Poole*, 12 Leigh, 112, that where a testator went abroad, leaving his wife as his agent to manage his business and carry on a brick manufactory, and upon his death abroad, she completed all brick begun before his death, which, together with all the stock on hand, she sold before qualifying as executor, she will be allowed all expenses incurred in so doing.

And an administrator who rechartered a ferry which belonged to his intestate was allowed the expenses of operating it, where he was charged with the rents and profits therefrom. *Huson v. Wallace*, 1 Rich. Eq. 1.

But an administrator who, under an un-

authorized order of the probate court, borrows money for the use of a partnership of which his decedent was a member, cannot have the amount thereof allowed on final accounting, where the conduct of the business resulted in a loss. *Tompkins v. Weeks*, 26 Cal. 50.

And the father of an intestate, who took possession of a business and carried it on for about a year before obtaining letters of administration, is not entitled, on accounting, to an allowance for money advanced by him to purchase merchandise for the business. *McKee v. Mobley*, 3 S. C. 242.

As to the individual liability of a personal representative who carries on a trade or business without authority, see *supra*, III. c. 2.

2. Of farming business.

The expenses of caring for and harvesting crops growing upon the lands of a decedent will be allowed an executor or administrator from the estate. *Re Wing*, 132 Iowa, 216, 109 N. W. 710; *Wattles v. Hyde*, 9 Conn. 10; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Lee v. Lee*, 6 Gill & J. 318; *Re Turpin*, 7 Ohio N. P. 569, 5 Ohio S. & C. P. Dec. 410; *Sparrow's Succession*, 39 La. Ann. 696, 2 So. 501; *Jaquett's Estate*, 13 Lanc. Bar 13; *Casner's Estate*, 2 Kulp, 474; *Percival v. Herbeumont*, 1 McMull. L. 59.

And an administrator who carefully and prudently cultivates and harvests a crop planted by his intestate is entitled to an allowance for the expenses incurred in doing so, to be paid from the proceeds of the crops. *Worley's Succession*, 40 La. Ann. 622, 4 So. 570.

In *Worley's Succession*, *supra*, it was said that such expenses would be paid from the proceeds of the crops raised by the administrator.

So, an administrator who employs labor in gathering a growing crop on decedent's farm, which was sold for the benefit of the heirs, is entitled to credit for the expense of the labor. *Re Turpin*, 7 Ohio N. P. 569, 5 Ohio S. & C. P. Dec. 410.

And where an administrator expends a large sum in good faith for necessary plowing, cultivating, pruning, and irrigating of a vineyard, advancing the necessary funds therefor, he will be credited on accounting with the income therefrom, which was less than the expenses, since he was not engaging in business in the usual meaning of the term. *Re Smith*, 118 Cal. 462, 50 Pac. 701.

So, an administrator will be allowed the expense of caring for a large number of cattle, sheep, etc., belonging to an insolvent estate. *Re Fernandez*, 119 Cal. 579, 51 Pac. 851.

And an executor who had, as agent, before the death of his intestate, sowed a crop upon a plantation owned by the latter, and had continued to work the plantation during the current season, will be allowed the necessary disbursement, where it did 40 L.R.A. (N.S.)

not appear that the plantation could have been advantageously leased after the testator's death, and that it was for the best interest of the creditors and the distributees to make a crop, and no objection to his doing so was made until after the crop had been materially damaged. *Wederstrandt's Succession*, 19 La. Ann. 494. The court said that the parties opposing such allowance had their remedy, but chose to remain silent and acquiesce in the course pursued by the executor; and the fact that he did not call a meeting of the creditors of the estate, as required by statute, could not throw upon him all the expenses incurred in good faith, and at the same time make him pay over the proceeds of the crops.

So, an administrator may work the land of an intestate with slaves belonging to the estate, and will be allowed all necessary expenses thereof, except for losses due to gross neglect, where he fairly accounts for the crops raised. *Huson v. Wallace*, 1 Rich. Eq. 1.

And it was said in *Byrd v. Wells*, 40 Miss. 711, that undoubtedly an executor who kept the property of an estate together for several years, and worked a plantation belonging to it, would be entitled to an allowance for slaves hired by him to work thereon, where the estate received the benefit of their services.

So, the expense of carrying on a farming business will be allowed an executor where those interested in the estate assented to his doing so. *Larroux v. Larroux*, 2 Redf. 69.

See also *Wederstrandt's Succession*, *infra*, IX.

As to estoppel in general, see *infra*, IX.

But, as it is not an administrator's duty to gather crops other than those ready at the death of his intestate, he will not be allowed the expense of gathering a fall crop, which apparently was sold without condition that the purchaser was to harvest it. *Casner's Estate*, 2 Kulp, 474.

And the expense of operating a farm of a decedent by his executor without testamentary authority will not be allowed him unless he clearly shows that it resulted beneficially to the estate. *Larroux v. Larroux*, *supra*.

As to the individual liability of a personal representative for debts contracted in carrying on a farming business without authority, see *supra*, III. c. 2 (c).

3. Of winding up business.

Expenses necessarily incurred by a personal representative in closing out a business will be allowed him. *Merritt v. Merritt*, 62 Mo. 150; *Re Semple*, 189 Pa. 385, 42 Atl. 28, reversing 28 Pittsb. L. J. N. S. 431; *Cornwell v. Deck*, 2 Redf. 87, affirmed on other points in 8 Hun, 122.

So, rent paid for a hotel building by an executor, to whom was bequeathed a half interest in the personal property therein, will be allowed him, where, for more than

a year, in good faith, he carried on at a loss, until it could be sold to advantage, a hotel business which was a losing venture during the lifetime of the testator. *Merritt v. Merritt*, 62 Mo. 150.

And the expense of a clerk employed to sell the goods in a country store will be allowed an administrator, where it did not appear that his conduct in carrying on the business was injudicious, or resulted in a loss to the estate, but was an exercise of fair discretion and judgment, and the interests of the estate, as well as if its creditors, were thereby best subserved rather than by a forced sale. *Cornwell v. Deck*, 2 Redf. 87, affirmed on other points in 8 Hun, 122.

But if continued for an unreasonable period after it does not pay, the administrator will not be allowed expenses incurred after the business should have been closed. *Re Vida*, 1 Haw. 89.

And an administrator who advances money to aid in carrying on a partnership business of which his intestate was a member cannot be allowed it as an expense of administration, since it was no part of his duty to aid in conducting such business. *Tompkins v. Weeks*, 26 Cal. 50.

As to the right of a personal representative to indemnity from an estate for expenses incurred in winding up a trade or business, see *infra*, VI.

4. Of business carried on by guardian.

It was held in *Scarborough v. Scarborough*, 44 La. Ann. 288, 10 So. 858, that debts contracted by a tutor while carrying on a mercantile and planting business belonging to minors, with the consent of the heirs of the decedent, will be allowed as a debt against the succession.

And in *Re Cameron*, 158 Mich. 174, 122 N. W. 564, it was held that a guardian who farms his ward's land at profit will be allowed the necessary expenses of so doing.

And where it did not appear that the estate had suffered any loss, a guardian will be allowed for expenses necessarily incurred in working his ward's farm, under a statute declaring that a guardian shall improve his ward's estate, and apply the income and profits to the latter's support. *Remington v. Field*, 16 R. I. 509, 17 Atl. 551.

So, an order of a probate court possessing equity powers, directing a guardian to invest his wards' money, without designating the amount, in completing an unfinished distillery, according to their interest therein, justifies the expenditure of a reasonable amount, and an administrator of the estate of the wards' parent, who advances the necessary amount upon the request of the guardian, will be allowed the amount thereof in the settlement of the estate. *Powell v. North*, 3 Ind. 392, 56 Am. Dec. 513.

As to the individual liability of a guardian for debts contracted while carrying 40 L.R.A. (N.S.)

on a trade or business on behalf of his ward, see *supra*, IV. c.

5. Of business carried on under statute.

Indebtedness incurred by an administrator while carrying on a plantation business under an order of a court, granted under a statute, may be allowed and retained by him from the estate, notwithstanding the business resulted in a loss which was not due to his fault. *Stephens v. James*, 77 Ga. 139, 3 S. E. 160; *Harding v. Evans*, 3 Port. (Ala.) 221, 29 Am. Dec. 255.

So, where a farming business was carried on by a personal representative under statutory authority, expenses incurred will be allowed him from the estate. *Ibid*.

By an Alabama statute, a personal representative who works the plantation of a decedent who dies after the first of the year will be allowed all necessary expenses of caring for and gathering the crops. *Loeb v. Richardson*, 74 Ala. 311; *Pinckard v. Pinckard*, 24 Ala. 250; *Taylor v. Bush*, 75 Ala. 432; *Eubank v. Clark*, 78 Ala. 73; *Naftel v. Osborn*, 96 Ala. 623, 12 So. 182.

And he will be allowed such expenses notwithstanding they largely exceed the profits, by reason of the destruction of the crops by natural causes. *Taylor v. Bush*, 75 Ala. 432.

So, an administrator who cultivates a plantation under an order of court made under a statute permitting the assets of a decedent to be kept together and managed by his personal representative for a term not exceeding ten years will be allowed the cost of erecting buildings necessary for the successful carrying on of the business. *Gerard v. Bunkley*, 17 Ala. 170.

And an administrator may bind an estate for the board of live stock belonging to it until the next term of the probate court, under a statute permitting him to procure indispensable labor or care for live stock belonging to an estate. *Powell v. Powell*, 23 Mo. App. 365.

And where an administrator is authorized by a court to sell a stock of merchandise in the usual course of trade, under a statute permitting sales of personal property by administrators, all necessary expenses connected with the business will be allowed him. *Re Osburn*, 36 Or. 8, 58 Pac. 521.

But the salary of clerks and bookkeepers, or the cost of drayage, will not be allowed an administrator who carried on a business under a void order of a court, made under a statute permitting the court, in its discretion, to order the private sale of a stock of goods, wares, or merchandise of a decedent upon terms and conditions made known to the court, since such statute authorized only a sale in bulk, and not one in the ordinary course of trade. *Tell City Furniture Co. v. Stiles*, 60 Miss. 849.

As to the individual liability of a personal representative for debts contracted while carrying on a trade or business under statutory authority, see *supra*, III. c. 5.

6. Of business carried on under order of court.

Where, in order to close a manufacturing business, it was carried on under an order of the probate court for three years, at a profit, the administrator was allowed from the estate the costs of necessary materials purchased in order to carry on the business. *Fleming v. Kelly*, 18 Colo. App. 23, 69 Pac. 272.

So, where special authority is obtained from the court to carry on a plantation business during the time necessary for the settlement of an estate, the estate is liable for the current expenses. *Carroll v. Davidson*, 23 La. Ann. 428.

And debts and expenses contracted by a personal representative while carrying on a business, in order to close it up as speedily as possible, under an order of a court, will be allowed from the estate. *Fleming v. Kelly* and *Carroll v. Davidson*, supra.

But, on the contrary, it was held in *Milner v. Didisheim*, 95 Ill. App. 321, that an administrator, and not the estate he represented, became individually liable for goods purchased for a business carried on by the administrator under the order of the probate court, unless the creditor agreed to look to the estate for his pay.

And a charge for money borrowed by an administrator for the use of a partnership of which his intestate was a member, which he did under a void order of the probate court, will not be allowed him on final accounting, where the business was conducted at a loss. *Tompkins v. Weeks*, 26 Cal. 50.

So, expenses of carrying on a business will not be allowed an administrator when incurred under a void order of the court. *Tell City Furniture Co. v. Stiles*, 60 Miss. 849.

As to the individual liability of a personal representative for debts contracted while carrying on a trade or business under an order of court, see *supra*, III. c, 6 (b).

7. Of business carried on under testamentary power.

An executor will be allowed from an estate for the expenses of conducting a business, notwithstanding it resulted in a loss, where he was empowered by will to continue the testator's business for the benefit of the latter's widow during her lifetime, and he collected accounts due at the time of the testator's death, and used the proceeds in the business, which could not be successfully carried on without money, since it was clearly the testator's intention that they should be so used. *Boulle v. Tompkins*, 5 Redf. 472.

So, expenses of ordinary repairs to the buildings of an estate in which a trade or business is carried on by a personal representative were allowed an executor who was empowered by will to conduct a business and to pay all necessary expenses and charges pertaining thereto. *Re Jones*, 103 40 L.R.A. (N.S.)

N. Y. 621, 57 Am. Rep. 775, 9 N. E. 493, affirming 37 Hun, 430, and 2 Dem. 602.

And this doctrine was applied in *Boulle v. Tompkins*, supra, where a mercantile business was carried on by an executor, pursuant to a testamentary direction.

And it has been held that expenses necessarily incurred by a personal representative while carrying on a farming business belonging to an estate, pursuant to the command of a will, are chargeable against the estate. *Guthrie v. Wheeler*, 51 Conn. 207; *Bantz v. Bantz*, 52 Md. 686; *Johnson v. Henagan*, 11 S. C. 93; *Allen v. Shanks*, 90 Tenn. 359, 16 S. W. 715.

Thus, an executor who managed a farm devised to him by will for sale, and who charged himself with the proceeds of all crops raised, will be allowed the cost of fertilizer purchased and used thereon. *Bantz v. Bantz*, 52 Md. 686.

And an executor who worked a plantation as directed by will will be allowed the necessary expenses of cultivating it and gathering the crops therefrom. *Johnson v. Henagan*, 11 S. C. 93.

So, an executor to whom the testator gave his property absolutely, subject to certain trusts, who purchased stock for decedent's farm, and from the income therefrom paid the legacies (such purchase being reasonable under the circumstances), will be allowed from the income for hay bought to feed the stock. *Guthrie v. Wheeler*, 51 Conn. 207.

And an executor may, under power contained in the will to manage and control an estate until a designated person becomes of age, rebuild a necessary ginhouse upon the plantation from the proceeds of crops raised, without obtaining an order of court therefor. *Henry v. Henderson*, 81 Miss. 743, 63 L.R.A. 616, 33 So. 960.

And an executor will be allowed the expenses of operating, in a prudent manner, a farm, under a testamentary direction, at a loss, during a period of great depression. *Allen v. Shanks*, 90 Tenn. 359, 16 S. W. 715.

But an executor who works a plantation, as directed by will, cannot be allowed the cost of slaves, a brood mare, and other property purchased for use thereon. *Johnson v. Henagan*, supra.

And expenses incurred in carrying on a business after the period fixed by will for doing so cannot be allowed an executor. *Allen v. Shanks*, supra.

VI. Right of personal representative to indemnity from estate for debts contracted.

Ordinarily an executor who is individually liable for debts contracted by him while carrying on a trade or business by virtue of a testamentary direction will be indemnified from the testator's estate. *Foxworth v. White*, 72 Ala. 224; *Alzheimer v. Hunter*, 56 Ark. 159, 19 S. W. 496; *Fridenburg v. Wilson*, 20 Fla. 369; *Laible v. Ferry*, 32 N. J. Eq. 791, reversing 31 N. J. Eq. 566, s. c. 27 N. J. Eq. 146; *Willis v. Sharp*,

113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434; Re Frith [1902] 1 Ch. 342, 71 L. J. Ch. N. S. 199, 86 L. T. N. S. 212; Moore v. M'Glynn [1904] 1 I. R. 334; Re Hodges [1899] 1 I. R. 480; Braun v. Braun, 14 Manitoba L. Rep. 346.

So, an executor who, for the purpose of profit, carried on for two years a business, as empowered by will, as well as by leave of court, and the assent of all the testator's creditors, is entitled to indemnity out of the estate in preference to such creditors, for trade debts incurred by him. Re Hodges [1899] 1 I. R. 480.

And where a business is carried on by direction of a will as well as by the consent of the testator's creditors, the executor is entitled to indemnity from the general assets of the estate for debts he contracts, in preference to their right to have their claims allowed as preferred debts. Dowse v. Gorton [1891] A. C. 190, 60 L. J. Ch. N. S. 745, 64 L. T. N. S. 809, 40 Week. Rep. 17, modifying L. R. 40 Ch. Div. 536; Frisby v. Owen, 66 L. T. N. S. 718.

And it was held in Re Brooke [1894] 2 Ch. 600, 64 L. J. Ch. N. S. 21, 8 Reports, 444, 71 L. T. N. S. 398, that an administrator who, for three years, with the consent of the testator's creditors, as well as by direction of the will, carried on a business for the benefit of the estate, is entitled to indemnity from the general assets of the estate for liabilities incurred by him if he is not indebted to the estate.

So, while an administrator is personally liable for debts contracted while carrying on a farming business under a statute, he is entitled to indemnity from the estate which came into his hands. Harding v. Evans, 3 Port. (Ala.) 221, 29 Am. Dec. 255.

And it was said in Ex parte Yates, 72 L. T. 823; that an executor who carried on a trade or business without testamentary authority, in order to wind it up, was entitled to indemnity from the estate for all expenses incurred while so engaged, irrespective of the assent to or sanction of his conduct by the testator's creditors.

And it was held in Re Johnson, L. R. 15 Ch. Div. 548, 49 L. J. Ch. N. S. 745, 43 L. T. N. S. 372, 29 Week. Rep. 168, that an executor was entitled to indemnity only from the specific assets directed by will to be employed in a business. To the same effect, see Fridenburg v. Wilson, 20 Fla. 359.

An executor who, without testamentary authority, conducted a hotel business in order to preserve its license and effect a sale of the business, continually advertising the business for sale, is entitled to indemnity from the estate for a resulting loss, since it will be considered as an expense of administration, even against such of the testator's creditors as acquiesced in the executor continuing such business. Wright v. Beatty, 2 Alberta L. Rep. 89.

And the interest of one *cestui que trust* who concurred in the continuance of a mercantile business by an executor in defiance of the commands of a will is answerable for 40 L.R.A. (N.S.)

indemnity to a testamentary trustee who becomes liable to the estate for losses sustained. Booth v. Booth, 1 Beav. 125, 8 L. J. Ch. N. S. 39, 2 Jur. 938.

But an executrix who was sole legatee, and who, without being empowered by will, carried on the testator's business for her own benefit, and not for the purpose of winding it up, is not entitled to indemnity from the estate as against the testator's creditors, who did not consent to her conduct. Ex parte Yates, 72 L. T. 823.

As to the right of one who extends credit to a personal representative while carrying on a trade or business on behalf of an estate, to be subrogated to the latter's right of indemnity from the estate, see *infra*, VII.

VII. Right of creditors to subrogation to personal representatives's right of indemnity.

Some cases hold that one who extends credit to an executor for the benefit of a business carried on by him under testamentary authority may be subrogated to the executor's right of indemnity which he has against the testator's estate for the personal liability assumed by him. Foxworth v. White, 72 Ala. 224; Moore v. M'Glynn [1904] 1 I. R. 334; Re Johnson, L. R. 15 Ch. Div. 548, 49 L. J. Ch. N. S. 745, 43 L. T. N. S. 372, 29 Week. Rep. 168; Re Frith [1902] 1 Ch. 342, 71 L. J. Ch. N. S. 199, 86 L. T. N. S. 212; Re Kidd, 70 L. T. N. S. 648, 8 Reports, 261, 42 Week. Rep. 571; Braun v. Braun, 14 Manitoba L. Rep. 346.

And a court of equity will subrogate a creditor to the executor's right of indemnity, where such was the agreement between them. Foxworth v. White, 72 Ala. 224.

So, where an executor carried on a business as directed by will, to which the testator's general creditors assented, those who extend credit to the executor for expenses incurred by him in continuing the business will be subrogated to his right of indemnity, which will, under the circumstances, extend to the testator's whole estate. Frisby v. Owen, 66 L. T. N. S. 718.

But in Boule v. Tompkins, 5 Redf. 472, the right of a creditor to subrogation was limited to the assets authorized to be employed in a business by an executor.

But a creditor will not be entitled to subrogation if the executor is in default to the estate. Foxworth v. White, 72 Ala. 224; Re Johnson, L. R. 15 Ch. Div. 548, 49 L. J. Ch. N. S. 745, 43 L. T. N. S. 372, 29 Week. Rep. 168; Re Frith [1902] 1 Ch. 342, 71 L. J. Ch. N. S. 199, 86 L. T. N. S. 212; Moore v. M'Glynn [1904] 1 I. R. 334.

VIII. Equitable rights of creditors.

It has been held that equity will hold an estate liable for debts contracted by a personal representative while carrying on a trade or business on behalf of an estate

which received a benefit from the extension of such credit. *McMahan v. Harbert*, 35 Tex. 451; *Moore v. Lampkin*, 63 Ga. 748; *Robert v. Tift*, 60 Ga. 566.

And one who extends credit to an executor who is carrying on a trade or business pursuant to the directions of a will may, in the first instance, without proceeding against the executor, subject the trade assets and the profits of the business to the satisfaction of his claim. *Ferry v. Laible*, 27 N. J. Eq. 146, s. c. 31 N. J. Eq. 566, reversed on other points in 32 N. J. Eq. 791.

So it was held in *M. Eisenstadt Jewelry Co. v. Mississippi Valley Trust Co.* 72 Mo. App. 514, that a court of equity would subject the profits of a trade or business to the satisfaction of an indebtedness contracted by an executor who carried it on by virtue of testamentary authority, where an execution against the executor personally had been returned *nulla bona*.

And where an executor, who carried on a business under a testamentary power to wind it up or continue it, as he might see fit, is insolvent or not responsible, so that those who extend credit to him while carrying on the business cannot obtain satisfaction of their claims from him, they may in equity proceed against the assets embarked in the trade or business. *Owen v. Delamere*, L. R. 13 Eq. 134, 27 L. T. N. S. 647, 42 L. J. Ch. N. S. 232, 21 Week. Rep. 218; *Fridenburg v. Wilson*, 20 Fla. 359.

So, it was said in *Willis v. Sharp*, 113 N. Y. 588, 4 L.R.A. 493, 21 N. E. 705, affirming 43 Hun, 434, that where a will discloses that it was the intention of the testator that his general estate should be bound by the contracts of his executor in carrying on a trade or business, if the executor is insolvent, persons who became creditors while the executor was so engaged might, in equity, obtain satisfaction of their claims from the general assets of the estate.

And it was said in *Fairland v. Percy*, L. R. 3 Prob. & Div. 217, that "where a testator by will directs that his business may be carried on, and that his personal estate shall be used as capital with which to do so, the persons who, after his death, become creditors of the business, in addition to the personal responsibility of the individuals who give the order for the goods or otherwise contract the debt, are entitled in equity to claim against the estate of the testator to the extent that he authorized it to be used in the business."

But an estate is not answerable in equity for the price of a pair of oxen purchased by an administrator for use in carrying on a farming business on behalf of the estate, without authority, since he alone is liable therefor. *Hallock v. Smith*, 50 Conn. 127.

And it was held in *Wade v. Pope*, 44 Ala. 690, and *Vann v. Vann*, 71 Ala. 154, that a creditor who has obtained a judgment at law against an executor for services rendered while carrying on a business pursuant to the terms of a will cannot, in equity, subject the assets of the estate to payment in satisfaction thereof. 40 L.R.A. (N.S.)

IX. Estoppel of beneficiaries of estate to charge personal representative, etc., with losses sustained.

The doctrine of *SWAINE v. HEMPHILL*, that a personal representative who carries on a trade or business without authority may be relieved from individual liability for resulting losses by conduct amounting to estoppel on the part of those interested in the estate, is recognized and applied in a number of cases.

Thus, this doctrine has been applied where an executor or administrator carried on at a loss a business at the solicitation of all those beneficially interested in an estate. *Poole v. Munday*, 103 Mass. 174; *French v. Davis*, 38 Miss. 167; *Billingslea v. Young*, 33 Miss. 95; *Merkel's Estate*, 131 Pa. 584, 18 Atl. 931; *Re Smith*, 30 Pittsb. L. J. N. S. 188; *Hibberd v. Hubbard*, 13 Pa. Dist. R. 12, reversed on other grounds in 211 Pa. 331, 60 Atl. 911.

So, it was said in *Ward v. Tinkham*, 65 Mich. 695, 32 N. W. 901, that an administrator who seeks to justify his conducting a business "by having procured the assent of the parties interested must be prepared to show that he has acted in entire good faith, and that he obtained such assent upon full and fair representations and information communicated to his *cestui que trustent* of all the facts and circumstances attending the risk to the fund, and of the proposed investment. He must be guilty of no fraud, falsehood, or deceit in obtaining such consent, and the burden of proof is upon him to show this, and in no other way can he be protected in deviating from the line of his fiduciary duty."

And beneficiaries who consent to the carrying on of a business by an executor without testamentary authority are estopped from asserting that it was wrongfully done. *Lovell v. Gibson*, 19 Grant, Ch. (U. C.) 280.

So, the consent of all the heirs and creditors of a decedent to the continuing of a business by an administrator will relieve the latter from all liability to them for resulting losses. *Merkel's Estate*, 131 Pa. 584, 18 Atl. 931.

And an administrator is relieved from individual liability to those beneficially interested in an estate for losses sustained in a business carried on by him in good faith, at the urgent request of all of them, where the business was managed by a minor son of the intestate, who was familiar with the business, and for whom it was intended when he became of age, since those who requested the administrator to do so will not be permitted to charge him with maladministration under the circumstances. *Poole v. Munday*, 103 Mass. 174.

So, an executor will not be surcharged with a loss where he carried on a manufacturing business, and during an unprosperous time, which was the result of a business depression, when unexpected difficulties arose, at the urgent solicitation of those interested in the estate, he, in good faith, and as an exercise of ordinary discretion,

borrowed money for use in the business, from which such beneficiaries received the profits as long as there were any. *Whitman's Estate*, 195 Pa. 144, 45 Atl. 673.

Where a widow, upon her husband's death, agreed with his surviving partner to continue the former's interest in the business, and that the survivor should pay for it as soon as possible, with interest, and nine years later, upon the survivor becoming insolvent, she was appointed administratrix of her husband's estate, she will not be charged with the value of the partnership interest as of the death of her intestate, at the instance of a daughter of the deceased, to whose support the interest paid was devoted, as it appeared that her course was prudent, and that the allowance of the daughter's support absorbed all of her interest in the estate. *Browne v. Bedford*, 4 Dem. 304.

So, a widow who carried on a manufacturing business as a testamentary trustee, under the directions of a will, after being discharged from her trust and receiving compensation for her services, is estopped, after opening a rival business, from objecting to losses sustained in the former business by her son, who was substituted for her as trustee. *Re Froelich*, 50 Misc. 103, 100 N. Y. Supp. 436, affirmed in 122 App. Div. 440, 107 N. Y. Supp. 173, and without opinion in 192 N. Y. 566, 85 N. E. 1110.

And an heir who had assigned his interest in an estate is estopped, six years after the sale by an administrator of a business at a loss, from charging him therewith, where the business was conducted with the consent of all the heirs, for three months before selling it, and it appeared that the stock was old, and that repeated attempts to sell it had been made, and that the best price attainable was received for it. *Re Semple*, 189 Pa. 385, 42 Atl. 28, reversing 28 Pittsb. L. J. N. S. 431.

Those beneficially interested in an estate are estopped from questioning the allowance to an executor of the expenses of working a plantation, where they remained silent and permitted him to do so without objection until the crops had been materially injured. *Wederstrandt's Succession*, 19 La. Ann. 494. The court said that the parties opposing such allowance had their remedy, but chose to remain silent and acquiesce in the course pursued by the executor, and the fact that he did not call a meeting of the creditors of the estate, as required by statute, could not throw upon him all the expenses incurred in good faith, and at the same time make him pay over the proceeds of the crops.

And a widow who assents to the executor of her deceased husband's estate carrying on a farm belonging thereto is estopped from objecting to the allowance of the expenses thereof. *Larroux v. Larroux*, 2 Redf. 69.

But it was held in *Re McGovern*, 118 N. Y. Supp. 378, that a sister of a deceased person, who, at the request of his other

heirs, took possession of and continued a business belonging to the deceased for four months before being appointed administratrix, was, at the instance of such heirs, chargeable with the losses sustained both before and after her appointment.

So, female beneficiaries who were unfamiliar with the English language are not estopped from charging executors, who were the surviving partners of the testator, with a loss resulting from their failure to give security, as required by the will, for the value of the testator's interest in the business, which was conveyed at his death to the surviving partners, by accepting from them a mortgage upon the partnership property without knowledge that it was a second mortgage, and that the firm was insolvent. *Luers v. Brunjes*, 5 Redf. 32.

Nor, under such circumstances, will the fact that they received from the business an income, amount to an estoppel. *Ibid*.

And where an executor operated a mill belonging to an estate without authority, for five years, those beneficially interested in the estate are not estopped from charging him with the cost of extensive permanent repairs to the mill, as well as the cost of new machinery installed, because one of the beneficiaries was consulted by the executor regarding the advisability of incurring such expense, and it did not appear what was said on that occasion. *Re Tisdale*, 110 App. Div. 857, 97 N. Y. Supp. 494.

Such consent, in order to create an estoppel, may be implied from the conduct of the beneficiaries as well as from express consent. *French v. Davis*, 38 Miss. 167; *Billingslea v. Young*, 33 Miss. 95; *Levi's Estate*, 224 Pa. 233, 73 Atl. 334; *Myrick's Succession*, 38 La. Ann. 611; *Garrett v. Noble*, 6 Sim. 504, 3 L. J. Ch. N. S. 159.

Thus, where all of the heirs at law of an intestate had knowledge of the fact that an administrator was keeping the property of the estate together and carrying on a plantation business, and did not make any objection thereto, the administrator is relieved from all individual liability to them except to account for the net profits of the business. *French v. Davis*, 38 Miss. 167.

And when the heirs and creditors of an estate remain silent while the executor works a plantation belonging to it, they are estopped from charging him with a resulting loss, since it was within their power in the first instance to have prevented his continuing the business. *Myrick's Succession*, 38 La. Ann. 611.

A delay of five years before objecting to the continuance of a business by an executor for a year, where he was directed by will to collect the personal estate with all convenient speed, will amount to an estoppel where those interested in the estate had full knowledge of the executor's conduct. *Garrett v. Noble*, 6 Sim. 504, 3 L. J. Ch. N. S. 159.

So, where the widow and children of a decedent do not object to the continuance of a business by an executor who was empowered by will to do so, the latter will

not be surcharged with debts contracted by him while so engaged, the estate being answerable therefor. *Levi's Estate*, 224 Pa. 233, 73 Atl. 334.

But no consent or conduct on the part of minor beneficiaries will create an estoppel. *Gilligan v. Daly*, — N. J. Eq. —, 80 Atl. 994; *Wielmann's Succession*, 112 La. 293, 36 So. 354; *Wiemann v. Mainegra*, 112 La. 305, 36 So. 358.

Nor is a minor estopped by the conduct of his guardian from holding a personal representative liable for losses, where he continues a business belonging to an estate. *Larroux v. Larroux*, 2 Redf. 69; *Wiemann v. Mainegra*, 112 La. 305, 36 So. 358.

An administrator who, with the concurrence of the adult heirs of a decedent, continued a commercial business belonging to the deceased for about six years, becomes liable to a minor heir for his proportionate share of the assets of the estate therein invested, less the disbursements of the administrator which would have been made had the administrator settled the estate in accordance with law. *Wiemann's Succession*, 112 La. 293, 36 So. 354.

And a minor heir is not estopped from holding an administrator and his sureties liable for losses, because his tutor was one of the adult heirs who concurred in permitting the administrator to carry on such business. *Wiemann v. Mainegra*, supra.

W. J. I.

INDIANA SUPREME COURT.

ELLA BROWN, Appt.,

v.

ALVA M. KITSELMAN et al.

(— Ind. —, 98 N. E. 631.)

Parties — action by woman — injury to husband.

A woman cannot recover damages for injury inflicted upon her husband to the diminution of his earning capacity and consequent ability to support and maintain her, nor for loss of his society and companionship because of such injury.

(May 28, 1912.)

Note. — Right of wife to sue for personal injury to husband.

Little authority has been found on this question further than that cited in *BROWN v. KITSELMAN*, and in the note to *Feneff v. New York C. & H. R. R. Co.* 24 L.R.A. (N.S.) 1024.

Sometimes cited in connection with the discussion of this question is *Monroe v. Maples*, 1 Root, 422, holding that the husband and wife cannot join in an action for personal injury to the husband, since the right of action is personal to the husband. The case does not disclose the basis upon which the wife claimed a right to damages. 40 L.R.A. (N.S.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Randolph County in defendants' favor in an action brought to recover damages for injuries to plaintiff's husband, alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Mr. J. W. Brissey, for appellant:

The consortium of the husband is a common-law right of the wife, and she may maintain her separate action against one who wrongfully deprives her of such right.

Haynes v. Nowlin, 129 Ind. 581, 14 L.R.A. 787, 28 Am. St. Rep. 213, 29 N. E. 389; *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932; *Wolf v. Wolf*, 130 Ind. 599, 30 N. E. 308; *Adams v. Main*, 3 Ind. App. 232, 50 Am. St. Rep. 266, 29 N. E. 792; *Reed v. Reed*, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 638; *Warren v. Warren*, 89 Mich. 123, 14 L.R.A. 545, 50 N. W. 842; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Waldron v. Waldron*, 45 Fed. 315; *Huling v. Huling*, 32 Ill. App. 519; *Bishop, Marr. & Div. ¶ 1358*; *Gregg v. Gregg*, 37 Ind. App. 216, 75 N. E. 674.

Mr. Elmer E. Stevenson, for appellees:

No action accrues to the wife for the loss of the wages or earning capacity of consortium of her husband, who may be injured by the negligence of another.

Goldman v. Cohen, 30 Misc. 336, 63 N. Y. Supp. 459; 21 Cyc. 1530; 9 Am. & Eng. Enc. Law, 817; *Glenn v. Western U. Teleg. Co.* 1 Ga. App. 821, 58 S. E. 83; *Feneff v. New York C. & H. R. R. Co.* 203 Mass. 278, 24 L.R.A. (N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436.

Morris, J., delivered the opinion of the court:

Appellant filed her complaint against appellees for damages growing out of personal injuries to her husband, Albert Brown. The lower court sustained a several demurrer for want of facts to each paragraph of complaint, and the appellant declined to plead further; whereupon judgment was rendered for appellees.

The husband's exclusive right to his wages, and the remoteness of the damages sought to be recovered, were the grounds upon which the court in *Welch v. Morrison*, 9 Ohio Dec. Reprint, 852, held that a wife whose husband was negligently injured by the defendant was not entitled to recover for the loss of his wages nor for compensation for nursing him, including the amount expended for medicine, nor for the mental distress and anxiety suffered by her.

Attention is also directed to *Glenn v. Western U. Teleg. Co.* 1 Ga. App. 821, 58 S. E. 83, declaring that since the obligation to support the wife and family is upon the husband, and not upon the wife, she cannot

The errors relied on here are predicated on the action of the circuit court in sustaining the several demurrer to each the third, fourth, and fifth paragraphs of complaint.

The third paragraph alleges that appellant's husband was in the employ of appellees, and, while so engaged, sustained an injury which resulted in the entire loss of his eyesight, and by reason thereof his earning capacity has been destroyed, and appellant, as a consequence, has been deprived of support and maintenance, to her damage in the sum of \$10,000. It is alleged that the husband's injury was approximately caused by the negligence of appellees, the particulars of which are set out in detail.

The fourth paragraph is similar to the third, with the addition that appellant therein alleges that, by reason of the negligent injury to her husband, she has been deprived of the companionship, comfort, and society of her husband, for which she demands damages.

The fifth paragraph is similar to the third in regard to the allegations of her husband's injury, and bases the right to recover solely on appellant's loss of the companionship, comfort, society, and protection of her husband.

A wife has no cause of action against a third person for damages for negligent injuries to her husband, resulting in the diminution of his earning capacity and his consequent ability to comfortably support and maintain her, because the husband is entitled, in a proper action, to full compensation for such loss. 21 Cyc. 1530.

May the wife recover from a third party for the loss of the society, companionship, and affection—consortium—of her husband, caused by the negligence of such party?

Since the removal of most of the common-law disabilities of the wife, it has been held in Indiana, and in most other jurisdictions, that a wife may recover damages for the alienation of her husband's affections. *Haynes v. Nowlin*, 129 Ind. 584, 14 L.R.A.

maintain an action for the salary which the husband would have earned, and from which he would have contributed to the support of the family, but for the defendant's negligence. This case involves an action against the telegraph company for negligently failing to deliver to the husband a message sent by the wife, announcing his appointment to a position, as well as her willingness to terminate an estrangement between them; and it was sought to recover as one element of damages, the amount of salary he would have earned.

As to the right of the husband to recover the loss of consortium through personal injury to the wife, see the note in 33 L.R.A. (N.S.) 1042.

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787; 28 Am. St. Rep. 213, 29 N. E. 389; *Wolf v. Wolf*, 130 Ind. 599, 30 N. E. 308; *Holmes v. Holmes*, 133 Ind. 386, 22 N. E. 932; *Postlewaite v. Postlewaite*, 1 Ind. App. 474, 28 N. E. 99; *Nolin v. Pearson*, 191 Mass. 283, 4 L.R.A. (N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 Ann. Cas. 658, and note on page 664. In such cases, no question of negligence is involved. The recovery is for an injury intentionally inflicted, and is not limited to compensation, but may be for punitive damages as well.

The question here involved has rarely been presented to courts of appeal, and, so far as we are able to discover, when presented, a recovery has been denied.

In *Goldman v. Cohen*, 30 Misc. 336, 63 N. Y. Supp. 459, it was said: "The defendant demurs to the complaint, which seeks recovery by a wife for the loss she sustained, as a wife, by the injury to her husband from the negligence of the defendant in the management of a horse. Her loss is that which usually occurs to a wife from the illness of a husband, in the deprivation of support and consortium, and the need of her personal care of him during his sickness. No case is cited where the wife recovered upon such a claim; and the absence of precedent, where such demands might have been numerous, if sustained by the law, goes far to the belief that such negligence has never yet been embraced within the circle of causes of action recognized by law, beyond the right given to the injured one, and its survival to the consort and next of kin in the event of his death. It is true that this century just closing has seen, with our own state foremost in advance, the adoption, by unwritten and statutory law, of juster and wider views of the wife's existence as a human being by the emancipation of her person from "the moderate chastisement" of the husband and the protection of her rights of property; but her interest in the husband's life and companionship is not a right of property, or derived from a contract of bargain and sale. That

As to the right of the husband or wife at common law to recover for loss of services or consortium against a person negligently causing the death of the other spouse, see the note in 19 L.R.A. (N.S.) 633.

As to the right of the husband at common law to recover for loss of time and funeral expenses necessitated by the negligent killing of his wife, see the note in 9 L.R.A. (N.S.) 1193.

As to the right of one spouse at common law to an action for the sale of intoxicants or drugs to the other, see the note to *Flantermeyer v. Cooper*, post, 360.

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interest lies in a region into which the law does not enter, except when necessity compels. It does recognize invasion by wilful misconduct. It inflicts heavy damages upon the enticer or seducer. But this is for punishment and atonement, rather than compensation. It comes within the range of concurrent and supplementary adjuncts to the criminal law for the prevention and redress of wrongs. The fault of negligence rarely demands a greater remedy than mere compensation. The right of action is remedial, not punitive. It reaches not out to those indirectly suffering by impairment of domestic relations, giving to dependent wife or child pecuniary equivalent. So far as the law can, it neutralizes such indirect losses by compensation to the husband and father, thus giving him the means of supplying the loss in earning power and expenses of sickness, and so avoids double or triple recoveries for the same elements of compensatory damages by different persons against him whose fault only gives ground for one restitution. The breach of a contract obligation directly affects the power of the husband to give solace and comfort to the wife; but she may not have a personal right of action, except where the law does allow her to be the moving cause to invoke the courts to punish destruction of marital rights. Judgment for defendant, on demurrer, with costs."

In 21 Cyc. on page 1530, it is said: "For an injury done to the husband, the wife cannot join with him in an action for damages; and no action accrues to the wife for the loss sustained by her, such as the loss of his wages; nor can she recover for nursing him, when injured by a third person's negligence."

In the recent case of *Feneff v. New York C. & H. R. R. Co.* (1909) 203 Mass. 278, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436, the question here under consideration was directly involved, and the right of recovery was denied. In the course of the opinion, it is said:

"The right to the consortium of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favor of each. Since the removal of the wife's disability to sue, this is now settled in most courts by a great weight of authority. *Nolin v. Pearson*, 191 Mass. 283, 4 L.R.A.(N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 Ann. Cas. 658, and cases cited. It is now generally held, in accordance with the decision in *Nolin v. Pearson*, that, for a direct and intentional invasion of a wife's right of consortium by another woman, through the alienation of the husband's affections and criminal conversation with him, an action may be maintained, 40 L.R.A.(N.S.)

as a similar action may be maintained by a husband for a similar wrong inflicted through adultery with his wife. . . .

"The wrong which may be redressed through such suits is one which has a direct tendency to deprive the husband or wife of the consortium of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained, merely because of an injury to the person of the spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that; through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury. The actions by husbands at common law for expenses and loss of services, in which the loss of consortium has been considered in estimating damages, were all in cases in which no damages could be awarded for loss of the ability to earn money and render services and be helpful to others, in an action by the husband and wife for the wife's personal damages, because at common law all these elements of damage belonged to the husband. . . . There was not an allowance to the wife for her loss of ability to earn wages and render services, and at the same time an allowance to the husband, in the form of compensation for the loss of consortium for the same diminution of ability to be helpful."

"Where there is no intentional wrong, the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily the relation between him and others, whereby they will be detrimentally affected by the impairment of his physical or mental ability, makes the damage to them only remote and consequential, and not a ground of recovery against the wrongdoer. . . . It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation to which he is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be made the subject of an action.

"The minor children of an injured father, who is legally bound to furnish them with support, may suffer indirectly from his injury. So, too, may his wife, to whom he

owes the same legal duty to furnish support; yet it was never held that a wife or minor child could recover for the consequences of a father's disability against one who had negligently injured him. The diminished value of the work that the husband with his wife, in such a case, is like the diminished value of the work that the husband can do for the support of his wife and the education and support of his minor children. The negligent defendant is supposed to have made full pecuniary compensation to the husband and father for his injury. In the benefit from this payment, the wife and children may be expected to share to some extent. If they still suffer loss, it is not direct, but only consequential."

We are of the opinion that the reasoning in the Feneff Case, *supra*, is sound, and that a wife is not entitled to recover for loss of consortium in such an action as this; and, as it is settled she may not recover for loss of support consequent on the diminution of her husband's earning capacity, it follows that the court did not err in sustaining the demurrer to the several paragraphs of complaint in controversy here.

Judgment affirmed.

IOWA SUPREME COURT.

STATE OF IOWA

v.

JOHN KERNAN, Appt.

(— Iowa, —, 135 N. W. 362.)

Indictment — language of statute — sufficiency.

1. An indictment in the language of the statute, which so individuates the offense that the accused has proper notice of the crime charged, is good.

Note. — *Intimation that a recommendation to mercy would be entertained as ground for reversal of conviction.*

This note does not cover the general question of the propriety of giving instructions to the jury on their power of recommendation to mercy. It deals only with the effect of the court's making an intimation that a recommendation to mercy would be entertained or carried out by it.

The holding in *STATE v. KERNAN*, that a promise of the court to consider a recommendation to mercy by the jury in a criminal case vitiated the verdict of guilty, on the ground that it tended to influence the verdict, although, because it was necessary to impose the maximum penalty under the indeterminate-sentence law, the recommendation was of no utility, seems sound. Prior to the decision in *STATE v. KERNAN*, the point seems to have been passed upon in only three cases, in which the result was in 40 L.R.A. (N.S.)

Criminal law — promise to consider recommendation — effect on verdict.

2. A promise of the court to consider a recommendation by the jury in a criminal case will vitiate a verdict of guilty, as tending to influence the verdict, although, because the maximum penalty must be imposed under the indeterminate-sentence law, the recommendation was of no utility.

(April 2, 1912.)

A PPEAL by defendant from a judgment of the District Court for Cass County, convicting him of committing lewd and lascivious acts with a child under thirteen years of age. Reversed.

Statement by Ladd, J.:

The defendant was accused of having committed lewd and lascivious acts with a child under thirteen years of age, and appeals.

Messrs. Willard & Willard for appellant.

Messrs. George Cosson, Attorney General, and John Fletcher, Assistant Attorney General, for appellee:

There was no promise made by the court that he would do less than his duty in the matter of fixing punishment, as an inducement to find the defendant guilty, and the recommendation made by the jury might or might not be considered by him; but it was within his right to reject it as mere surplusage, if he so desired.

State v. Newman, 49 W. Va. 724, 39 S. E. 655; *State v. Gill*, 14 S. C. 410; *State v. Bennett*, 40 S. C. 308, 18 S. E. 886; *Ray v. State*, 108 Tenn. 282, 67 S. W. 553; *Greer v. State*, 3 Baxt. 321; *Penn v. State*, 62 Miss. 450; *Wair v. State*, 51 Ga. 303.

The indictment charges the offense in the language of the statute; and as the offense is there named and described, it is sufficient.

accord with the conclusion reached in that case.

In *State v. Kiefer*, 16 S. D. 180, 91 N. W. 1117, 1 Ann. Cas. 268, 12 Am. Crim. Rep. 619, where the jury sent a communication to the court, asking if they could recommend the defendant to its mercy, and the court answered affirmatively, and added that it had always made it an invariable rule to follow such recommendation, it was held that there was prejudicial error. The court said: "This proceeding on the part of the court was clearly error. The answer to the question, while not strictly in the nature of an instruction or charge of the court, was nevertheless information conveyed to the jury, while deliberating upon their verdict, calculated to influence them. It will be observed that the court informed the jury that he had made it an invariable rule to follow the recommendations of the jury. Such a statement to the jury in a doubtful case might reasonably be presumed to influence

State v. Bauguess, 106 Iowa, 107, 76 N. W. 508; State v. Whalen, 98 Iowa, 662, 68 N. W. 554; State v. Porter, 105 Iowa, 677, 75 N. W. 519; People v. Carroll, 1 Cal. App. 2, 81 Pac. 680.

There was no testimony that would tend to make either Ethel Walker or the other little girls accomplices, nor is there any testimony that the Walker girl consented to the acts of the defendant.

State v. Goodsell, 138 Iowa, 504, 116 N. W. 605; State v. Rennick, 127 Iowa, 294, 103 N. W. 159, 4 Ann. Cas. 568; State v. Kouhns, 103 Iowa, 720, 73 N. W. 353.

Ladd, J., delivered the opinion of the court:

The accused was indicted under § 4938a, Code Supplement (chapter 173, Acts 32d G. A.), denouncing as a crime the wilful commission of "any lewd, immoral, or lascivious act upon or with the body, or any part . . . thereof, of a child of the age of thirteen years or under, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, or of such child." The indictment was substantially in the language of this statute, and, as it so individuated the offense that the accused had proper notice of the crime charged, the indictment was good. State v. Porter, 105 Iowa, 677, 75 N. W. 519; State v. Johnson, 114 Iowa, 430, 87 N. W. 279; State v. Leasman, 137 Iowa, 191, 114 N. W. 1032; State v. McGruder, 125 Iowa, 741, 101 N. W. 646; State v. Beebe, 115 Iowa, 128, 88 N. W. 358.

In People v. Grinnell, 9 Cal. App. 238, 98 Pac. 681, the defect in the indictment was the omission to negative an exception, not included in the statute of this state, constituting a part of the description of the offense, and, for this reason, the decision is not in point.

2. The cause had been submitted to the jury, and, after being out all night, that

the jurors in arriving at their verdict.

. . . It is true that in the case at bar the trial judge did not distinctly agree, in terms, that the jury could depend on the clemency of the court; but the language used by him was, in effect, an agreement or statement that the jury could rely upon the clemency of the court. The learned judge said: 'I have made it an invariable rule . . . to follow such recommendation.' The jurors might very naturally conclude from the language used that they could rely upon him to extend clemency to the accused in case he should be convicted, and it might have the effect to induce the jurors to disregard any reasonable doubts they might have as to the guilt of the accused. Jurors, in the discharge of their duties, having nothing to do regarding the punishment to be inflicted upon the accused, as the extent 40 L.R.A.(N.S.)

body came into court, and, in the absence of defendant, stated that they had failed to agree, and wanted to know if they could make a recommendation to the court. Thereupon the court informed them that "while it is not usual, and some of the judges objected to a recommendation, it didn't, and they might do so, and he would consider such recommendation." The jury then retired and on the same day returned a verdict of guilty, and recommended "the clemency of the court, and that the sentence be made as light as possible." Though doubtless not so intended, what occurred was well calculated to influence the verdict of the jury. Indeed, that the court's response would be so used was to be inferred from the inquiry. As contended, no promise was made save that the "recommendation would be considered;" but, from what was said, the jury might well have understood that it would be favorably considered, and at least that it would be weighed in pronouncing judgment. It amounted to holding out an inducement to the jury to agree upon a verdict, although under the indeterminate-sentence law, such recommendation might not have been given the slightest consideration, for, in any event, the maximum penalty must have been imposed.

In McBean v. State, 83 Wis. 206, 53 N. W. 497, it appears that the jury had sent this inquiry to the court: "If we bring in a verdict of guilty, can we depend on the clemency of the court?" And the court responded in substance that they could. This was held to be error, the court saying: "The question put by the jury to the trial judge in the case at bar was, in and of itself, harmless. The error consists of the promise made by the trial judge to the jury, to the effect that, if they found McBean guilty, they might rely upon him to extend the clemency of the court to the prisoner. It sufficiently appears from the verdict re-

of the punishment is left entirely to the discretion of the court, within certain limitations prescribed by statute. And while it is the duty of the court to instruct the jury upon the law of the case, it should not in any manner attempt to influence its deliberations, and the court should be exceedingly careful to refrain from all expressions of opinion that might be calculated to influence the minds of the jurors. Undoubtedly the learned circuit court, in replying to the request of the foreman of the jury, was actuated by no improper motive, but the proceeding is a dangerous one, and cannot be sanctioned by this court."

The other decisions which have considered the point under discussion are fully set out by the court in its opinion in STATE v. KERNAN.

J. T. W.

turned that the jury did rely upon such promise. The promise thus secured was well calculated to overcome reasonable doubts and coerce an agreement for conviction. It was an unauthorized interference with the deliberations of the jury. *Ryan v. Rockford Ins. Co.* 77 Wis. 611, 46 N. W. 885. 'A verdict is a declaration of the truth as to the matters of fact submitted to the jury.' *Shenners v. West Side Street R. Co.* 78 Wis. 387, 47 N. W. 622. To be such truth, however, it must be based wholly upon the evidence in the case. A verdict in disregard of such evidence, in whole or in part, is a false verdict. It follows that any promise, pledge, or declaration of the trial judge, calculated to draw the attention of the jury away from the evidence, and to induce them to base their verdict upon ulterior considerations, is, necessarily, misleading, and hence erroneous."

In *Territory v. Griego*, 8 N. M. 133, 42 Pac. 81, jurors had been out a long time and, on returning into court, reported their inability to agree, and, after some talk with them, the court said there was an instruction he might have given which the law authorized: "While the law fixes the punishment in this case, or rather, while the court assesses the punishment, the law authorizes you, in case you find the defendant guilty, to commend him to the mercy of the court; and that recommendation made by the jury will be considered by the court in fixing the punishment." In half an hour the jury returned with a verdict of guilty and a recommendation to the mercy of the court. In holding this instruction erroneous, the court remarked that the sudden agreement of the jurors, after being out fifty-four hours, indicated that they must have been "influenced quite powerfully by the judge's instructions that a recommendation of mercy would receive his consideration in fixing the punishment. It seems within the range of reasonable probability that with a knowledge that nothing but the death penalty would be the consequence of their verdict, no agreement could have been secured from the jury. The gravity of the punishment may well have caused jurors to hang to a doubt of guilt rather than hang a man whose guilt they doubted. Coming, as it did, without request, after the jury had been deliberating and unable to agree for fifty-four hours, it was an indication, quite pointed, of the judge's opinion. *Randolph v. Lampkin*, 90 Ky. 551, 10 L.R.A. 88, 14 S. W. 538. It was 40 L.R.A. (N.S.)

an intimation from the court of a lighter sentence than the jurors had expected, and must have been harmful to the defendant."

In *State v. Kiefer*, 16 S. D. 180, 91 N. W. 1117, 1 Ann. Cas. 268, 12 Am. Crim. Rep. 619, to an inquiry by the jury whether they could recommend the accused to the mercy of the court, the latter answered that it had made it an invariable rule to follow such recommendations, and this answer was held to be calculated to influence the jury. Other decisions are readily distinguishable because of differences in the facts.

In *Lovett v. State*, 30 Fla. 142, 17 L.R.A. 705, 11 So. 550, the statutory effect of a recommendation to mercy by the majority of the jury reduced the penalty from death to life imprisonment, and an instruction with reference thereto was approved. In *State v. Gill*, 14 S. C. 410, the court merely replied affirmatively to an inquiry of the jury whether they might recommend the prisoner to mercy if found guilty, and, since no intimation of the consequence of such a recommendation was given, the court held there to have been no prejudice. In *Crawford v. State*, 2 Yerg. 60, 24 Am. Dec. 467, a recommendation of mercy to the governor was returned with the verdict. One of the jurors made affidavit that he would not have agreed to the verdict but for the belief that it would be effectual, and another swore that it led him to agree. Such affidavits were held admissible, and a new trial ordered because of the misapprehension of these jurors. But in *State v. Bennett*, 40 S. C. 308, 18 S. E. 886, and *Penn v. State*, 62 Miss. 450, such a showing was held not to invalidate a verdict.

The jurors should not have concerned themselves with the punishment, and ought to have been plainly told that they ought not to take that into consideration. Their function ended in deducing the truth from the evidence adduced and expressing it in their verdict. Anything said by the court calculated to draw their attention from the performance thereof, and to induce them to rest their conclusion upon ulterior considerations, necessarily is misleading and prejudicial. We are of opinion that the promise of the court to give the recommendation consideration might well have led the jury to believe, and doubtless did, that the sentence to follow would be somewhat modified because thereof, and that this was extremely prejudicial to the defendant.

Because of this error, the judgment is reversed, and the cause remanded.

IOWA SUPREME COURT.

FROHARDT BROTHERS et al.

v.

W. A. DUFF.

((— Iowa, —, 135 N. W. 609.)

Statute of frauds — promise to pay another's debt — waiver of attachment.

1. An oral agreement by a mortgagee in possession of mortgaged property to pay a debt of the mortgagor to avoid an attachment of the property of which he is in possession may be found to be an original agreement to pay the debt, and therefore not to be within the statute of frauds, although the liability of the original debtor was not terminated.

Note. — Is oral promise to pay another's pre-existing debt, made in order to secure a benefit to the promisor, without releasing the original debtor, within the statute of frauds.

This is the subject of a note in 22 L.R.A. (N.S.) 1077, to which the present note is supplemental.

The note does not include cases involving oral promises to the original debtor, but only cases where the oral promise was made to the creditor; nor does it cover cases involving a promise to pay another's debt, made contemporaneously with the creation of the debt. For cases of the latter character, see notes in 15 L.R.A. (N.S.) 214 and 32 L.R.A. (N.S.) 598.

General rule.

At the outset, attention is called to the distinction between a consideration sufficient to support a contract and a consideration which will make a promise to pay an existing debt of another an original one.

As shown in the note in 22 L.R.A. (N.S.) 1077, to which this note is supplemental, by the weight of authority, a promise to pay the pre-existing debt of another may be original rather than collateral, and hence not within the statute of frauds, although the original debtor is not released. In order, however, that such a promise be removed from the operation of the statute of frauds, it must be an original promise to pay out of money of the debtor then in the promisor's hands or thereafter to be placed in his custody, or it must be an independent agreement with the creditor, based upon some substantial consideration or benefit inuring to the promisor, the securing of which is the primary purpose of the promise, the payment of the debt being merely secondary or incidental.

In *Southern Indiana Loan & Sav. Inst. v. Roberts*, 42 Ind. App. 653, 86 N. E. 490, however, the rule is stated that a valid oral promise to pay another's debt cannot be made directly with the creditor, even though founded upon a valuable considera-

40 L.R.A. (N.S.).

Appeal — elimination of counts — ruling on prior trial.

2. Parties failing to appeal from an order withdrawing from the jury the issues presented by certain counts of the complaint cannot, in case of a disagreement as to the other counts, which necessitates a new trial, question on appeal from the second judgment a ruling that such counts have been eliminated from the case, if no separate appeal was taken therefrom.

(Evans, J., dissents in part.)

(April 9, 1912.)

CROSS-APPEALS from a judgment of the District Court for Pottawattamie County in an action on alleged oral promises to pay to plaintiffs the amount of cer-

tion; but it must be founded upon a valuable consideration and be in writing.

The rule has been stated thus: "Where the promise to pay the debt of another is not the chief purpose of the transaction in which it inheres, and a substantial and valuable consideration therefor inures directly to the benefit of the promisor, as in a case in which he obtains a conveyance of property in consideration of his promise to pay the debt of the grantor, or to pay an encumbrance upon the property, the promise does not fall within the statute, and no writing is necessary to support it. In cases of this character, the fact that the object of the promisors is not to answer for the debts, defaults, or miscarriages of others, but is to obtain substantial benefits or advantages to themselves, which they actually secure as the consideration for their agreements, distinguishes these promises from those within the statute, and makes them original agreements of the promisors, which are valid without writings." *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 98 C. C. A. 229, 173 Fed. 859.

In *Peele v. Powell*, 156 N. C. 553, 73 S. E. 234, the rule is stated that where the promise is for the benefit of the promisor, and he has a personal immediate, pecuniary benefit in the transaction, or the promise is to pay the debt of another as part of the consideration of property to be conveyed to the promisor, or is a promise to make good notes transferred in payment of property, the promise is valid although in parol. To the same effect, see *Whitehurst v. Padgett*, 157 N. C. 424, 73 S. E. 240.

In *Zimmerman v. Holt*, — Ark. —, 144 S. W. 222, the doctrine is stated that if a primary debt subsists against another, the promise of a third person to pay it, made subsequent to the time it was incurred, is not an original undertaking unless founded upon a new consideration, moving to and beneficial to the promisor, so that he thereby comes under an independent duty to pay, irrespective of the liability of the original debtor.

To remove a promise to pay the pre-existing debt of another from the operation of

tain claims held by them against a third person; defendant appealing from the judgment against him in favor of plaintiffs Frohardt Brothers; and plaintiffs Droge Brothers appealing from the judgment as against them. Affirmed on both appeals.

Statement by McClain, Ch. J.:

Action on alleged oral promises by defendant to pay to plaintiffs the amount of certain claims held by plaintiffs against one Whitsett. The defendant relied upon the statute of frauds, and the court submitted the case to the jury to determine whether the agreements of defendant were original and absolute undertakings to pay to plaintiffs the amounts of their respective claims

against Whitsett, or whether it was a collateral undertaking merely to see that the claims against Whitsett were paid, if he did not pay them. There was a verdict against defendant in favor of Frohardt Brothers, and one in favor of defendant against Droge Brothers, and judgment was rendered accordingly, from which defendant appeals as to the judgment against him, and Droge Brothers appeal from the judgment as against them. Defendant's appeal having been first perfected, he is treated as the appellant.

Messrs. Flickinger Brothers, for plaintiffs:

The agreement is not within the statute of frauds.

the statute of frauds, the promise must be based on a beneficial consideration moving to the promisor, and it must be an independent promise to pay, and not a mere guaranty upon a new and beneficial consideration. *Ogden v. Sergeant*, 119 N. Y. Supp. 672, affirmed in 137 App. Div. 925, 122 N. Y. Supp. 1139. Unless some independent benefit accrues to the promisor, his promise to pay the pre-existing debt of another is not an original obligation, and hence is within the statute of frauds. *Yracheta v. Stanford*, 120 N. Y. Supp. 117.

There must be a release of some benefit or advantage by the promisee, and such benefit or advantage must accrue to the promisor. *Blasdel v. Erickson*, 157 Ill. App. 815.

As to the necessity that the original obligation be released, in *Holcomb v. Mashburn*, 10 Ga. App. 781, 74 S. E. 307, the court said that this was one test to determine whether or not a promise to pay the debt of another was an original obligation; but that this was not the only test.

Where a plaintiff relies upon an oral promise of the defendant to pay the debt of another, the burden is on the former to show facts taking the promise out of the statute. *Estes v. Bryant-For-Daniel Co.* — Tex. Civ. App. —, 140 S. W. 1177.

Cases illustrative of rule—original promise.

The following promises to pay the debt of another, and which have been held to be original promises, and hence not within the statute of frauds, are illustrative of the rule referred to:

—a promise made to a person holding possession of property under a pledge, to pay the amount due from the pledgeor, in consideration of the surrender to the promisor of the possession of the property. *Oleson v. Oleson*, 90 Neb. 738, 134 N. W. 648;

—a promise by a purchaser of property from the buyer of the same property on conditional sale, made to the original vendor, to pay the latter the balance due on the contract, in consideration of being permitted 40 L.R.A. (N.S.)

to retain the property. *Barth v. Sanders*, 113 N. Y. Supp. 651;

—a promise to pay the debt of another, based upon an agreement by the promisee to extend the time of payment for the promisor's benefit. *Old River Lumber Co. v. Skeeters*, — Tex. Civ. App. —, 140 S. W. 511;

—a promise to pay in consideration of the consent of the mortgagee to the transfer of the property mortgaged from the mortgagor to the promisor. *Gay v. Schaefer*, 52 Wash. 269, 100 Pac. 334;

—a promise by the creditor of a tenant to pay the latter's landlord, where the promisor had received from the tenant, as a partial payment of his claim, the proceeds of a sale by the tenant of a portion of his crops upon which the landlord had a lien, the promise being made to the latter to induce him to refrain from making trouble for the tenant until he had gathered and sold his crop. *Marrow v. White*, 151 N. C. 96, 65 S. E. 746;

—an oral promise by the owner of an equity of redemption, made to the mortgagee, to pay the mortgage debt if the latter would not foreclose. *Manning v. Anthony*, 208 Mass. 399, 32 L.R.A. (N.S.) 1179, 94 N. E. 466. The foregoing case suggests a line of cases that are in general excluded from this note; viz., agreements by the purchasers of property subject to lien, with the debtors, to pay the amount of the liens;

—a promise by a person interested in property subject to mortgage to pay the mortgage in consideration of forbearance by the mortgagee to foreclose, and his agreement to assign same at the option of the promisor. *Lee v. Unkefer*, 85 S. C. 199, 65 S. E. 989, 67 S. E. 246;

—a promise by a person in possession of real estate covered by a mortgage which the mortgagee is threatening to foreclose, to pay same in consideration of forbearance to foreclose for a stated period of time. *Fitzgerald v. Flanagan*, — Iowa, —, 135 N. W. 738;

—a promise by a mortgagee of the property of a company, by a creditor thereof, that if the latter would forbear to sue the company, he would pay the indebtedness in

Helt v. Smith, 74 Iowa, 667, 39 N. W. 81; Stewart v. Hinkle, 1 Bond, 506, Fed. Cas. No. 13,430; Crawford v. King, 54 Ind. 6; Russell v. Babcock, 14 Me. 138; Rogers v. Empkie Hardware Co. 24 Neb. 653, 39 N. W. 844; Kershaw v. Whitaker, 1 Brev. 9; Smith v. Rogers, 35 Vt. 140; Clay v. Walton, 9 Cal. 328; Alger v. Scoville, 1 Gray. 391; Bailey v. Marshall, 174 Pa. 602, 34 Atl. 326; Lemmon v. Box, 20 Tex. 329; McCreary v. Van Hook, 35 Tex. 631;

Carraher v. Allen, 112 Iowa, 170, 83 N. W. 902; Harlan v. Harlan, 102 Iowa, 704, 72 N. W. 286; Chamberlin v. Ingalls, 38 Iowa, 300; Johnson v. Knapp, 36 Iowa, 616; Mills v. Brown, 11 Iowa, 314; Blake v. Robinson, 129 Iowa, 198, 105 N. W. 401; Pratt v. Fishwild, 121 Iowa, 642, 96 N. W. 1089; Blair Town Lot & Land Co. v. Walker, 39 Iowa, 406; Emerson v. Slater, 22 How. 28, 16 L. ed. 360; Davis v. Patrick, 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct.

instalments. Beltine Chemical & Mfg. Co. v. Zulfer, 152 Ill. App. 308;

—an agreement by a person interested in the financial success of a company, made to a bank having a note against it, then due, that if the latter would renew the note, he would deposit in the bank a sum of money and leave the same until payment in full of the note. Thompson v. Hazelwood Sav. & Trust Co. 234 Pa. 452, 83 Atl. 284;

—a promise by a contractor undertaking to complete a job free from all liens, to pay a creditor of a subcontractor entitled to a lien upon the property, in consideration of the forbearance by such creditor to assert his lien. McDonald v. General Constr. Co. 152 Iowa, 273, 132 N. W. 369;

—where the promisee had the right to file a claim of lien upon property, which he was threatening to do, a promise by a third person to pay the debt if the former would refrain, where the purpose to file the claim of lien is abandoned, and the action of the promisee in this respect inures to the benefit of the promisor, who was also a creditor of the same debtor, and who thereafter filed and perfected his claim of lien upon the property. Spencer v. Nalle, — Tex. Civ. App. —, 143 S. W. 991;

—a promise to pay out of property in the promisor's hands belonging to the debtor, as soon as he realized upon the property. Hardenberg v. Roberts, 146 Iowa, 696, 125 N. W. 818;

—a promise to pay out of money thereafter to be earned by the debtor by performing labor for the promisor, where, as a result of the promise, the creditor forbears to enforce his claim, and extends to the debtor additional credit, thereby enabling the latter to continue to render to the promisor valuable services. Schoening v. Maple Valley Lumber Co. 61 Wash. 332, 112 Pac. 381;

—a promise by a general contractor entitled to retain from money thereafter to become due a subcontractor, sufficient to protect him against liens for claims against the former, to pay a third person, a creditor of such subcontractor, the balance due him, and any sums thereafter to become due him, in consideration of his performing work for the subcontractor. Jones v. General Constr. Co. 150 Iowa, 194, 129 N. W. 830;

—a promise to pay a third person out of money to be due from the promisor to the original debtor, where made for the purpose of securing the performance of a contract by the promisor with the original debtor, in 40 L.R.A. (N.S.)

the performance of which the promisor is interested. Dale v. Gaither Lumber Co. 152 N. C. 651, 28 L.R.A. (N.S.) 407, 68 S. E. 134;

—a promise made by a wife to work as a laborer for a share of a crop, and permit the employer or lessor to deduct from the proceeds thereof a debt due him from her husband, where made in consideration of the lease. Wilkie v. Murphy, 88 S. C. 415, 70 S. E. 1028;

—a promise by the manager of a company, in consideration of a loan to him for the benefit of the company, to pay a past-due debt owing by the company to the lender. Holcomb v. Mashburn, 10 Ga. App. 781, 74 S. E. 307;

—a promise to pay an attorney's fee due from a third party, in consideration of his consent that the promisor be permitted to settle the litigation between the promisor and the debtor, the promise also furnishing an inducement to the debtor to settle, since he was thereby relieved of paying his attorney. VanWinkle v. King, 145 Ky. 691, 141 S. W. 46.

—collateral promise.

An oral acceptance of an order, if not based on a valuable consideration accruing to the acceptor, is within the statute of frauds and unenforceable. Hill v. Wright, 144 Ky. 806, 139 S. W. 946.

Where the only consideration to support a promise to pay the debt of another is the forbearance by the promisee to enforce payment of a debt against the debtor before a designated period, such forbearance is not a consideration capable of supporting the contract to pay another's debt, and does not evidence a new and independent contract from that of the original obligation, and hence it is a mere collateral undertaking, and within the statute. Byrd v. Hickman, 159 Ala. 505, 48 So. 669. This case was again before the court in 167 Ala. 351, 52 So. 426, and the theory then advanced to sustain the promise was that it was made directly to the debtor, in consideration of the payment by the debtor of a portion of a debt owing to the promisor. Under this theory the case is not within the scope of the note.

The mere forbearance to bring an attachment action against the debtor furnishes no consideration to support a promise by a third person to pay the debt of the attach-

Rep. 58; *Williams Shoe Co. v. Gotzian*, 130 Iowa, 713, 107 N. W. 807; *Miller v. Adams*, 142 Iowa, 515, 119 N. W. 593.

Messrs. Reed & Robertson, for defendant:

The alleged oral contract is within the statute of frauds.

20 Cyc. 170, 192; *Westheimer v. Peacock*, 2 Iowa, 528; *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 98 C. C. A. 229, 173 Fed. 862; *Barker v. Bucklin*, 2

Denio, 59, 43 Am. Dec. 726; *Chadwick v. Brown, Morris* (Iowa) 492; *Barham v. Colp*, 87 Mo. App. 152; *Sternburg v. Callanan*, 14 Iowa, 258; *Anderson v. Davis*, 9 Vt. 136, 31 Am. Dec. 612; *Kauffman v. Harstock*, 31 Iowa, 472; *Schaafs v. Wentz*, 100 Iowa, 708, 69 N. W. 1022; *Dee v. Downs*, 57 Iowa, 590, 11 N. W. 2; *Griffin v. Hoag*, 105 Iowa, 499, 75 N. W. 372.

Vaughn v. Smith, 65 Iowa, 579, 22 N. W. 684; *Walker v. Irwin*, 94 Iowa, 448, 62 N.

ment debtor, and does not take the promise out of the operation of the statute of frauds, where no facts are alleged in the pleadings from which it may be determined that the promisee had even a reasonable ground to believe that an attachment suit instituted by him against the debtor or his goods and chattels would avail him anything. While it is not necessary that a certain right of recovery should exist, if the suit which is alleged to have been forborne was brought, it must appear that the one forbearing to sue should in good faith have believed himself entitled to maintain his suit, and that he actually intended to institute the same. *Ruehle v. Montelius*, 149 Ill. App. 416.

An oral agreement to pay the debt of a third person out of money the promisor has agreed to loan the debtor is within the operation of the statute of frauds and therefore invalid, although, by reason of this agreement, the promisee delivered to the debtor the balance of goods sold him, and also dismissed two actions he had commenced against the promisor on drafts drawn against the latter by the debtor in favor of the promisee, it not appearing that the actions were sustainable, the dismissal of the actions, which clearly appears by the pleadings to the plaintiff to have been without foundation, being of substantial benefit to the defendant, and not constituting a sufficient consideration to transfer a guaranty into an original undertaking. *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 98 C. C. A. 229, 173 Fed. 859.

So, an oral promise to pay for services rendered another after the rendition of the services is within the statute of frauds. *Sealey v. Combs*, — Ky. —, 118 S. W. 972.

A promise to pay the debt of a third person, made to induce, and which has the effect of inducing the promisee to refrain from levying an execution upon goods of the debtor, and to return same unsatisfied, is not an original promise within the rule, since yielding or releasing the lien on the execution is a consideration moving from the promisee, but does not benefit the promisor, who receives no consideration or benefit from his promise. *Blasdel v. Erickson*, 157 Ill. App. 615.

A promise by a purchaser of goods to a person claiming a vendor's lien thereon (which, however, was unfounded, as he had lost his lien), to pay the amount of his claim in consideration of the release of all claim on the goods, is not an original 40 L.R.A. (N.S.)

promise, where the promisee does not release the original debtor, since it is essential, to remove such a promise from the operation of the statute of frauds, that the parties to the original indebtedness either expressly or impliedly consent to the substitution of the new. *Swisher v. Inside Grocery & Market Co.* 158 Ill. App. 186.

The interest of a stockholder of a corporation is not sufficient to make his agreement to pay a debt owing by the corporation an original obligation, and the agreement by the creditor to furnish the corporation goods in the future furnishes no consideration for the agreement to pay an existing debt of the corporation. *Winne v. Mehrbach*, 130 App. Div. 329, 114 N. Y. Supp. 618.

Although a husband was doing a retail business in property of his wife as her tenant, a promise by the latter to pay a debt of her husband is within the statute of frauds, even though made for the purpose of inducing the creditor to continue to deliver goods to the husband, thereby enabling him to continue his business. *Bauer v. Ambs*, 144 App. Div. 274, 128 N. Y. Supp. 1024.

An agreement by the owner of property that he would see paid the amount then due for material furnished a contractor making improvements upon the property is within the statute of frauds, although the promisee was thereby induced to furnish further material. *Stouffer v. Jackson*, 42 Pa. Super. Ct. 450.

A promise by a father to pay a previously contracted debt of his minor son is a collateral agreement, and hence within the statute of frauds. *Fisher v. Lutz*, 146 Wis. 664, 132 N. W. 592.

In *Harris v. Paulk*, 10 Ga. App. 334, 73 S. E. 430, a promise is held to be collateral rather than original, and hence to be within the statute of frauds, where the promisee had the right to the services of the debtor until payment of his debt, and the promise to pay the debt at a future time was made to secure the release of the debtor, to enable the promisor to secure his services. The court apparently took the view that to render the promise an original one there must be a complete novation; and since the debtor was not released, the promise to pay was collateral. Although no point is made of that fact, the promise to pay was collateral in form,—a promise to see that the creditor was paid. A. G. S.

W. 785; *Winburn v. Fidelity Loan & Bldg. Asso.* 110 Iowa, 376, 81 N. W. 682; *Regan v. Kirk*, 140 Iowa, 302, 118 N. W. 317.

McClain, Ch. J., delivered the opinion of the court:

Frohardt Brothers and Droge Brothers held two separate and independent claims against one Whitsett, and were threatening separately to attach Whitsett's property, consisting of a livery stock, on which defendant had a chattel mortgage, and of which he had possession. Thereupon it is alleged that defendant promised to each of the respective creditors of Whitsett that if they would refrain from attaching Whitsett's property in defendant's hands and attacking the validity of defendant's mortgage, he would pay their respective claims; and this action is founded upon such oral promises. While the causes of action of the two plaintiffs are distinct and separate, they were, without objection, allowed to proceed as coplaintiffs in this action. By separate appeals, the correctness of these two different portions of the final judgment is questioned. The appeal of the defendant from the judgment against him in favor of Frohardt Brothers will first be considered.

1. There was evidence tending to show that when Frohardt Brothers were threatening to attach the property of Whitsett, including the livery stock of which the defendant had possession, at least the greater part of it covered by a chattel mortgage to defendant, the defendant urged the plaintiffs not to levy the attachment, as it would interfere with his (defendant's) business, and also injure Whitsett, and that defendant promised, if Frohardt Brothers would not levy such attachment, he (defendant) would pay their claim, and that Frohardt Brothers refrained from attaching Whitsett's property in defendant's hands, but did subsequently secure a judgment against Whitsett for the amount of their claim; and, further, that defendant was interfered with in his possession of Whitsett's property. The concrete question now presented is whether a finding by the jury that defendant did make an absolute and independent agreement on his own behalf that if Frohardt Brothers did not levy an attachment on Whitsett's property in defendant's hands the defendant would pay the amount of Whitsett's claim to Frohardt Brothers, and compliance with such agreement on the part of Frohardt Brothers was sufficient, notwithstanding the statute of frauds, to justify a judgment in favor of Frohardt Brothers against defendant on his oral promise. The same question in another form is involved in the claim for defendant that, under the evidence, the court

erred in leaving it to the jury to say whether the oral promise of the defendant to pay to Frohardt Brothers the amount of their claim against Whitsett was an absolute and independent promise, rather than a collateral promise to pay Whitsett's debt.

This case is one of a class as to which it has been difficult for the courts to state any clear and consistent rule for the application of the statute of frauds, so far as it prohibits the introduction of oral evidence to prove a contract to pay the debt of another. There has been no difficulty in holding that agreements of guaranty, whether made before or after the guaranteed debt has been contracted, are covered by the statute, even though based on an independent consideration of detriment to the creditor or advantage to the guarantor. That is to say, adequate and lawful consideration for an oral contract of guaranty does not take it out of the statute. On the other hand it is well settled (and no citation of authorities in support of the proposition is necessary) that an independent agreement on a distinct consideration to assume and discharge the debt of another may be valid, notwithstanding the statute; as, for instance, where, on such new promise, the original debtor is released, or where the promisor agrees to discharge the debt of another in consideration of his being relieved from liability for his own obligation to the creditor, to whom the debt of such other person is owing. Thus it appears that there may be a binding oral promise to pay an amount due to the promisee from a third person, if supported on a good consideration, but that not every promise to pay the amount due from another to the promisee, although supported on a legal and adequate consideration, is enforceable. The distinction between these two classes of cases seems to be this: Does the promisor, for a consideration of advantage to himself, make an absolute and independent promise to pay the amount due to the promisee from a third person? or is his promise to pay the amount due from such third person merely collateral to the third person's obligation? On the one hand, the release of the original debtor is sufficient to show that the promise to pay his debt is a new, original, and independent promise. On the other hand, if the promisor merely undertakes to pay the debt of another in the event that such other person does not pay it, then the promise is collateral, and the legality and adequacy of the consideration does not take it out of the statute of frauds.

While there was at one time, especially in the English courts, an inclination to treat as collateral, and therefore as within

the statute of frauds, every promise to pay the amount of another's debt, the unmistakable weight of the more recent cases, especially in this country, has been in favor of sustaining, as against the statute of frauds, an oral promise to unqualifiedly and absolutely pay another's debt on a consideration of advantage accruing to the promisor from such promise. As was said in *Emerson v. Slater*, 22 How. 28, 43, 10 L. ed. 360, 365. "Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." And in *Nugent v. Wolfe*, 111 Pa. 471, 56 Am. Rep. 291, 4 Atl. 15, this language is used (quoted with approval in *Bailey v. Marshall*, 174 Pa. 602, 34 Atl. 326): "It is difficult, if not impossible, to formulate a rule by which to determine, in every case, whether a promise, relating to the debt or liability of a third person, is or is not within the statute; but, as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after or at the time with the promise of the principal, is within the statute, and not binding, unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute."

The following cases support the general proposition that, if the leading object of the promisor is not to become surety or guarantor of another, but to promote or subserve some interest of his own, his oral promise to pay the amount of another's

debt is not within the statute of frauds, even though the original debtor is not released; *Tindal v. Touchberry*, 3 Strobb. 177, 49 Am. Dec. 637; *Smith v. Delaney*, 64 Conn. 264, 29 Atl. 496, 42 Am. St. Rep. 181, and note; *Joseph v. Smith*, 39 Neb. 259, 42 Am. St. Rep. 571, 57 N. W. 1012; *Marrow v. White*, 151 N. C. 96, 65 S. E. 746; *Lorick v. Caldwell*, 85 S. C. 94, 67 S. E. 143; *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 98 C. C. A. 229, 173 Fed. 859; *Oldenburg v. Dorsey*, 102 Md. 172, 62 Atl. 576, 5 Ann. Cas. 841.

If the evidence is in conflict as to whether the promise is independent or collateral, the question is for the jury. *Davis v. Patrick*, 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. Rep. 58; *McGowan Commercial Co. v. Midland Coal & Lumber Co.* 41 Mont. 211, 108 Pac. 655; *Johnson v. Bank*, 60 W. Va. 320, 55 S. E. 394, 9 Ann. Cas. 893, and note. Some of the more recent of our own cases on the subject support the rule above announced. *Pratt v. Fishwild*, 121 Iowa, 642, 98 N. W. 1089; *Blake v. Robinson*, 129 Iowa, 196, 105 N. W. 401; *Harlan v. Harlan*, 102 Iowa, 701, 72 N. W. 286; *Carraher v. Allen*, 112 Iowa, 168, 83 N. W. 902; *Miller v. Adams*, 142 Iowa, 515, 119 N. W. 593; *Helt v. Smith*, 74 Iowa, 667, 39 N. W. 81.

It is true that in some of these cases the facts involved did not necessarily require the announcement of such a rule as we are now recognizing. But we cannot properly disregard the repeated announcement of such rule as having been made through misapprehension and oversight. Unless there are in cases in this court which, as applied to the facts of this case, necessarily lead to a different result, we should give heed to our previous repeated statement of a general principle applicable to the case, although it may have been made under circumstances not giving rise to the precise question now before us. We fail to find among the cases in this court relied upon for appellant any decision as to this branch of the statute of frauds, inconsistent with the general proposition already stated. In *Westheimer v. Peacock*, 2 Iowa, 528, the statute of frauds was applied in an action brought against a father who had orally promised to pay his son's debt; but the court said: "There is nothing to show that the defendant, when he made the promise, had in view or secured a benefit which accrued immediately to himself. On the contrary, his object was to obtain forbearance or benefit to his son. If for his own benefit, the promise would not be within the statute; if for the debtor, it would. And this distinction we think important, and one that is clearly recognized by the

authorities." In *Sternburg v. Callanan*, 14 Iowa, 251, the question was whether the defendant partnership had assumed the individual debt of one of the partners, and the court held the partnership not bound, because there had been no novation, and held the jury should have been instructed that an oral promise by one of the partners to pay the individual debt of another partner could not be established by parol; but the question of the statute of frauds was not otherwise discussed. In *Kauffman v. Harstock*, 31 Iowa, 472, it was simply held that an agreement, upon certain contingencies, to step into the place of another, as to his debt, and to hold the creditor harmless, was within the statute of frauds. In *Dee v. Downs*, 57 Iowa, 589, 11 N. W. 2, was involved only the question whether an agreement to become surety for another was within the statute. In *Vaughn v. Smith*, 65 Iowa, 579, 22 N. W. 684, it was held that there was no new and independent consideration for the oral promise to answer for the debt of another, and that it was therefore within the statute of frauds. In *Walker v. Irwin*, 94 Iowa, 448, 62 N. W. 785, it was pointed out that the oral agreement relied upon was not an original agreement, but one obligating the promisor to step into the place of the debtor and pay his liability upon certain conditions, and that it was therefore collateral, although the contingencies contemplated had happened; and it is said that the defendant received no personal benefit, so that his obligation was without consideration. In *Schaafs v. Wentz*, 100 Iowa, 708, 69 N. W. 1022, the oral promise relied upon was held to be collateral, and therefore within the statute. In *Griffin v. Hoag*, 105 Iowa, 499, 75 N. W. 372, the oral promise relied on was held unenforceable, because a mere naked promise, without consideration of detriment to the promisee or advantage to the promisor. In *Winburn v. Fidelity Loan & Bldg. Assn.* 110 Iowa, 374, 81 N. W. 682, it was held by a divided court that an oral acceptance by an agent of orders drawn upon him for his principal's funds would not render his principal liable, in the absence of the existence of funds in the hands of the agent out of which the orders could be paid. It is difficult to find any application of the case to the question now under consideration. In *Regan v. Kirk*, 140 Iowa, 302, 118 N. W. 317, it was held, without discussion that reliance by the promisee on an oral promise to pay the debt of another would not render such promise enforceable.

None of these cases are at all inconsistent in principle with the rule that an oral agreement, entered into on considera-

tion of benefit to the promisor, and relied upon by the promisee to his detriment, to pay to the promisee the amount of the claim of the latter against a third person, may be enforced, without regard to whether the effect of the agreement is to release such third person from his liability; and we reach the conclusion that the court properly submitted to the jury the question whether the oral promise of the defendant to pay to Frohardt Brothers, the amount of their claim against Whitsett was an original and independent obligation, entered into on account of anticipated benefit to defendant, or whether it was merely a collateral agreement to pay Whitsett's debt, and that the judgment against the defendant in favor of Frohardt Brothers should be affirmed.

2. The appeal of Droge Brothers is predicated on a refusal of the trial court to allow them to introduce evidence on two other counts of the original petition. It appears that, as originally filed, the petition was in two counts, one alleging partnership between defendant and Whitsett, and the other charging fraud and conspiracy between them to put the property of the latter beyond the reach of creditors. Subsequently an amendment was filed to the petition, alleging an independent promise of defendant to pay Whitsett's debts to each of the plaintiffs. When the case came on for trial, evidence was presented in behalf of the plaintiffs under the petition as thus amended, but on motion of defendant the court withdrew from the jury the consideration of the issues raised by denial of the first and second counts, and submitted to the jury only the issue as to an independent promise. The jury disagreed on this submission, and when the case came on for retrial the judge held that the previous ruling as to the first two counts constituted in effect an adjudication, and that there could be a trial only on the third count. The record as presented for Droge Brothers shows that the trial court found a determination as to the first and second counts which did in fact constitute an adjudication, and, if so, plainly those counts were not proper subject-matter for further evidence in the case. The mistrial was only as to the issue arising under the third count; that is, the amendment. There was no mistrial as to the first and second counts; for they were never submitted to the jury at all.

The final adjudication may consist of many judgments, or, when the claim consists of several parts or items, such judgments may be for either of the parts, or any specific part or item, of such aggregate claim, and against him on the other part

thereof. Code, § 3769. It is not necessary now to determine whether the final adjudication as to the first and second counts was in such form that a separate appeal might have been prosecuted from it, or whether it was an incidental ruling of the trial court, which might be reviewed on appeal from the final judgment. No separate appeal was taken, and on the present appeal there is no claim of error as to the ruling. Under these circumstances, Droge Brothers cannot complain of the action of the trial court in refusing to receive evidence on the last trial in support of the first two counts of the petition.

The judgment of the trial court is therefore, on both appeals, affirmed.

Evans, J., dissenting in part:

I do not agree to the first branch of the majority opinion. It goes beyond any previous decision of this court. In practical effect, it is an evasion of the statute of frauds. My views are expressed in the former opinion filed in this case, which can be found in — Iowa, —, 132 N. W. 31.

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WASHINGTON SUPREME COURT.
(Department No. 1.)

STATE OF WASHINGTON, Appt.,
v.

LUDOVIC DALLAGIOVANNA, Respnt.

(— Wash. —, 124 Pac. 209.)

Perjury — meaning of "swear."

1. To bring one within a statute making guilty of perjury every person who shall

Note. — Perjury as affected by invalidity of proceeding in which testimony is taken.

The early cases upon the question here considered are covered in the note to Morford v. Territory, 54 L.R.A. 513, to which the present note is supplementary.

Jurisdictional defects generally.

As stated in the note referred to, it is well established that perjury cannot be predicated upon a false oath taken in a proceeding before a court which had no jurisdiction to inquire into the matter which was the subject of the proceeding.

Thus, where the county attorney had no jurisdiction to administer an oath and proceed with an investigation of an alleged crime as a court of inquiry, perjury cannot be predicated upon testimony given in such proceeding. Williams v. State, 50 Tex. Crim. Rep. 269, 96 S. W. 47.

So, where the jurisdiction of corporation courts is limited to cases arising within the corporation limits, an indictment for 40 L.R.A. (N.S.)

knowingly swear falsely concerning any matter, he must make a statement under the sanctity of an oath administered by some qualified officer having authority to administer the oath in the particular proceeding or investigation in which the statement is made.

Same — jurisdiction of investigation — necessity.

2. That a committee of a common council is acting under authority to investigate and probe charges made by the acting mayor does not show that the matter under investigation is within the jurisdiction of the council, so as to render an oath taken by a witness appearing before it one "required by law," within the meaning of a statute empowering the officer before whom it was taken to administer such oath, and, therefore, violation of the oath does not necessarily come within a statute making every person who shall swear falsely guilty of perjury.

(June 18, 1912.)

APPEAL by the state from an order of the Superior Court for King County sustaining a demurrer to an indictment charging defendant with perjury in the second degree. Affirmed.

The facts are stated in the opinion.

Messrs. John F. Murphy, and H. B. Butler, for the State:

Notaries public have authority to administer oaths generally wherever the same are required by law.

Cox v. Stern, 170 Ill. 442, 62 Am. St. Rep. 385, 48 N. E. 906; Morris v. State, 2 Tex. App. 502; Norton v. Hauge, 47 Minn. 405, 50 N. W. 368; Lutchner v. United States, 19 C. C. A. 259, 41 U. S. App. 54, 72 Fed. 968; Newcomb v. Indianapolis, 141 Ind. 451, 28 L.R.A. 732, 40 N. E. 919.

perjury which fails to allege that the crime under consideration in the former case was committed within the city limits will be quashed. Moss v. State, 47 Tex. Crim. Rep. 459, 83 S. W. 820, 11 Ann. Cas. 710.

And where it is not a violation of law to play cards at a house occupied by a family when no bet or wager is made, perjury cannot be predicated upon testimony given before a grand jury which has under investigation merely the question of playing cards at a house occupied by a family. Gallegos v. State, 50 Tex. Crim. Rep. 190, 95 S. W. 123.

The fact, however, that a complaint for the same offense had already been made before a justice of the peace at the time one charged with perjury testified before a grand jury will not prevent his conviction on the theory that the matter had been placed beyond the jurisdiction of the grand jury. Wilks v. State, — Tex. Crim. Rep. —, 66 S. W. 787.

And the fact that the grand jury which indicted defendant for perjury had previously indicted him for bigamy, and that

Messrs. Vanderveer & Cummings, for respondent:

Peter A. Kimple had no authority to administer an oath to the defendant under the circumstances recited in the indictment.

Ex parte Conrades, 185 Mo. 411, 85 S. W. 160; State v. Carpenter, 164 Mo. 588, 65 S. W. 255; Com. v. Hillenbrand, 96 Ky. 407, 29 S. W. 287; Kerfoot v. Com. 89 Ky. 174, 12 S. W. 189; State v. McCarthy, 41 Minn. 59, 42 N. W. 599; Re Van Tine, 12 How. Pr. 507; Morford v. Territory, 10 Okla. 741, 54 L.R.A. 513, 63 Pac. 958; Gallegos v. State, 50 Tex. Crim. Rep. 190, 95 S. W. 123.

both charges involved the fact that he had married a certain person on a given date, does not deprive the court of jurisdiction to try the indictment for perjury, so that perjury cannot be predicated upon false testimony given on such trial. People v. Collins, 6 Cal. App. 492, 92 Pac. 513.

And where the record fails to show that a motion to withdraw a plea of not guilty was granted, or that the plea was withdrawn, and it appears that the case was subsequently tried on the merits, there is an issue before the court, and one who testifies falsely may be convicted of perjury. State v. Gregg, 123 La. 610, 49 So. 211.

Defects in organization or constitution of tribunals.

An irregularity in the appointment of a master in chancery to take testimony, in that he was not designated in the order by any official title, cannot be questioned on the trial of one charged with perjury, who testified before such officer. Markey v. State, 47 Fla. 38, 37 So. 53.

And where the parties in proceedings to take depositions waive the issuance of the commission provided for by statute, the failure to appoint such a commission does not render the proceeding void, and perjury may be predicated upon testimony taken in the proceedings. Manning v. State, 46 Tex. Crim. Rep. 326, 81 S. W. 957, 3 Ann. Cas. 867.

And the fact that no paper was filed in a pending case showing a necessity for the taking of a deposition, as required by statute, does not show a lack of authority on the part of the officer taking the deposition, where the parties and their attorneys voluntarily appeared and testified, and a conviction for perjury may be had where false testimony is given. State v. Woolridge, 45 Or. 389, 78 Pac. 333.

When the court had lost or exceeded its jurisdiction.

Where the Constitution and statutes require the defendant in a prosecution for a felony to be present during the trial, one who testifies in a proceeding in which the accused, who was charged with a felony, was absent while testimony was given and

Parker, J., delivered the opinion of the court:

This is an appeal by the state from an order of the superior court for King county sustaining appellant's demurrer to an indictment found against him by the grand jury in that court, charging him with perjury in the second degree. The following is all of the language of the indictment requiring our attention: "On the 26th day of September, A. D. 1910, the city council of the city of Seattle duly and regularly passed a resolution, and on the same day the same was duly filed as required by law, which said resolution was as follows: 'Be it

until the end of the trial, cannot be convicted of perjury, since such trial is void. Emery v. State, 57 Tex. Crim. Rep. 423, 136 Am. St. Rep. 988, 123 S. W. 133. The court said: "The presence, therefore, of the accused in court and before the jury during the trial of this case is a jurisdictional question, and such presence is absolutely necessary to the validity of the trial. There are three facts that seem to be absolutely necessary to the jurisdiction of the court, or as jurisdictional questions: first, the court must have jurisdiction of the person; second, of the subject-matter; and, third, to render the particular judgment rendered. Otherwise, the prosecution will be void, as also the judgment. . . . All the cases hold that the jurisdiction of the person is essential to the validity of a proceeding, otherwise it is a nullity and void. This rule has been followed in Texas in all its history. . . . If this rule is correct, and there seems to be absolutely no question of it, then it is necessary that the court have jurisdiction of the person in order to make valid the judgment rendered. Under the provisions of our law, constitutional and statutory, it is necessary, in order to constitute perjury, that the court have jurisdiction of the person on trial in order to render the testimony of the witnesses, given on that trial, false, or in fact testimony at all; and without the presence of an accused in a felony case during the introduction of the evidence, the court is without authority to try the case; and being without authority, its proceedings would be necessarily void. The same rule applies in cases where the court has not acquired jurisdiction of the person under necessary process or pleadings, although, in fact, the accused was tried. . . . It would follow, therefore, that false evidence given in a matter which is a void prosecution is not perjury."

Where the Code provides that every proceeding is judicial within the meaning of the act, which is held before any person acting as a court, justice, or tribunal having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person, so as to authorize it or him to hold the proceeding,

resolved by the city council of the city of Seattle: That, whereas, it appears that during the absence of H. C. Gill, mayor of the city of Seattle, one of our members, elected by this body as the acting president, has been required under the charter of the city of Seattle to assume the important office of acting mayor, and whereas, the said member has, during such incumbency in that office, endeavored to subordinate the vicious element of the city to the rule of law, and by strict enforcement of the ordinances of the city has, as far as possible within the time at his command, done much to restore the city to a state of order and

cleanliness, and whereas, in his effort to enforce the laws, he is reported to have found conditions which indicate the existence of corruption on the part of certain persons connected with the administration of civic affairs, now, therefore: be it resolved, that we commend Mr. Max Wardall, acting mayor, for the vigorous and courageous stand he has made to bring about better conditions in the city, and pledge him the sympathy and support of this body, of which he is a member. And furthermore, be it resolved, that, in furthering that end, a committee of five be appointed by this council to investigate and probe the char-

and although such proceeding was held in a wrong place, or was otherwise invalid, one may be convicted of perjury who testifies falsely before a magistrate assuming to act as a justice of the peace, having authority to hear a complaint, although, on account of residence in another county, he had no jurisdiction over the subject-matter of the complaint, since it is a judicial proceeding within the meaning of the act. *Drew v. Rex*, 33 Can. S. C. 228.

Defects in preliminary matters affecting the jurisdiction in the particular case.

The fact that the defendant in a prosecution had not pleaded to the indictment, although it may constitute reversible error, does not render the trial void, so that a conviction for perjury may not be had against one who swears falsely therein. *State v. Walton*, 53 Or. 557, 101 Pac. 389. The court said: "Perjury cannot be committed in a judicial proceeding absolutely void for want of jurisdiction. . . . But where the court before whom the oath of a witness is taken has jurisdiction of the subject-matter and the parties, and the testimony given is material to the inquiry then before the court, false swearing is perjury, though the proceedings may be so irregular or erroneous as to require a reversal on appeal. . . . The statutes of this state provide: 'If any person . . . of whom an oath or affirmation shall be required by such law shall wilfully swear or affirm falsely in regard to any matter or thing concerning which such oath or affirmation is authorized or required, such person shall be deemed guilty of perjury.' § 1875. The court in which the testimony of Johnson and Hogeboom was given had jurisdiction of the case then on trial. They were required by law to take an oath or affirmation to tell the truth (§ 694); and, if the evidence given by them was material to the inquiry then before the court, perjury could be assigned thereon, if it was wilfully false, notwithstanding the proceedings were so irregular as to require a reversal on appeal. The irregularities or errors on the trial were matters which concerned the defendant in the case, but not the witnesses who testified therein. It would be no defense for them, if charged with perjury, to

show that the court committed error in the proceeding, provided it had jurisdiction. It would be most unreasonable to require that all proceedings of a court, in which a witness testified falsely, 'should be in strict conformity to law before the witness could be proceeded against for perjury. Such a rule would change the parties and issues, and, instead of trying a perjurer for false swearing, the court would be called upon to review the judgment of the court in which the false swearing occurred.'

And where one brought before a police magistrate made no objection to the manner in which he had been brought before such officer, or to the manner in which the charge was laid, but testified in his own behalf, the evidence is given in a judicial proceeding within the meaning of § 171 of the Code, and he may be convicted of perjury. *Rex v. Yaldon*, 17 Ont. L. Rep. 179, 12 Ont. Week. Rep. 384.

It is proper in a prosecution for perjury to refuse to give an instruction that the information in the former proceeding was defective and did not charge a crime, since the question of the validity of such information is for the court in which the trial was had. *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389.

And the fact that an indictment for perjury charges that the defendant was being tried in the proceeding in which the false testimony was given for two separate offenses at the same time does not render it demurrable, since, if the court had jurisdiction of the two offenses, even though they were improperly joined in the same proceeding, a conviction could be had for perjury. *Gardner v. State*, 80 Ark. 264, 97 S. W. 48.

When want of jurisdiction arises from facts dehors the record.

Where a bill for divorce contains allegations that the parties have been residents of the state for the period required in order to enable them to maintain such a bill, a conviction for perjury in swearing falsely before a master appointed to make testimony in the proceeding will not be barred, although, upon the trial of the complaint for perjury, it appears that the parties had not been residents of the state for the time

ges made by the acting mayor, and report back to this body at the earliest time possible. . . . In pursuance of said resolution, and on said 20th day of September, 1910, a committee of five persons, namely, E. L. Blaine, J. Y. C. Kellogg, T. P. Revelle, V. P. Hart, and James Conway, were duly appointed as a committee under said resolution; and, immediately thereupon, they and each of them assumed their office as said committee. On the 21st day of October, 1910, said committee were in session at said city of Seattle, and were at said time investigating charges of corruption on the part of certain persons connected with the administration of civic affairs in said city, and on the said 21st day of October, A. D. 1910, he, said Ludovic Dallagiovanna, appeared in person before said committee in said city of Seattle, at one of its sessions then being had and held, and he, said Ludovic Dallagiovanna, then and there being,

was then and there duly sworn as a witness before said committee, by and before Peter A. Kimple, who was then a duly appointed, qualified, and acting notary public in and for the state of Washington, residing at said city of Seattle, that the evidence which he would give before said committee should be the truth, the whole truth, and nothing but the truth; he, said Peter A. Kimple, as such notary public, then and there having sufficient and competent power and authority to administer said oath to said Ludovic Dallagiovanna in that behalf, and said Ludovic Dallagiovanna, being so sworn as aforesaid, did then and there knowingly, wilfully, and feloniously swear falsely that he, said Ludovic Dallagiovanna, did not then have any interest in the Sixth Avenue Hotel in the said city of Seattle, and that he did not have anything to do with said Sixth Avenue Hotel, and that he had never received any money out of said Sixth Ave-

specified. *Markey v. State*, 47 Fla. 39, 37 So. 53. The court said: "The circuit court had jurisdiction of the subject-matter of the divorce, and in the proceeding to obtain it, to take testimony upon the question of the two years' residence alleged. If it should be conceded that the jurisdiction of the circuit court to grant the divorce depended upon the truthfulness of the allegation with respect to residence, as contended by plaintiff in error, still the allegation of such residence gave the court jurisdiction to inquire as to its truthfulness, and false swearing upon the inquiry had in respect thereto would be perjury. In other words, we might admit that if the allegation with respect to residence was untrue, the decree of divorce granted upon false testimony sustaining its truth would be void, and yet hold the party giving the false testimony guilty of perjury, for the court, having jurisdiction over the matter of divorce and actions therefor, necessarily had jurisdiction to take testimony concerning allegations essential to the right to grant it, and false testimony respecting these matters will be perjury, even though the decree of divorce should be held to be void for the reason that in fact these allegations were untrue."

Defects not affecting jurisdiction generally.

According to the statement in the early note, it is well established that facts, errors, or irregularities in the proceedings in which perjury is charged to have been committed, though sufficiently serious to require a reversal, will not defeat a charge of perjury unless they are jurisdictional.

And although an information is voidable on the ground that it does not charge the offense with sufficient detail, where the accused proceeds with the hearing without objection, he cannot complain that perjury cannot be assigned on false testimony given 40 L.R.A. (N.S.)

by him at such hearing. *State v. Perry*, 117 Iowa, 463, 91 N. W. 765.

And notwithstanding that an information is invalid and subject to be quashed on motion, yet a prosecution for perjury may be predicated upon false testimony given on the trial. *Kelley v. State*, 51 Tex. Crim. Rep. 507, 103 S. W. 189.

Matters especially affecting sanction under which testimony is given.

As to whether perjury may be predicated of false swearing where no oath or the particular one administered was not required, see note to *State v. Parrish*, 39 L.R.A. (N.S.) 96.

It is not material to the charge of perjury whether the defendant was sworn in the former trial in the usual form or otherwise. *People v. Rodley*, 131 Cal. 240, 63 Pac. 351.

And the omission from the oath administered of the words "So help you God," as provided by statute, is an irregularity in form, and not of substance, and is no defense in a prosecution for perjury. *People v. Parent*, 139 Cal. 600, 73 Pac. 423.

And where a statute declares that it shall be no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner, the fact that the form of the oath set forth in an indictment for perjury is not precisely the same as given in the statute will not prevent a conviction, where the oath set forth is in substance the same. *People v. Collins*, 6 Cal. App. 492, 92 Pac. 513.

Matters relating to jury.

The fact that the jury were not sworn will not entitle the defendant to a verdict of not guilty in a subsequent trial for perjury. *Schooler v. State*, 52 Tex. Crim. Rep. 331, 106 S. W. 359.

J. T. W.

nue Hotel, and that he did not then know who was then running said Sixth Avenue Hotel."

The arguments of counsel for both sides are directed to the question of the authority of the notary public before whom it is charged respondent took the oath to administer an oath under the circumstances recited in the indictment. The arguments proceeded upon the assumption that this is the controlling question touching the sufficiency of the facts alleged to constitute the crime of perjury in the second degree, which is defined by § 2353, Rem. & Bal. Code, as follows: "Every person who, whether orally or in writing, and whether as a volunteer or in a proceeding or investigation authorized by law, shall knowingly swear falsely concerning any matter whatsoever, shall be guilty of perjury in the second degree."

It is manifest that the word "swear," as used in this section, means to state a fact or facts under the sanctity of an oath or affirmation administered by some duly qualified officer having authority to administer the oath in the particular proceeding or investigation in which the statement of the affiant is to be made.

Counsel for the state rest their claim of authority in behalf of the notary administering the oath mentioned in the indictment, upon the following language of § 8298, Rem. & Bal. Code: "Every duly qualified notary public is authorized in any county in this state: . . . (3) To take depositions and affidavits, and administer all oaths required by law to be administered. . . ." Now, whatever may be said as to the binding force of an oath as a basis for a perjury charge of this nature, administered by some other officer having powers defined by other statutory provisions, we are here dealing with the powers of a notary public as defined by this law, from which it is plain that a notary public cannot administer any oath with any binding force in law, except such oath is "required by law." Whether or not the oath here involved was so required depends upon the powers of the committee in the particular proceeding or investigation they were engaged in at the time the alleged false statements were made before it. That the indictment must affirmatively state facts showing that the proceeding or investigation before the committee was such as lay within its power to investigate by requiring the sworn testimony of witnesses seems too elementary to call for argument or citation of authorities in support thereof. This indictment fails to inform us of the nature of the matter the committee was authorized by the resolution to investigate with any

degree of certainty. The resolution only purports to authorize the committee "to investigate and probe charges made by the acting mayor." Whom those charges were against or what they consisted of is scarcely hinted at by the language of the resolution quoted in the information. The facts alleged, we think, are not sufficient to affirmatively show that the committee was investigating a matter which was within either the council or its jurisdiction. This being so, it does not affirmatively appear from the language of the charge made that the oath was one "required by law;" and hence the administration of such oath by the notary public had no such binding force as is necessary to support a charge of perjury. The law relating to false sworn statements as a basis of a perjury charge, when such statements are made in a proceeding before a court or tribunal having no jurisdiction over the subject of inquiry, is well stated in the note to *Morford v. Territory*, 54 L.R.A. 513, as follows: "It is established by numerous cases and beyond question that perjury cannot be predicated of a false oath in a proceeding before a court which had no jurisdiction to inquire into the matter which was the subject of that proceeding." The application of this principle is illustrated in *Gallegos v. State*, 50 Tex. Crim. Rep. 190, 95 S. W. 123, where there was involved the jurisdiction of a grand jury. The court said: "So it would appear that the grand jury were investigating or inquiring about a matter which was not a violation of the law. The court had no jurisdiction to make an inquiry except such matter as is an offense against the laws of the state of Texas. See the matter of jurisdiction discussed in *McDonough v. State*, 47 Tex. Crim. Rep. 227, 122 Am. St. Rep. 684, 84 S. W. 594. The grand jury having under investigation a matter which was not an offense, perjury could not be predicated on false testimony delivered during such investigation."

We agree with the learned trial court, and affirm his ruling in sustaining respondent's demurrer to the indictment.

Crow, Chadwick, and Gose, JJ., concur.

CONNECTICUT SUPREME COURT OF ERRORS.

WILLIAM H. CADWELL, Appt.,

v.

CONNECTICUT COMPANY.

(85 Conn. 401, 83 Atl. 215.)

Highway — additional servitude — electric railway.

1. The mere fact that an electric rail-

way is constructed in a public street with T-rails, and that its cars are operated by the use of wires and poles, does not show that it is an additional servitude on the highway.

Same — freight cars — through traffic — effect.

2. The running upon an interurban electric railway constructed in a public street, of cars designed to carry property only, which run from terminus to terminus without stopping to receive and discharge contents, and discharging such contents at the two termini only, impose an additional servitude on the fee.

(May 16, 1912.)

APPPEAL by plaintiff from a judgment of the Superior Court for Hartford Coun-

Note. — Interurban trolley road as additional burden.

The earlier cases upon this subject are collected in the note to *Abbott v. Milwaukee Light, Heat & Traction Co.* 4 L.R.A. (N.S.) 202.

For other cases as to whether an interurban railroad operating within the limits of a city is to be deemed a street railroad, see note to *Rasch v. Nassau Electric R. Co.* 36 L.R.A. (N.S.) 673, IV. b, 2, (d), notes 45, 46, p. 717.

As to remedy of abutting owner as affected by his consent to the construction of railroad or street railway in street or highway, see note to *Wolfard v. Fisher*, 7 L.R.A. (N.S.) 991, and continuation of the same subject in note to *Smyth v. Brooklyn Union Elev. R. Co.* 23 L.R.A. (N.S.) 433; as to effect of acquiescence or consent by a town or municipality to the construction or use of railroad in street or highway, to estop it from objecting thereto, see note to *Bangor v. Bay City Traction & Electric Co.* 7 L.R.A. (N.S.) 1187.

As to preventive remedy of nonconsenting abutting property owner, where use of highway for street railway is authorized by the public, see note to *State ex rel. Dawson v. Parsons Street R. & Electrical Co.* 28 L.R.A. (N.S.) 1082.

As to judicial power over right of eminent domain with reference to street railways, see note to *Henderson v. Lexington*, 22 L.R.A. (N.S.) 134.

This note does not discuss the right of an interurban railway company to exercise the power of eminent domain.

The interurban railway has been defined as a railway operated on the streets of a city or town by electricity, or by other power than steam, which extends beyond the corporate limits of such city or town to another city, town, or village, or, any railway operated by other power than steam extending from one city, town, or village to another city, town, or village. Supplement to Iowa Code, § 2033a. And the court in *Cedar Rapids & M. C. R. Co. v. Cummins*, 125 Iowa, 430, 101 N. W. 176, approves of 40 L.R.A. (N.S.)

ty sustaining a demurrer to the complaint in an action brought to recover damages for an alleged invasion of plaintiff's rights as owner of the soil of the highway, by running interurban electric railway cars therein. Reversed.

Statement by Prentice, J.:

The action was to recover damages by reason of the defendant's operation of its electric street railway over the plaintiff's land within the highway and in front of his premises. The complaint alleges the plaintiff's ownership and possession of a tract of land in New Britain bounded on one side by West Main street. The remaining allegations are the following: "(2) Running between the town of Plainville and

this definition, saying that it accords with the common understanding.

Interurban railways are of a hybrid character and partake to some extent of the nature of both street railways and commercial railroads. In cities and towns they resemble street railways in many respects,—they are operated upon the streets, their cars stop at street corners for the accommodation of passengers, and the road bed is constructed so as to conform to the grade of the streets, and not to interfere with the traffic thereon. In the country, however, the modern lines are constructed to a large extent upon private rights of way, upon road beds similar in construction to steam railroads, with the T-rail, and, in some cases, upon graded and rock ballasted roads; the cars run at a high rate of speed, stop only at designated stations, and usually are larger and heavier than ordinary street cars. In fact, they are becoming more and more like commercial railroads. Many of them carry mail, express, and light freight; some of them carry heavy freight, a few of them operate special freight trains, while on some of the western lines sleeping cars have been added to the limited trains. *Booth, Street Railways*, 2d ed. § 431.

"In respect of motor power employed, and especially of the character of the service rendered, many suburban and even interurban electric railways, especially in populous localities, more resemble what are called street railways, than ordinary steam railways. They facilitate traffic, communication, and transportation. They do not destroy or seriously interfere with the ordinary modes of using the streets and highways, and when legislatively authorized they seem to be a proper use of the street or highway, for which the legislature may or may not provide compensation to the abutter as it may determine,—the rule of justice dictating that where the value of the abutter's property is lessened over and beyond the benefits received, the legislature ought to provide that he should be paid in money for such diminished value. . . . Such a line may stand in a class by itself,

the town of New Britain there has been constructed an electric railway, the track of which is built with T-rails, and the cars of which are operated by the use of said track and certain poles and wires. (3) A part of said track built with T-rails, one of said poles, and certain of said wires are located upon and over a part of said land, above described, which is covered by a public highway called West Main street. (4) On or about June 1, 1907, the defendant, for the purposes of maintaining said electric railway as described upon said land, and for the further purpose of operating said electric railway upon said land as a common carrier of persons and property by means of street cars, and for the further purpose of operating said electric railway

upon said land as a common carrier of property by means of cars which are solely designed for and which carry property exclusively, and which do not stop as they run, to take on and discharge said property, and have a station in the town of Plainville and the town of New Britain, at which they stop to take on and discharge said property, unlawfully entered upon that part of said land, above described, which is covered by said public highway called West Main street, and ever since its entry, day by day, has maintained said electric railway as described upon said land; and ever since its entry, day by day, has operated said electric railway upon said land as a common carrier of persons and property by means of street cars, and ever since its entry, day

and it does not seem to the author that, simply because it connects different places, it necessarily imposes an additional burden upon the abutter. Each case must be considered on its circumstances. Each line is what it is, and not something else." 3 Dill. Mun. Corp. 5th ed. p. 2032, note.

"Starting with the well-settled propositions that the street passenger railway is a legitimate street use, and that the commercial railroad is not, it does not seem difficult to dispose of the interurban railroad. In so far as it is operated as a street passenger railway, in aid of local travel, stopping at street crossings or at convenient intervals to take up and let down passengers, it is on the same basis as the urban street railway. If not operated for the accommodation of local travel, and in substantially the same manner as the urban street railway, it should be classed with the commercial railroad, with the consequent liability to abutting owners. Such a railroad, with its trains sweeping across the country at 20 or 30 miles an hour, and sometimes more, stopping only at cities and towns and at infrequent intervals in the country, and in the cities and towns stopping only for the accommodation of its interurban passengers, and not at all for local traffic on the street, is clearly analogous to the steam railroad, and competes with it and it alone. . . . If the interurban railroad carries freight as well as passengers, the analogy to the steam railroad is complete." 1 Lewis, Em. Dom. 3d ed. § 165.

Original taking for interurban purposes.

It seems to be the general rule in recent cases that an interurban railway carrying passengers, baggage, freight, express, and mail, is considered as an additional burden upon the street or highway. Thus, the owner of the fee in a common which is subject to rights of access over it to the public street, in favor of adjoining owners, is entitled to more than nominal damages for the added burden imposed by the construction and operation of an interurban rail-

way upon a public street passing through the common. *Buffalo, L. & R. R. Co. v. Hoyer*, 147 App. Div. 205, 132 N. Y. Supp. 31.

And as against demurrer, a complaint charging that an electric railway company operates cars designed and used for carrying property exclusively, and which run from terminus to terminus between two towns some miles distant from each other without stopping to receive or discharge contents, this being done at the termini only, sets up a good cause of action for damages in favor of an abutting owner for the increased burden. *CADWELL v. CONNECTICUT CO.*

Likewise, when a steam railroad, in locating its tracks over a farm, condemns land for highway purposes, and the original highway is abandoned, such abandoned strip reverts to the abutting owner, and the steam railroad cannot grant to an interurban railroad the right to use that strip without payment of damages to the abutting owner. *Miller v. Cincinnati, L. & A. Electric Street R. Co.* 43 Ind. App. 540, 88 N. E. 102.

The same doctrine is recognized in the following cases:

—in *Wilbur Lumber Co. v. Milwaukee Light, Heat & Traction Co.* 134 Wis. 352, 114 N. W. 815, where it is held that under a statute authorizing condemnation proceedings by an interurban railway, if the company neglects to act, the abutting owner may proceed for the assessment of substantial damages;

—in *Swinhart v. St. Louis & Suburban R. Co.* 207 Mo. 423, 105 S. W. 1043, where an injunction was granted in favor of the abutting owner against such use of the street by a suburban railway company as practically to destroy the usefulness of the street to him;

—in *Spalding v. Macomb & W. I. R. Co.* 225 Ill. 585, 80 N. E. 327, where it is held that a railroad carrying not only passengers, but all kinds of freight and merchandise, from point to point on city streets, and from town to town, is not a street railway, but a commercial road, and that un-

by day, has operated said electric railway upon said land as a common carrier of property by means of cars which are solely designed for and which carry property exclusively, and which do not stop as they run, to take on and discharge said property, and have a station in the town of Plainville and the town of New Britain at which they stop to take on and discharge said property."

Mr. Charles H. Mitchell, for appellant:

The construction of any kind of railway in a highway, the soil of which belongs in fee to the adjoining proprietors, is a trespass upon their land, unless it has been duly authorized by law. The use of a highway for ordinary travel is a matter of common right; but to lay down upon it a fixed structure of a permanent character, designed for the use of vehicles of a peculiar description, moving upon invariable lines of track, cannot be justified without a special franchise proceeding from the state.

Canastota Knife Co. v. Newington Tramway Co. 69 Conn. 160, 36 Atl. 1107; *Knapp & C. Mfg. Co. v. New York, N. H. & H. R. Co.* 76 Conn. 316, 100 Am. St. Rep. 994, 56 Atl. 512; *Peck v. Smith*, 1 Conn. 132; *Nolan v. New Britain*, 69 Conn. 675, 38 Atl. 703.

Messrs. Robinson & Robinson and **Francis W. Cole**, for appellee:

Legislative authority for the location of

a railway upon a highway is all that the law requires, unless such railway be an additional servitude.

Canastota Knife Co. v. Newington Tramway Co. 69 Conn. 146, 36 Atl. 1107; *McKeon v. New York, N. H. & H. R. Co.* 75 Conn. 343, 61 L.R.A. 730, 53 Atl. 656; *Knapp & C. Mfg. Co. v. New York, N. H. & H. R. Co.* 76 Conn. 311, 100 Am. St. Rep. 994, 56 Atl. 512.

The T-rail is not an additional servitude. If the top of the rail is flush with the surface of the road, and the space between the rails is filled in, it is immaterial whether the rail is a T-rail or a grooved rail. The important thing is that the rail conform to the established grade of the highway.

Canastota Knife Co. v. Newington Tramway Co. 69 Conn. 146, 36 Atl. 1107; *Nieman v. Detroit Suburban Street R. Co.* 103 Mich. 256, 61 N. W. 519.

Nor are poles and wires an additional servitude.

Howe v. West End Street R. Co. 167 Mass. 46, 44 N. E. 386; *State, Kennelly, Prosecutor, v. Jersey City*, 57 N. J. L. 293, 26 L.R.A. 281, 30 Atl. 531.

The mere carriage of property does not make a street railway an additional servitude upon a highway.

Baldwin, Am. Railroad Law, p. 159; *Howe v. West End Street R. Co.* 167 Mass. 46, 44 N. E. 386; *Kinsey v. Union Traction Co.*

less it has compensated the owner of the fee in the street, it may be ordered to remove its road, even after operations have begun. In this case the railroad was not authorized to use steam, but was doing so in contravention of its charter and of a city ordinance;

—and in *Greene v. Aurora R. Co.* 84 C. C. A. 589, 157 Fed. 85, where an injunction was granted to an abutting owner with the fee to the center of the street, against the use of such street by a commercial railroad company, it not being quite clear whether it was an electric or a steam railroad.

A petition by an interurban railroad company in proceedings to condemn land for right of way is fatally defective if it does not include, as parties defendant, all the nonagreeing landowners whose lands are to be taken. *Kansas City Interurban R. Co. v. Davis*, 197 Mo. 669, 114 Am. St. Rep. 790, 95 S. W. 881.

But in *Tomlin v. Cedar Rapids & I. C. R. & Light Co.* 141 Iowa, 599, 22 L.R.A. (N. S.) 530, 120 N. W. 93, it is held by a divided court that, by virtue of an ordinance vacating a part of a street, giving an interurban railway company the right to use the part so vacated for a right of way, and granting its use subject to such right of way to the city, so much of the street ceases to be a street; the right of the public therein is devested, and it becomes

private property, and an interurban road located thereon does not entitle the abutting owner to damages.

For other cases, as to whether an interurban railroad is an additional servitude upon rural or city highways, see note to *Rasch v. Nassau Electric R. Co.* 36 L.R.A. (N.S.) 673, IV. b, 4, p. 728.

Use of street railroad tracks for interurban purposes.

The earlier cases upon the question of damages to abutting owner for right to run interurban cars over tracks of a street railway company are collected in the note to *Gosa v. Milwaukee Light, Heat & Traction Co.* 15 L.R.A. (N.S.) 531.

When a line of road originally used only for urban street car service is later subjected to interurban service as well, this new use is deemed an added burden, for which the abutting owner is entitled to compensation. Thus, a traction company authorized to operate a line of road within a municipality as a street railway only may not lawfully, by contract with an interurban railroad company which is without authority to enter such municipality, gain the right to carry the cars of the latter upon the streets of the city without the permission of the city, even under a statute giving railroad companies power to make contracts and arrangements with each

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169 Ind. 563, 81 N. E. 922; *Aycock v. San Antonio Brewing Asso.* 26 Tex. Civ. App. 341, 63 S. W. 953.

Prentice, J., delivered the opinion of the court:

Acts done within the limits of a highway may work an actionable injury to the property rights of an abutting proprietor and occupant by virtue of either his ownership of the fee of the land covered by the highway, or his ownership and possession of the abutting property. *Cadwell v. Connecticut R. & Lighting Co.* 84 Conn. 450, 452, 80 Atl. 285. In the former case the acts may constitute a trespass. This is the case whenever the acts, being without authority or in excess of authority, are such as impose an additional servitude upon the land covered by the highway. *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 146, 161, 36 Atl. 1107; *Norwich Gas-light Co. v. Norwich City Gas Co.* 25 Conn. 19; *Nicholson v. New York & N. H. R. Co.* 22 Conn. 74, 56 Am. Dec. 390; *Munson v. Mallory*, 36 Conn. 165, 172, 4 Am. Rep. 52. In the latter case the injured party has his remedy as for a nuisance. *Cadwell v. Connecticut R. & Lighting Co.* 84 Conn. 450, 454, 80 Atl. 285.

This action, unlike that last cited, which was also brought by this plaintiff against this defendant, and dealt with the same

other for leasing or running their roads, and the right of connecting with each other on terms agreed upon by the companies. The effect of such an arrangement would be to confer upon the interurban company authority to extend its line into the streets of the city, and operate its cars thereon, without any reference to the objections of the city or of private individuals who may own the fee of the streets, and such is not the law. *Aurora v. Elgin, A. & S. Traction Co.* 227 Ill. 485, 118 Am. St. Rep. 284, 81 N. E. 544.

And an interurban railroad company, having taken over the property of a street railway company, neither one of which is authorized to carry on a freight business within the municipality, cannot engage in the freight business within such municipality without compensating an abutting owner for all damages, past, present, and future, caused by such new use of the tracks; and this is true although the fee to the street is in the city, and although the city may have a legal remedy to stop the carrying on of the freight business, but has not resorted to it. *Rockford & Interurban R. Co. v. Keyt*, 117 Ill. App. 32.

The same principle is recognized in *Murdock v. Beloit, D. L. & J. R. Co.* 147 Wis. 100, 132 N. W. 979, the chief question in that case being as to the measure of damages; and in *Schuster v. Milwaukee Elec-* 40 L.R.A. (N.S.)

general situation, is one which belongs to the former class. It seeks redress, as the former did not, for an alleged invasion of the plaintiff's rights as owner of the soil of the highway through certain conduct of the defendant therein, which is set out and claimed to have been without right. The two cases thus have little in common. In the former we were dealing with an alleged nuisance affecting injuriously the rights of the plaintiff as an abutting owner; in the present, with a claimed trespass done to the land within the highway limits.

This complaint is not drafted with precision, in that it does not directly aver either the plaintiff's ownership and possession of the land over which the highway is laid out, or the defendant's invasion of the plaintiff's rights therein by its acts set up. There are, however, allegations from which these averments may well be inferred, and in which it was evidently intended that they should be included, so that the purpose of the pleader to charge a trespass upon the land within the highway, through the operation of the recited acts of the defendant in imposing an additional servitude thereon, is apparent. Counsel for the plaintiff so interprets his pleadings, and counsel for the defendant accept it as sufficiently alleging a cause of action of that character.

The latter suggests that a cause of action for a nuisance may also be within the

tric R. & Light Co. 142 Wis. 578, 126 N. W. 26, where it is held that an abutting owner holding the fee to the center of the street, subject only to the public easement therein, including the maintenance and operation of a street railway, is entitled to an injunction against the use of the street railway tracks by a connecting interurban company, which is not authorized to operate inside the city limits, the court saying that such a use of the street railway tracks is unlawful, not only as against the individual abutting owner, but against the public as well.

When an interurban railway company has been conducting its business for some time within a municipality, over the line of a street railway which it owns, and the franchise of which is to continue only fifty years, and later the interurban company seeks to condemn land in the same streets for a permanent interurban line, subject to the duty to continue the operation of the street cars as defined by the street railway franchise, the damages to be awarded the abutting owner are not simply those sustained by the mere operation of interurban cars over street railway tracks, but such as flow from the appropriation of a permanent right of way for the interurban railway. *Marsh v. Milwaukee Light, Heat & Traction Co.* 134 Wis. 384, 114 N. W. 804.

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purview of the allegations. Plaintiff's counsel makes no such claim, and there appears to be no substantial basis for it. It is quite evident that the averments respecting rails and structures, which the plaintiff makes, and which alone give color to the suggestion that the complaint may be regarded as comprehending a cause of action for a nuisance, were made for no other purpose than as pertinent to the charge that a servitude was being imposed upon the land of the highway in excess of that resulting from the existing highway easement.

We have, then, before us for determination the single question whether or not the allegations of the complaint show the imposition upon the soil of the highway of an additional servitude. In answering this question it is first of all important to know what legislative authority, if any, the defendant had to construct and operate an electric street railway in front of the plaintiff's premises. The complaint is silent upon this subject, and unless we can gather adequate information upon it through the exercise of that judicial knowledge which we have of its charter rights, the defendant will be left in the position of one who invades a highway with a street railway without legislative authority. If that is the position which the defendant occupies before the court under its demurrer, it is clear that it was improperly sustained. It is not easy to discover how it can escape from this position with its inevitable result, since the charter informs us only that it has legislative authority to construct and operate for the carriage of both persons and property its tracks through a portion of West Main street. Where that portion is in relation to the plaintiff's property we are not told, and neither legal presumptions nor § 3840 of the General Statutes, suffice to supply the deficiency.

If, however, it is assumed that the defendant has constructed and operated its road in front of the plaintiff's property under such conditions as to entitle it to the full benefit of the charter and statute authority to utilize it for the transportation of passengers and property, as counsel agree that the fact is, and ask us to assume, we are under the necessity of examining the allegations to learn whether they set up any conduct on the defendant's part outside of the limits of the authority thus attempted to be conferred, or within those limits, but without the power of the general assembly to confer in the absence of compensation to landowners.

The allegation that it has constructed its tracks with T-rails, and that its cars are operated upon such tracks and by the use of 40 L.R.A. (N.S.)

of certain wires and poles, in the absence of further information, may be dismissed from present consideration. It is true that an additional servitude may result from methods of construction and operation, but the bald facts here stated are altogether insufficient to establish such a condition as that principle contemplates. *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 146, 159, 36 Atl. 1107; *Nieman v. Detroit Suburban Street R. Co.* 103 Mich. 256, 260, 61 N. W. 519; *Newell v. Minneapolis L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839; *Mordhurst v. Ft. Wayne & S. W. Traction Co.* 163 Ind. 268, 66 L.R.A. 105, 106 Am. St. Rep. 222, 71 N. E. 642, 2 Ann. Cas. 967.

The other conduct complained of is the unlawful entry upon the land of the highway for the purpose of maintaining its electric railway, of operating this railway upon said land as a common carrier of persons and property by means of street cars, and of operating said railway upon said land as a common carrier of property by means of cars designed solely for and carrying property exclusively, and which run without stopping between termini located in different towns, which termini are the only points where what is carried is either taken on or discharged, and the continued doing in fact of these things for the period of several years prior to the commencement of the action.

Here are three distinct grounds of complaint. The first, that the defendant is maintaining in the street an electric street railway, using poles and wires in its operation and T-rails for its tracks, calls for no extended consideration. The *Canastota Knife Company Case*, *supra*, effectually disposes of any contention that the construction and operation according to customary methods, and without especial features creating exceptional conditions, of an electric street railway having its rails laid on a level with the surface of the highway, and designed and used for the accommodation of passenger travel, imposes an additional servitude upon the soil of the highway. There is no suggestion in this portion of the complaint that the service performed by the defendant's railway is other than the customary passenger service, that the manner of its construction, operation, or use differs in any respect from the ordinary, or is marked by special features which would tend to give to it a different character from that of the regulation electric street railway, except perhaps the fact that T-rails are used. The inadequacy of this isolated fact we have already had occasion to notice.

The two remaining grounds of complaint

import another factor into the situation, and one which takes it outside of the direct application of the decision in the *Canastota Knife Co. Case*, and of all other Connecticut decisions. It calls for a consideration of the rights of an electric street railway company in the matter of property transportation, directly for hire, and not as an incident of passenger service. The complaint contains certain charges involving this subject. If, in the doing of any of the things so charged, the defendant is going further in its use of the highway than it can properly do within the limits of the highway easement, a good cause of action is stated.

The subject of the ability of an electric street railway company having the customary construction and operation in a highway, to become a carrier of things without imposing an additional servitude, has been much discussed in the cases and by text writers, and with widely varying results. In at least one jurisdiction it has been broadly held that highways are as open to use in the transportation of property by street railways as in that of persons, and that such carriage of property generally is not a new and independent use. *Montgomery v. Santa Anna Westminster R. Co.* 104 Cal. 186, 25 L.R.A. 654, 43 Am. St. Rep. 89, 37 Pac. 786.

This broad conclusion has not met with general acceptance, and we are unable to appreciate the force of the reasoning by which it has been supported. To say that, because highways ever have been and are established and maintained for purposes of public travel, and in their conception and purpose are, and from the earliest times have been, set apart for transportation thereon of the things as well as persons, and for the convenience and service of the public by providing means for such transportation, it follows that any and all use of the highway for the transportation of things, no matter what they are, or how, or for what purpose or end, or for whose benefit or convenience they are carried, or what effect their carriage, or the method of it (physical features of the system apart), may have upon the enjoyment of the highway by the public generally, or by the abutting property owner, is, we think, to ignore possible factors in a situation which might possess large, if not controlling, importance.

The highway conception involves the idea of an agency for the common use and accommodation of all the public,—of a use from the enjoyment of which no one shall be unreasonably excluded by the operations of others, and in the enjoyment of which no one shall be unreasonably hindered or annoyed. *Canastota Knife Co. v. Newington*

Tramway Co. 69 Conn. 146, 156, 36 Atl. 1107. In that conception the highway becomes a place set apart for the convenience and benefit of members of the local community, and of the adjacent landowner among others. It contemplates that its use and enjoyment by those who have occasion to use it shall not be of such character as to unreasonably interfere with its free and beneficial enjoyment by these persons, or to be "the proximate cause of special damage of a new description to the owner of the soil." *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 146, 156, 36 Atl. 1107, 1111; *New York, N. H. & H. R. Co. v. Fair Haven & W. R. Co.* 70 Conn. 610, 615, 40 Atl. 607, 41 Atl. 169. We are therefore unprepared to say that any change in highway use which might attend the carriage of property over public ways, whatever its character, and however conducted (construction of the road and structures in the highway aside), would be one of degree only, and not of kind, and that the highway would remain in all essential particulars unchanged in character, purpose, and use under all conditions of property transportation over it. It is easy to conceive of conditions, and by no means remote ones, under which it could not be said fairly that the use was in aid of the identical use for which the way was created, and not a new and independent use; and this is a test which must be met and satisfied. This view is one which was plainly foreshadowed in the *Canastota Knife Co. Case* and the earlier case of *Imlay v. Union Branch R. Co.* 26 Conn. 249, 68 Am. Dec. 392. In fact, the opinion in the former case went so far as to suggest certain conditions of passenger traffic, independent of construction, which would destroy the identity of use between it and highway use. 69 Conn. 154, 36 Atl. 1107.

Other cases have gone to the other extreme, and held that, where there is a carriage of property, there an additional servitude is necessarily imposed. *Wilder v. Aurora D. & R. Electric Traction Co.* 216 Ill. 493, 75 N. E. 194; *Birmingham Belt R. Co. v. Lockwood*, 150 Ala. 610, 43 So. 819; *Rische v. Texas Transp. Co.* 27 Tex. Civ. App. 33, 66 S. W. 324. The argument upon which this conclusion is based is one to the general effect that, where such conditions exist, the carrier becomes closely assimilated to the ordinary railroads, and should therefore be classed with them in their relation to the highway easement. Some authorities, including text writers, elaborate this argument by dividing carriers using tracks as a medium of transportation into two classes, to wit: (1) The street railway, which is defined to be one

laid in highways, and designed and used for passenger transportation only; and (2) the commercial railroad, which term is employed in the classification to embrace the ordinary steam road and all others, whatever the kind of power utilized, and wherever laid, which are carriers of things. This classification having been established, it is said that those of the former class impose no additional servitude, while those of the latter do. *Lewis, Em. Dom.* § 150; *Nellis, Street Railways*, § 83; *Linden Land Co. v. Milwaukee Electric R. & Light Co.* 107 Wis. 511, 83 N. W. 851; *Wilder v. Aurora D. & R. Electric Traction Co.* 216 Ill. 493, 75 N. E. 194; *Rische v. Texas Transp. Co.* 27 Tex. Civ. App. 33, 66 S. W. 324; *Schaaf v. Cleveland, M. & S. R. Co.* 66 Ohio St. 216, 64 N. E. 135.

The logic of the general proposition enunciated in this class of cases and of this classification is not apparent to us. The purposes for which highways always have been, and now are, laid out, and the right of way therefor acquired, include their use for the transportation thereon of property as well as that of persons. Their intended ministration to the public convenience and advantage is one which comprehends a public service in both capacities. What basis in reason there is for a distinction between conditions which result from the application of like improved methods when made to the carriage of persons and when made to the carriage of things, unless reason for that distinction be found in something besides the bare fact that in the one case it is persons and in the other property which is concerned, we are unable to discover. It well may be that the application of the new methods to property carrying in given cases, or conceivably in all cases, may take such shape and involve such incidents as to create reasons for a recognition of the fact that in those cases an additional servitude will thereby be created. But that is a very different thing from saying that there can be no property carrying without destroying the identity of the highway use for the simple reason that the subject of the carriage is property.

It is easy to conceive how the denial of the right to utilize new methods in the carriage of things over a highway, without transgressing the right of way involved in the highway easement, might result in serious inconvenience and disadvantage to the public, whose interest the highway was designed to serve, and to the local public most directly concerned, and a material diminution of the highway privilege which they are entitled to enjoy. *Mordhurst v. Ft. Wayne & S. W. Traction Co.* 163 Ind. 268, 66 L.R.A. 105, 106 Am. St. Rep. 222, 71 N. 40 L.R.A. (N.S.)

E. 642, 2 Ann. Cas. 967. Inability to carry property includes inability to carry mails or packages for local delivery, or to accommodate the strictly local public in any manner of transportation of things. Can it be fairly said that in no service of this character can conditions be found which, by reason of the inherent nature of the service, will not be in excess of the highway privilege? We think not, and, furthermore, that the incidents of such service are not necessarily such that it must be said of them that they are incompatible with highway use.

There are other cases which have drawn a distinction between urban and interurban service, and attempted to find in that distinction a feature of significance, if not controlling significance, in the determination of the question before the court. *Zehren v. Milwaukee Electric R. & Light Co.* 99 Wis. 83, 41 L.R.A. 575, 67 Am. St. Rep. 844, 74 N. W. 538; *Younkin v. Milwaukee Light, Heat & Traction Co.* 112 Wis. 15, 87 N. W. 861; *Harvey v. Aurora & G. R. Co.* 174 Ill. 295, 51 N. E. 163. See *Dill. Mun. Corp.* 5th ed. § 1258. We can discover no good reason for this distinction, at least under our system, where the public easement is for the benefit of all the public alike, without regard for territorial subdivisions, and where the character of a highway and of the highway easement is the same wherever it is located, and however great or small the extent of its service. *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 146, 154, 36 Atl. 1107; *Dill. Mun. Corp.* 5th ed. § 1258.

We are satisfied that the question for solution is one which cannot, by reason of its nature, be resolved in any of the ways indicated. It is one which may present itself under too many widely differing aspects to be resolved in respect to all which may arise by any such artificial process as the application of a simple test which regards a single fact or incident only, and ignores all others. The several tests indicated possess the merit of simplicity, but no one of them is founded in a sound logic, avoids practical difficulties, or escapes what may be harsh results to the public and results defeating the very purpose of a public way. The practical difficulties attending their application are apparent. We are satisfied that there can be no short cut to a reasonable and just conclusion under the varying conditions which may arise, and one which shall serve the best interests of the public, including abutting owners themselves. Such a conclusion is one which can be reached only by a study of the conditions which are present in a given case, or in given classes of cases, and by bringing

to bear upon these conditions those pertinent considerations which are best calculated to disclose whether the new use is in aid of the highway use, or an essentially different and independent use.

We have no occasion here to attempt an exhaustive recital of those considerations. We have already had occasion to notice a number of them, and sufficiently for present purposes called attention to the objective point of inquiry, the general direction of it, and the salient suggestive facts to be looked at.

The fact that this is the only method by which satisfactory results can be arrived at is emphasized by a study of the cases which have sought to adopt more direct methods. Dillon and other writers, realizing the difficulties which must beset an attempt to adopt shorter and simpler processes, have asserted, and we think correctly, that after all each situation must be dealt with upon its own merits. Dill. Mun. Corp. 5th ed. § 2032 note; Nichols. Em. Dom. § 100. This is substantially the attitude which certain courts have taken. *White v. Blanchard Bros. Granite Co.* 178 Mass. 363, 366, et seq., 50 N. E. 1025; *Mordhurst v. Ft. Wayne & S. W. Traction Co.* 163 Ind. 268, 66 L.R.A. 105, 106 Am. St. Rep. 222, 71 N. E. 642, 2 Ann. Cas. 967; *Schaaf v. Cleveland, M. & S. R. Co.* 66 Ohio St. 215, 64 N. E. 145.

Turning now to the allegations of the complaint, we find that it is there charged that the defendant, in the operation of its road, has been and is transporting property as well as persons. This charge, standing as it does by itself, and without amplification, is under our conclusion insufficient to establish conduct which is outside of highway rights. It is, however, further averred that its road is operated as a carrier of property by means of cars designed for and carrying property exclusively, and which run from terminus to terminus, presumably some miles distant from each other, without stopping to receive or discharge contents, and receiving and discharging such contents at the two termini only.

In the Canastota Knife Company Case, it was suggested that a passenger traffic road running under similar conditions, and not serving and accommodating the public as it ran, might not be rightfully operated in a highway without creating an additional servitude. Here is set up a situation where all local accommodation is *prima facie* excluded. The company, in the operation of its property carrying cars, does not serve and accommodate as they run, and the highway is apparently put to a use in which there is no purpose to facilitate its most natural and normal use. Under the allega-

tions the transportation might well be for the general purposes of commerce, rather than as an adjunct of ordinary street travel, and the service rendered thus brought into close affiliation with that rendered by ordinary freight carrying roads of the steam variety. Dill. Mun. Corp. 5th ed. § 1259; *Kinsey v. Union Traction Co.* 169 Ind. 563, 584, 81 N. E. 922. The allegations are not as full and as informing concerning the situation as they should have been made; but they are sufficient to enable the plaintiff to establish under them an invasion of his rights as fee owner, and they ought not to have been disposed of upon demurrer, but should have been allowed to stand, to be dealt with after the pertinent facts of the situation had been more fully developed by the pleadings or upon a hearing.

There is error. The judgment is reversed, and the cause remanded to be proceeded with according to law.

In this opinion Hall, Ch. J., Thayer, and Rorabach, JJ., concur.

Wheeler, J., concurring in the judgment (June 13, 1912):

The complaint alleges the defendant's unlawful entry upon the plaintiff's land; the demurrer admits this. While we take judicial notice of the legislative authority of the defendant to operate an electric railway for the carriage of persons and property, we cannot take judicial notice of the authority of the defendant to locate its tracks on West Main street in front of the plaintiff's premises. Before we can know this, the facts surrounding the location, and the defendant's compliance with the statutory prerequisites, must appear of record. "But the construction of any kind of railway in a highway, the soil of which belongs in fee to the adjoining proprietors, is a trespass upon their land, unless it has been duly authorized by law." *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 146, 160, 36 Atl. 1107, 1111.

Since the decision of this question is fatal to the demurrer, it is in my opinion unnecessary to discuss or decide the question of additional servitude. A subject of such importance ought not to be disposed of without fullest argument upon issues joined, raising the question definitely and necessarily. I cannot but regard the opinion upon this subject as *obiter*. The question of additional servitude was no more material to the proper decision of the Canastota Knife Co. Case than is that question material to the proper decision of this case. But we have in other cases approved the doctrine of that case, and it must be accepted as settled. Inasmuch as the opinion

in this case discusses and purports to decide the question of additional servitude in its relation to the facts of this case, I will briefly express my view.

The fundamental purpose of a street railway is the accommodation of street travel. It is a local convenience for local travel. "A street railway without a street to run on, and to serve and accommodate as it runs, would be an anomaly." Baldwin, J., in *Canastota Knife Co. v. Newington Tramway Co.* supra. For this reason we have treated the street railway as an improved method of using the street. Counsel for the street railway in the *Canastota Knife Co. Case* well said: "In a word, the street railway is for the sole purpose of carrying on the kind of public travel for which the highway was made, and the steam road is not." In the earlier days of the electric street railway, it was generally held that it was one for the transportation of passengers, and not of goods. Elliott, Roads, 1st ed. p. 457. At the beginning we did not contemplate a street railway operated as a common carrier of property, nor anticipate the changes and development in its business, more and more approximating it in construction, as well as in operation, to the steam road.

We have held that "the location of an ordinary steam railroad upon a highway imposes an additional burden upon the soil, for which the owner of the fee is entitled to demand compensation." And that the location of an electric railway in a highway does not impose such servitude upon the soil of the owner of the fee of the highway, unless "either the mode of construction or of operation be such as to make it a substantial impediment to public travel, or a proximate cause of special damage, of a new description to the owner of the soil." *Canastota Knife Co. v. Newington Tramway Co.* supra. It may be that in view of our former decisions, whether the carriage of goods by a street railway is an additional servitude depends upon whether it is serving an ordinary highway use, and must be determined in each case by its own facts. In the application of such a test there may well be left out of consideration the traffic of goods, which is the mere incident of ordinary street car passenger traffic, included in which is the hand baggage of the passenger, the light package delivered occasionally from the car platform, the mail bag, and the newspaper bundle. Logically, under this test, the carrying of local freight and express which would otherwise be carried in vehicles over the highway may be justified as ordinary highway use. But in practice it will be found impracticable to deliver freight or express

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from door to door along a street without impairing the use of the street for a highway for the public and the adjoining owners.

No attempt to use a street railway for the general carriage of local freight or express has, so far as we are aware, ever been made in Connecticut. To do so would require additional and frequent switches and turnouts, convert the highway along its entire length into a freight yard, cause long stops to be made, which would seriously inconvenience, if not destroy, passenger traffic, and congest the streets with vehicles loading or unloading goods. Local passenger travel with frequent service, and a local freight or express service, cannot be conducted on the same tracks. The operation of a street railway in this manner must necessarily produce annoyance and inconvenience alike to the owners of the fee of the highway as to the public. Lewis, Em. Dom. 3d ed. § 166.

It is difficult to conceive of a local traffic of this character, which is not of necessity an additional servitude upon the highway. "There is no reason," as Lewis says, "why the principle of the street railway cases should be extended to include a traffic so entirely different in its nature and involving such a different use of the street." Lewis, Em. Dom. 3d ed. § 166, p. 293.

In every case where the specific facts are either alleged or proven, the conclusion whether these facts constitute an additional servitude is a question of law. This case does not confine its allegations to a general complaint of the carriage of goods, and hence this question was not necessary to adjudicate in this case. The complaint specifically alleges that the defendant has entered upon the plaintiff's land for the purpose of operating its railway over the highway of which the plaintiff has the fee, "as a common carrier of property by means of cars which are solely designed for and which carry property exclusively, and which do not stop as they run, to take on and discharge said property, and have a station in the town of Plainville and the town of New Britain, at which they stop to take on and discharge said property." The demurrer thus admits that (1) The cars carry property exclusively. (2) They do not stop between the termini named to take on and discharge property. (3) They have two stations in the places named, where they take on and discharge property.

This traffic is not incident to the passenger traffic. It is not for the mere accommodation of its passengers. It is purely a commercial traffic. Local traffic along the route is not served, nor is this intended.

The cars maintain a through freight or express traffic between the points named. The street railway thus serves the same purpose as the steam road between these points. Its cars are designed to carry property exclusively, as do the steam road cars. It maintains freight stations at the termini named, as does the steam road. It conveys property which formerly was conveyed by the steam road and in part by other vehicles. It diverts a part of the traffic of the steam road to the highway. It does not differ materially in its carriage of goods from the steam road save in degree, and in that the one operates on its own private way and the other mainly on the public highway. Through freight or express traffic is the business of the commercial railroad, as steam roads are called in the law. Dill. Mun. Corp. §§ 1257, 1258. "If the interurban railroad carries freight as well as passengers, the analogy to the steam railroad is complete. Most of the freight so carried is such as would otherwise seek transportation on the steam railroad, rather than in drays and wagons on the streets and highways." Lewis, Em. Dom. 3d ed. § 165, p. 287.

The diversion of this through freight or express business to this highway does not aid or facilitate traffic on the street, but adds to it, interferes with its ordinary use, and increases the burden upon the street. The majority of the authorities support this position, among which are: *Aurora v. Elgin, A. & S. Traction Co.* 227 Ill. 485, 496, 118 Am. St. Rep. 284, 81 N. E. 544; *Spalding v. Macomb & W. I. R. Co.* 225 Ill. 585, 590, 80 N. E. 327; *Wilder v. Aurora, D. & R. Electric Traction Co.* 216 Ill. 493, 528, 75 N. E. 194; *Diebold v. Kentucky Traction Co.* 117 Ky. 146, 149, 63 L.R.A. 637, 111 Am. St. Rep. 230, 77 S. W. 674, 4 Ann. Cas. 445; *Massachusetts Loan & T. Co. v. Hamilton*, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588, 591; *Abbott v. Milwaukee Light, Heat & Traction Co.* 126 Wis. 634, 637, 4 L.R.A.(N.S.) 202, 106 N. W. 523; *Younkin v. Milwaukee Light, Heat & Traction Co.* 120 Wis. 477, 98 N. W. 215; *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.* 95 Wis. 561, 571, 37 L.R.A. 856, 60 Am. St. Rep. 136, 70 N. W. 678; note to *Abbott v. Milwaukee Light, Heat & Traction Co.* 4 Street R. Rep. 1077; *Schaaf v. Cleveland, M. & S. R. Co.* 66 Ohio St. 215, 229, 64 N. E. 145.

Under these allegations of the complaint, the plaintiff's land has been subjected to a servitude other than that incident to ordinary travel, and he is entitled to compensation therefor.

The demurrer should be overruled.
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IDAHO SUPREME COURT.

ALBERT L. HATCH

v.

CONSUMERS' COMPANY, Limited.

(17 Idaho, 204, 104 Pac. 670.)

Water — public supply — franchise — duty to lay laterals.

1. Under the franchise granted by the city of Cœur d'Alene to the Consumers' Company to occupy the streets and alleys of the city for the purpose of supplying the city and inhabitants thereof with fresh water, the right and authority to dig in the streets and alleys and lay pipes therein for supplying consumers with water is conferred upon the company alone, and no such right is conferred upon the individual or consumer, and the consumer acquires no right to lay pipes or acquire property in the streets and alleys, but, on the contrary, the duty to do so and the rights acquired thereby belong to the water company. It is consequently the duty of the water company to supply and lay the laterals from its main to the line of a consumers' property abutting on such street, and such laterals are the property of the water company.

Same — rental — advance payment.

2. Under the statute of this state (§ 2839, Rev. Codes), and the general rule of law applicable in such cases, a water company may make and enforce such reasonable rules and regulations as are in harmony with law and consonant with justice for the conduct of its business, the protection and preservation of its property, and the collection of its water rentals, and in so doing may require the consumer to pay reasonable water rentals in advance, or in default thereof, shut off the water supply, or may require a month's rent to be paid at the end of the month, or in default thereof, shut off the water until such time as the rent due is paid.

Same — collecting back rent — refusing service.

3. A water company cannot enforce a rule requiring a consumer to pay an old or disputed bill for water furnished him at some previous time for some other and independent use, or at some other place or residence, or for a separate or distinct transaction from that for which he is claiming and demanding a water supply, as a condition precedent to supplying him with water,

Headnotes by AILSHIE, J.

Note. — Discontinuing service to compel payment of water bills.

The earlier cases on this subject are collected in a note appended to *Mansfield v. Humphreys Mfg. Co.* 31 L.R.A.(N.S.) 301, which supplements a note in 61 L.R.A. 105.

Upon the question of damages for cutting water supply, see cross references to a note in 31 L.R.A.(N.S.) 301.

As shown in the earlier notes, a water

where he tenders payment of the established water rate in advance for the service he is demanding.

Same—public policy.

4. In such cases the parties are not upon equal grounds. The consumer's necessities for water for business, health, comfort, and life are such as to put him at a decided disadvantage and deprive him of the right to contest an unjust claim; and it would therefore be unjust, unsafe, and contrary to public policy to invest a public service corporation with power to become both judge and jury in the determination of claims and demands it holds against the consumer.

Municipal corporation — extension of limits — noncontiguous territory.

5. An ordinance of the city of Cœur d'Alene, passed and approved in the month of April, 1904, including the Krotzer addition to Cœur d'Alene City within the corporate limits thereof, was not void on account of an intervening strip of land 2,663 feet in length by 2.8 feet wide at one end, and 67 feet wide at the other. Section 9 of the act of February 9, 1899, as appears at page 109 of the 1899 Session Laws, which was in force at the time of the adoption of

the foregoing ordinance, provided that land or territory laid off or subdivided as provided by statute "shall be regarded and treated as contiguous to such city or town, notwithstanding any stream or embankment or any strip or parcel of land not more than 200 feet in width may be or lie between such land or territory and the corporate limits of such city or town."

Same — questioning validity — power.

6. In a case where the city authorities have by ordinance extended the city limits so as to include an additoin or tract of land and the inhabitants thereof, and all parties affected thereby have acquiesced in the action of the city authorities and have transacted their business upon the theory that such territory was included within the city limits, a public service corporation will not be allowed to question the validity of such action of the city council in a collateral attack after the lapse of five years.

Water — public supply — franchise — extension of mains.

7. Under the terms of a franchise ordinance wherein it is provided that the company receiving the franchise shall not be required to extend its water mains along any ungraded street or alley, no question

company or a municipality furnishing its inhabitants with water may, within reasonable limitations, enforce regulations providing for cutting off the supply of those who refuse to pay for it.

Thus, a city supplying its inhabitants with water may cut off the supply for a refusal to pay a just claim for wilful or unreasonable waste or for fraudulent use of water, until such waste is stopped and all arrears are paid. *J. N. Matthews Co. v. Buffalo*, 126 N. Y. Supp. 596.

Independent transactions.

As shown in the earlier notes, and in accord with *HATCH v. CONSUMERS' Co.*, it seems to be quite generally held by the authorities that a refusal to furnish water supply cannot be sustained merely because the consumer declines and refuses to pay past due water rents for some other and independent use, or at some other place or residence. To the same effect is *Benson v. Paris Mountain Water Co.* 88 S. C. 351, 70 S. E. 897.

Disputed claims.

Likewise, it is generally held that the supply cannot be cut off to enforce payment of disputed bills. In such cases the court will enjoin the company from cutting off the supply until the correctness of the bill can be determined (*Spaulding Mfg. Co. v. Grinnell*, — Iowa, —, 136 N. W. 649); or will award mandamus where the water company insists upon payment of the disputed amount as a condition to restoring service (*Benson v. Paris Mountain Water Co.* supra).

So, it has been held that when the correctness of a bill is disputed by a consumer, 40 L.R.A.(N.S.)

and the company, by reason of the failure of such consumer to pay the bill, discontinues its service, it does so at its peril, and if in the wrong is liable to compensatory damages in any event, and, when the circumstances justify it, to punitive damages. *Birmingham Waterworks Co. v. Keiley*, 2 Ala. App. 639, 56 So. 338; *Birmingham Waterworks Co. v. Bailey*, — Ala. App. —, 59 So. 338.

Unpaid claims against former occupant.

As shown in the earlier notes, it is generally held that a regulation providing for shutting off the water supply cannot be enforced to compel payment which it is not the duty of the consumer to make.

Thus applying the rule announced in *Burke v. Water Valley*, 87 Miss. 732, 112 Am. St. Rep. 468, 40 So. 820, which held a regulation that water shall not be furnished until a delinquent charge is paid void as being unreasonable, in so far as it prevents a new tenant, on tendering water charges, from getting water unless he pays a delinquent charge against the property, it was held in *Ginnings v. Meridian Waterworks Co.* — Miss. —, 56 So. 450, that a lessee of a part of a storeroom in which lessor was carrying on a separate business was entitled to water service for his own use, where he made application therefor in good faith, though the water had been discontinued for lessor's failure to pay rentals as he agreed with the tenant to do.

And a rule of a municipality supplying its inhabitants with water, that charges for water shall be to the owner of the property, and not to the tenant, and that if the water rents are not paid, the water shall be cut off, and not connected again until the de-

as to the construction of such provision can arise in a case where the company has, in fact, extended its main along such ungraded street. After so doing, the company cannot refuse to supply consumers along such street, on the theory that it was not compelled to build along such street in the first place.

Same — contract duty — extent.

8. A corporation receiving a franchise from a municipality in this state authorizing it to supply the inhabitants with water, by accepting such franchise and attempting to operate thereunder, enters into an implied contract to serve all the inhabitants of such municipality without distinction or discrimination, upon such persons paying it the established rates and complying with the reasonable rules and regulations of such company.

Corporation — public service — compelling performance of duty — confiscation of property.

9. To compel a public service corporation to live up to the law of its existence, and to discharge the duties for which it was organized and for which it received its franchise, can in no case amount to a confiscation of its property, or taking its prop-

erty without due process of law, even though such requirement necessitates the corporation using a part or all of its property or investing its money in order to meet its duties and obligations.

Water — public supply — compulsory service — validity.

10. There can be no element of confiscation or taking property without due process of law in a case where a writ of mandate is issued to compel a water company to put in laterals and service connections from its main to the property line of an abutting owner at an expense of \$8.50, where he tenders the monthly water rate of \$1.50 in advance. In such case the rental rate constitutes a fair and reasonable income and revenue on the sum invested, and compulsory service in such case contains no element of confiscation.

Same — assumption of dishonesty.

11. A public service corporation organized for the purpose of supplying the inhabitants of a municipality with water is not justified in assuming that the people it is to serve are dishonest, and that they will demand and pay for a month's water supply merely for the purpose of entailing upon the company the expense of putting in

linquent charge is paid, which prevents a purchaser of the property, on tendering such sums of money as might be required in advance for water to be used in the future, from getting the necessary water unless he pays a delinquent charge against the property, is void as unreasonable. *Houston v. Lockwood Invest. Co.* — Tex. Civ. App. —, 144 S. W. 685.

The court said in the above case that the practical effect of the ordinance was to place a lien on the premises, which the subsequent purchaser would be forced to pay, when, but for the laches of the municipality and its failure to enforce its own regulations against the prior owner, there could have been no arrearages. The court also said: "In so far as the provisions mentioned partake of the nature of a lien, they are directly unreasonable, in that there is no recognized place for public record of such lien, so as to give notice to the subsequent purchaser that there were arrearages upon the property. It is true he might ascertain by inquiry of the city whether such was the condition or not; but the knowledge to be gained by him by such inquiry would be a matter of grace with the city, and not a matter of right to the subsequent purchaser."

But in *Kohler v. Reitz*, 46 Pa. Super. Ct. 350, it was held that a municipal ordinance providing for the stopping of the water supply unless all arrearages are paid, whether owing by the former occupant or owner, is reasonable.

Accordingly it was held in the above case, under an ordinance providing that in case of nonpayment of water rates, the water supply shall be shut off from the premises, and shall not be again turned on until all water rates and penalties in arrears shall 40 L.R.A. (N.S.)

have been paid, that a purchaser of the premises at sheriff's sale could not compel the city officers to restore the supply of water to said premises until the amount of the water rent due from the former occupant or owner had been paid, where he could have obtained knowledge that the water rates were unpaid by inquiring at the office of the city treasurer, and where it appeared that notice had been publicly given at the sale that the water rates were due and unpaid.

A statute relating to municipal liens upon real estate does not deprive the municipality from proceeding against the owner or occupant personally, by discontinuing service to compel payment of water bills, where a right to a lien has never been asserted. *Ibid.*

Miscellaneous.

On a proceeding by bill to restrain the water company from cutting off the water supply, in which defendant filed a cross bill for an accounting for water alleged to have been stolen by the plaintiff from the defendant water company by means of a device connecting the main with plaintiff's works without passing through the meter, and the court found that a specified amount had been misappropriated by the plaintiff a decree requiring plaintiff to pay the water company for the water so taken, and to remove the device complained of, and enjoining the water company from cutting off the supply so long as plaintiff complied with the rules of the water company, was properly entered. *American Conduit Mfg. Co. v. Kensington Water Co.* 234 Pa. 208, 83 Atl. 70.

A. J. R.

laterals and service connections, and that they will thereafter refuse to take water and thereby discommode themselves and depreciate their own property; and the courts will not base decisions upon such an assumption.

(November 9, 1909.)

APPPLICATION for a writ of mandamus to require defendant to make necessary connections with its water main and to supply plaintiff with water upon receipt of the established rental rates. Writ granted.

The facts are stated in the opinion.

Messrs. Reed & Boughton, for plaintiff:

A regulation that in case a consumer is in default his supply will be cut off is reasonable and may be enforced. But such a regulation cannot be made the instrument by which the water company can become the judge in its own case, or shut off water to enforce payment of a disputed bill; nor by its means can payment be enforced which it is not the duty of the consumer to make.

1 Farnham, Waters, 877.

The account is with the premises, and not with the consumer, so that water cannot be refused to an applicant because he is in arrears for water furnished him elsewhere.

1 Farnham, Waters, 880; Dayton v. Quigley, 29 N. J. Eq. 77.

The consumer could not legally be required to pay for a portion of the company's system, and neither could the company legally require an unreasonable payment in advance, in order to secure water for domestic purposes.

Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518; Bothwell v. Consumers' Co. 13 Idaho, 568, 24 L.R.A. (N.S.) 485, 92 Pac. 533.

Messrs. Robert H. Elder and Gray & Knight, for defendant:

The requirement of a quarter's rent in advance is not unreasonable.

Harbison v. Knoxville Water Co. — Tenn. —, 53 S. W. 993.

The right of a company to protect itself by requiring a deposit or other assurance that it will be paid for water furnished is well established.

Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa, 426, 138 Am. St. Rep. 299, 120 N. W. 966; Williams v. Mutual Gas Co. 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236.

A regulation requiring applicant to agree to pay a reasonable charge for connections is a reasonable and proper one, especially when the commission has fixed such charge, and it appears that the commissioners, in fixing the charge for such connections, had due regard to the monthly rate, and *vice versa*. 40 L.R.A. (N.S.)

State ex rel. Foley v. Hillyard Water Co. 49 Wash. 282, 94 Pac. 1080; Public Service Corp. v. American Lighting Co. 67 N. J. Eq. 122, 57 Atl. 482; Prindiville v. Jackson, 79 Ill. 337; Jackson v. Ellendale, 4 N. D. 478, 61 N. W. 1030; Palmer v. Danville, 154 Ill. 156, 38 N. E. 1067.

A company cannot be compelled to furnish taps free, without assurance of continued use.

Public Service Corp. v. American Lighting Co. 67 N. J. Eq. 122, 57 Atl. 482; State ex rel. Foley v. Hillyard Water Co. 49 Wash. 232, 94 Pac. 1080; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 465, 62 Am. St. Rep. 261, 50 Pac. 633.

A corporation cannot be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Trammell v. Dinsmore, 42 C. C. A. 623, 102 Fed. 799; San Diego Land & Town Co. v. Jasper, 110 Fed. 714; Jack v. Williams, 113 Fed. 827; Boise City Irrig. & Land Co. v. Clark, 65 C. C. A. 399, 131 Fed. 415.

Allshie, J., delivered the opinion of the court:

This is an original action commenced in this court, praying for the issuance of a writ of mandate against the defendant corporation, requiring and commanding that it connect plaintiff's water pipes with defendant's water system in the city of Cœur d'Alene. The complaint alleges that the plaintiff is the owner of a lot or tract of land in Krotzer's addition to Cœur d'Alene City, and that he has built a dwelling house thereon, and has placed water pipes therein, extending from his house to the curb line in Third street in front of his premises. He alleges that the water rate for the service he requires and has demanded is \$1.50 per month, payable in advance, as fixed by the water commissioners appointed in conformity with the law for the establishing of water rates to be charged by the defendant company. He also alleges that he tendered the company at its office one month's water rent, and demanded that it make the connections and turn on the water for his use; "that the company thereupon refused and declined to do so, unless he would also pay it the sum of \$8.50 for making the tap in its water main, or deposit the sum of \$15, the same to be refunded when the tap is taken out, less the actual cost of labor and cost of one corporation cock, or, in lieu thereof, that he should deposit \$40 in cash, the same to be applied on payment of water to be

used from said tap;" that the company now is, and has been for more than five years last past, operating in the village of Cœur d'Alene, under the terms of a franchise of the village embodied in ordinance No 93 of said village, and that it is collecting monthly water rates in advance for water furnished to the inhabitants of the village; that the water rates have been established by a commission appointed in conformity with law, and which said commission established rates to be charged on the 14th day of October, 1907, and that the rate so established that applies to a service such as plaintiff demands is \$1.50 per month; that the defendant company has a water main on Third street in front of plaintiff's property, and is furnishing other consumers along that street with water, for which it is charging and receiving the sum of \$1.50 per month in advance; that the company has an abundant supply of fresh water unsold, and is able to supply the plaintiff with all the water he demands. Plaintiff prays that a writ of mandate issue against the defendant requiring and compelling it to make the necessary connection with its water main, and supply plaintiff with water upon receipt of the rental rates as established by the board. An alternative writ of mandate was issued against the defendant, and it has answered admitting plaintiff's demand, and that it has a water main on Third street in front of plaintiff's house, and that it has refused to supply the plaintiff with water unless he accede to its requirements, as set out in plaintiff's complaint.

Defendant has also pleaded further matter in defense of the action, in substance, as follows: That prior to the construction by plaintiff of the house for which he now claims a water supply, plaintiff carried water from the faucet at the houses of some of defendant's water consumers, for which he became indebted to the defendant in the sum of \$28, which sum the plaintiff has neglected, failed, and refused to pay, and that the defendant refused to supply plaintiff with water in the future until such time as he paid the balance due for water previously supplied to him in the manner above mentioned. It also alleges that plaintiff's property is not within the corporate limits of Cœur d'Alene City. It further alleges that commissioners have heretofore been appointed in conformity with the law, for the purpose of fixing rates to be charged by the defendant, and that, in pursuance of the power and authority vested in them, they met and fixed and established rates, and that the rate to be charged for service such as plaintiff demands is \$1.50 per month in advance, and the further sum of \$8.50 for making "water service connections;" and 40 L.R.A. (N.S.)

that the company has made and established a rule that, where demand is made to have water supplied to a place that has not previously been receiving water, it requires that the applicant pay one month's rent in advance, and also the sum of \$8.50 for tapping its main and making connections, or deposit the sum of \$15, the same to be refunded when tap is taken out, less actual cost of labor and cost of one corporation cock, or a deposit of \$40 cash, the same to apply on payment of water used. Defendant alleges that the plaintiff declined and refused to comply with the rules and regulations of the company with reference to these several deposits, with the exception of the \$1.50 monthly water rate, and that the defendant accordingly declined and refused to make the connection and furnish plaintiff with water. It is also alleged that the commissioners took into consideration the payment of \$8.50 for making tap and service connection in the fixing of monthly water rates. On motion of the plaintiff, the court made an order striking from defendant's answer that portion thereof relating to the "rate to be charged for making service connections" as established by the commissioners, for the reason that under the provisions of our statute (§ 2839, Rev. Codes) the commissioners had no authority to fix any rates except "the rates to be charged for water." They had no authority to fix rates or charges for the construction or alteration of any part of the defendant's pipes or water system, and had no authority to establish any rate for any labor or service or material or thing other than for the use of water to be supplied by the corporation. The court also sustained the plaintiff's motion to strike from the answer all the allegations with reference to the failure and neglect and refusal of the plaintiff to pay the sum of \$28, balance due for water used by the plaintiff while residing at a different place, and carried by him from a faucet at the residences of some of defendant's other consumers. The court thereupon ordered a reference to take testimony, and, upon the coming in of the report and the submission of all the evidence on the part of both plaintiff and defendant, the case was argued by the respective counsel, and has been submitted for our final determination.

We have heretofore held in *Bothwell v. Consumers' Co.* 13 Idaho. 568, 24 L.R.A. (N.S.) 485, 92 Pac. 533, and *Pocatello Water Co. v. Standley*, 7 Idaho, 155, 61 Pac. 518, that the mains and laterals laid within the streets and alleys are the property of the water company, and that the franchise granted such company authorizes it to dig in the streets and alleys, and use and

occupy them for the purpose of laying and maintaining their pipe lines and delivering water to consumers. We discover no reason for departing from the rule announced in those cases. See also § 2840, Rev. Codes. On the other hand, the consumer has no right or franchise to excavate the streets or to lay or maintain pipes therein. When he undertakes to pass beyond his property line with pipes, he is met by the public authorities and the franchise held by the water company. He is in no position to acquire a property right in the streets and alleys by laying pipes therein. The water company, on the contrary, is clothed with this power and right and all the necessary authority for creating and establishing property rights therein and the protection of such property. There is no reason in saying that the company has no interest in laterals it may lay in the streets from its main to the line of abutting property owners. These laterals are of just as much use and as valuable to the company as its mains, in proportion to the amount of water to be delivered through such laterals as compared with that delivered through the main. The only difference whatever is in the extent of the service. The capacity of a main is ordinarily such that it will supply a large number of consumers along the street from the one main. The capacity of a lateral is ordinarily such that it will only supply one or two consumers. The relative value to the company of the main and laterals is measured by the extent of the service from the two. The necessity, however, for one, is just as great as for the other. Without a main none of the residents along a street can be supplied. Without a lateral the individual consumer cannot be supplied. The law of ownership is the same in the one case as the other, and the right of property and control is the same in each instance. Water companies maintain waterworks for the purpose of collecting rates and tolls. They operate them for gain. In order to collect tolls, they must deliver water. The consumer, on the other hand, pays his money for service. Unless he is served, there is nothing for which he may be called upon to pay.

We are aware that some courts have held that the consumer may be required to pay the expenses of "service connections," as it is sometimes called, or, rather, for laterals extending from the curb line to the main. So far as we have been able to examine, however, these decisions are based upon express statutes. There is a line of decisions to that effect in Wisconsin. The case of *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249, is a leading authority on this point, and holds that the expense of laying water pipes from the curb line to connect with the main may be properly as-

sessed against the property of the abutting owner, but this is based upon the express provision of the Wisconsin statute authorizing the levying of assessments against abutting property owners for such purposes, "whenever the council shall order the paving or repaving of any street in which water, gas mains, and sewers, or either of them, shall have been previously laid or constructed." In that case it was claimed that the statute was unconstitutional, in that it authorized a taking of property without due process of law. The court upheld the statute on the ground that the laying of the gas and water pipes was an improvement to the property of the abutting owners, and that it conferred a benefit. We know of no case, however, that has held to such a rule in the absence of a statute or ordinance authorizing and providing for levying an assessment for such purposes. Counsel for defendant seem to place great reliance on the case of *State ex rel. Foley v. Hillyard Water Co.* 49 Wash., 232, 94 Pac. 1080, but an examination of that case discloses that it was decided on entirely different grounds. As we read and understand that case, the court denied *Foley* relief on the grounds of waiver and estoppel by reason of his previous action and conduct in the matter. The question involved in the case at bar does not seem to have been urged or considered in that case. In *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244, in considering the respective rights and duties of the water consumer and the water company with reference to laying pipes and acquiring property rights in the streets, Justice Lord, speaking for the Oregon supreme court, said: "The pipe which was laid by the defendant in Tillamook street was laid in pursuance of the franchise granted by the city, as it had no authority to lay any other kind of pipe or main than prescribed by the ordinance, or for any other purpose than conducting water to supply the city and its inhabitants, without discrimination, to all persons having buildings or lots on the lines of their pipes, upon tender of the proper compensation. There is no claim that *Hughes* and *Prescott* had any right to dig up the street, or to lay such pipe. It could only be done by the defendant, so far as disclosed by this record, under the grant, in the mode prescribed, and for the purposes already stated."

As to the right of a water company to refuse to supply the consumer until he pays overdue rents, there is not entire harmony among the authorities. 1 *Farnham on Waters and Water Rights*, § 164a, contains the following *résumé* of various decisions of the courts on this subject: "A very effective method of compelling the payment of water

rates is the stopping of further supplies until arrears are paid. There is nothing to compel either a municipality or a water company to furnish water to one who will not pay for it, and a regulation that in case a consumer is in default his supply will be cut off is reasonable and may be enforced. But such a regulation cannot be made the instrument by which the water company can become the judge in its own case, and shut off water to enforce payment of disputed bills. Nor by its means can payment be enforced which it is not the duty of the consumer to make. Nor can it be used as a means of collecting bills for independent matters not connected with the premises on which the water is desired." On one phase of the question the authorities seem to be in entire harmony, and that is to the effect that a water company can make and enforce such reasonable rules and regulations as are in harmony with law and justice, for the conduct of its business and the collection of its water rentals. A regulation requiring a consumer to pay a month's rent in advance, or in default thereof, the company will shut off the water, or requiring the consumer to pay at the end of the month the rates for the preceding month, or in default thereof, the company will shut off the water, has generally been held reasonable and within the power of such public service corporations. *Tacoma Hotel Co. v. Tacoma Light & Water Co.* 3 Wash. 316, 14 L.R.A. 669, 28 Am. St. Rep. 35, 28 Pac. 516; *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; *Harbison v. Knoxville Water Co.* — Tenn. —, 53 S. W. 993; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; *State ex rel. Latsch v. Water & Light Comrs.* 105 Minn. 472, 127 Am. St. Rep. 681, 117 N. W. 827; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa, 426, 138 Am. St. Rep. 299, 120 N. W. 966. The rules of some companies seem to require one month's payment in advance while others have required a quarter's payment in advance. It has been held, however, that a requirement that a consumer pay one year in advance was unreasonable. *Rockland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368, 24 Atl. 840. It has likewise been held that, where the water has been shut off from a consumer on account of a default in payment of rentals when due, he cannot be charged the additional sum of \$1 for turning the water off and on. *American Waterworks Co. v. State*, 46 Neb. 194, 30 L.R.A. 447, 50 Am. St. Rep. 610, 64 N. W. 711. It seems to be quite generally held by the authorities that such a company may not refuse to supply the water to a consumer upon payment of rents in advance as required by the rules and regulations of the 40 L.R.A. (N.S.)

company, merely because he declines and refuses to pay a disputed bill, or to pay past due water rents for some other and independent use, or at some other place or residence, or for a separate or distinct transaction from that for which he is claiming and demanding a water supply. *Crumley v. Watauga Water Co.* 99 Tenn. 420, 41 S. W. 1058; *Wood v. Auburn*, 87 Me. 287, 29 L.R.A. 376, 32 Atl. 906; *American Waterworks Co. v. State*, 46 Neb. 194, 30 L.R.A. 447, 50 Am. St. Rep. 610, 64 N. W. 711. A public service corporation cannot safely be invested with a power and authority which will allow it to be come both judge and jury in the determination of a disputed claim due it from a consumer. To do so would be dangerous and investing it with a power that invites extortion, and is too liable to be abused. As was very aptly said by the supreme court of Maine in *Wood v. Auburn*, 87 Me. 287, 29 L.R.A. 376, 32 Atl. 906: "The parties are not upon equal ground. The city as a water company cannot do as it will with its water. It owes a duty to each consumer. The consumer once taken onto the system becomes dependent on that system for a prime necessity of business, comfort, health, and even life. He must have the pure water daily and hourly. To suddenly deprive him of this water, in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for the water. He must surrender, and swallow his choking sense of injustice. Such a power in a water company or municipality places the consumer at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost, the collector may have embezzled the money, yet the consumer must pay it again, and perhaps still again. He cannot resist, lest he lose the water. . . . To oblige a person to follow such a course would be a violation of the fundamental juristic principle of procedure. . . . The water must be supplied to the complainant so long as he will promptly pay current instalments, and otherwise conform to the reasonable rules governing the supply of water. The respondent must now in its turn resort to judicial process, if it desires to enforce any further payment." The foregoing conforms to our idea of justice, and comports with the principles of fair dealing. Such companies receive a public franchise for the purpose of serving the people for reasonable compensation, but they have no right to use the privileges granted for the purpose of oppression, discrimination, or harassing or annoying the water consumer. Courts will not tolerate any such conduct for a moment. In the case at bar the bill the defendant was seeking to collect was for water alleged

to have been used by plaintiff while residing at different places, and where he carried the water from the residences of other consumers, and the claim covers a period of over two years. This claim, if an obligation against plaintiff, was a wholly separate transaction, and must be collected in the usual way in which debts are collectable. It cannot be wrung from the plaintiff by preying on his present rights and necessities for an essential to life and health.

It is argued by the defendant that plaintiff's property is not within the corporate limits of Cœur d'Alene City, and this contention grows out of the following conditions: In 1904 the city council passed an ordinance, known as ordinance No. 99, extending the city limits so as to include Krotzer's addition, in which plaintiff's property is located. It appears from the evidence in the case, however, that there is intervening between the original boundary line of Cœur d'Alene City and this addition a strip of land 2,663 feet in length by 2.8 feet wide at the westerly end and 67 feet wide at the easterly end. It also appears that this tract of land has never been included within the corporate limits of the city, under any ordinance or resolution of the city council. It is contended on behalf of the defendant that the action of the board in the passage of ordinance No. 99, incorporating the Krotzer addition within the city limits, is void for the reason, first, that the city clerk failed to file a copy of ordinance No. 99 with the county recorder, in accordance with the provisions of § 2 of an act approved March 8, 1905, as appears at page 392 of the 1905 Session Laws, and which provision has been incorporated in § 2173 of the Revised Codes. Whether or not this failure on the part of the clerk would defeat the purposes and objects of the ordinance is a question that we will not consider here, for the reason that this statute was not in force at the time of the passage and approval of ordinance No. 99. The ordinance was passed and approved in April, 1904, whereas the statute invoked was not approved until March 8, 1905.

It is next urged that, under the provisions of § 2172 of the Revised Codes, it is only competent for city or village authorities to incorporate within municipal boundaries the "land lying contiguous or adjacent" to the city, town, or village. It is contended that this addition was neither contiguous or adjacent to the city of Cœur d'Alene while the strip of land above described was intervening between the city boundary and the addition laid out and platted. This contention is answered by the provisions of § 9 of the act of February 9, 1899, with reference to cities, towns, and villages, as ap-

pears on page 109 of the 1899 Session Laws. It provides, among other things, that land or territory laid off or subdivided as provided by statute "shall be regarded and treated as contiguous to such city or town, notwithstanding any stream or embankment or any strip or parcel of land not more than 200 feet in width may be or lie between such land or territory and the corporate limits of such city or town." Whether that provision of the statute be in force and effect now is immaterial. It is sufficient to say that it was in force and effect, at the time of the passage and approval of ordinance No. 99 of the city of Cœur d'Alene, and completely answers the contention as to intervening territory between the original city limits and the Krotzer addition.

Over and above the foregoing answers given to defendant's contention, there is another reason why defendant's position is not tenable here. The ordinance extending the city limits so as to include plaintiff's premises was passed and approved in April, 1904, and the city authorities proceeded at once to exercise municipal jurisdiction over the territory, levied and collected taxes, exercised police jurisdiction over the new territory, and, so far as appears in this action, all parties acquiesced in the action of the city council, and proceeded to and did transact their business upon the theory and under the assumption that this addition was within the corporate limits of the city. This was not only true as to the plaintiff and Cœur d'Alene City, but it is true as to the defendant itself. It appeals affirmatively from the record that the defendant operated its water plant on Third street, running through this addition, upon the theory that it was within the corporate limits, and charged consumers therein the regular rates established by the water commission. This is a collateral attack, and the water company could not be permitted at this late date and in this manner, to raise a question of so serious import involving the jurisdiction and authority of the municipality. *Kuhn v. Port Townsend*, 12 Wash. 605, 29 L.R.A. 445, 50 Am. St. Rep. 911, 41 Pac. 923; *Clement v. Everest*, 29 Mich. 19; *Mullikin v. Bloomington*, 72 Ind. 161; *Frace v. Tacoma*, 16 Wash. 69, 47 Pac. 219; *McQuillin*, Mun. Ord. § 279; *Coler v. Dwight School Twp.* 3 N. D. 249, 28 L.R.A. 649, 55 N. W. 587, 589. Defendant invokes the provisions of § 10 of ordinance No. 93, granting it a franchise to operate within the corporate limits of Cœur d'Alene City, and contends that under that provision of the ordinance it cannot be compelled by mandamus to supply a water consumer on an ungraded street. That provision of the ordinance is as follows: "Said Consumers' Company, its

successors or assigns, may extend said distributing system of mains, pipes, laterals, and other facilities along any of the streets or alleys of said village, whether such street or alley shall have been graded at the time of such extension or not, but shall not be required to extend the same along any ungraded street or alley." It appears that Third street in front of plaintiff's premises is an ungraded street, but, whatever might be said with reference to the foregoing provision of the ordinance granting the franchise, it is a sufficient answer for the present case to say that, notwithstanding this provision of the ordinance, the defendant has laid its main along this street. It is already there, and therefore needs no coercion for that purpose. It is consequently liable to supply the inhabitants along the street who tender the established water rates and demand service.

Finally, it is argued that, to grant a writ of mandate in this case would amount to a confiscation of defendant's property, and be in violation of the 14th Amendment to the Federal Constitution. This contention cannot be sustained. The reasons are numerous against the position of defendant. In the first place, the defendant is a creature of the laws of this state, created for a special purpose of a public character. It is not permitted like a private party to charge whatever it pleases, or to serve those only whom it may choose to serve. It must, on the contrary, serve the inhabitants of the municipality from which it receives a franchise for a reasonable uniform compensation, to be established in conformity with law (§ 2839, Rev. Codes); and it must serve all persons without distinction or discrimination who pay the rate established and comply with the reasonable rules and regulations of the company (§§ 1, 2, art. 15, Const. Idaho; §§ 2839, 2840, Rev. Codes). *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841, 41 S. W. 1060; *American Waterworks Co. v. State*, 46 Neb. 194, 30 L.R.A. 447, 449, 50 Am. St. Rep. 610, 64 N. W. 711; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244; *Mahoney v. American Land & Water Co.* 2 Cal. App. 185, 83 Pac. 267; *Olmsted v. Morris Aqueduct*, 47 N. J. L. 311; *Rushville v. Rushville, Natural Gas Co.* 15 L.R.A. 321, and note, 132 Ind. 575, 28 N. E. 853). It was said by Chancellor Pitney in *Long Branch Commission v. Tintern Manor Water Co.* 70 N. J. Eq. 71, 62 Atl. 474, in speaking for the court of chancery of New Jersey, that "a company which seeks and obtains a franchise to supply a certain territory with water for public and domestic uses is under a moral, and in my judgment a legal, obligation to furnish a supply which shall be

equal to all emergencies which may be reasonably anticipated, including unusual droughts and unusual conflagrations, and to bear constantly in mind the prospective increase in population and a consequent increased demand for water." To compel the defendant to live up to the law of its existence can in no case amount to a confiscation of its property, and still in every instance wherein it is compelled by compulsory process to do any given act, the exercise of such judicial power necessarily involves either the use of the company's property or the expenditure of its money. To abide by the law and discharge its public duties, however, is a part of the contract it impliedly enters into with the state and municipality when it receives its charter and franchise and commences business. For the discharge of these duties and obligations, it agrees to invest money and acquire property, and by that means serve the public indiscriminately for a reasonable compensation. When it neglects such duty, it may be coerced by judicial process. This is not confiscation or taking property without due process of law. It is a procedure almost daily invoked throughout the country against irrigation companies, gas and light companies, and railroad companies, as well as water companies. There is nothing new or novel about it. The company must either live up to the requirements of the law, or when that becomes too burdensome it may go out of business; but it cannot reap the benefits of its charter without assuming the duties thereof.

In this case the rates have been established, and the defendant makes no contention that the rates are too low, or that it cannot make a fair income at the rates as established. It has never questioned these rates, and, in fact, from the evidence submitted in the record, it would seem that they are sufficient to net the defendant an exceptionally large return on the investment. Now, those rates were necessarily established on an estimate, among other things, of the total amount of investment and the number of consumers being served at the time the rates were fixed by the board. It is conceded that \$8.50 will cover the total additional investment necessary to be made in order to serve the plaintiff, and thereby secure the additional revenue of \$1.50 per month or \$18 per annum. This does not sound like confiscation to us. An income of \$18 per annum on an investment of \$8.50 is certainly a spendid profit. But the water company replies that it has no assurance that the plaintiff will take water for more than one month. This argument leads to an inference that the water company wants someone to insure its perpetual income.

While there can be no such thing as an absolute certainty that any one of its consumers will continue to use water for a whole year, or that they may not all quit using water at the end of the current month, yet it would be a violent and unjustifiable assumption to say that the plaintiff or any other consumer will only use water for one month. The defendant, like all individuals and corporations, must do business in a measure upon confidence and the assumption that the people with whom it is dealing are ordinarily honest (*Harbison v. Knoxville Water Co.* — Tenn. —, 53 S. W. 993; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa, 428, 138 Am. St. Rep. 299, 120 N. W. 966), and that they are going to conduct their business in their own interests. It is scarcely likely that a man is going to build a dwelling house on his lot and fit it up with water pipes and pay for water for one month, in order to force a public service corporation to expend \$8.50 in making the necessary connections, and then depreciate his own property and discommode himself or his tenant by having the water shut off and thereafter doing without. Such an assumption is not sufficient on which to transact business, and no individual or corporation would proceed upon such an assumption, and it is equally true that the courts are not going to render decisions on any such assumption. The common experience of mankind disproves such theory. It is possible, and indeed probable, that an occasional instance will arise where, for want of a tenant or some other sufficient cause, a proprietor may not receive water from the company regularly every month, but such a case will be the exception, and will by no means constitute the rule. These exceptions will be no more frequent among the new consumers than among the old patrons of the company, and there can be no more excuse on this ground for refusing a new consumer water than there would be for refusing to supply one who has been previously receiving water. The supposition is that the rates received by the company are sufficient upon the whole to amply compensate the company for any such loss or diminution of rents as may arise from the exceptional instance where a consumer will cease to pay regular monthly water rates. This objection is entirely too imaginary, chimerical, and improbable to receive serious consideration from the hands of the court, as a ground for denying an applicant a water supply upon the tender of the payment of the established rate.

It follows from what has been said that a peremptory writ of mandate must issue commanding and requiring the defendant to 40 L.R.A. (N.S.)

make the necessary tap and connection with its water main, and to supply plaintiff with water upon receipt of the monthly water rate heretofore tendered by plaintiff. The rule and regulation of the water company requiring the consumer to pay for the laterals and connections from its main to the street line of the consumer's property is unreasonable, and in conflict with the statute and charter and franchise under which the defendant is operating, and such regulation cannot be upheld by the court.

The writ will issue as prayed for by plaintiff, and the defendant will be required to make return to the clerk of this court within thirty days from date of filing this opinion, showing that it has complied with the order of the court; and it is ordered and decreed accordingly. Costs of this action will be taxed against the defendant.

Sullivan, Ch. J., and Stewart, J., concur.

Affirmed by the Supreme Court of the United States April 1, 1912, 224 U. S. 148, 56 L. ed. 703, 32 Sup. Ct. Rep. 465.

*

MINNESOTA SUPREME COURT.

W. A. MARIN, Appt.,
v.

AUSTIN C. KNOX et al., Respts.

(117 Minn. 428, 136 N. W. 15.)

Mortgage — for purchase money — priority.

1. Where a mutual agreement is made between a vendor in a contract to convey land, the vendee therein, and a third party, that the vendee is to obtain money to pay part of the balance of the purchase price from

Headnotes by HOLT, J.

Note. — Mortgage to secure money advanced to purchase property as a purchase money mortgage.

As to the right of one advancing money for the purchase price of property, to be subrogated to vendor's lien, see note in 37 L.R.A. (N.S.) 1203.

Where contemporaneously executed—general rule.

It is the general rule, to which there is little dissent, that a mortgage on land executed by the purchaser of the land contemporaneously with the acquisition of the legal title thereto is a purchase money mortgage, and entitled to priority as such over all other claims or liens arising through the mortgagor; and this is true without reference to whether the mortgage

such third party, securing the same by a first mortgage upon the land, and the vendor is to take a second mortgage for the remainder of the purchase price, and pursuant to such agreement the deed and mortgages are executed and delivered, such mortgages are superior to the lien of a judgment obtained against the vendee prior to the delivery of the mortgages

Same — single transaction — noncontemporaneous delivery.

2. If such deed and mortgages be executed and delivered pursuant to such mutual agreement, it constitutes but one transaction, although the documents may not have been delivered on the same day.

Evidence — sufficiency.

3. The evidence examined, and held to sustain the finding that the mortgages of the defendants were purchase money mort-

gages, and entitled to priority over the title acquired by plaintiff through execution sale on a judgment obtained against the vendee prior to the delivery of the mortgages.

(May 10, 1912.)

APPEAL by plaintiff from a judgment of the District Court for Otter Tail County in favor of defendants in a suit to determine adverse claims to certain real estate, and establish a lien superior to certain mortgages thereon. Affirmed.

The facts are stated in the opinion.

Messrs. Charles Loring and W. A. Marin (*pro se*), for appellant:

To secure a priority, the money must have been loaned with the express purpose

was executed to the vendor or to a third person.

Cal.—Van Loben Sels v. Bunnell, 120 Cal. 680, 53 Pac. 266.

Ga.—Achey v. Coleman, 92 Ga. 745, 19 S. E. 710; Protestant Episcopal Church v. Lowe County, 131 Ga. 666, 127 Am. St. Rep. 243, 63 S. E. 136.

Ill.—Curtis v. Root, 20 Ill. 53; Austin v. Underwood, 37 Ill. 438, 87 Am. Dec. 254; Magee v. Magee, 51 Ill. 500, 99 Am. Dec. 571.

Iowa.—Laidley v. Aikin, 80 Iowa, 112, 20 Am. St. Rep. 408, 45 N. W. 384; Kaiser v. Lembeck, 55 Iowa, 244, 7 N. W. 519.

Kan.—Foster Lumber Co. v. Harlan County Bank, 71 Kan. 158, 114 Am. St. Rep. 470, 80 Pac. 49, 6 Ann. Cas. 44.

Mass.—Clark v. Munroe, 14 Mass. 351.

Minn.—Stewart v. Smith, 36 Minn. 82, 1 Am. St. Rep. 651, 30 N. W. 430; Jacoby v. Crowe, 36 Minn. 93, 30 N. W. 441.

N. Y.—Jackson ex dem. Beebe v. Austin, 15 Johns. 477; Haywood v. Nooney, 3 Barb. 643.

N. C.—Moring v. Dickerson, 85 N. C. 466.

Ohio.—Neff v. Crumbaker, 40 Ohio St. 85.

Pa.—Albright v. Lafayette Bldg. & Sav. Asso. 102 Pa. 411; Hiser v. Hiser, 13 Montg. Co. L. Rep. 49; Commonwealth Title Ins. & T. Co. v. Ellis, 8 Pa. Dist. R. 5.

Wis.—Jones v. Parker, 51 Wis. 218, 8 N. W. 124.

The test whether a mortgage is a purchase money mortgage is not whether it is executed to the vendor, but whether the proceeds are to be used to apply on the purchase price. Commonwealth Title Ins. & T. Co. v. Ellis, 8 Pa. Dist. R. 5.

A mortgage to secure the purchase money, given by a purchaser of land simultaneously with the conveyance of the land to him, does not necessarily lose the character of a purchase money mortgage merely because taken in the name of a person other than the vendor, by the vendor's procurement. Albright v. Lafayette Bldg. & Sav. Asso. 102 Pa. 411; Hiser v. Hiser, 13 Montg. Co. L. Rep. 49.

40 L.R.A. (N.S.)

Where a statute provides that whenever lands are sold and conveyed, and a mortgage is given by the purchaser at the same time to secure the payment of the purchase money, such mortgage shall be preferred to any previous judgment which may have been obtained against the purchaser, it is not necessary, in order to bring a contemporaneously executed mortgage within the terms of the statute, that it be executed to the vendor. It is sufficient if it is executed to a third person for money advanced on the purchase price, if executed contemporaneously with a deed of the property to the mortgagor. Jackson ex dem. Beebe v. Austin, 15 Johns. 477, followed in Haywood v. Nooney, 3 Barb. 643.

The claims of third persons to have their mortgages upheld as purchase money mortgages are recognized only when it has been made to appear that the money was loaned to the purchaser, and was used by the latter, expressly to pay for the property. It is not sufficient merely to show that the mortgagor used the money loaned to pay for the land mortgaged. Van Loben Sels v. Bunnell, 120 Cal. 680, 53 Pac. 266.

Where a mortgage is not in fact given for the purchase money of property, although it contains a recital that that is the purpose of it, it does not take priority over other liens made an equitable charge on the land by the express terms of the deed of the property to the mortgagor. Crombie v. Rosentock, 19 Abb. N. C. 312.

—as applied to judgments against purchaser.

A mortgage for the purchase money of land, where executed at the time of the conveyance of the property, is entitled to preference or priority over previous judgments against the purchaser, and the same equitable considerations which demand this rule also require that a third person who advances the purchase money, and takes a mortgage from the purchaser contemporaneously with a deed to the latter of the mortgaged property, shall be protected to

and intention that it should be used in paying purchase price of the land.

27 Cyc. 1182; *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537; *Jones, Mortg.* 6th ed. 1904, § 469; *Small v. Stagg*, 95 Ill. 39; *Alderson v. Ames*, 6 Md. 52; *Stansell v. Roberts*, 13 Ohio, 148, 42 Am. Dec. 193; *Calmes v. McCracken*, 8 S. C. 87; *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266; *Cohn v. Hoffman*, 50 Ark. 108, 6 S. W. 511; *Heuisler v. Nickum*, 38 Md. 270; *Donovan v. Twist*, 105 App. Div. 171, 93 N. Y. Supp. 990; *Nicholson v. Aney*, 127 Iowa, 278, 103 N. W. 201.

Appellant was a purchaser of the land at an execution sale, and, as such, a bona fide purchaser without notice.

Bank of Ada v. Gullikson, 64 Minn. 91,

the same extent *Kaiser v. Lembeck*, 55 Iowa, 244, 7 N. W. 519.

And a purchase money mortgage executed contemporaneously with a deed to the mortgagor of the mortgaged premises excludes any claim or lien arising through him, and it is immaterial that the mortgage was made to a third person, since the latter is entitled to the same preference over a prior judgment against the mortgagor as though the mortgage had been executed to the vendor himself. *Protestant Episcopal Church v. Lowe County*, 131 Ga. 666, 127 Am. St. Rep. 243, 63 S. E. 136.

Where a purchaser of land, at the time he receives a conveyance thereof, executes a mortgage thereon to a third person advancing to the vendor the purchase money for him, the mortgage is entitled to the same preference over a prior judgment as it would have had if it had been executed to the vendor himself, and it is immaterial that there is no agreement to give the mortgage priority; neither is it important that the purchase was previously made by executory contract. *Laidley v. Aikin*, 80 Iowa, 112, 20 Am. St. Rep. 408, 45 N. W. 384.

Where a deed to land, although dated prior to a mortgage to a third person as security for money advanced to be applied on the purchase price, did not go into effect, and was not actually delivered, until the purchase money was paid, the mortgagee has in equity the right to a repayment of the loan out of the land or its proceeds in preference to the judgment creditors of the mortgagor, since the existence of their judgments when the legal title passed through the debtor gave them no hold upon the property to the exclusion of the mortgagee, who paid for the land and took the title as part of the same transaction. *Achey v. Coleman*, 92 Ga. 745, 19 S. E. 710.

Where the execution of a mortgage upon land to a third person, to secure money advanced by the latter to pay for the land, is practically simultaneous with the execution of a deed of the land to the mortgagor, the mortgage is a purchase money mortgage, and takes priority over judgment liens 40 L.R.A. (N.S.)

66 N. W. 131; *Welles v. Baldwin*, 28 Minn. 408, 10 N. W. 427; *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541, 19 Am. St. Rep. 259, 45 N. W. 1136.

Keplinger cannot claim that his mortgage is a prior lien to the judgment of appellant, because it is for the balance of the purchase price.

Reilly v. Williams, 47 Minn. 590, 50 N. W. 826.

A vendor's lien was not assignable.

Hammond v. Peyton, 34 Minn. 529, 27 N. W. 72; *Law v. Butler*, 44 Minn. 482, 9 L.R.A. 856, 47 N. W. 53.

Messrs. Parsons & Brown, for respondents:

The mortgages are purchase money mort-

of the creditors of the mortgagor. *Curtis v. Root*, 20 Ill. 53.

—as to mortgages executed by purchaser.

A mortgage held by a wife upon all the property of her husband, and which took effect as to future-acquired land immediately upon its acquirement by the husband, is entitled to priority over a mortgage given by the husband at the time he acquired the land, the proceeds of which he used to pay for the land. *Fontenot v. Soileau*, 2 La. Ann. 774.

In *Moring v. Dickerson*, 85 N. C. 466, in holding to be a purchase money mortgage, a mortgage executed to a third person contemporaneously with a deed conveying the property to the mortgagor, the proceeds of which were used in paying for the land, and hence to take priority over a prior dated mortgage executed by the purchaser, the court said that it reached this conclusion, "not upon the ground of any supposed equity in the vendor as such to have the purchase money of the land sold or any right of subrogation in the defendant . . . to his lien upon the land, but purely and simply upon the ground that the two instruments, being executed at the same moment of time, are to be treated as one, and construed as if the association had conveyed the land directly to her, and had not made use of the defendant . . . as an instrument to that end. If there had been an interval of time between the two transactions during which the title to the land had rested in . . . [defendant], then this right of priority would have been lost to her and attached to the elder mortgage."

Money advanced to be used in buying a tract of land, under a promise by the purchaser to execute the lender a mortgage for the amount advanced, in equity constitutes a lien upon the land, whether or not the mortgage is executed; and this lien is superior to a subsequently executed mortgage to a person having notice of the facts, and is also superior to any homestead rights of the purchaser. *Foster Lumber Co. v. Harlan County Bank*, 71 Kan. 158, 114 Am. St. Rep. 470, 80 Pac. 49, 6 Ann. Cas. 44.

gages and superior to the judgment of the plaintiff.

Banning v. Edes, 6 Minn. 402, Gil. 270; *Spalti v. Blumer*, 56 Minn. 523, 58 N. W. 156; *Peaslee v. Hart*, 71 Minn. 319, 73 N. W. 976; *Stewart v. Smith*, 36 Minn. 82, 1 Am. St. Rep. 651, 30 N. W. 430; *Jacoby v. Crowe*, 36 Minn. 93, 30 N. W. 441; *Schoch v. Birdsall*, 48 Minn. 441, 51 N. W. 382; *Devlin, Deeds*, 1911 ed. § 643a; *Pingrey, Real Prop.* § 827; *Tiffany, Real Prop.* p. 1314; *Summers v. Darne*, 31 Gratt. 791; *Demeter v. Wilcox*, 115 Mo. 634, 37 Am. St. Rep. 422, 22 S. W. 613; *Kaiser v. Lembeck*, 55 Iowa, 244, 7 N. W. 519.

The rule that the deed and mortgage are parts of one and the same transaction applies equally in favor of a third person

who advances the purchase money, and at the time of the conveyance takes a mortgage on the land for his indemnity.

Cowardin v. Anderson, 78 Va. 88; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47; *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266; *Laidley v. Aikin*, 80 Iowa, 112, 20 Am. St. Rep. 408, 45 N. W. 384; *Cake's Appeal*, 23 Pa. 186, 62 Am. Dec. 328.

Holt, J., delivered the opinion of the court:

In this action, brought to determine the adverse claims to 120 acres of land in Otter Trail county, the three defendants, John W. Thorp, James A. Brown, and E. R. Keplinger, answered, each claiming a mortgage lien superior to plaintiff's estate

—as to dower and homestead rights.

A mortgage to a third person executed by the purchaser contemporaneously with a deed of the mortgaged land to the latter is a purchase money mortgage, and as such is not subject to the dower right of the wife of the mortgagor. *Clark v. Munroe*, 14 Mass. 351. Neither is it subject to any homestead rights of the purchaser. *Foster Lumber Co. v. Harlan County Bank*, supra.

A mortgage executed to a third person, to secure money then advanced on the purchase price, where executed contemporaneously with a deed to the mortgagor of the mortgaged premises, is a purchase money mortgage, and hence the signature of the wife of the mortgagor is not necessary to give it validity, and it is not subject to the homestead rights of the mortgagor or his wife. *Jones v. Parker*, 51 Wis. 218, 8 N. W. 124.

Where land is purchased with the money of another, actually paid to the vendor by the lender, none of it passing through the hands of the purchaser, a mortgage contemporaneously executed to secure the money thus advanced is a purchase money mortgage as against any homestead rights. *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254.

So where, at the instance of a purchaser of land, money borrowed of a third person is paid by the lender directly to the vendor, to apply on the purchase price, the lien of the lender takes precedence over any homestead rights of the purchaser, although the former has no mortgage on the land to secure the money he has advanced, the purchaser having violated his agreement to secure the loan by a mortgage on the land. *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571.

It has, however, been held that a statute declaring that a homestead right shall not be claimed against a debt due for the purchase money of land has reference only to money due from the purchaser to the vendor, and not to money advanced the purchaser to pay for the land. *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537.
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—miscellaneous.

As between the lien of the vendor for the purchase money, and a mortgage to a third person to secure a loan to the mortgagor of money paid on the purchase price, the mortgage has priority. *Neff v. Crumbaker*, 40 Ohio St. 85.

A person advancing money to pay off a purchase money note, and taking a deed to the land as security, is entitled to priority over general creditors in sharing in the proceeds of the sale of the land. *Hill v. Cole*, 84 Ga. 245, 10 S. E. 739.

A subsequent lien holder who advances money to pay the balance of the purchase price due to the vendor, in order to protect his lien as against other lien holders, has the right of priority for the amount thus advanced. *Steinkemeyer v. Gillespie*, 82 Ill. 253.

A mortgage to a third person to secure money advanced by the latter to apply on the purchase price, where executed substantially at the time of the execution of a deed of the property to the mortgagor, is a purchase money mortgage, and does not require, for its validity, the signature of the husband of the mortgagor. *Wheadon v. Mead*, 72 Minn. 372, 75 N. W. 598. And as to such a mortgage, when a husband is the purchaser, the signature of his wife is not necessary to its validity. *Jones v. Parker*, 51 Wis. 218, 8 N. W. 124.

Where mortgage is subsequent to deed.

A mortgage executed to a third person subsequently to a conveyance of the legal title to the property to the mortgagor is nevertheless a purchase money mortgage, where the two conveyances are in fact a part of the same transaction, or where the mortgage is executed in accordance with an agreement entered into at the time the mortgagor acquired the legal title.

In *Stewart v. Smith*, 36 Minn. 82, 1 Am. St. Rep. 651, 30 N. W. 430, in holding it to be unnecessary that a mortgage advanced for purchase money should be executed contemporaneously with the deed conveying the mortgaged property to the mortgagor, the

in the premises. The trial resulted in findings that plaintiff was the owner, subject to the liens the defendants asserted. From the judgment entered upon these findings, this appeal is taken.

On December 18, 1902, the defendant Keplinger was the owner of the land, and on that day gave defendant Austin C. Knox a contract agreeing to convey for \$3,200. Knox went into possession and made certain payments, but not as agreed, and prior to December, 1907, he removed from the state. On April 21, 1908, \$2,116.40 was due and unpaid on the contract.

court reasoned: "The rule, as generally stated in the books, is that, to give a purchase money mortgage this precedence, it must have been executed simultaneously, or at the same time, with the deed of purchase. Some ground for a narrow and literal construction of this language is furnished by the fact that the reason usually assigned for the doctrine is the technical one of the mere transitory seisin of the mortgagor, rather than the superior equity which the mortgagee has to be paid the purchase money of the land before it shall be subjected to other claims against the purchaser. But it is evident, both upon principle and authority that what is meant by this statement of the rule is not that the two acts—the execution of the deed of purchase and the execution of the mortgage—should be literally simultaneous. This would be almost an impossibility. Some lapse of time must necessarily intervene between the two acts. An examination of the cases will show that the real test is not whether the deed and mortgage were in fact executed at the same instant, or even on the same day, but whether they were parts of one continuous transaction, and so intended to be, so that the two instruments should be given contemporaneous operation in order to promote the intent of the parties."

A mortgage is a purchase money mortgage, although not executed contemporaneously with a deed of the mortgaged property to the mortgagor, where the mortgage is subsequently executed in pursuance of an agreement between the parties at the time the execution of the deed, for the advancement of money on the purchase price and the execution of a mortgage to secure the same. *MARIN v. KNOX*. It is none the less a purchase money mortgage or deed of trust, although executed to a third person sometime subsequently to a conveyance of the mortgaged property to the mortgagor, where in the conveyance a deed of trust is contracted for. *Wheatley v. Calhoun*, 12 Leigh, 264, 37 Am. Dec. 654.

So, a mortgage given to secure money to be applied on the purchase price of land, although given after the execution of a deed of the property mortgaged, the mortgagee paying the money to a third person with whom the deed had been deposited in escrow until the payment of the purchase price, and 40 L.R.A. (N.S.)

Keplinger, at this time residing on the Pacific coast, was in need of the money, and urged Knox to close up the deal. Finally, through agents and friends, an agreement was made whereby Knox, upon receiving the deed to the land, was to give a first mortgage thereon to raise \$1,500 to pay Keplinger upon the amount due for the purchase price, and give a second mortgage for \$616.40 to Keplinger, to secure the balance thereof. The defendant Thorp, through his agent, defendant Brown, agreed to take the first mortgage for \$1,500, due in ten years, with 7½ per cent interest;

securing the deed and delivering it to the mortgagor, is nevertheless a purchase money mortgage, and takes precedence over liens for material, although the material was on the property at the time the mortgage was executed. *Birmingham Bldg. & L. Asso. v. Boggs*, 116 Ala. 587, 67 Am. St. Rep. 147, 22 So. 852.

A mortgage given sometime after the execution of a deed conveying the land to the mortgagor is a purchase money mortgage, where executed to secure the payment of a note given for a portion of the purchase price of the land at the time of the original transaction. *Reynolds v. Morse*, 52 Iowa, 155, 2 N. W. 1070.

But even though a mortgage contains a recital that it is given to secure the advancement by the mortgagee of the balance due on the purchase price for the mortgaged property, it does not take priority over a previously executed mortgage on the same property by the mortgagor, although the latter mortgage was given to secure an ordinary debt. *Houston v. Houston*, 67 Ind. 276.

The mere fact that the proceeds of a mortgage were used to pay off an existing purchase money mortgage, gives to the mortgagee no right of priority on the theory that his mortgage is also a purchase money mortgage. *Gashe v. Ohio Lumber Co.* 5 Ohio S. & C. P. Dec. 130.

And mechanics' liens for material furnished and work performed upon property prior to the execution of a mortgage thereon to secure money loaned to pay upon the purchase price take priority over the mortgage. *Mutual Aid Bldg. & L. Co. v. Gashe*, 18 Ohio C. C. 681, 6 Ohio C. D. 779.

A person loaning money to be used in paying for land theretofore purchased is not a surety for the purchaser, or under any obligation to pay the debt created in purchasing the land, and hence is not entitled to priority over a judgment lien against the purchaser existing prior to the date of the mortgage, there being no assignment of the deed to the mortgagee, and no circumstances connected with the transaction manifesting any intention to keep the lien of the vendor alive for his protection, but the agreement being merely that the mortgagee should rely upon the mortgage as his security, the transaction amounting therefore simply to a loan of money to the mortgagor upon an agreed

but, since Brown was to receive from Thorp for the services rendered all of the interest above 6 per cent, the \$1,500 mortgage was made to draw only 6 per cent interest annually, and a separate mortgage made to Brown to secure the $1\frac{1}{2}$ per cent interest. Also a mortgage for \$616.40 was made to Keplinger. The deed from Keplinger to Knox was dated January 13, 1908. The mortgages to Thorp and Brown were dated April 11, 1908, and that to Keplinger dated April 21, 1908. The Thorp mortgage was filed for record April 23, 1908, the Brown mortgage May 1, 1908, at 4 P. M., the deed

to Knox May 1, 1908, at 4:40 P. M., and the Keplinger mortgage May 7, 1908. The testimony shows that Mr. Baker, Keplinger's agent, did not deliver the deed until he received the mortgage from Knox for the balance of the purchase price. Plaintiff obtained title to the property upon an execution sale under a judgment rendered and docketed in the district court of said county, in his favor and against the defendant Austin C. Knox, May 24, 1907, for \$210.68.

Ever since the decision of *Banning v. Edes*, 6 Minn. 402, Gil. 270, it has been the law in this state that a purchase mon-

security. *Cohn v. Hoffman*, 50 Ark. 108, 6 S. W. 511.

So, the fact that a purchase money loan was paid out of the proceeds of a mortgage on the property purchased does not give to the mortgage a priority of lien over prior mechanics' liens. *Thomas v. Hoge*, 58 Kan. 166, 48 Pac. 844.

Where a deed to land was executed one day prior to a trustee deed given by the grantee to secure a third person for money loaned to pay a portion of the purchase price, and the two are separate and distinct acts, and there is no testimony from which it can be presumed that the vendor, the purchaser, and the holder of the trust deed intended to have the two transactions bear any relation to each other, the deed of trust will not be regarded as a purchase money mortgage, as against a person in possession of a portion of the land at the time of the execution of the mortgage, and who was a bona fide purchaser from the mortgagor of such portion of the land. *Small v. Stagg*, 95 Ill. 39.

A mortgage executed sometime after the mortgagor acquired title to the property mortgaged, although executed to secure the payment of money loaned to pay the balance of the purchase money, is not a purchase money mortgage, and as such entitled to priority over a judgment lien against the mortgagor, although the mortgagee actually paid the money directly to the vendor. *Gilman v. Dingeman*, 49 Iowa, 308.

A mortgage executed three days after the mortgagor acquired the property is not a purchase money mortgage, within the terms of a statute giving such mortgages a priority, although the proceeds were actually used to pay for the land mortgaged, the mortgage itself containing no recital of that fact; and hence judgments existing against the purchaser at the time he obtained the title to the property take priority over the mortgage. *Heusler v. Nickum*, 38 Md. 270.

As between mortgage to vendor and simultaneous or prior mortgage to third person.

As between the vendor who takes a mortgage for part of the purchase money executed contemporaneously with the deed of the property, and a person advancing to the purchaser money accepted on the purchase price, and taking a mortgage on the land as 40 L.R.A. (N.S.)

security therefor, the former has priority, although the latter mortgage was executed and registered first. *McMillan v. Munro*, 25 Ont. App. Rep. 288; *Truesdale v. Brennan*, 153 Mo. 600, 55 S. W. 147; *Turk v. Funk*, 68 Mo. 18, 30 Am. Rep. 771; *Brasted v. Sutton*, 29 N. J. Eq. 513; *Protection Bldg. & L. Asso. v. Knowles*, 54 N. J. Eq. 519, 34 Atl. 1083; *Protection Bldg. & L. Asso. v. Chickering*, 55 N. J. Eq. 822, 41 Atl. 1115; *Boies v. Benham*, 127 N. Y. 620, 14 L.R.A. 55, 28 N. E. 657; *Frazier v. Center*, 1 M'Cord, Eq. 270.

A purchase money mortgage executed to a third person prior to the actual acquirement by the mortgagor of a legal title to the land, although at the time of the mortgage he was in possession thereof, does not take priority over a subsequent deed of the property from the mortgagor to a third person having no notice of the mortgage. *Donovan v. Twist*, 105 App. Div. 171, 93 N. Y. Supp. 990.

Where a purchaser of land borrowed the amount of a cash payment from a third person, giving the latter a mortgage on the land to secure the money advanced, which was executed prior to the execution to the purchaser of a deed to the land, the mortgage does not take priority over a mortgage executed to the vendor contemporaneously with the execution of the deed to secure the balance of the purchase money, although the latter mortgage was recorded subsequently to the former. *Brower v. Witmeyer*, 121 Ind. 83, 22 N. E. 975.

But it has been held that, although a person may have had a vendor's lien upon the land, which he surrendered when taking a mortgage thereon, nevertheless as to another mortgage upon the land of the same date he has no advantage from the fact that his mortgage was given to secure the purchase money. *Koevenig v. Schmitz*, 71 Iowa, 175, 32 N. W. 320.

Where by agreement between the vendor, the vendee, and a third person, the latter advances to the vendee money to be applied on the purchase price, it being agreed that his mortgage is to have priority over a mortgage thereafter executed to the vendor for the balance of the purchase money, the mortgage of the latter will be subject to the first mortgage, according to the terms of the agreement. *Hopler v. Cutler*, — N. J. Eq. —, 34 Atl. 746. A. G. S.

ey mortgage has priority over a previously docketed judgment against the mortgagor. Hence plaintiff's ownership must necessarily be subject to Keplinger's mortgage for \$616.40, unless the latter lost his right by permitting the other two mortgages, if they be not also purchase money mortgages, to obtain priority over his. *Reilly v. Williams*, 47 Minn. 590, 50 N. W. 826. The defendants Thorp and Brown insist that their mortgages are purchase money mortgages. If this be true, the judgment is right. It is also the settled law in this state that a person other than the vendor may obtain a purchase money mortgage, so called, thereby acquiring the same equities as would the vendor, had he taken the mortgage. *Jones v. Tainter*, 15 Minn. 512, Gil. 423; *Stewart v. Smith*, 36 Minn. 82, 1 Am. St. Rep. 651, 30 N. W. 430. See also *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47; *Cowardin v. Anderson*, 78 Va. 88; *Kaiser v. Lembeck*, 55 Iowa, 244, 7 N. W. 519. Therefore the only question here is: Does the evidence sustain the court's finding that these mortgages to Thorp and Brown were such that they may be considered in a legal sense purchase money mortgages? The evidence is clear that every dollar obtained by means of these mortgages, namely, \$1,500, was paid to Keplinger upon the purchase price, and that the deed to Knox was not delivered until this money was turned over. The court had also ample warrant for finding that it was agreed between all the parties concerned that the delivery of the deed was to be part of the transaction of executing all three mortgages as purchase money mortgages, to take precedence among themselves as therein agreed. The only doubt that might be entertained as to the correctness of the disposition of the case by the lower court arises from the Brown mortgage. But this vanishes when the situation and agreement of the parties are considered. The loan agreed to be made by Thorp through Brown was for \$1,500, payable ten years from date, with $7\frac{1}{2}$ per cent interest per annum. Thorp resided in New York, his agent in Minnesota. Between them there was an understanding that Brown should receive for his services part of the agreed interest as it was paid in. To carry out this agreement, the two mortgages were made; that one of Mr. Brown being very brief, conditioned to be void if \$22.50 was paid on April 11th annually for ten years, this being the same date as the 6 per cent interest stipulated in the Thorp mortgage became due. In reality, the two constitute but one mortgage, securing the \$1,500 borrowed and used to pay for the land, and the agreed 40 L.R.A. (N.S.)

interest thereon, namely, $7\frac{1}{2}$ per cent per annum.

Plaintiff also claims that, since the deed and the mortgages were not executed simultaneously, the mortgages may not be regarded as purchase money mortgages. It is true that the Thorp mortgage was recorded before the Keplinger mortgage was acknowledged, and hence must have been delivered before. But we must consider the situation of the parties and their agents. Each one of the four parties to the transaction resided in a state where none of the others were. Their agents were not in the same town. Under these circumstances, a few days' difference in the delivery of the instruments that completed the one transaction is not significant. *Stewart v. Smith*, 36 Minn. 82, 1 Am. St. Rep. 651, 30 N. W. 430; *Demeter v. Wilcox*, 115 Mo. 634, 37 Am. St. Rep. 422, 22 S. W. 613.

Plaintiff earnestly contends that, because the contract for purchase of the land was made in 1902, there could be no agreement to take back a purchase money mortgage in 1908; the written contract containing no provision for a mortgage. We fail to see the force of this position. In *Laidley v. Aikin*, 80 Iowa, 112, 20 Am. St. Rep. 408, 45 N. W. 384, the contract to convey had been given three years before the purchase money mortgage was made. Knox had failed to make the payments stipulated in the contract, and Keplinger, by giving the thirty-day notice required, was in a position to terminate all rights under the contract. In this situation, had Keplinger given a deed upon receiving back a mortgage from Knox for the amount due and unpaid, could it for a moment be claimed that the mortgage was not entitled to be considered as a purchase money mortgage? When plaintiff obtained his judgment, it did not become a lien on the unpaid amount of the purchase price, and he should not be heard to object to whatever agreement the parties mutually agreed upon to secure the same, as long as the equity of Knox in the land was not diminished.

We conclude, from the examination of the testimony and admitted facts, that the court was fully warranted in finding that, at the time the mortgages were delivered, \$2,116.40 was due Keplinger upon the purchase price of the land; that the execution and delivery of the deed by Keplinger to Knox, and the mortgages from the latter to Thorp, Brown, and Keplinger, together with the payment to Keplinger of the proceeds of the \$1,500 loan upon the unpaid purchase price of the land, constituted but one transaction; that the intent and agree-

ment of all said parties was that the title to the land should vest in Knox, subject to the purchase money mortgage liens of said three mortgages; and hence that said three mortgages in fact do represent and secure the payment of the purchase price of the land, and no other amount whatsoever.

The authorities relied on by appellant (*Nicholson v. Aney*, 127 Iowa, 278, 103 N. W. 201; *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266; *Small v. Stagg*, 95 Ill. 39) are not applicable, because either it was shown that the money was a mere loan, with no agreement between the vendor, vendee, and mortgagor that the mortgage should be a purchase money mortgage, or else no agreement to so consider the mortgage between these interested parties was proven. The cases of *Stansell v. Roberts*, 13 Ohio, 148, 42 Am. Dec. 193, and *Heuissler v. Nickum*, 38 Md. 278, were decided upon the effect given to the recording statutes of those states.

Judgment affirmed.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA, Appt.,
v.
NORMAN WILLIAMS.

(158 N. C. 610, 73 S. E. 1000.)

License — nonresident merchant — agent — uniformity.

A municipal corporation cannot be authorized to exact a license tax from agents seeking orders for merchants located in oth-

Note. — Discrimination against nonresidents, by statute or municipal ordinance imposing license or occupation tax.

The scope of this note is exclusive of the question as to when a statute or ordinance which discriminates against nonresidents amounts to an unlawful regulation of interstate commerce. The aspect of this question which is most commonly presented has already been treated in a note to *State v. Bayer*, 19 L.R.A. (N.S.) 297, entitled "License or occupation tax on hawkers and peddlers, and persons engaged in soliciting orders by sample or otherwise, as a violation of the commerce clause," and its continuation in 28 L.R.A. (N.S.) 265.

Nor does its scope require the inclusion of cases involving statutes or ordinances relating to sales and discriminating against property because of its extraterritorial origin, such as *Vines v. State*, 67 Ala. 73; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Weaver v. State*, 89 Ga. 639, 15 S. E. 840; *Atlanta v. Jacobs*, 125 Ga. 523, 54 S. E. 40 L.R.A. (N.S.)

er towns and states, which is not imposed upon the agents of local merchants, under a Constitution which authorizes the taxing of trades, but which has been held to require them to be taxed uniformly.

(March 6, 1912.)

APPEAL by the State from a judgment of the Superior Court for Carteret County which reversed a judgment of the Mayor's Court of Morehead City convicting defendant of violating a municipal ordinance forbidding the solicitation of orders without a license. Affirmed.

The facts are stated in the opinion.

Messrs. T. N. Bickett, Attorney General, and T. H. Calvert, Assistant Attorney General, for the State.

No counsel for defendant.

Walker, J., delivered the opinion of the court:

The defendant was convicted in the mayor's court of Morehead City for the violation of an ordinance of the town which required "every person, firm, or corporation in the state, soliciting or taking orders for goods at retail, to be delivered in the town by nonresident merchants, firms, or corporations resident in the state, to pay a tax of \$10 per day or \$30 per year." Defendant appealed to the superior court, in which a special verdict was returned by the jury finding that the defendant represented one A. A. Joseph, a merchant tailor or clothier of Goldsboro, North Carolina, and solicited and received orders in said town of Morehead City for tailor-made clothes, to be delivered to customers there, without having paid the tax imposed by

534; *State v. Furbush*, 72 Me. 493; and *Sipe v. Murphy*, 49 Ohio St. 536, 17 L.R.A. 184, 31 N. E. 884.

Neither does it include cases in which the enactment in question was attacked as discriminating in favor of nonresidents, of which *Ft. Smith v. Scruggs*, 70 Ark. 549, 58 L.R.A. 921, 91 Am. St. Rep. 100, 69 S. W. 679; *People v. Schreiber*, 250 Ill. 345, 95 N. E. 189; and *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973, are instances; nor cases in which the alleged discrimination was between different classes of citizens; but it is intended to present only those decisions which involve the question of the right to discriminate against nonresidents, or the question whether a particular statute or ordinance does so discriminate.

It is desired to make special mention of certain cases as deemed not to fall within the scope of this note, which turn rather on the want of power on the part of the municipality to tax an occupation not wholly carried on within its limits, than on a want of power to enact a discriminatory ordinance. These are *Com. v. Stedder*, 2 Cush.

the ordinance. Upon this finding, the court held the ordinance to be invalid, directed a verdict to be entered accordingly, and discharged defendant, and the state appealed. The Constitution (article 5, § 3) authorizes the legislature to tax trades, professions, franchises, and incomes, provided that no income shall be taxed when the property from which it is derived is taxed. In accordance with this article, the legislature, by Private Laws of 1905, chap. 254, § 12, provided that the commissioners of Morehead City should have the power to levy and collect a fair and reasonable special or license tax, and, among others, on the following subjects: "Itinerant merchants, peddlers, and transient dealers, drummers or commercial travelers, and

every agency for the sale of merchandise not manufactured in the town, and all other subjects taxed by the state." The ordinance in question was enacted under authority supposed to have been given in the passage we have taken from the amended charter of the town, and we are to say whether it is valid or not. The Constitution (article 5, § 3) provides that "laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money;" and there is conferred in the same section the power to tax trades, professions, and so forth, as above set out. This court has held that the rule of uniformity applies to

562, 48 Am. Dec. 679, in which it was held that a city could not require a license, even without a money payment, as a condition of the running of an omnibus into the city by an inhabitant of another town; *Kiel v. Chicago*, 176 Ill. 137, 52 N. E. 29, in which an ordinance requiring a person carrying on the business of a brewer or distiller within the city to obtain a license, and providing that the selling or delivering within the city of any product of a brewery or distillery by or on behalf of the person, firm, or corporation conducting or operating such brewery or distillery, should be held to be a carrying on the business of a brewer or of a distiller within the meaning of the ordinance, was held to be in excess of the power conferred upon the city to tax, license, and regulate brewers; and *St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440, in which it was held to be not within the powers of the city to impose a license tax upon wagons hauling into and out of the city.

The inquiry to which this note is addressed is of a twofold character, its first branch being whether a state or municipality may discriminate against nonresidents in its enactments; the second, whether or not the particular enactments in question are discriminatory.

Again, the question constituting the first branch of inquiry, as to whether nonresidents may be discriminated against, has two aspects, its first being whether discriminatory legislation is a proper exercise of the power to legislate, and its second being whether such legislation contravenes constitutional restrictions. The former aspect is more apparent where municipal ordinances are involved; but where statutes are in question, it is overshadowed by the constitutional question.

In *Dillon, Municipal Corporations*, 5th ed. § 593, it is said: "As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination, or unjust or oppressive inter-

ference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation."

"It is a rule, therefore," says the court in *Simrall v. Covington*, 90 Ky. 444, 9 L.R.A. 556, 29 Am. St. Rep. 398, 14 S. W. 369, "that where the by-law of a municipality enacted under a general grant of power or by virtue of its incidental authority is unfair and partial in its operation, it will be declared void. It will not be upheld if it be unreasonable and oppressive. It must not contravene common right or the general law of the state, or make unwarranted or special discriminations."

So, also, in *Jonas v. Gilbert*, 5 Can. S. C. 356, it is held that a by-law which discriminates between resident and nonresident traders, merchants, etc., by imposing upon nonresidents a license tax of double the amount required from residents, exceeds the powers vested in a municipality to license occupations and to fix the fees therefor, since the general power to tax by means of licenses involves the principle of equality and uniformity; and the power to discriminate must be expressly authorized by law, and cannot be inferred from general words.

An ordinance imposing a greater license fee on nonresidents than is required of residents is void as having a direct tendency to create monopoly. *State, Muhlenbrinck, Prosecutor, v. Long Branch*, 42 N. J. L. 364, 36 Am. Rep. 518; *State, Morgan, Prosecutor, v. Orange*, 50 N. J. L. 389, 13 Atl. 240.

In *State, Muhlenbrinck, Prosecutor, v. Long Branch*, supra, the court said: "The corporation is not endowed with power to pass ordinances in restraint of trade. . . . The control it may exercise over business and trade is such only as belongs to the necessities and demands of local governments, such as have relation to the general prosperity of the citizen, the public health, order, and morals of the community. It cannot, outside of these considerations, enter into the arena of business competition, to advance a favored class and retard others.

the latter provision as much as to the former, although there are no express words to that effect in the section; it being considered that a tax not uniform, as properly understood, though levied on trades, professions, or privileges, would be so inconsistent with natural justice and with the intent so apparent in the section we have quoted, that its collection would be restrained as unconstitutional. *Gatlin v. Tarboro*, 78 N. C. 119; *Worth v. Wilmington & W. R. Co.* 89 N. C. 291, 45 Am. Rep. 679. And this may be taken as the settled construction of the section. It may also be considered as settled that in laying the tax the different subjects may be reasonably, though not arbitrarily, classified, and a different rule of taxation prescribed

for each class, provided the rule is uniform in its application to the class for which it was made. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Worth v. Wilmington & W. R. Co.* supra. As stated in those cases, the result must be to prevent discrimination among the individuals or subjects of any one class, based upon special privileges, immunities, or exemptions allowed to one, and not to the others. If an ordinance, therefore, is not founded upon this fair and just basis, it will be deemed unreasonable and violative of the fundamental principle of taxation. Constitutional and legislative authority conferred upon a municipality to tax does not enable it to create a privilege for the purpose of taxing it, or to discriminate between per-

All citizens in pursuit of legitimate, honest occupations stand equal before the law, and a police power intrusted to a corporation is unreasonably exercised in making invidious distinctions between citizens endowed with equal rights. It is incompetent for this board of commissioners, intrusted as it is, with the rule in local municipal affairs, to erect walls of exclusion against citizens without its limits, or obstruct free commerce and trade between them and its own inhabitants."

Another reason suggested in *Sayre v. Phillips*, 148 Pa. 482, 16 L.R.A. 49, 33 Am. St. Rep. 842, 24 Atl. 76, is that as the enactment of legislation discriminating against citizens of other states is beyond the power of a state, and as the power of a municipality to enact by-laws and ordinances is derived from the state, the state cannot confer upon a municipality powers which it does not itself possess, and cannot give its creature immunity from the settled limitations that bind its own actions.

It is thoroughly settled, in view of the provision of art. 4, § 2, of the Federal Constitution, that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, and the provision of the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws,—that neither a state nor its municipalities, who derive their power from the state, may discriminate against nonresidents. This rule, however, is subject to certain exceptions which exist: (a) Where a foreign corporation is the object of discrimination; (b) where the statute or ordinance in question is an exercise of the police power, and the discrimination therein between residents and nonresidents bears some reasonable relation to the end sought to be attained, as in cases of statutes relating to the granting of licenses to sell liquor or to practise medicine; (c) where the statute is an exercise of the taxing power, in which case it may be proper to make a special exemption of persons otherwise taxed; and (d) where the regulation in question is of the right to take fish or game.

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Aliens.

The decisions as to the power of a state under the 14th Amendment to deny to aliens the right to engage in a lawful occupation are collected in a note to *Com. v. Hana*, 11 L.R.A. (N.S.) 799. The only additional case bearing upon the question which appears to have been decided since the compilation of such note is *State v. Kofines*, 33 R. I. 211, 80 Atl. 432, set forth infra, under heading "Discrimination in fish and game laws."

Foreign corporations.

Ever since the decision of *Bank of Augusta v. Earle*, 13 Pet. 586, 10 L. ed. 306, and *Paul v. Virginia*, infra, it has been a settled principle of constitutional law that while, where contracts or rights of property are to be enforced by or against corporations, the courts of the United States will, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the state under which it is created, and to this extent will treat a corporation as a citizen within the clause of the Constitution extending judicial power of the United States to controversies between citizens of the different states, a corporation is not a citizen within the meaning of the provision of art. 4, § 2, which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

It is equally well settled that a foreign corporation is not entitled to claim the protection of the provision of the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Thus, in *People v. Fire Asso. of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380, the court said: "The constitutional difference between the rights of nonresident individuals and foreign corporations is fundamental and apparent. The citizen of another state has a constitutional right to come within our jurisdiction. The charter of the nation has secured him that right, and we cannot exclude him, nor clog his right with con-

sons exercising the same privilege, by imposing a tax upon one of a class at a higher rate in a different mode or upon other principles, than one applied to the exercise of the same privilege by others of the same class. The power to tax extends no further than is permitted by its charter, and any attempt to impose burdens upon some of a class from which others are exempted would be void, as being beyond the granted powers of the municipality, and as an exercise of partial legislation. *Nashville v. Althrop*, 5 Coldw. 554; *Cooley, Const. Lim.* 390. The defendant can be held liable to taxation as a merchant, under the general laws of the state or of the municipality, in the same manner and to the same extent as all other merchants of the same class

exercising these privileges within the corporation, but not otherwise, or farther than they. When the by-law of a municipal corporation enacted under a general grant of power, or by virtue of its incidental authority, is partial, unreasonable or oppressive, it will be declared void, as an unwarranted exercise of its taxing power. *Simrall v. Covington*, 90 Ky. 444, 9 L.R.A. 556, 29 Am. St. Rep. 398, 14 S. W. 369.

"Municipal by-laws must also be reasonable. Whenever they appear not to be so, the court must, as a matter of law, declare them void. . . . So a by-law, to be reasonable, should be in harmony with the general principles of the common law." *Cooley Const. Lim.* 200, 202. "As it would be unreasonable and unjust to make, under

ditions, unless in exceptional cases under the police power. But foreign corporations, artificial beings, the product of a law not our own, have no constitutional right to pass their own borders and come into ours. The Federal Constitution has neither granted nor secured any such right. We may exclude absolutely, and in that power is involved the right to admit upon such conditions as we please. Until they are within our jurisdiction the final clause of article [amendment] 14, by its own terms, does not apply. While they stand at the door bargaining for the right to come within, they may decline to come, but cannot question our conditions if they do."

The fact that a foreign corporation has for a long time done business and acquired valuable property within the state does not render the enforcement against it of a statute imposing conditions upon the right of a foreign corporation to do business within the state a violation of the 14th Amendment. *Western U. Teleg. Co. v. State*, — Tex. Civ. App. —, 121 S. W. 194.

While if a foreign corporation is admitted into a state and lawfully engages in business therein, its property and rights within such state are entitled to the equal protection of the law, the same as those of a like domestic corporation, it does not thereby so come within the protection of the 14th Amendment that a discriminatory license fee may not be imposed as a condition upon its right to continue in business within the state. *Manchester F. Ins. Co. v. Herriott*, 91 Fed. 711.

An exception to the general rule that a state may not discriminate against nonresidents therefore exists in the case of foreign corporations, unless the foreign corporation has acquired some contract right to immunity from discrimination, or the powers of the state to enact discriminatory legislation are otherwise limited by the provisions of its own Constitution.

The courts have accordingly affirmed the constitutionality of

—a law requiring insurance companies incorporated under the laws of other states to file security before they can obtain a license (40 L.R.A. (N.S.)

cense to issue policies in the state. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357;

—a statute requiring agents of foreign insurance companies to take out a license before doing business in the state, and to pay certain fees and percentages. *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972;

—a statute requiring agents of foreign insurance companies to pay a percentage of the amount of premiums received by them, into the state treasury. *People v. Thurber*, 13 Ill. 554;

—a municipal ordinance imposing a license tax on all foreign insurance companies doing business in the city, based upon the amount of premiums received by them. *Walker v. Springfield*, 94 Ill. 364;

—a statute imposing a tax upon foreign insurance companies as a condition of their doing business within the state, which discriminates in favor of domestic insurance companies by imposing a higher tax upon foreign companies. *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665;

—a statute imposing upon insurance companies organized in foreign countries, as a condition of their right to continue in business in the state, a license tax greater than upon domestic companies or those of sister states. *Manchester F. Ins. Co. v. Herriott*, 91 Fed. 711;

—a statute requiring foreign insurance companies only to take out licenses for their agents as a condition to doing business in the state. *Com. v. Gregory*, 121 Ky. 256, 89 S. W. 168.

—a statute providing, as one of the conditions upon which foreign insurance companies are admitted to do business, that they pay certain taxes charged against them under an unconstitutional statute. *New York L. Ins. Co. v. McMaster*, 84 S. C. 495, 66 S. E. 877;

—a statute imposing a license tax on certain classes of corporations doing business within the state, whose domiciles are in other states or foreign countries. *State v. Hammond Packing Co.* 110 La. 180, 98 Am. St. Rep. 459, 34 So. 368;

—a statute providing that no foreign cor-

the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation." 1 Dill. Mun. Corp. § 322. As said in *Simrall v. Covington*, supra: The above "views are enforced in the cases of *Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441; *Robinson v. Franklin*, 1 Humph. 156, 34 Am. Dec. 625; *Anderson v. Wellington*, 40 Kan. 173, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719, and many other cases that

might be cited. All recognize the rule, which is fundamental, that the by-laws of a municipality, whether they purport to regulate callings or otherwise, must, as indeed must every law, preserve equality of right. Those exercising the same privilege must be treated alike. The door must be closed to none by discrimination, if we would avoid monopoly and wrong. This principle is as necessary to sound legislation as the circulation of the blood is to the human system, or the flow of tide water to the ocean. It has produced a line of decisions which are universally regarded as sound by the courts of the country. Thus, in *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642, an ordinance of a city, passed under a general charter power, exacting a

poration, except a foreign insurance company, which does not invest and use its capital in the state, shall have an office in the state, unless it shall have first obtained an annual license so to do. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737:

—a statute imposing upon a foreign corporation a special franchise tax in addition to that levied upon corporations generally. *Southern R. Co. v. Greene*, 160 Ala. 396, 4 So. 404.

A statute providing that when, by the laws of any other state, any taxes are imposed on insurance companies organized or incorporated under the law of the state, and transacting business in such other state, greater than those imposed by the enacting state upon similar companies of such other state, the same tax shall be imposed upon all insurance companies doing business in the state which are organized under the laws of such other state, is not contrary to the 14th Amendment to the Constitution of the United States. *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108, affirming 92 N. Y. 311, 44 Am. Rep. 380.

But a like statute has been held to contravene the provisions of the Kentucky Constitution that no law shall be enacted to take effect upon the approval of any other authority than the general assembly: that taxes shall be levied and collected for public purposes only, and shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and shall be levied and collected by the general laws; that the purposes for which a tax is levied must be distinctly specified, and no tax levied and collected for one purpose shall ever be devoted to another purpose; and that the general assembly may, by general laws only, provide for the payment of license fees on franchises and the various trades, occupations, and professions. *Western & S. L. Ins. Co. v. Com.* 133 Ky. 292, 117 S. W. 376.

A statute imposing upon domestic corporations not having their principal place 40 L.R.A. (N.S.)

of business and chief works within the state, a greater license tax than upon those which do, does not violate the provision of the Federal Constitution prohibiting any state from passing any law impairing an obligation of a contract, or the provision of the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws. *Blue Jacket Consol. Copper Co. v. Scherr*, 50 W. Va. 633, 40 S. E. 514.

A statute imposing a greater license tax upon foreign insurance corporations than is required of domestic insurance corporations does not conflict with the constitutional provision requiring that taxation shall be equal and uniform, since the burden is equal upon all those included in the same class; nor does it conflict with art. 4, § 2, of the Federal Constitution, since citizens of all classes are permitted to pursue the occupation of insuring by incorporating themselves in companies for that business under the laws of the state. *State v. Fossdick*, 21 La. Ann. 434.

But in *American Smelting & Ref. Co. v. Colorado*, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 Ann. Cas. 978, reversing 34 Colo. 240, 82 Pac. 531, it is held that a contract right to do business in the state during the corporate lifetime of domestic corporations, without being subject to any greater liabilities than then were or might be imposed upon domestic corporations, is acquired by a foreign corporation by virtue of its admission into a state with the right to do business therein under the then existing laws of that state, which, *inter alia*, subject a foreign corporation coming into the state to the liabilities, restrictions, and duties which then were or might thereafter be imposed upon domestic corporations of like character; and that such right is unconstitutionally impaired by a statute exacting from such corporation an annual tax or license fee in double the amount of that imposed upon domestic corporations.

An ordinance requiring insurance agents who represent companies not located within a city, and those only, to pay a tax and procure a license before transacting business,

license for selling goods, and fixing one rate for selling goods at the time within the city, and another and much larger for those without, was held invalid, as unjust, partial, and oppressive. In *Nashville v. Althrop*, 5 Coldw. 554, an ordinance discriminating between merchants and other dealers residing within and those without the limits of the city, and prescribing a special rate of taxation for the latter, was declared to be beyond the limit of constitutional legislation. In this state we have no constitutional provision as to taxation *co nomine*, but it is the settled constitutional rule, declared by oft-repeated decisions of this court, that every tax must be certain, universal, and, so far as practicable, equal and uniform. Burdens cannot

constitutionally be imposed upon particular individuals, while others of the same class or locality who have rendered no public service are exempt." The case of *Simrall v. Covington*, supra, is directly in point, as will appear from this extract: "The ordinance now in question not only discriminates between residents of the city of Covington and those residing outside of it, whether within or without the state, but it places a burden upon some within the city, while others of its residents engaged in a like business are exempt. It is therefore unreasonable partial legislation. To be reasonable, a municipal by-law should be equal in its operation. *Tugman v. Chicago*, 78 Ill. 405; *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576. This

cannot be justified by the rule that conditions may be imposed upon a foreign corporation desiring to do business within the state, since it relates directly to, and deals with, the individual representative. *Simrall v. Covington*, 90 Ky. 444, 9 L.R.A. 556, 29 Am. St. Rep. 398, 14 S. W. 369.

Liquor licenses.

Another exception to the general rule that enactments discriminating against nonresidents are invalid exists where the statute or ordinance in question is a police regulation, and the classification dividing residents from nonresidents bears a reasonable relation to the purpose to be subserved. To this exception may be assigned the decisions which uphold the constitutionality of a requirement that the holder of a liquor license must be a resident of the state, which are collected in the note to *DeGrazier v. Stephens*, 16 L.R.A. (N.S.) 1033, since the compilation of which no further decisions have appeared.

A statute providing that every person who shall engage in the business of selling liquor to citizens or residents of the state at wholesale, or soliciting and taking orders from citizens or residents of the state for liquors to be shipped into the state, or furnished or supplied at wholesale to any person within the state not having his, their, or its principal place of business within the state does not discriminate against nonresidents, the tax being upon the business done within the state, and nothing being required of a nonresident that is not required of a resident vendor. *People v. Walling*, 53 Mich. 264, 18 N. W. 807, which is reversed in 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454, upon the ground that the statute in question was an unlawful regulation of interstate commerce.

A statute imposing a tax on the business of manufacturing or selling liquor, which provides that no person paying a manufacturer's tax thereunder shall be liable to pay a wholesale dealer's tax, does not discriminate against nonresidents of the state. *People v. Lyng*, 74 Mich. 579, 42 N. W. 139.
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Licenses to practise medicine.

To the same exception may be referred the decisions as to the right of the state to discriminate between residents and nonresidents with regard to the qualifications which will entitle one to a license to practise medicine.

A statute making it unlawful for any person to practise medicine within the state without first obtaining a license, and providing for the issuance of licenses, (1) to graduates of reputable medical colleges; (2) to persons who have resided and practised medicine in the state continuously for ten years immediately prior to the taking effect of the act; and (3) to persons who have resided and practised medicine in the state continuously for three years immediately prior to the taking effect of the act, and who have prior to that date attended one full course of lectures in some reputable medical college,—is not, in so far as it makes continuous residence in the state either for ten years or for three years one of the necessary qualifications of the applicant for license to practise medicine, in conflict with the provisions of the Federal Constitution that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, since the act is not a grant of privileges or immunities, but an exercise of the police power for a purpose to which the classification therein made bears a direct relation. *State ex rel. Walker v. Green*, 112 Ind. 462, 14 N. E. 352.

A similar statute was sustained in *Ex parte Spinney*, 10 Nev. 323, in which it was said: "Now this law makes no distinction in terms between our own citizens and citizens of other states. It merely prescribes the qualifications that practitioners are required to possess, and admits all to practise who can bring themselves within the rule, whether they are citizens of this state or other states. But it is argued that one of the sorts of qualification recognized is such that of necessity none but citizens of this

one being clearly an infringement of individual right, partial and unreasonable in its character, cannot be sustained."

This doctrine appears to have been adopted by practically all the courts, and is clearly founded in reason and justice. Some courts hold that such an ordinance is invalid because it authorizes the taking of one citizen's property for the benefit of the public, and, worse still, for private use or advantage, without just compensation. *St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440. But a sufficient reason under our Constitution is that the discrimination in favor of the resident of the town, and against the nonresident, violates the rule of uniformity. It has been held that such distinctions between the inhabitants of the

state, based upon no other ground than the place of actual residence, are in restraint of trade, invidious, unjust, and illegal. *State, Muhlenbrinck, Prosecutor, v. Long Branch*, 42 N. J. L. 364, 36 Am. Rep. 518. Ordinances passed in the exercise of the police power, or for the purpose of revenue, and intended to regulate or control the sale of articles in a town or city, or in other matters, must, of course, be reasonable, and it belongs to the courts to determine what are reasonable regulations within the power granted by charter. *Kip v. Paterson*, 26 N. J. L. 298; *State, Morgan, Prosecutor, v. Orange*, 50 N. J. L. 389, 13 Atl. 240. In the case last cited it was held that an ordinance imposing a larger license fee on a nonresident than on a resi-

state can possess it. This is so, but it does not follow, therefore, that the law is unconstitutional; for if the qualification is in itself reasonable, and such as tends to subserve public interests, the legislature had the right to exact it, and the circumstance that citizens of other states cannot possess it may be a misfortune to them, but is no reason why a precaution proper in itself should be dispensed with."

An ordinance requiring the licensing of itinerant physicians, but which nowhere confines itself to traveling physicians who are nonresidents of the city, is not open to objection as discriminating in favor of residents. *Fairfield v. Shallenberger*, 135 Iowa, 615, 113 N. W. 459.

Discrimination in fish and game laws.

The decisions upon the right to discriminate against nonresidents in granting licenses to take fish or game are collected in the note to *Harper v. Galloway*, 26 L.R.A. (N.S.) 794; and see also on the subject, *State v. Leavitt*, 26 L.R.A. (N.S.) 799, as well as the cases following, which have appeared since the compilation of the note referred to.

In *People v. Setunsky*, 161 Mich. 624, 126 N. W. 844, it is held that a state may exclude nonresidents altogether from fishing privileges in its waters, and therefore may require them to pay a larger license fee for their fishing boats than is required from residents of the state.

A statute forbidding the taking of lobsters from the waters of the state without a license, and which provides that the commissioners of fisheries may grant or refuse such licenses "to such citizens of this state as have resided in this state for at least one year next preceding the granting of such license, as they may think proper," is a proper exercise of the police power, and does not violate any constitutional right of aliens or nonresidents. *State v. Koffnes*, 33 R. I. 211, 80 Atl. 432.

A statute prohibiting nonresidents from taking pearl mussels or other shellfish for profit, without license and payment of a prescribed privilege tax, does not contravene 40 L.R.A. (N.S.)

the provisions of art. 4, § 2, or of the 14th Amendment, of the Federal Constitution, since the title of game and fish not reduced to possession or under restraint is in the several states in trust for their inhabitants, and the right to take such game or fish is a property right, and not one of citizenship, and therefore not among the rights, privileges, and immunities secured by the Federal Constitution. *State v. Ashman*, 123 Tenn. 654, 135 S. W. 325.

Merchants.

The exception of "farm products purchased from the producer," from the return required to be made by merchants and other dealers as the basis of a license tax, is not a discrimination against the citizens of other states. *State v. Stevenson*, 109 N. C. 730, 26 Am. St. Rep. 595, 14 S. E. 385.

Such an exception does not render the statute imposing it a discrimination in favor of inhabitants of the state as against nonresidents, upon the theory that, by reason of locality, a merchant naturally will buy a much greater quantity of farm products in his own state than out of it. *Ex parte Brown*, 48 Fed. 435.

A statute requiring a license to be obtained for the sale of goods, if designed to discriminate against nonresident merchants, and against goods sold from other states, in favor of resident merchants and goods held in the state for sale, and so operating, is invalid. *Ex parte Thornton*, 4 Hughes, 220, 12 Fed. 538.

A statute imposing a tax on every nonresident who shall sell goods within the state so discriminates against nonresidents as to violate art. 4, § 2, of the Federal Constitution. *Sinclair v. State*, 69 N. C. 47.

An ordinance imposing a greater tax on the amount of sales made by nonresident merchants than on those made by residents contravenes a constitutional provision that all taxes shall be uniform upon the same class of subjects. *Easton City v. Easton Beef Co.* 5 Pa. Co. Ct. 68.

But in *Com. use of Titusville v. Clark*, 195 Pa. 634, 57 L.R.A. 348, 86 Am. St. Rep. 694,

dent was illegal, as being discriminating, and therefore unreasonable. Other decisions to be examined, and which seem to be directly in point, are *Atlanta v. Jacobs*, 125 Ga. 523, 154 S. E. 534; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Saginaw v. Saginaw Circuit Judge*, 106 Mich. 32, 63 N. W. 985; *Clements v. Casper*, 4 Wyo. 494, 35 Pac. 472; *Pacific Junction v. Dyer*, 64 Iowa, 38, 19 N. W. 862; *Shamokin v. Flannigan*, 156 Pa. 43, 26 Atl. 780; *Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; *Graffty v. Rushville*, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609; *Fecheimer v. Louisville*, 84 Ky. 306, 2 S. W. 65. "The corporation

is not endowed with power to pass ordinances in restraint of trade. *Kip v. Paterson*, supra; *Dunham v. Rochester*, 5 Cow. 462. The control it may exercise over business and trade is such only as belongs to the necessities and demands of local government, such as have relation to the general prosperity of the citizen, the public health, order, and morals of the community. It cannot, outside of these considerations, enter into the arena of business competition to advance a favored class and retard others. All citizens in pursuit of legitimate, honest occupations stand equal before the law, and a police power intrusted to a

46 Atl. 286, it is held that the provision in an ordinance requiring a license tax for revenue purposes from all dealers or vendors of merchandise, that no manufacturer who is a citizen of the municipality shall be considered a dealer or vendor unless he sells goods not of his own manufacture, is a proper classification and a valid exercise of legislative power.

Transient merchants.

A statute conferring upon a city a power to license, tax, and regulate transient merchants cannot be regarded as discriminating in favor of residents. *Mt. Pleasant v. Clutch*, 6 Iowa, 546.

An ordinance for the licensing of transient merchants is not to be regarded as discriminating against nonresidents merely because there may not be any resident merchants who are compelled to pay the license. *Ottumwa v. Zekind*, 95 Iowa, 622, 29 L.R.A. 734, 58 Am. St. Rep. 447, 64 N. W. 646.

But an ordinance requiring transient merchants to obtain a license, and defining transient merchants as "every nonresident person who shall sell, exchange, or dispose of any goods, wares, or merchandise of his own, or of other nonresident owners," conflicts with the provision of the Iowa Constitution that laws of a general nature shall have a uniform operation. *Pacific Junction v. Dyer*, 64 Iowa, 38, 19 N. W. 862.

An ordinance providing that persons who "temporarily reside in" a municipality must obtain a license before they can sell goods in a certain manner is invalid by reason of its discrimination against nonresidents. *Carrollton v. Bazzette*, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837.

An ordinance imposing a license tax on transient persons other than citizens of the municipality, for selling goods, is unconstitutional and void. *McGraw v. Marion*, 98 Ky. 673, 47 L.R.A. 593, 34 S. W. 18.

A statute imposing a license tax upon "all traveling agents from other states offering any species of merchandise for sale or selling the same," but which exacts no license or tax upon the same class of persons who are citizens of the state, violates art. 4, § 2, of the Federal Constitution. *McGuire v. Parker*, 32 La. Ann. 832. In this case 40 L.R.A. (N.S.)

the court said: "When we consider the meaning of these terms, and reflect upon the important object sought to be accomplished by this constitutional provision, so essential not only to unrestricted trade and intercourse between the states, but even to the liberties and highest privileges of the citizens of a common country, we are bound to conclude that a requirement of a state law that discriminates so glaringly against citizens of other states, and in favor of the citizens of its own state, is designed to defeat the objects and purposes which this wise constitutional provision was intended to secure, and therefore violates the spirit of the clause invoked."

An ordinance regulating transient traders, which imposes a license fee upon nonresidents only, is invalid as being in restraint of trade. *Saginaw v. Saginaw Circuit Judge*, 106 Mich. 32, 63 N. W. 985.

An ordinance providing for the licensing and regulation of itinerant merchants and transient vendors, which expressly excludes from its operation actual and bona fide residents of the city, contravenes the provision of art. 4, § 2, and of the 14th Amendment of the Federal Constitution, as well as a provision of the state Constitution that no member of the state shall be deprived of any of the rights or privileges secured to any of the citizens thereof. *State ex rel. Greenwood v. Nolan*, 108 Minn. 170, 122 N. W. 255.

Hawkers, peddlers, and itinerant vendors.

A statute providing that before any person, either as owner, manufacturer, or agent, shall travel through any county and peddle or sell certain enumerated articles, he shall procure a license, does not discriminate against nonresidents of the state or of any county. *Crenshaw v. State*, 95 Ark. 464, 130 S. W. 569.

A village ordinance defining who shall be deemed peddlers under its provisions, and requiring such persons to obtain a license, which by its terms applies to "every person," and which provides that it shall not be construed to apply to "the regular and ordinary trade of merchants or storekeepers occupying established and permanent places of business in said village, nor to the taking of orders and delivery of goods to

corporation is unreasonably exercised in making invidious distinctions between citizens endowed with equal rights. It is incompetent for this board of commissioners, intrusted as it is with the rule in local municipal affairs, to erect walls of exclusion against citizens without its limits, or obstruct free commerce and trade between them and its own inhabitants." State, Muhlenbrinck, Prosecutor, v. Long Branch, supra. It seems to us that the ordinance in question is aimed at nonresidents, and there is room for the reasonable suspicion that it was designed principally for the benefit of residents, in erecting a barrier

against the introduction of foreign trade for their protection. It is therefore open to the just criticism that it is discriminative, in restraint of trade, and not authorized by the terms of the Constitution, which were intended to secure equality in such matters. *Saginaw v. Saginaw Circuit Judge*, 106 Mich. 32, 63 N. W. 985. "Municipalities are not in any sense close corporations. They are not vested with rights for local legislation, in order that they may arrogate to their own inhabitants additional rights and privileges to those enjoyed by other citizens of the state or nation. Neither may rights be denied to its citizens

their customers by established dealers in the regular course of their business," does not discriminate against nonresidents. *Case & M. Co. v. Forest Park*, 152 Ill. App. 188.

A town ordinance making it unlawful for any traveling peddler to ply his vocation within the corporate limits without first procuring a license does not discriminate in favor of citizens of the town, and against those who do not reside in the town. *Martin v. Rosedale*, 130 Ind. 109, 29 N. E. 410.

A statute requiring peddlers to be licensed, and restricting the granting of such license to the county in which the applicant holds his residence, cannot be so applied as to discriminate against citizens of other states. *Bliss's Petition*, 63 N. H. 135.

A statute which, for the purpose of revenue, imposes taxes on occupations, including, *inter alia*, that of peddling, and punishing a failure to take out a license as a misdemeanor, is not rendered obnoxious to the provision of the Federal Constitution that "the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states," by the passage of another statute providing that it shall be lawful for all persons to peddle and sell without a license all things made or manufactured in the state, since it is within the power of the state to exempt from taxation manufactures within its borders. *Seymour v. State*, 51 Ala. 52.

A statute requiring a license to be obtained by peddlers of certain articles in any county, but providing that the act "shall not apply to any resident merchant in said county," is obnoxious to the provision of the 14th Amendment, prohibiting a state from denying to any person within its jurisdiction the full protection of the laws, and is also in conflict with art. 2, § 18, of the Constitution of the state of Arkansas, which provides that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which by the same terms shall not equally belong to all citizens." *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030.

A statute providing for the licensing of itinerant venders, and defining an itinerant vender as any person, either as principal or agent, who engages in a temporary or trans-

sient business in the state, either in one locality, or in traveling about the country, or from place to place, selling manufactured goods, wares, or merchandise, violates the provision of the Federal Constitution that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, since the citizen of another state who has no permanent place of business is inhibited from selling his manufactured articles to consumers in Colorado, except on payment of a license fee, if he seeks and secures such customers in a manner which would make him an itinerant vender as defined by the act, while the citizen and resident of the state with a permanent place of business therein is exempted from its operation; and such statute cannot be justified as an exercise of the police power on the ground that its purpose is to prevent fraud, since the classification therein bears no reasonable or just relation to the object to which it is addressed, but is merely arbitrary. *Smith v. Farr*, 46 Colo. 364, 104 Pac. 401.

In *Leonard v. Reed*, 46 Colo. 307, 133 Am. St. Rep. 77, 104 Pac. 410, the same statute was again held invalid as being nothing more or less than an imposition of a tax upon nonresidents bringing merchandise into the state for the privilege of selling it, the court saying: "Plaintiff in error is required to pay the license fee exacted for the privilege of disposing of his merchandise at a storeroom, because he temporarily occupies it without the intention of engaging in permanent trade at that place. His temporary occupation results from the fact that he is a nonresident, bringing with him from a sister state articles of merchandise which he seeks to dispose of to those purchasing for their own use. A resident merchant permanently engaged in selling the same class of merchandise at a storeroom in Colorado Springs is exempted from the payment of such license. This imposes a burden upon the nonresident coming to the state for the purpose of engaging in commerce, by requiring him to pay for the privilege of selling articles of merchandise brought with or sent to him from the outside, from which the resident permanently engaged in business is exempted."

A power conferred upon a municipality

and still allowed to be exercised by non-residents who may come within the corporate limits. Discrimination against residents is equally odious as discrimination in their favor." *Horr & B. Mun. Police Ord.* § 137.

We conclude, therefore, that the ordinance of Morehead City under which the de-

fendant was charged criminally before the justice is invalid, in that "it spends its whole force on nonresidents, and spares residents entirely." The Superior Court properly directed that a verdict of not guilty be entered upon the findings of the jury. The defendant was entitled to his discharge.

by its charter, to tax itinerant traders, is not properly exercised by an ordinance imposing such a tax upon nonresidents only. *Gould v. Atlanta*, 55 Ga. 678. In this case the court said: "When power is given to municipal corporations to impose taxes, whatever else the grant may mean, it certainly means that the citizens are to be taxed. That is the plainest and most obvious construction in all cases. Other persons may be included, but citizens must be, unless expressly excepted. It is for them, and upon them chiefly, that local legislation is to act. Until there is an ordinance that binds the citizen, there can be none (other than a mere police regulation) that binds the stranger. When the stranger comes into the city he may be watched, but he cannot be taxed if citizens of his class are not taxed, unless there is some special grant of authority enabling the municipality to tax him as a nonresident."

A municipal ordinance imposing a license tax upon nonresident peddlers only is void, because it tends to create monopolies, and makes an unjust and unwarrantable discrimination between resident and nonresident citizens exercising the same calling in a business which before its enactment was free to all. *Braceville v. Doherty*, 30 Ill. App. 645.

A city ordinance requiring peddlers to procure licenses, but exempting from its operation bona fide residents who may sell articles manufactured in the city, is void. *Lucas v. Macomb*, 49 Ill. App. 60.

In *Sears v. Warren County*, 36 Ind. 267, 10 Am. Rep. 62, it was held that a statute requiring a license fee to be paid by traveling merchants and peddlers not residents of the state was not in conflict with the provision of the Federal Constitution that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, upon the ground that the tax is not on the persons or property of nonresidents, but on a particular business carried on in the state; and, further, that it did not conflict with the provision of the state Constitution that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens, since such section can have no application to nonresidents of the state.

A municipal ordinance requiring every person who hawks or peddles any goods, wares, or merchandise not the growth or manufacture of the county in which the city enacting the ordinance is situated, and containing the proviso that nothing therein shall be construed to apply to any citizens

of the city, is not a valid exercise of power, being repugnant to the provision of the Federal Constitution that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and to the provision of the state Constitution that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. *Grafty v. Rushville*, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609.

A statute imposing a peddlers' license tax which expressly exempts from its operation the owner of goods peddling them in the county in which he is a resident taxpayer, or in any county immediately adjoining thereto, obviously discriminates in favor of the resident against the nonresident, and is repugnant to art. 4, § 2, of the Federal Constitution. *Re Jarvis*, 66 Kan. 329, 71 Pac. 576, 15 Am. Crim. Rep. 391.

A statute requiring peddlers to obtain licenses, and providing that itinerant persons who are citizens of the state and who vend exclusively goods, wares, and merchandise which are the growth, product, or manufacture of the state, shall not be deemed peddlers, nor required to take out a license, violates art. 4, § 2, of the Federal Constitution. *Rash v. Halloway*, 82 Ky. 674.

An ordinance imposing a license tax on "peddlers or itinerant retailers of goods" applies to residents as well as nonresidents. *West v. Mt. Sterling*, 23 Ky. L. Rep. 1670, 65 S. W. 120.

A statute requiring peddlers to obtain a license, but providing that "any resident of a town having a place of business therein, owning and paying taxes to the amount of \$25 on his stock in trade, can peddle said goods in his own town without paying any license fee whatever," conflicts with the provision of the 14th Amendment, that "no state shall deny any person within its jurisdiction the equal protection of the laws," and denies the equal right to acquire property and pursue happiness guaranteed by the state Constitution, since the differentiation of persons who are, from those who are not, to pay license fees, is not a discrimination based upon the inherent differences in the nature of the business carried on, or the kind of property owned or dealt in. *State v. Mitchell*, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887.

A discrimination in the granting of peddlers' licenses, but which no fee is required of a person in the city or town in which he pays taxes upon his stock in trade, and is qualified to vote, is obnoxious to the 14th Amendment. *Com. v. Hans*, 195 Mass. 262,

11 L.R.A. (N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514.

An ordinance imposing a license tax upon hawkers and peddlers which practically exempts residents from its provisions, while imposing an unjust and unreasonable license fee upon nonresidents, is invalid. *Brooks v. Mangan*, 86 Mich. 576, 24 Am. St. Rep. 137, 49 N. W. 633.

An ordinance making it unlawful to sell or offer for sale, as a hawker, peddler, traveling merchant, or agent, either by sample or otherwise, any garden, farm, or dairy products, or any other goods, wares, or merchandise, without first obtaining a license, but containing a proviso that it should not apply to those persons holding mercantile licenses within the borough, who should comply with the market ordinance, nor to persons selling or offering for sale the products of their own farm or garden, and hawkers who first attend the borough market and comply with the provisions of the market ordinance, is invalid as a trade regulation. *Shamokin v. Flannigan*, 156 Pa. 43, 26 Atl. 780.

A borough ordinance which discriminates against nonresidents by prohibiting all persons from peddling or selling goods from house to house without a license, which is fixed at so high a figure that it amounts to a prohibition, but which excepts residents of the borough from its provisions, is void, being beyond the powers of the corporation; and it cannot be sustained as a police regulation, because not directed against the business or practice sought to be regulated, but against some of the persons engaged in it. *Sayre v. Phillips*, 148 Pa. 482, 16 L.R.A. 49, 33 Am. St. Rep. 842, 24 Atl. 76.

A statute imposing a license fee upon peddlers in a certain county, but providing that it shall not apply to merchants residing and having a regular place of business therein, nor to the sale by citizens of the said county or products of their own growth and manufacture, is not a police regulation, intended to protect the people against fraud from traveling vendors of merchandise, but is intended to protect the merchants and residents of the county against competition from those who live in any other part of the world, and is therefore a denial to citizens residing outside of the county of equal rights in business with those who live in the county, on the sole ground of their residence, and therefore violative of art. 4, § 2, of the Federal Constitution. *Com. v. Snyder*, 182 Pa. 630, 38 Atl. 356.

An ordinance prohibiting peddling without a license, with a proviso that it shall not apply to persons holding mercantile licenses within the borough, is not a police, but a trade, regulation, and therefore invalid. *West Pittston v. Dymond*, 8 Kulp. 12.

An exemption of manufacturers who have paid taxes on capital employed, from the provisions of a statute imposing a license tax upon peddlers, in its application to a citizen of another state, deprives him of privileges and immunities possessed by citi-

zens of the enacting state. *Com. v. Myer*, 92 Va. 809, 31 L.R.A. 379, 23 S. E. 915.

A statute which provides that no person shall be licensed as a peddler who has not resided in the state one year next preceding the application for a license, and that no person shall be deemed a peddler by reason of selling articles which are the manufacture of the state, with certain specified exceptions, unconstitutionally discriminates against citizens of other states. *Re Watson*, 15 Fed. 511.

Hucksters.

A statute making it unlawful for any person to engage in huckstering without obtaining a license, but containing the provision that nothing contained therein should prevent any citizen of the commonwealth from vending, hawking, or peddling products of his farm or garden, contravenes art. 4, § 2, of the Federal Constitution. *Com. v. Simons*, 15 Pa. Co. Ct. 550.

Canvassers and sample sellers.

In *Dozier v. State*, 154 Ala. 83, 129 Am. St. Rep. 51, 46 So. 9, reversed in 218 U. S. 124, 54 L. ed. 965, 28 L.R.A. (N.S.) 264, 30 Sup. Ct. Rep. 649, on the ground that the statute in question was an interference with interstate commerce, it was held that a statute imposing a license tax upon any person soliciting orders for the enlargement of photographs or for picture frames, but providing that the act shall not apply to merchants or dealers having a permanent place of business in the state, and keeping picture frames as a part or all of their stock in trade, did not unconstitutionally discriminate in favor of merchants having a permanent place of business, as against merchants residing without the state, since the condition or exception applies alike to any merchant, whether residing in the state or out of it, provided he has a permanent place of business in the state.

A statute imposing a license tax for purposes of revenue upon every person not a resident merchant, mechanic, or manufacturer, engaging in the business of selling by sample, does not discriminate in favor of the citizens of the state, since the word "residents," as used in connection with the words "merchant, mechanic, or manufacturer," is not intended to import a personal residence, but only the place of business. *Speer v. Com.* 23 Gratt. 935, 14 Am. Rep. 164.

A statute discriminating between a merchant and a sample merchant, by taxing the business of the one lightly while taxing that of the other heavily, cannot be held unconstitutional on the assumption that merchants must necessarily be residents, and that sample merchants must necessarily be nonresidents. *Ex parte Thornton*, 4 Hughes, 220, 12 Fed. 538.

An ordinance requiring a license to be obtained by any person whose principal place of business is not in the city, or who conducts his principal place of business

without the city, and sells or offers to sell any goods, wares, or merchandise by sample or representation to any person other than persons living or doing a licensed business in the city, violates art. 4, § 2, of the Federal Constitution; and the fact that its provisions apply to residents of the state as well as to nonresidents does not add to the validity of the act, or give strength to the argument in support of it. *Fecheimer Bros. v. Louisville*, 84 Ky. 306, 2 S. W. 65.

A state statute which prohibits the sale within a certain district of the state of articles other than agricultural products and articles manufactured in the state, by persons not residents in the state, without first obtaining a license and paying therefor, is repugnant to art. 4, § 2, of the Constitution. *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449, reversing 31 Md. 279, 1 Am. Rep. 50.

A village ordinance imposing a license fee upon nonresident auctioneers and sample sellers is discriminatory, and therefore illegal from a constitutional standpoint. *Radebaugh v. Plain City*, 11 Ohio Dec. Reprint, 612.

An ordinance requiring a nonresident to obtain a license before engaging in the business of canvassing is void for want of authority to make it. *Wilcox v. Knoxville*, 12 Pa. Co. Ct. 641.

An ordinance requiring a license to be obtained for the sale of goods by sample, but which provides that it shall not be so construed as to impose any additional tax or disability upon merchants of the city, discriminates between residents and nonresidents, and assumes to lay down a special rate of taxation for the former class, and is therefore invalid as contravening provisions of the state Constitution that the legislature shall have no power to suspend any law of the land for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land. *Nashville v. Althrop*, 5 Coldw. 554.

In *Robbins v. Taxing Dist.* 13 Lea, 303, reversed in 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, on the ground that the statute in question unlawfully interfered with interstate commerce, it was held that a statute providing that all drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay a specified tax, was not rendered a partial law by the exemption of resident merchants selling their own goods by sample within the district, from the special privilege tax.

A statute imposing a heavy license tax upon the right to canvass from house to house for a certain limited number of articles not produced or manufactured within the state, and not injurious to health or morals, for the apparent purpose of favoring resident merchants with established places of business, violates the provisions of the Federal Constitution against abridg-

ing privileges or immunities of the citizens of the United States, and denying equal protection of the laws. *State v. Bayer*, 34 Utah, 257, 19 L.R.A. (N.S.) 297, 97 Pac. 129.

An ordinance enacting that no person being a nonresident shall sell by sample or otherwise any goods, wares, or merchandise without first obtaining a license is unconstitutional as an attempted discrimination adverse to nonresidents of the state. *Clements v. Casper*, 4 Wyo. 494, 35 Pac. 472.

Agents for nursery stock.

A statute requiring every person acting as an agent for the sale of nursery stock not grown in the state, to obtain a license, with the proviso that any citizen of the state may sell nursery stock grown one year or more in lands or nurseries owned by him in the state, on which taxes have been paid, without procuring a license, but which does not give the citizens of other states the right to sell without a license stock so grown, violates art. 4, § 2, of the Constitution of the United States. *State v. Lancaster*, 63 N. H. 267.

A statute providing that permits shall be obtained for the sale of nursery stock, which requires only agents selling trees grown in other states to carry duplicates of the principal's permit, for which duplicate an additional charge is made, illegally discriminates between resident and nonresident dealers. *Ex parte Hawley*, 22 S. D. 23, 15 L.R.A. (N.S.) 138, 115 N. W. 93.

A statute requiring every person selling fruit trees or other nursery stock grown outside the state to file an affidavit with the secretary of state, together with a bond conditioned to save harmless any citizen of the state who shall be defrauded by any false or fraudulent representations as to the place where such stock was grown, or as to its hardiness for climate, violates art. 4, § 2, of the Constitution of the United States. *Re Schechter*, 4 Inters. Com. Rep. 849, 63 Fed. 695.

Miscellaneous.

The provision of a municipal charter authorizing a tax upon sales by auctioneers, "except property sold by citizens of the town or county, and who are bona fide owners thereof," and an ordinance adopted in pursuance of such provision, fixing the license fee of auctioneers and salesmen at \$5 for residents of the county, and \$10 for such as are not residents of the county, discriminate against goods and merchandise brought into the state for sale by nonresident owners, and therefore conflict with art. 4, § 2, of the Federal Constitution. *Daniel v. Richmond*, 78 Ky. 542.

But a statute requiring the payment of a license fee for the privilege of purchasing certain kinds of produce in a certain county, to be shipped out of it, which fee is greater in the case of nonresidents of the county than of residents, is not obnoxious

to United States Constitution, art. 4, § 2, since the discrimination is not against citizens of other states more than citizens of the enacting state, nor against foreign markets more than domestic markets. *Rothermel v. Meyerle*, 136 Pa. 250, 9 L.R.A. 366, 3 Inters. Com. Rep. 315, 20 Atl. 583.

An ordinance levying a license tax on "every agency of a brewery of another state doing business in the city" is plainly offensive to that provision of the Constitution of the United States by which the citizens of each state are declared entitled to all the immunities and privileges of the citizens of the several states. *Cullman v. Arndt*, 125 Ala. 581, 28 So. 70.

An ordinance requiring a license fee from all depots and agencies established in the city, of all breweries and distilleries and all wholesale dealers in malt liquors, which excepts from its operation any resident engaged in the wholesale business of bottling, or bottling and vending, beer, is void as making an unjust discrimination in favor of residents as against nonresidents. *Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857.

An ordinance which, as a police regulation, requires butchers to obtain a license, and which discriminates between residents and nonresidents in respect to the amount of fee, is void. *Conshohocken v. Fennel*, 3 Del. Co. Rep. 354.

An ordinance requiring drivers of business vehicles to be licensed, which provides that residents may obtain a license by paying \$1. and that nonresidents, or persons who have not resided in the city three months, must obtain a permit, is void for discrimination. *Jersey City v. Chasan*, 81 N. J. L. 315, 79 Atl. 1058.

A statute which fixes prices of licenses to sell and put up lightning rods at \$100 to citizens of the state, and \$500 to citizens of other states, conflicts with art. 4, § 2, of the Federal Constitution. *State v. Wiggin*, 64 N. H. 508, 1 L.R.A. 56, 15 Atl. 128.

An ordinance imposing a tax on each vehicle employed in carrying, transporting, or peddling merchandise or provisions, which excepts from its operation vehicles used by persons engaged in business within the territorial limits, who have a permit to carry on the same, is void for discrimination. *Thompson v. Ocean Grove Camp Meeting Asso.* 55 N. J. L. 507, 26 Atl. 798.

But an ordinance requiring payment of a license fee for tugs and barges, which provides that a reduction of 40 per cent shall be allowed for those owned by residents of the city and returned and assessed for taxation therein, is not in conflict with any constitutional provision. *St. Louis v. Consolidated Coal Co.* 113 Mo. 83, 20 S. W. 699.

The fact that a larger tax is levied upon transient and traveling photographers than upon those resident in the city will not invalidate an ordinance. *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949.

In *Charleston v. State*, 2 Speers, L. 719, it was held that a municipality could not 40 L.R.A. (N.S.)

impose a larger tax on the slave of a non-resident employed within the city, than that on slaves of residents.

A statute requiring nonresidents keeping live stock for grazing purposes in any county of the state, to pay a certain sum per head, which shall be in lieu of all taxes, contravenes the provision of the Colorado state Constitution that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws which shall prescribe such regulations as shall secure a just valuation for taxation. *Kiowa County v. Dunn*, 21 Colo. 185, 40 Pac. 357.

A law imposing a tax on each sheep whose owner, residing outside of the state, shall bring sheep into the state for the purpose of pasture, or of driving such sheep through the state, is held in *Reser v. Umatilla County*, 48 Or. 326, 120 Am. St. Rep. 815, 86 Pac. 595, not to impose a license tax in the exercise of the police power, since its payment does not confer some right or privilege upon the owners which otherwise would not exist, but to be a revenue measure, and therefore violative of a constitutional provision requiring taxes to be uniform and assessed according to value.

E. S. O.

OREGON SUPREME COURT.

BEATRICE DE VALL, Resp't,
v.

THOMAS DE VALL, Appt.

(60 Or. 493, 118 Pac. 843.)

New trial — power to grant — grounds not specified in motion.

1. A court of general jurisdiction may set aside a judgment and grant a new trial for reasons not stated in the motion, although the statute provides that new trials may be granted on motion of the party aggrieved for specified causes materially affecting the substantial rights of such party.

On Petition for Rehearing.

Same — power of court — effect of statute.

2. The power of the court to grant a new trial to correct errors which it discovers is not destroyed by a statute regulating the making of motions for new trial by parties aggrieved by rulings made.

(November 14, 1911.)

Note. — Right of court to grant new trial on its own motion, or on grounds other than those urged by the moving party.

As to power of trial court to cure an excessive verdict by requiring or permitting a reduction where the true measure of damages is not ascertainable by mere computa-

APPEAL by defendant from an order of the Circuit Court for Wallowa County vacating a judgment and granting a new trial in an action brought to recover an amount alleged to be due on a foreign judgment. Affirmed.

Statement by Eakin, Ch. J.:

This is an action by Beatrice De Vall against Thomas De Vall to recover judgment for the sum of \$1,008, with interest and costs, upon a decree of the circuit court of the state of Wisconsin. This is the second appeal. For a full statement of the issues, see the same case in 57 Or. 128, 109 Pac. 755, 110 Pac. 705.

Upon the second trial, had on November 19, 1910, before a jury, verdict was ren-

tion, see note to Tunnel Min. & Leasing Co. v. Cooper, 39 L.R.A. (N.S.) 1062.

At common law—civil cases.

At common law the courts of general jurisdiction have inherent power to grant a new trial on their own motion. *Rex v. Gough*, 2 Dougl. K. B. 791; *Rex v. Holt*, 5 T. R. 436; *Rex v. Atkinson*, 5 T. R. 437, note a (where new trials were granted in criminal cases); *Duff v. Fisher*, 15 Cal. 380 (*obiter*; verdict clearly against the evidence); *Cleveland, C. C. & St. L. R. Co. v. Miller*, 165 Ind. 381, 74 N. E. 509 (*obiter*; answers to interrogatories, such that the ends of justice require the verdict should be set aside); *Allen v. Wheeler*, 54 Iowa, 628, 7 N. W. 111 (verdict in conflict with the instructions); *Hensley v. Davidson Bros. Co.* 135 Iowa, 106, 112 N. W. 227, 14 Ann. Cas. 62; *Gale v. Kemper*, 10 La. 205 (within sound discretion of trial judge); approved and followed in *State v. Fourth Dist. Judge*, 8 La. Ann. 92 (where the court set aside an unsigned judgment of divorce, and dismissed the suit because a decree of separation had been rendered in another jurisdiction on the same grounds); *Hawkins v. New Orleans Printing & Pub. Co.* 29 La. Ann. 134 (bribery of a juror); *Marchand v. Noyes*, 33 La. Ann. 882 (unsigned default judgment entered upon unanswered interrogatories in garnishment proceedings against a municipal corporation); *state ex rel. Wentz v. Fifth Dist. Judge*, 35 La. Ann. 874 (excessive verdict); *State ex rel. Shreveport Cotton Oil Co. v. Blackman*, 110 La. 266, 34 So. 438; *Cartwright v. New Orleans R. & Light Co.* — La. —, 59 So. 124 (verdict contrary to the evidence, the law, and the court's instructions); *Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800; *Forbes v. New York L. Ins. Co.* 178 Mass. 139, 59 N. E. 636; *Ft. Wayne & B. I. R. Co. v. Wayne Circuit Judge*, 110 Mich. 173, 68 N. W. 115 (insufficiency of award in personal injury case); *Bank of Willmar v. Lawler*, 78 Minn. 135, 80 N. W. 868 (verdict palpably against the evidence, and failure of jury

ordered for the defendant, and judgment entered thereon. Thereafter, on the same day, a motion for a new trial was filed by plaintiff upon the following causes: (1) Because the court erred in overruling plaintiff's objection to the reception of any evidence under the answer. (2) Because the court erred in admitting evidence against the objection of plaintiff. (3) Because the court erred in refusing to receive evidence offered by plaintiff upon the trial. (4) Because the verdict was contrary to law. (5) Because the verdict was contrary to the evidence. (6) Because the court erred in refusing to direct a verdict upon the motion of plaintiff to find and bring a verdict for plaintiff.

February 14, 1911, being at the same

to find on the issues directed by the court); *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422 (mistake of witnesses and want of evidence to sustain the verdict); *Ensor v. Smith*, 57 Mo. App. 584 (*obiter*; misconduct of counsel); *Baughman v. National Waterworks Co.* 58 Mo. App. 576 (for any good ground); *New York L. Ins. Co. v. Goodrich*, 74 Mo. App. 355 (errors in admitting evidence); *Head v. Randolph*, 83 Mo. App. 284 (*obiter*; failure of justice from any cause); *Richter v. United R. Co.* 145 Mo. App. 16, 129 S. W. 1055; *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35; *Gallegos v. Sandoval*, 15 N. M. 216, 106 Pac. 373; *Schmidt v. Brown*, 80 Hun, 183, 30 N. Y. Supp. 68 (verdict against weight of evidence); *Com. v. Gabor*, 209 Pa. 201, 58 Atl. 278, citing *Graham v. Graham*, 1 Serg. & R. 330, as authority for the general proposition (verdict received and jury discharged in the absence of accused); *Anderson v. Fox*, 2 Hen. & M. 245 (excessive damages); *Eggen v. Fox*, 124 Wis. 534, 102 N. W. 1054; *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294 (which held that where an error in the amount recovered is apparent upon the record, and it could not have been remedied by an amendment of the pleadings, the Federal Supreme Court will, of its own motion, direct that it be corrected, and, if necessary, order a new trial or further proceedings for that purpose).

In *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35, it is said that the power of the courts of general jurisdiction, in the correction of errors committed by them, "is exercised not alone on account of their solicitude for the rights of litigants, but also in justice to themselves as instruments provided for the impartial administration of the law."

The power of the trial court to grant a new trial on its own motion is not limited to cases where the error is that of the court, or where there is misconduct of the jury. *Ft. Wayne & B. I. R. Co. v. Wayne Circuit Judge*, 110 Mich. 173, 68 N. W. 115, criticizing *Lloyd v. Brinck*, 35 Tex. 1.

So it has been held that a justice of the peace has power to grant a new trial on

term of the court, upon consideration of such motion, the court made the following order: "This cause coming on to be heard this day, on the motion of plaintiff, asking that a judgment heretofore rendered herein be set aside and a new trial granted, plaintiff appearing by her attorney, Thos. M. Dill, and defendant appearing by his attorney, A. S. Cooley, and the court having carefully considered and weighed all the evidence introduced on the trial of this case, and having considered the entire record herein, including the instructions given to the jurors, and it appearing that, among the instructions given by the court to the jury, was the following, 'Upon the other hand, if the defendant has satisfied you by a preponderance of the evidence that

said M. C. Porter was not served with said notice on said 24th day of April, 1907, or that renewal of said notice at the October term of said court was not given to the said Porter, then you should find for the defendant,' and the court believing that said instruction was erroneous under the evidence introduced on the trial of this case, and that said instruction was prejudicial to plaintiff, therefore, because of the giving of said erroneous instruction as above quoted, and for no other reason or reasons, it is ordered and adjudged that the judgment heretofore rendered in this case be and the same is hereby set aside, and a new trial is hereby granted." From this order, defendant appealed, under § 548, L. O. L.

his own motion, where he believes his previous findings erroneous. *State ex rel. Henderson v. McCrea*, 40 La. Ann. 20, 3 So. 380.

The trial court should set aside a verdict awarding excessive damages, on its own motion, in a case where the court might have assessed the damages without the intervention of the jury, and failure to make application in the lower court to have the assessment of damages set aside will not preclude the appellate court from exercising its supervising power over it. *Dicken v. Smith*, 1 Litt. (Ky.) 209.

It has been held that the right of the court to grant a new trial on its own motion can be exercised, ordinarily only within the time allowed the parties to make a motion therefor. *Culverhouse v. Marx*, 38 La. Ann. 667; *State ex rel. Shreveport Cotton Oil Co. v. Blackman*, 110 La. 266, 34 So. 438.

In *Cartwright v. New Orleans R. & Light Co.* — La. —, 59 So. 124, it was held that the trial judge may *ex officio* grant a new trial at any time before judgment is signed.

In other cases it has been held that the common-law power of the court to set aside a verdict or judgment on its own motion must be exercised during the term in which it is rendered. *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422; *Jones v. Marble Head Lime Co.* 128 Mo. App. 345, 107 S. W. 420; *Head v. Randolph*, 83 Mo. App. 284; *Baughman v. National Waterworks Co.* 58 Mo. App. 576; *Gallejos v. Sandoval*, 15 N. M. 216, 106 Pac. 373.

In *State ex rel. Brainard v. Adams*, 12 Mo. App. 436, it was said that the statutory rule which directs that "all motions for new trials and in arrest of judgment shall be made within four days after trial" must be construed as regulating the privilege of the party who may move, and not as granting a defined power to the court, or as abridging its powers already existing.

And in *Rex v. Atkinson*, 5 T. R. 437, note a, where the four days' limitation within which a motion for a new trial must be made had expired, Lord Mansfield said that "no motion could be made for a new

trial, but if it came out incidentally by the report that it was proper, the court might grant one; . . . [that] if the court conceive a doubt that justice is not done, it is never too late to grant a new trial, but not on the application of the party." To the same effect is the statement of *Grose, J.*, in *Rex v. Holt*, 5 T. R. 446.

The appellate court will not interfere with the discretion of the trial court in granting a new trial on its own motion, except in a case of clear abuse of its exercise. *Ft. Wayne & B. I. R. Co. v. Wayne Circuit Judge*, 110 Mich. 173, 68 N. W. 115; *New York L. Ins. Co. v. Goodrich*, 74 Mo. App. 355; *Hesse v. Seyp*, 88 Mo. App. 66; *Schuetz v. St. Louis Transit Co.* 108 Mo. App. 21, 82 S. W. 541; *Eggen v. Fox*, 124 Wis. 534, 102 N. W. 1054; *Parker v. Britton*, 133 Mo. App. 270, 113 S. W. 259 (which held grant of new trial because of neglect of counsel to present evidence, an abuse of the court's discretion).

And where the specific grounds upon which the order for a new trial was made do not appear, the appellate court will presume that the court acted within its discretionary power. *Eggen v. Fox*, 124 Wis. 534, 102 N. W. 1054.

In *Bank of Willmar v. Lawler*, 78 Minn. 135, 80 N. W. 868, it was said that as a general rule the trial court should not exercise this power except in aggravated cases.

On the other hand, it was held in *Lloyd v. Brinck*, 35 Tex. 1, that where the verdict of the jury is in proper form and responsive to the issues presented by the pleadings, the trial court has no discretionary power to set the verdict aside on its own motion, notwithstanding it may have been against the weight of the evidence, in disregard of the instruction of the court. The courts expressly refused to follow this case in *Ft. Wayne & B. I. R. Co. v. Wayne Circuit Judge*, 110 Mich. 173, 68 N. W. 115; *State ex rel. Brainard v. Adams*, 12 Mo. App. 436.

It was pointed out by the court, however, in *Lloyd v. Brinck*, *supra*, that where the jury find a verdict upon issues not presented, or where they find their verdict

Mr. A. S. Cooley, for appellant:

A new trial is statutory, and can be granted only when authorized by statute, and in the manner, on the conditions, and for the reasons therein stated.

Amacher v. Johnson, 174 Ind. 249, 91 N. E. 929; *Ogle v. Potter*, 24 Mont. 521, 62 Pac. 921; *State ex rel. Stromberg-Mullins Co. v. Second Judicial Dist. Ct.* 28 Mont. 123, 72 Pac. 413; *Freeman v. Weare*, 42 Mont. 472, 113 Pac. 466; *Dorsey v. Barry*, 24 Cal. 455; *Publishing House v. Heyl*, 61 Kan. 634, 60 Pac. 317; *State ex rel. Richeson v. Richeson*, 36 Ind. App. 373, 75 N. E. 847; *Scott v. Ford*, 52 Or. 298, 97 Pac. 99.

The court has no authority to set aside

upon a portion only of the material issues presented, or where the verdict itself is fatally defective or not supported by any evidence, the court would be justified in treating it as a nullity.

—criminal cases.

The right of the court to grant a new trial on its own motion is recognized in criminal cases as well as in civil cases. The English precedents above cited were made in criminal cases, and the only essential difference in the exercise of this power in civil and in criminal cases is that in the latter the court may not put an additional burden on the accused. *Com. v. Gabor*, 200 Pa. 201, 58 Atl. 278.

On the trial of an indictment for murder, an order setting aside a verdict of guilty of manslaughter, and granting a new trial because the verdict was received and the jury discharged in the absence of the accused, does not violate the constitutional provision that no person shall for the same offense be twice put in jeopardy. *Ibid.* The court pointed out that the accused could not on a second trial be found guilty on the indictment of any higher grade than manslaughter; that he had therefore everything to gain, and nothing to lose, by another trial. *Ibid.*

In *Rex v. Holt*, 5 T. R. 438, Lord Kenyon said: "I well remember the case of *Rex v. Gough*, where the objection to the verdict was taken by the court themselves, who thought that substantial justice had not been done. And there are not wanting other instances of the same kind, where the court in criminal cases have shown themselves anxious to be satisfied whether or not the defendant had been properly convicted, without any motion of the party for that purpose. This was done by Lord Mansfield in *Rex v. Morris*, 2 Burr. 1189, and the same has often occurred in other cases." And in the same case *Grose, J.*, said that "wherever the court have seen of themselves or on the suggestion of counsel that the defendant has been improperly convicted, they always have interposed

the judgment and grant a new trial on a ground not specified in the motion.

Peirson v. Boston Elev. R. Co. 191 Mass. 223, 77 N. E. 769; *Earles v. Gilham*, 20 Nev. 46, 14 Pac. 587; *Slater v. Union P. R. Co.* 8 Utah, 178, 30 Pac. 493; *Sterling v. Parsons*, 9 Utah, 81, 33 Pac. 245; *Spencer v. Long*, 39 Cal. 700; *Budd v. Draais*, 50 Cal. 120; *McWilliams v. Herschman*, 5 Nev. 263; *Paragoonah Field & Canal Co. v. Edwards*, 9 Utah, 477, 35 Pac. 487; *Walls v. Preston*, 25 Cal. 61; *Moore v. Murdock*, 26 Cal. 524.

The motion in this case does not specify any ground for a new trial, and should have been disregarded by the court.

Gilbersen v. Miller Min. & Smelting Co. 4 Utah, 46, 5 Pac. 700; *Felt v. East Chi-*

. . . to prevent judgment being passed on an innocent man."

But in *State v. Snyder*, 98 Mo. 555, 12 S. W. 369, it was held that the trial court could not set aside a verdict of conviction without the consent of the accused, and that a plea of former jeopardy must be sustained upon a second trial which was awarded on the court's own motion.

Likewise, in *State v. Williams*, 38 Ia. Ann. 960, the power of the court on its own motion to grant a new trial in a criminal case was denied.

The reasons assigned by the court for granting the new trial in the above case were that the evidence in its opinion did not justify the verdict; that it was unlawful to sentence accused for a felony when he was not guilty; and that, as it did not appoint counsel, it was its duty to see that accused was not led into error. The appellate court, in reversing the order awarding a new trial, said that it was the duty of the trial court to appoint counsel for accused; that, having permitted the accused to go to trial without being represented by counsel, it was clearly the duty of the trial court to have appointed counsel to care for the interests of the accused after the rendition of a verdict which he thought unjust, but, conceding the correctness of the motives of the trial judge and the unworthiness of the verdict, the court ventured beyond the bounds of duty, as the trial court is in no sense the custodian for the accused, and it was not its duty to see that accused was not led into error. It was suggested, but not decided, that a plea of former jeopardy might be available on a second trial. *Ibid.*

As affected by statute.

Statutes regulating the granting of new trials have generally been construed strictly, and not as a limitation upon the power of the court to grant a new trial on its own motion, but as a regulation of the privilege of the parties who may make the motion. *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422, explaining *State ex rel. Brain-*

cago Iron & Steel Co. 27 Ind. App. 494, 61 N. E. 744; Baltimore & O. R. Co. v. Daegling, 30 Ind. App. 180, 65 N. E. 761; Watson v. Molden, 10 Idaho, 570, 79 Pac. 507; West Chicago Street R. Co. v. Krueger, 168 Ill. 586, 48 N. E. 442; Hutton v. Reed, 25 Cal. 490; Phoenix Ins. Co. v. Schwartz, 115 Ga. 113, 57 L.R.A. 753, 90 Am. St. Rep. 98, 41 S. E. 240; Stevens v. Leonard, 154 Ind. 67, 77 Am. St. Rep. 446, 56 N. E. 28; Sherman v. Shaw, 9 Nev. 151; Chicago City R. Co. v. Smith, 226 Ill. 178, 80 N. E. 719; Janeway v. Burton, 201 Ill. 78, 66 N. E. 337; United States v. Trabing, 3 Wyo. 144, 6 Pac. 721; People use of Brooks v. Petrie, 191 Ill. 497, 85 Am. St. Rep. 268, 61 N. E. 499; Lasher v. Colton, 225 Ill. 234, 80 N. E. 124, 8 Ann. Cas. 367.

erd v. Adams, 84 Mo. 310, which reversed 12 Mo. App. 436; Parker v. Britton, 133 Mo. App. 270, 113 S. W. 259; Allen v. Wheeler, 54 Iowa, 628, 7 N. W. 111 (where the Code provided that a verdict may be vacated on the application of the party aggrieved); Bank of Willmar v. Lawler, 78 Minn. 135, 80 N. W. 868.

In *State ex rel. Brainard v. Adams*, 12 Mo. App. 436, it was said that the statutory provisions which prescribe the terms on which new trials may be granted "on motion of the proper party," or "upon good cause shown," must be construed as regulating the privilege of the party who may move, and not as granting a defined power to the court, or as abridging its powers already existing.

The provision of a statute that "only one new trial shall be allowed to either party, except where the triers of the fact shall have erred in a matter of law, and where the jury shall be guilty of misbehavior," does not preclude the court from exercising its common-law powers to set aside a verdict and judgment on its own motion. *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422.

Under the statutory provisions that "in civil causes in which any questions or issues are submitted to a jury, a verdict shall not be set aside, except upon motion in writing of one of the parties specifying the grounds relied upon in support of it," the court may of its own motion set aside a verdict which it has directed the jury to find. *Forbes v. New York L. Ins. Co.* 178 Mass. 139, 59 N. E. 636.

A statutory provision that the trial judge may, in his discretion, entertain a motion to set aside the verdict upon the minutes, does not preclude him from doing so on his own motion. *Schmidt v. Brown*, 80 Hun, 183, 30 N. Y. Supp. 68.

On the other hand, it has been held that where the statute specified the manner in which a verdict or other decision may be set aside and a new trial granted, the court is without power to grant a new trial on its own motion. *Long v. Kingfisher County*, 5 Okla. 128, 47 Pac. 1063; *Scott v. Ford*, 52 Or. 289, 97 Pac. 99. 40 L.R.A. (N.S.)

Where the court makes an order setting aside the judgment and granting a new trial on a ground not discretionary, and commits an error as to some legal proposition, the order will be reversed on appeal.

Clifford v. Denver, S. P. & P. R. Co. 12 Colo. 125, 20 Pac. 335; *Manson v. Ware*, 63 Iowa, 345, 19 N. W. 276.

The granting of a new trial because of errors of law is not within the discretion of the court.

United States v. Trabing, 3 Wyo. 144, 6 Pac. 722; *Scott v. Ford*, 52 Or. 289, 97 Pac. 99.

When the court does not grant a new trial for any of the reasons specified in the motion, it in effect denies the motion.

Vastine v. Rex, 93 Mo. App. 93; *Clyde*

In *Townley v. Adams*, 118 Cal. 382, 50 Pac. 550, it was held that the Code provision expressly authorizing the court to vacate a verdict on its own motion in certain cases must be construed as a limitation upon the power of the court to grant a new trial, in view of the fact that the Code undertakes to cover the whole subject of new trials, and the provision that "the rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects."

And in *Flugel v. Henschel*, 6 N. D. 205, 69 N. W. 195, which held the Code provision granting the court power to vacate the verdict and award a new trial in certain cases was a limitation upon the power of the court, it was said: "The abridgment of the common-law right of a trial court to vacate a verdict on its own motion became highly proper, and indeed necessary, after the legislative branch of the government had made ample provision to facilitate the setting aside of illegal and unjust verdicts by means of a motion made for that purpose by a party to the action whose rights have been prejudiced by any such verdict."

Under an express statutory provision authorizing the court on its own motion, without the application of either of the parties, to vacate the verdict and grant a new trial, "when there has been such a plain disregard by the jury of the instructions of the court or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice," it was said in *Eades v. Trowbridge*, 143 Cal. 25, 76 Pac. 714, that "the instruction disregarded must be as to some matter or of such a nature that it is plain that the jury grossly disobeyed the judge," and it was further said by the court that "the same reasoning applies to the evidence. A plain disregard of the evidence must be made to appear. This does

Mill. & Elevator Co. v. Buoy, 71 Kan. 293, 80 Pac. 591.

Messrs. John P. Rusk and Thomas M. Dill, for respondent:

In passing upon a motion for a new trial, the trial court should weigh the entire case, and if in its opinion the verdict is against the clear weight of the testimony, it should grant a new trial.

not mean that the court thinks the verdict not the correct conclusion from the evidence, but it means that the rule should apply only where the jury plainly, palpably, and grossly disregard the evidence." To the same effect are *Townley v. Adams*, 118 Cal. 382, 50 Pac. 550, and *Mizener v. Bradbury*, 128 Cal. 340, 60 Pac. 928 (which also reversed the trial court's order setting aside the verdict); *Occidental Real Estate Co. v. Gantner & Mattern*, 7 Cal. App. 727, 95 Pac. 1042 (which sustained the order setting aside the verdict); *Gould v. Duluth & D. Elevator Co.* 2 N. D. 216, 50 N. W. 969; *Flugel v. Henschel*, 6 N. D. 205, 69 N. W. 195 (where it was said that the power to vacate should be exercised with great caution, and only in extreme cases); *Clement v. Barnes*, 6 S. D. 483, 61 N. W. 1126 (which held that the verdict must be so perceptibly in disregard of the instructions or the evidence as to satisfy the court upon its announcement, and without the necessity of mature reflection, that the same is grossly erroneous or the result of passion or prejudice).

In *Flugel v. Henschel*, 6 N. D. 205, 69 N. W. 195, it was said: "To justify the action by the court on its own motion, the case must be gross and one obviously requiring immediate action."

In *Gould v. Duluth & D. Elevator Co.* 2 N. D. 216, 50 N. W. 969, it was said: "Instances of vacating verdicts and granting new trials without application of the parties have been exceedingly rare, and no such summary action should be taken except in cases falling clearly within the statute, and then the order should be made promptly on coming in of the verdict. In no case should such an order be made after a delay of some months, and where the parties have taken action predicated upon the verdict."

And in *Clement v. Barnes*, 6 S. D. 483, 61 N. W. 1126, it is said that "the order should be made promptly upon the coming in and entry of the verdict."

Accordingly, in *Kaslow v. Chamberlain*, 17 N. D. 449, 117 N. W. 529, it was held that the court had no power to order a new trial of its own motion one year after verdict and entry of judgment.

And in *Traxinger v. Minneapolis, St. P. & S. Ste. M. R. Co.* 23 S. D. 90, 120 N. W. 770, it was said that "it is clear that the trial court had no authority to vacate the verdict under § 304, after the lapse of nine months."

For grounds not specified in the motion.

The trial court is not prevented from 40 L.R.A.(N.S.)

Multnomah County v. Willamette Towing Co. 49 Or. 213, 89 Pac. 389; *Serles v. Serles*, 35 Or. 293, 57 Pac. 634; *Webster v. Suiter*, 15 Cal. App. 390, 114 Pac. 1007; *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 382; *Spencer v. Brockway*, 1 Ohio, 259, 13 Am. Dec. 616; *Pelton v. Platner*, 13 Ohio, 209, 42 Am. Dec. 199; *Black, Judgm.* 2d ed. § 273; *Caughran v. Gilman*, 72 Iowa,

exercising its common-law power to grant a new trial on its motion, by the presentation of a motion therefor by one of the parties; but the court may grant a new trial for a reason not specified in the motion. *Bond v. Cutler*, 7 Mass. 205; *Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800 (but see *infra*, as to effect of statute); *E. O. Stanard Mill. Co. v. White Line Central Transit Co.* 122 Mo. 258, 26 S. W. 704; *Parker v. Britton*, 133 Mo. App. 270, 113 S. W. 259; *Nulton v. Croskey*, 111 Mo. App. 18, 85 S. W. 644; *Hesse v. Seyp*, 88 Mo. App. 66; *Lovell v. Davis*, 52 Mo. App. 342 (for error in the instructions given to the jury); *Ivanhoe Furnace Corp. v. Crowder*, 110 Va. 387, 66 S. E. 63; *Cleveland, C. C. & St. L. R. Co. v. Miller*, 165 Ind. 381, 74 N. E. 509 (*obiter*).

And while it has been held that a party cannot be heard to object or complain of the rulings of the court made during the trial for the first time on a motion for a new trial, nevertheless the court may of its own motion, when errors have been brought to its attention in that way, award a new trial where it believes that injustice has been done. *Schuette v. St. Louis Transit Co.* 108 Mo. App. 21, 82 S. W. 541 (improper argument of counsel); *Richter v. United R. Co.* 145 Mo. App. 1, 129 S. W. 1055 (improper remark by the court in presence of jury).

And, although the dissatisfied party is precluded from urging the insufficiency of the charge to the jury as a ground for a new trial, because of his failure to reserve an exception thereto, the court may of its own motion grant a new trial for that reason. *Merchants' & F. Bank v. McKellar*, 44 La. Ann. 940, 11 So. 592.

But the trial court has no power to grant a new trial upon a ground not specified in the motion, where the statute provides that "a verdict shall not be set aside except upon a motion in writing by a party to the cause, stating the reasons relied upon in its support." *Peirson v. Boston Elev. R. Co.* 191 Mass. 223, 77 N. E. 769. To the same effect is *Loveland v. Rand*, 200 Mass. 142, 85 N. E. 948.

And on a motion for a nonsuit, the court has, upon its own motion, sometimes granted a new trial upon the payment of costs. *Doe ex dem. Burnham v. Simmons*, 7 U. C. Q. B. 196; *Hatton v. Beacon Ins. Co.* 16 U. C. Q. B. 316; *Pearman v. Hyland*, 22 U. C. Q. B. 202; *Cameron v. Monarch Assur. Co.* 7 U. C. C. P. 212; *Coons v. Aetna Ins. Co.* 18 U. C. C. P. 305. A. L. R.

570, 34 N. W. 423; *Bolton v. Stewart*, 29 Cal. 615; *Grant v. Moore*, 29 Cal. 644; *Coghill v. Marks*, 29 Cal. 674.

Eakin, Ch. J., delivered the opinion of the court:

1. It thus appears that, although there was a motion to set aside the verdict, the court in its discretion set aside such motion on the ground of error not assigned in it, and the contention of defendant is that the court had no authority to set aside a verdict upon its own motion, nor upon a ground not assigned in the motion. There is no bill of exception here, and the defendant does not contend that the instruction mentioned in the order was not erroneous. Therefore the only question to be considered is as to the power of the court to set aside a judgment and grant a new trial, either on its own motion, or upon a ground of error not assigned in the motion. Although there seems to be some conflict of opinion upon this question, the great weight of authority sustains the view that courts of general jurisdiction have inherent power to correct judicial errors for the purpose of promoting impartial administration of justice, and the right of a court to grant a new trial on its own motion is generally recognized. The Oklahoma supreme court, in *Long v. Kingfisher County*, 5 Okla. 128, 47 Pac. 1063, has held directly to the contrary, citing no authority other than its own statute, the language of which is not materially different from that of other states relating to the granting of new trials. Section 4493, Code of 1903, relating to motions for new trial, provides that "the former verdict . . . shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party," and then names five causes which may be included in such motion, being identical with those in other states.

The supreme court of Texas has held to the same effect in *Lloyd v. Brinck*, 35 Tex. 1. The North Dakota statute expressly authorizes the court on its own motion to vacate a verdict for certain causes, which has the effect to preclude the consideration of any others. The statutes of California and South Dakota have similar provisions, and therefore have no application upon this question. On the contrary, the Code of Iowa of 1897, § 3755, provides that "the former verdict . . . shall be vacated and a new trial granted on the application of the party aggrieved," etc., being the exact language of the Oklahoma statute.

In *Allen v. Wheeler*, 54 Iowa, 631, 7 N. 40 L.R.A. (N.S.)

W. 113, in considering the power of the court to grant a new trial on its own motion, it is said that this statute "does not provide that the court may not, upon its own motion, and for error which is apparent, set aside a verdict. Such power exists at common law, and we do not understand that any provision of our statute is a limitation to the power of the court on its own motion to compel juries to observe and follow the law as embodied in the instructions given by the court." And in a late case (*Hensley v. Davidson Bros. Co.* 135 Iowa, 106, 112 N. W. 227) it is said that: "There is no provision in the Code relating to orders of this kind on the court's own motion. That such right exists, however, is indisputable. It is one of the inherent powers of the court, essential to the administration of justice." And, after citing many cases to that effect, and quoting from some, the court say: "That a motion therefor is pending will not deprive the court of the power to order a new trial on grounds not raised therein. This must necessarily be so, for one of the controlling reasons for the existence of the power is to enable the court to guard the rights of parties who, for some cause, have proven unable to protect themselves, and another to enable the court to correct its errors, rather than wait for this to be done by the appellate court." To this case there is appended a note in 14 Ann. Cas. 65, reviewing the authorities, in which the author says that this power is generally recognized; that the provisions of the statute regulating motions for new trial do not prevent the court from granting a new trial on its own motion. The Minnesota Code of 1905, § 4198, is very similar to that of Iowa and Oklahoma, and in *Bank of Willmar v. Lawler*, 78 Minn. 136, 80 N. W. 868, it is said: "Appellant contends that, as our statute provides that the notice of motion for a new trial shall be in writing, and shall state the grounds of the motion, the court below had no authority to grant a new trial on its own motion. Under the common-law practice, it was well settled that the trial court could grant a new trial on its own motion. . . . Our Code of Civil Procedure does not expressly cut off this power of the court, and, in our opinion, does not do so by implication, although the Code may to some extent limit or modify that power. . . . The provisions of such a statute, regulating motions for a new trial, do not prevent the court in a proper case from granting a new trial on its own motion."

In *State ex rel. Brainerd v. Adams*, 84 Mo. 315, it is said: "If the court commits a palpable error in an instruction to the

jury, or witnesses misconduct of members of the jury, which on motion would authorize it to set aside the verdict, shall it, on account of the ignorance or timidity of the aggrieved party, which prevents him from moving in the matter, render an unjust judgment on the verdict? If the jury find a verdict palpably against the law as declared by the court, is it powerless to maintain its own dignity and self-respect, unless someone who feels aggrieved shall move in the matter? That this power may be abused by the court is no argument against its existence. The appellate courts will find a way to correct any abuse of the power by the lower courts. It is conceded by the court of appeals, in the opinion delivered in this cause, that at common law this power could be exercised by the courts independent of any application by a party for its exercise. . . . And that our statute, prescribing the time within which a party may file a motion to set aside a verdict, does not confer upon the court any power which did not previously exist, or abridge the recognized power of the court, but simply regulated the privilege of the parties to the suit."

In *Hewitt v. Steele*, 118 Mo. 473, 24 S. W. 440, it is held that the court is not confined to the grounds assigned in the motion, but may consider any good cause, and the appellate court, in reviewing the action of the trial court, will not be confined to the grounds stated in the order of the court, but may consider any ground set out in the motion. The Nebraska Code of 1891, § 4835, is in effect identical with that of Iowa, and in *Weber v. Kirkendall*, 44 Neb. 766, 769, 63 N. W. 35, 36, the court say: "We do not doubt the power of the trial court to re-examine its record, and to set aside a verdict on account of prejudicial error, on its own motion, in the absence of a request by either party. . . . The rule thus recognized has not only the sanction of authority, but rests upon the soundest and most satisfactory reasons. The power is inherent." Additional cases recognizing this power are *Cleveland, C. C. & St. L. R. Co. v. Miller*, 165 Ind. 387, 74 N. E. 509; *Ft. Wayne & B. I. R. Co. v. Wayne Circuit Judge*, 110 Mich. 173, 68 N. W. 115; *Schmidt v. Brown*, 80 Hun, 183, 30 N. Y. Supp. 68; *Eggen v. Fox*, 124 Wis. 534, 102 N. W. 1054. See also 29 Cyc. 929.

This was also the rule in Massachusetts prior to 1897. *Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800. But by a legislative act of that year it was provided that a verdict shall not be set aside, except by a motion in writing, which, it has been held, takes from the court the power to act upon its

own motion. *Peirson v. Boston Elev. R. Co.* 191 Mass. 229, 77 N. E. 769. These authorities, however, recognize the fact that it is within the power of the court to abuse this right, and that it should only be exercised in extreme cases where, without it, there would be a miscarriage of justice.

In *Bank of Willmar v. Lawler*, 78 Minn. 136, 80 N. W. 868, it is said that, as a general rule, the trial courts should not exercise this power, except in aggravated cases; and in *Hensley v. Davidson Bros. Co.* 135 Iowa, 106, 112 N. W. 227, 14 Ann. Cas. 62, it is said that "resort to this power will rarely be required, and, it should be exercised with great caution and in aggravated cases only. Ample provisions are to be found in the Code of Procedure for the protection of litigants on their own application, and for the court to interpose, without affording the defeated party an opportunity to elect whether he will accept the result, lays it open to the suspicion of partisanship."

2. Thus we see that, by virtue of the inherent power of the court, it has authority, on its own motion, or for causes other than those assigned in a motion, to set aside a judgment and grant a new trial, unless such power of the court has been limited by statute. The statute of Oregon (§ 174, L. O. L.), relating to motions for new trials, is in effect the same as that of Iowa, above quoted, namely: "A former judgment may be set aside and a new trial granted on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party," etc. It contains no limitation upon the power of the court to set aside a judgment and grant a new trial upon its own motion, and it was within the court's discretion to set the judgment aside, if error appeared in the record that did or might result in a miscarriage of justice. The court only sought to rectify its own error in giving the instruction mentioned, which instruction we must assume was erroneous, and this was within its power that the rights of the litigant might be protected, and also in justice to the court, as responsible for the impartial administration of the law.

Scott v. Ford, 52 Or. 288, 97 Pac. 99, is cited by counsel for defendant as controlling in this case; but in that case there was no motion by the respondent to set aside the findings, and no error was committed on the trial as constituting a basis for an order vacating a verdict. But the order was made for the purpose of giving the plaintiff an opportunity to amend his pleadings, and it is practically conceded in the opinion, at page 299, that the court

may set aside the verdict on its own motion, "where it appears that it has been imposed upon in an *ex parte* proceeding, or the verdict entered through improper or collusive agreements, etc., and that the court would have the power essential to its protection and that of the public under such circumstances (State *ex rel.* Brainerd v. Adams, 84 Mo. 310, 316); but that question is not involved here."

The case cited in the above quotation says that "an error in matter of law is one which the court ought to have the right to correct at any time during the term," so that the result in the case of *Scott v. Ford* is not opposed to the conclusion we have reached in this case. As said in *Hensley v. Davidson Bros. Co.* supra, occasion to do so will seldom arise, and the power should be exercised only to prevent a wrong to one of the parties by correcting the error or misconduct of the jury, or an error committed by the court itself. But, so far as the record discloses, this is a case within the latter exception. The trial court concluded that it gave an erroneous instruction tending to mislead the jury.

The order of the court vacating the judgment and granting a new trial is affirmed.

A petition for rehearing having been filed, McBride, J., on January 23, 1912, handed down the following response (— Or. —, 120 Pac. 13):

3. The power to grant new trials is in its inception a common-law right. 3 Bl. Com. Lewis' ed. § 387. Courts of general common-law jurisdiction have inherent power to grant new trials; this power is not taken away by statute, unless the intent to do so is clear. 29 Cyc. 722, and cases there cited. Statutes limiting this power are in derogation of the common law, and such statutes should be strictly construed. *Ferguson v. Jones*, 17 Or. 204, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac. 842.

In our opinion, chapter 8 of title 2, L. O. L., has reference exclusively to motions for new trial made by the parties, and was not intended to restrict the common-law power of the courts in order to correct their own mistakes. The motion practically takes the place of a pleading, and the statute, for the sake of orderly procedure, specifies the time within which the pleading shall be filed, and what it shall contain; but it was not the intention of the lawmakers, in thus regulating the manner in which the parties should carry on their contention before the court, to take away another important power which the court possessed, namely, that of correcting *sua sponte* its own mistakes. This 40 L.R.A. (N.S.)

is the view intimated by Mr. Chief Justice Field, in *Duff v. Fisher*, 15 Cal. 375. He observes: "It may be and probably is true that the court, whether sitting in equity or on trial of a common-law action, may, of its own motion, set aside the verdict of a jury when it is clearly and palpably against the evidence; but when the court is satisfied with the verdict, the parties can only question its correctness by following the course pointed out by the statute." This excerpt clearly draws the distinction between the power of the court derived from the common law and the rights of a party proceeding under the statute. The exercise of the power of the court to correct its own error is a valuable one, tending to prevent appeals and reversals, and it should not be construed away where the intent of the legislature to destroy it is not clearly manifest.

The petition for rehearing is denied.

OREGON SUPREME COURT.

F. W. ISHERWOOD et al., Resp'ts.,

v.

CHRISTINE SALENE, Appt.

(— Or. —, 123 Pac. 49.)

License — grant — right to hunt — interference — liability.

1. One who has granted the exclusive right to shoot wild fowl upon the waters upon his land is not liable in damages for clearing and draining the land, if he does so in good faith for the purpose of improving it, but may be so if he acts in bad faith in order to injure the grantees.

Equity — jurisdiction — interference with licensee — remedy at law.

2. Equity has no jurisdiction of a suit to prevent wrongful interference by one who has granted the right to hunt on his land with the rights of the grantee, since the remedy at law for damages is adequate.

(April 23, 1912.)

Note. — Nature and extent of right created by private grant of hunting or fishing privilege.

In addition to the cases discussed in the present note, see those which are set out in *ISHERWOOD v. SALENE*.

As to injunction against hunting or fishing on navigable waters or against interference therewith, see the notes in 17 L.R.A. (N.S.) 1236, and 38 L.R.A. (N.S.) 286.

As to the right of way on shore as appurtenant to fishery rights, see subdivision III. of the note in 4 L.R.A. (N.S.) 872.

As to the right of riparian owner on tidal or navigable waters to exclusive fishery,

A PPEAL by defendant from a judgment of the Circuit Court for Columbia County in plaintiffs' favor in an action brought to enjoin defendant from draining certain waters on her lands and from clearing the land to the injury of plaintiffs' rights of hunting on such land. Reversed.

The facts are stated in the opinion.

Messrs. Coovert & Stapleton for appellant.

Mr. William T. Muir, for respondents:

The Bingham deed grants a profit *à prendre*.

Bingham v. Salene, 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523.

see the note to Hume v. Rogue River Packing Co. 31 L.R.A. (N.S.) 396.

As to the right of free fishing in great ponds, see the note in 31 L.R.A. (N.S.) 434.

On the question of injury to a fishing right as damage from pollution, see the note in 33 L.R.A. (N.S.) 74.

Hunting privilege—generally.

Beginning with the early English cases it has been uniformly held that a shooting privilege is a profit *à prendre*.

Thus, in Davies's Case, 3 Mod. 246, in holding that the lord of a manor might acquire for himself and his tenants and farmers a prescriptive right to take fowl in the warren of another, the court apparently indorsed the argument that such a right was a profit *à prendre in alieno solo*, and was therefore such as the tenants of a manor might prescribe by a *que estate* exclusive of the lord.

A right to shoot and take away game is a profit *à prendre*, and therefore is an interest in the land within the statute of frauds. Webber v. Lee, 51 L. J. Q. B. N. S. 485, L. R. 9 Q. B. Div. 315, 47 L. T. N. S. 215, 30 Week. Rep. 866, 47 J. P. 4.

It was held in Hooper v. Clark, 8 Best & S. 150, 36 L. J. Q. B. N. S. 79, L. R. 2 Q. B. 200, 16 L. T. N. S. 152, 15 Week. Rep. 347, that the right granted by deed to kill and take game was an incorporeal hereditament, touching which the grantee's covenant to leave the estate as well stocked as when he entered upon its enjoyment was a covenant running with the land, and was enforceable by the assignees of the reversion.

In Vermont it is held that the exclusive right to shoot and fish upon the lands of another, when not granted in favor of any dominant tenement, is not an easement, but a profit *à prendre*, and the grantee of such a right, though not the owner of the soil, has such an interest in the land as entitles him to maintain an action of trespass, under a statute authorizing such an action in respect of lands by the owner thereof. Payne v. Sheets, 75 Vt. 335, 65 Atl. 656.

And a right to shoot upon the lands of another, acquired in connection with the 40 L.R.A. (N.S.)

The lakes and other waters must, so far as consistent with the right to hunt thereon, be left in their natural state.

Salene v. Isherwood, 55 Or. 263, 106 Pac. 18.

The owner of land on the margin of a natural lake or pond has a right to have the natural level of the water maintained so as to permit him to enjoy the advantages attendant upon riparian ownership, and to protect him from the disadvantage of having a strip of uncovered lake bottom left in front of his property.

2 Farnham, Waters, 1618, § 477a.

Mr. W. L. Brewster also for respondents.

purchase of a lot carved therefrom, is not a mere license revocable at pleasure, but is an interest which will support an action of specific performance. St. Helen Shooting Club v. Barber, 150 Mich. 571, 114 N. W. 399.

—affirmative rights of grantee.

One who has a right of shooting on a farm must not do unnecessary damage to standing crops, but must exercise his privilege at a time and in the manner that is usual with sportsmen. Hilton v. Green, 2 Fost. & F. 821.

A grant of the right to shoot and sport over a specified tract of land does not justify the grantee in breeding and turning into the lands game bred elsewhere, to the injury of the grantor's crops. Birkbeck v. Paget, 31 Beav. 403. This case is cited with approval in Farrer v. Nelson, L. R. 15 Q. B. Div. 258, 49 J. P. 725, 54 L. J. Q. B. N. S. 385, 52 L. T. N. S. 786, 33 Week. Rep. 800, which holds that the occupant of a farm under a lease reserving the shooting rights to the lessor has a right of action against the lessee of the shooting right, for damage to crops caused by overstocking the farm with game. While it appears that the game was bred upon the estate of the lessor outside the plaintiff's farm, the court seems inclined to go a little further than Birkbeck v. Paget, and to place its decision upon the somewhat broader ground that the holder of the shooting right had no right to increase the game to an unreasonable extent.

The deed involved in ISHERWOOD v. SALLENE was the subject of litigation in an early case which held that the rights thereby granted were confined to shooting upon the waters, and did not include the right to shoot fowl upon the lands; and that, though possibly assignable, the instrument did not authorize the grantees to issue permits to other persons. Bingham v. Salene, 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523. In a subsequent case involving the same fishing privilege (Salene v. Isherwood, 55 Or. 263, 106 Pac. 18), it was further held that the instrument must be deemed to give the grantees a right to maintain such small boats and temporary structures as would

Eakin, Ch. J., delivered the opinion of the court:

On February 13, 1878, the defendant, Christine Salene, and her husband Charles, now deceased, conveyed to "H. T. and E. W. Bingham, and to their heirs and assigns forever, the sole and exclusive right, privilege, and easement, to shoot, take, and kill any and all wild duck and other wild fowl upon and in any and all lakes, sloughs, and waters situate, lying, or being upon our land," etc. Plaintiffs are the grantees of the Bingham of such right and privilege, and they bring this suit to enjoin defendant from draining Wapato, Big Slavin, Round, and Knighton lakes, and certain

not interfere with the use of the adjacent farm, and that such right included the erection of blinds, the use of decoys, the keeping of dogs, and the recovery of such game as might, when shot, fall upon the adjacent land. Invoking the rule of the earlier case that the grantees had no right to issue permits to third persons, the court held that the grantees had no right to authorize their servants, or persons purporting to be such, to hunt upon the premises. And it was further held that the grantees had no right to dam up the lake. And while it was intimated that the language of the deed did not authorize the grantees to feed the fowl by artificial means when high water had destroyed the natural feed, it was held that the parties seemed to have acquiesced in a contrary construction, and therefore the grantees would be deemed to have that right.

A clause in a lease of land reserving to the lessor the right of "shooting and sporting" over the land is not limited to "game" in its strict sense, but is a reservation of the right to shoot such animals as are, in common parlance, understood to be the subjects of sport (rabbits). *Jeffries v. Evans*, 19 C. B. N. S. 264, 34 L. J. C. P. N. S. 261, 11 Jur. N. S. 584, 13 L. T. N. S. 72, 13 Week. Rep. 864, 15 Eng. Rul. Cas. 716.

It was held in *Wickham v. Hawker*, 7 Mees. & W. 63, that a grant to one, his heirs and assigns, of liberty to go upon the grantor's land, to hunt and fish with servants and otherwise, was a grant, not of a mere license of pleasure, but of a license of a profit *& prendre* within the operation of the prescription act. *Parke, B.*, cited as a leading case, *Norfolk v. Wiseman*, 12 Henry VII. 25, 13 Henry VII. 13, and as holding that if a grant of hunting is a mere license of pleasure, no other person can justify under it, but that if it is a license of profit the rule is otherwise. And the following language was quoted from *Norfolk v. Wiseman*: "If there be a license for him and his servants to hunt, by these words, for him and his servants, shall be understood a license of profit; for these words imply that the grantee hath a property in the thing hunted, because that by such a license the grantee may justify for his serv-

sloughs, situated on her lands, which she threatens to do, and also from cutting and burning brush and timber which borders the lakes. These lakes cover almost one sixth of the farm of defendant. The land upon which the lakes are situated is the donation land claim of Charles Salene, and consists of about 480 acres, through which Willamette slough, a navigable stream, flows. Much of the farm is overflowed during the winter and spring months, especially when the water is high in the Columbia river. When the waters are low, the tide rises about 3 feet in the river and the slough. At the low stage of the water in the slough, not at low tide,

ant to hunt, which is more than a license of pleasure." *Parke, B.*, also referred to the following comment in *Manwood*, 108, on a case in the Year Book of 11 Henry VII. folio 86: "If one license me and my heirs to come and hunt in his park, I must have a writing (that is, a deed) of that license, for a thing passes by the license, which endures in perpetuity: but if he license me, one time to hunt, this is good without deed, for no inheritance passes."

And it was held that the reservation to the defendant in a demise to the plaintiff, of the right to sport over the demised premises, in common with the latter, his heirs and assigns, and with "any friend of his or them," was not confined to a single friend at a time, but should be deemed to have reference to plurality of friends. *Gardiner v. Colyer*, 10 L. T. N. S. 715, 12 Week. Rep. 979.

—interference by grantor.

The grant of the exclusive right to shoot over lands, together with a covenant of quiet enjoyment, does not prevent the landowner or his tenants from cutting underwood and otherwise using the land in the ordinary and accustomed way, provided there is no wilful destruction of game. *Jeffries v. Evans*, *supra*.

So, "the sole right of shooting and fishing over the whole estate" of the grantor is not an interest in the land, within the meaning of a statute providing for compensation to persons whose interest in land is injured by the construction of a railroad. *Bird v. Great Eastern R. Co.* 19 C. B. N. S. 268, 34 L. J. C. P. N. S. 366, 11 Jur. N. S. 782, 13 L. T. N. S. 365, 13 Week. Rep. 989. The court said that the instrument creating the shooting privilege was not under seal, and could not be enforced, if enforceable at all, against anyone but the grantor, and was therefore not enforceable against the railway which purchased its right of way from the grantor. However, it was intimated that even if the instrument had been under seal the result would have been the same, since, in the absence of a covenant to the contrary, the grantor would not be liable for any act in the enjoyment of his estate which was not wilfully committed

but very near it, the elevation of the surface of the water in the lakes is about 3 feet higher than the surface of the water in the Willamette slough. In the dry season the depth of the water in the lakes is from 4 inches to a foot. The evidence shows that two of the lakes cover about 40 acres of ground, while the portion of the other two, situated on defendant's land, cover nearly as much. Part of the farm is covered with timber and part with brush, while the lakes are bordered with willows. Willamette slough flows within 200 or 300 feet of two of the lakes. Defendant's residence is between Wapato lake and the slough, and she uses the

farm as a stock and dairy farm.

From the time of the execution of the deed from defendant to the Bingham, there have been disputes as to the rights of the Bingham and their successors, and continual trouble between plaintiffs and defendant. Plaintiffs' grantors treated the grant as a license to use defendant's place as they pleased, as was found by this court in *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523, and plaintiffs now contend for rights which can only be sustained upon the theory that they have a freehold interest in the land, rather than an incorporeal hereditament. In 1909 the rights of plaintiffs, under defendant's deed, were again before this court (*Salene*

to injure the hunting or fishing privilege, or was calculated directly to interfere with it.

And the lessor of a shooting privilege cannot be enjoined by the lessee from dividing the land into lots and selling the same subject to the shooting privilege, upon the ground that the same may interfere with the shooting; but to warrant an injunction it must appear that such will be the inevitable result. *Pattison v. Gilford*, 43 L. J. Ch. N. S. 524, L. R. 18 Eq. 259, 22 Week. Rep. 673.

Fishing privilege—generally.

With respect to the different kinds of fisheries, Mr. Farnham says at p. 1390 of vol. II. of his work on Waters: "Much discussion has occurred as to the kinds of fishery which may exist, most of which is merely curious learning at the present time. The principal kinds which have been mentioned are four,—(1) several, (2) free, (3) common fishery, (4) common of fishery. 'Attempt has been made to distinguish between the last three kinds, but not with marked success. In *Benett v. Costor*, 8 Taunt, 183, 2 J. B. Moore, 83, 19 Revised Rep. 491, an action for interfering with plaintiff's fishery when the plaintiff declared on the right to a common fishery whereas he should have alleged a common of fishery, the court, in discussing the difference between the two rights, said a common of fishery is a right in common with certain other persons in a particular stream. Though text writers have used the terms *communem piscariam* and *communiam piscaria*, a common fishery extends to all mankind. Holt, Ch. J., divided fisheries into three classes,—(1) *separalis*, (2) *libera*, (3) *communis*. Smith v. Kemp, Holt, 322, 2 Salk. 637, Carth. 285, 4 Mod. 186. Schultes, Aquatic Rights, 60, after a careful consideration of the question, concluded that there are in fact only two sorts of fishery, free or common of fishery and several fishery, or fishery in gross, though fisheries may acquire various provincial denominations, and be subject to peculiar and different restraints according 40 L.R.A. (N.S.)

to the locality of their situation and the usage of the neighborhood. And in *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68, Fitzgerald, B., said that 'the most important distinction in fisheries lies in their being exclusive or otherwise. Still, the exclusive right of fishing may be either in the soil of the owner or not.' It thus appears that the main division of fishery is into those which are exclusively in an individual and those which are shared in common with others, the latter receiving various names which depend upon the manner in which the right is shared. The distinction between free fishery and several fishery goes back to the Year Books, 17 Edw. IV. 6 pl. 5, and lies in the fact that the latter is exclusive, while the former may be in common with others. Hall, Sea Shores, 68; Melvin v. Whiting, 7 Pick. 79. *Libera piscaria* cannot be held to refer to an exclusive fishery in case of a large inland sea and without warrant by subsequent usages or the act of the parties. *Johnston v. Bloomfield*, supra. A free fishery is merely the right to fish in a certain place in common with all others who may have a right to fish there, and is the same as an unlimited common of fishery. Woolrych, Waters, p. 123; *Johnston v. Bloomfield*, supra; *Yard v. Carman*, 3 N. J. L. 937. Blackstone thought that a free fishery was an exclusive right of fishing through franchise in a public river, and differs from a several fishery in that the latter must be connected with, or derived from, ownership of the soil, while the former need not be. 2 Bl. Com. 39. But that distinction does not meet the necessities of the case, because it merely defines a several fishery in gross, while the idea carried by the term 'free fishery' is that the one possessing it has a right of fishery in a certain place, of which he cannot be deprived, but which is not exclusive. The grant by a riparian proprietor of a 'free fishery' in a non-navigable stream passes nothing more than the same right of fishery as is claimed by everyone who has land in the manor along the bank of the river. *Lamb v. Newbiggin*, 1 Car. & K. 549. 'A man may have a free fishery on his own soil, as, for

v. Isherwood, 55 Or. 263, 106 Pac. 18), in which plaintiffs were restrained from certain encroachments beyond the terms of the deed, and by this suit they again ask to have defendant limited in the improvement and use of her farm. In the opinion in the case last referred to, plaintiffs' right to tempt the ducks to the lakes in increased numbers by placing feed for them there, under the terms of the deed, was held doubtful; but, as the owner had previously recognized the right, plaintiffs were sustained in the exercise of it.

Plaintiffs now contend for rights not expressly granted by the deed, but implied therein, which can only be sustained on the theory that plaintiffs' interest, not only in the lakes, but in the lands bordering there-

instance, he may have a river in his own manor, and another may have a right of fishing there with him.' *Gibbs v. Wooliscott*, 3 Salk. 291, Comb. 433, 464. See also 18 Vin. Abr. title *Piscary*, (B). A riparian proprietor has no such property in *libera piscaria* as to be able to call the fish his own and maintain trespass for their taking by another. *Upton v. Dawkin*, 3 Mod. 97."

—general nature and incidents of right.

On this aspect of the question the present note supplements subdivision II. c. of the note in 60 L.R.A. 481.

A right to take fish from the private waters of another is not a mere easement, but is a right of profit in the land, and therefore can be acquired only by prescription or grant, and not by custom or dedication. *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718.

And where the ownership of the soil is in another, a several fishery is such an incorporeal hereditament as will support an action of trespass. *Holford v. Bailey*, 13 Q. B. 426, 18 L. J. Q. B. N. S. 109, 13 Jur. 278.

So, in *Albright v. Cortright*, 64 N. J. L. 330, 48 L.R.A. 616, 81 Am. St. Rep. 504, 45 Atl. 634, the decision that the defendant had no right to fish on waters on the private lands of the plaintiff was arrived at by this line of reasoning: It was held that since the defendant had no express license from the plaintiff, whatever right he could have must have been by way of easement, custom, or prescription; that the right claimed was not an easement, but a profit *à prendre*; that the right to take profit from the land of another could not be acquired by custom; and that the defendant could not, merely as one of the public, claim the right by prescription, since the public could not prescribe.

A devise to a daughter, her heirs, and assigns of certain land. "with a privilege of digging 10 barrels of clams yearly" on lands of the devisor, creates, so far as the fishery is concerned, not a mere personal privilege, but an estate of inheritance which 40 L.R.A. (N.S.)

on, is a freehold interest. The right to hunt under such a grant is limited to the usual and reasonable methods generally used in the vicinity at the time of the execution of the deed. *Salene v. Isherwood*, supra; *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523; *Hilton v. Green*, 2 Post. & F. 821. Under such a deed, the grantor is under no obligation to maintain a preserve for the pleasure and sport of the grantees, but they must exercise the right in the condition it may be at the time.

We are cited to no cases upon the questions involved here other than the two Oregon cases, supra, and there are but few American cases on the subject, and none discuss this question, viz., the extent of

is assignable. *Lakeman v. Butler*, 17 Pick. 436, 28 Am. Dec. 311.

But a right to fish on the lands of another, which is merely personal to the owner of the right, and not appendant to any estate, is capable neither of assignment nor inheritance. *Mallet v. McCord*, 127 Ga. 761, 56 S. E. 1015.

In *Grove v. Portal*, 71 L. J. Ch. N. S. 209, [1902] 1 Ch. 727, 86 L. T. N. S. 350, 18 Times L. R. 319, it was held that a covenant against subletting in a lease of the exclusive right of fishing in a certain portion of a river, together with liberty of ingress and egress for the lessee and his authorized friends, was not broken by the lessee granting a license to another person to fish in the waters embraced within the lease, provided the licensee should use but two rods at the same time,—the court saying that the covenant not to underlet "the said premises" referred to the whole premises, and did not operate to prevent a leasing of a part of the premises. It was intimated, however, that if the lessee had granted an exclusive license for two rods, the effect would have been to transfer the premises to the licensee, and therefore would have effected a breach of the covenant.

The owner of a fishing privilege on flats, which has been severed from the uplands, may maintain trespass against the occupant of the uplands who places a weir on the flats. *Wyman v. Oliver*, 75 Me. 421. In this case it appeared that, upon the distribution of an intestate's estate, the uplands were divided between his heirs, and the fishing privilege was set off to the wife as dower; and it was held that this severed the fishing privilege from the uplands, and that the widow's subsequent release or conveyance of the dower to the heirs did not restore the privilege to its former status as an incident of the uplands.

Since the owner of flats located in waters in which the right of fishery is common, has no right to convey the fishery, his lease of "the exclusive privilege of fishing with nets" on a certain portion of the flats is not a lease of the fishery, but only of a certain part of the flats for the convenience

the rights of the grantee in a hunting privilege. *Bingham v. Salene*, supra, is one of the principal American cases cited in the text-books and cyclopedias upon the effect of such a grant, but there are several English cases quite in point. *Jeffryes v. Evans* (1865) 19 C. B. N. S. 246, 15 Eng. Rul. Cas. 716, is a case where the defendant leased the land to Rees, reserving to himself the exclusive right to shoot, fish, and sport thereon, and thereafter he demised to plaintiff the hunting and fishing privilege reserved in the former lease. Rees, the lessee under his lease, cut down certain furze cover and woods on the land, which constituted shelter for rabbits and other game, of which plaintiff complained. In deciding the case, Erle, Ch. J., says

of drawing nets; and while it seems that the lessee cannot maintain an action against a member of the public for taking fish upon the flats, he may maintain an action of trespass for drawing nets thereon. *Brink v. Richtmyer*, 14 Johns. 255.

And while the grantee of the right of taking certain specified fish on the shore frontage of the grantor, together with all privileges necessary for carrying out the fishery, has no right to attach fixtures for the express purpose of taking fish other than those mentioned in the grant, nevertheless, fish of other kinds which the grantee finds in a weir constructed solely for the purpose of taking the fish specified belong to him upon the theory that fish, before they are taken, are the property of no one, but that, when taken, they, like all animals, *feræ naturæ*, belong to the taker. *Treat v. Parsons*, 84 Me. 520, 24 Atl. 946.

—several fishery as including title to soil.

Lord Coke took the stand that the soil did not pass with the grant of a several fishery. He says in Co. Litt. 4b: "If a man be seised of a river, and by deed do grant *separalem piscariam* in the same, and maketh livery of seisin *secundum formam chartæ*, the soile doth not passe, nor the water; for the grantor may take water there; and if the river become drie he may take the benefit of the soile; for there passed to the grantee but a particular right, and the livery being made *secundum formam chartæ* cannot enlarge the grant. For the same reason, if a man grant *aquam suam* the soile shall not passe, but the piscary within the water passeth therewith. And land covered with water shall be demanded by the name of so many acres *aqua co-operta*, whereby it appeareth that they are distinct things." So, he says at 122 a: "A man may prescribe to have *separalem piscariam* in such a water, and the owner of the soyle shall not fish there; but if he claim to have *communiam piscariam* or *liberam piscariam*, the owner of the soyle shall fish there."

However, the courts have uniformly tak-

"The next question arises upon the second breach, which alleges that Rees, lawfully claiming, and in fact having, through and under the lessors, the right to cut down divers furze covers, woods, and plantations in and upon the lands over which the plaintiff had under, and by virtue of the said indenture the exclusive right of shooting and sporting. . . . It is contended on the part of the plaintiff that the covenant for quiet enjoyment of the premises demised and granted was impliedly a covenant not to grub up or destroy the furze and underwood; and so the breach of it was an eviction of the plaintiff from his right of sporting. To this it seems to me there is a short answer. There has been no eviction. The plaintiff has just as

en the position that prima facie the soil is in the owner of a several fishery. *Holford v. Bailey*, 13 Q. B. 426, 18 L. J. Q. B. N. S. 109, 13 Jur. 278; *Foster v. Wright*, L. R. 4 C. P. Div. 438, 49 L. J. C. N. S. 97, 44 J. P. 7; *Partheriche v. Mason*, 2 Chitty, 658.

With this position, the court in *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68, are inclined to agree, the specific holding being that there is a difference between *libera piscaria* and *separalis piscaria*, and that the grant of *libera piscaria* does not amount to an exclusive fishery or pass title to the soil.

So, it was held in *Anonymous*, Lofft, 364, that notwithstanding the *dictum* of Lord Coke, the presumption is that the owner of a several fishery is the owner of the soil. This case is decided upon the authority of *Smith and Kemp*, Skinner, 342, 2 Salk. 637, 4 Mod. 186, Holt, 322, Carth. 285, which holds that the owner of a free fishery can maintain trespass against one who takes fish therefrom, and that fisheries are divided into three kinds,—(1) *separalis piscaria*, (2) *libera piscaria*, (3) *communis piscaria*. In the case of the first two it was held that trespass would lie, but that in the case of the third, it would not lie; and this upon the ground that the owner of a several fishery was the owner of the soil, that where a free fishery was granted, the grantee had a property in the fish and might bring a possessory action for them without making any title, while *communis piscaria* was similar to any other common, at least with respect to the fact that a commoner cannot maintain any action with respect thereto.

While a several fishery may exist, either apart from or as incident to the ownership of the soil over which the stream flows, it is settled that where a several fishery is proved to exist, the owner of the fishery is to be presumed the owner of the soil unless there is evidence to the contrary. *Hanbury v. Jenkins* [1901] 2 Ch. 401, 70 L. J. Ch. N. S. 730, 65 J. P. 631, 49 Week. Rep. 615, 17 Times L. R. 539 (the court added in effect that this was especially so where the grant of the fishery expressly included "weirs," the court saying that a grant of

much right to shoot and sport over the 30 or 40 acres of land which has been so treated as he had before; and that is all the plaintiff covenanted that he should have." Willes, J., in the same case, says: "As to the other point, the argument urged on the part of the plaintiff would have been entitled to much weight if the grant had been of the woods and underwoods, though, if it had been a grant of the latter, I should have thought that the tenant might lawfully have cut the underwood in the usual and accustomed way. . . . The grant is of the exclusive right of fishing and sporting over, and taking the game, rabbits, and wild fowl on the land demised, and on that under lease to Rees. I apprehend that such a grant as that does not

prevent the landowner or his tenants from using the land in the ordinary and accustomed way, provided they do not resort to any expedients for destroying or driving away the game. Cutting furze and underwood in the ordinary course of the cultivation of land cannot be said to be a wilful destruction of the game." Smith, J., in the same case, says: "It appears to me that the cutting of the furze and underwood, which may have been done in the ordinary course of good management of the farm, was not an interruption of the enjoyment of the incorporeal hereditaments granted to the plaintiff. He had the same right to sport over the land as before. If he wished to have the condition of the land as to furze and underwood preserved, he

weirs necessarily granted the soil to which they were attached).

And this presumption displaces the presumption that would otherwise arise in favor of the riparian proprietor. *Ecroyd v. Coulthard*, 66 L. J. Ch. N. S. 751, [1897] 2 Ch. 554, 77 L. T. N. S. 357, 46 Week. Rep. 119, 61 J. P. 791.

In *Atty. Gen. v. Emerson* [1891] A. C. 649, 61 L. J. Q. B. N. S. 79, 65 L. T. N. S. 564, 55 J. P. 709, 23 Eng. Rul. Cas. 739, holding that proof of the ownership of a several fishery over a part of the foreshore raised a presumption against the Crown that the freehold of the soil in that part of the foreshore was in the owner of the fishery—Lord Herschell said that he was not inclined to inquire upon what basis this presumption rested, though he pointed out that in earlier days the exclusive right of fishing over the foreshore being no doubt the most valuable right of property connected with it, it might have been thought probable that where this right was granted, either the fishery would be conferred upon one who was already owner of the soil, or that the soil would be granted with it.

It was held in *Marshall v. Ulleswater Steam Nav. Co.* 3 Best & S. 732, 9 Jur. N. S. 988, 32 L. J. Q. B. N. S. 139, 8 L. T. N. S. 416, 11 Week. Rep. 489, that although the description of a fishery was left uncertain, where the deed which conveyed it was a feoffment with livery of seisin duly indorsed, and conveyed subject to a free rent, the fishery must be deemed to be several, and it therefore presumably included the soil.

It was held in *Rex v. Old Alresford*, 1 T. R. 358, that where there was rented to a pauper "the fishery of a pond with the spear-sedge, flags, and rushes growing in or about the same," it was presumed that the soil passed with it, and that the same was a tenement within the statute relating to settlements of paupers. Here the court said in a general way that the letting of a fishery of this kind raised the presumption that the soil passed with it.

In *Ecroyd v. Coulthard*, *supra*, the court 40 L.R.A. (N.S.)

said that there was no magic in the words "public" and "navigable" employed in the rule that the owner of a several fishery in a public navigable river is presumed the owner of the soil, and declared that those words were used as referring to the owner's right even though the river was public and navigable, and that *a fortiori* the presumption attached where the stream was neither public nor navigable. In this connection the court cites *Foster v. Wright*, L. R. 4 C. P. Div. 438, 49 L. J. C. P. N. S. 97, 44 J. P. 7.

By the application of the doctrine of accretions and relictions, it was held in *Foster v. Wright*, *supra*, that the owner of a several fishery continued to have the exclusive right of fishing notwithstanding a gradual change in the course of the stream, and could maintain an action of trespass against the owner of land which was originally nonriparian, but a portion of which became the bed of the river when in the course of the change the intervening strip and a part of the defendant's land was washed away, and the extent of the encroachment upon the latter was clearly defined.

Hindson v. Ashby [1896] 2 Ch. 1, involved a dispute between a riparian owner on a nontidal stream, and the owner of a several fishery therein, as to the respective rights of the parties in a strip of land which had formerly formed a part of the bed of the stream, but which at times now became dry. Refraining from deciding the general question whether the riparian proprietor could claim the accretions, and instead, apparently invoking the rule that even if a riparian proprietor in such circumstances may ordinarily claim the accretions, such right yields to the presumption that the owner of a several fishery is the owner of the bed of the stream,—the court held that, since the accretions had not ceased to constitute the bed of the stream, they belonged to the owner of the several fishery. In reaching this conclusion the court said: "Treating the defendant as the owner of a several fishery, and as presumptively, as well as by admission of the plaintiffs, the owner of the bed

should have expressly stipulated that the present mode of cultivation of the land should not be altered."

In *Boyle v. Holcroft* [1905] 1 I. R. 245, 250, Barton, J., says: "I take it that, as a general rule, so long as the tenant is bona fide and reasonably managing and using the lands, the owner of the fishing rights must be content to exercise his right upon the lands in the condition in which they may happen to be from time to time." In *Fetherstonhaugh v. Hagarty* (1878) Ir. L. R. 3 Eq. 150, where a lease was given, reserving to the owner the hunting privilege, the lessee ploughed 40 acres of ground and thus broke up and smothered the rabbit burrows, to the injury of the hunting. It is held that a tenant under a lease such as this, where an exclusive profit *à prendre* is reserved or granted to the landowner, cannot be made answerable for acts done in the ordinary and proper cultivation of the farm, even though they result in the destruction of game. In *Gearns v. Baker* (1875) L. R. 10 Ch. 355, it is held that a landowner who has demised for a term of years the right to shoot over his lands is not thereby prevented from cutting timber, as he thinks fit, in the ordinary management of his land, although injurious to the shooting. Sir W. M. James, L. J., says: "The agreement is an ordinary agreement for letting shooting, and I must say that it would be an immense surprise to many persons who let shooting lease for twenty-one years is to be interfered with by this court or by any other court in their mode of managing their own property. It is preposterous to suppose that a man who grants a shooting lease for twenty one years is to be dictated to by this court as to whether

he shall cut down a tree or remove a copse, because by so doing he would be driving away the hares or interfering with the breeding of pheasants. If men mean to acquire such rights, they must express their meaning clearly. I am of opinion that such rights are not expressed, and not implied in the ordinary grant of shooting, and that this court has no right to interfere in the way suggested."

These cases reflect the views of eight different judges, and cover a period from 1863 to 1905, and we think their reasoning is sound. We find no case to the contrary. The opinion in *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523, construes this deed to be a conveyance of license or a profit *à prendre*, and holds that the right cannot be extended beyond the terms of the deed. Lord, Ch. J., says: "While 'the supposed odiousness of this right,' as Lord Campbell said, 'cannot influence our decision,' the fact, at least, admonishes us that no intentions or presumptions are to be indulged in in the construction of the grant, not warranted by the plain import of its terms and provisions. A grant of this description is construed strictly." And speaking of this same deed in *Salene v. Isherwood*, 55 Or. 267, 106 Pac. 18, it is said that the deed is to be construed strictly. Although the conveyance was upon a valuable consideration, yet it was merely nominal; and the grantors evidently had no thought that they were deeding away their right to control and farm one sixth of their land, and they did not grant more than the privilege of shooting in certain places on the farm such wild fowls as might by their own inclination be found there in certain seasons in their migrations, and the gran-

of the river within the limits of the fishery, it is very difficult to see how either his rights or those of the riparian proprietor can be affected either by accretions to the bed or by the lowering of the level of the water, so long as the accretions or the soil from which the water has receded are still in fact part of the bed of the river. So long as this is the case, so long will the riparian proprietors continue to be such, and to be entitled to free access to and from their lands to the water across the accretions and soil left dry, and otherwise to use such accretions and soil to the same extent as they were entitled to use the bed of the river before any change in it became observable. On the other hand, in the case supposed, the owner of the several fishery will have the same rights to such accretions and soil as parts of the bed of the river, as he had to the old bed of the river before any change took place." Whether the accretions could ever become the property of the plaintiffs, or cease to be the property of the defendants, when, for instance, it ceased to be a part of the bed of the river, the court expressly refused to decide.

It was held in *Fitzgerald v. Faunce*, 46 N. J. L. 536, that a conveyance by an owner of land adjoining the Delaware river, of the sole right, use, and enjoyment for all purposes of fishing whatsoever and none other, of a strip of land described by courses and distances beginning along an artificial embankment, made to prevent the tide from flowing over the low lands, and running out to low-water mark, conveyed an actual estate, and not merely an easement; passed the fee of the land next the river; and made the grantee the riparian owner; and that the successor in title of the grantor by mesne conveyances executed subject to the former conveyance could not, as against the grantee in such former conveyance, avail himself of a grant to him by riparian commissioners of the state rights in the land under the water in front of the strip. L. A. W.

ants, when, for instance, it ceased to be a part of the bed of the river, the court expressly refused to decide.

tees of the privilege or their assigns have no ground upon which to ask more; nor is the court justified in implying more than is expressed in the deed.

This brings us to the application of the facts to this statement of the law. It is quite apparent that there is bad feeling between the parties hereto; and, if defendant has endeavored to throw every obstacle in the way of successful shooting, as claimed by plaintiffs, that fact might tend to give her acts in cutting brush and making fires on the immediate border of the lakes the appearance of an effort to drive away the birds or make it more difficult for plaintiffs to shoot them, and not for the bona fide purpose of clearing the land in the interest of better farming. If she is systematically clearing her land, evidencing a bona fide intention to improve it, no complaint can be made against her.

As to the draining of the lakes, the complaint is that she threatens to drain them, and she admits such a purpose. Much evidence was taken upon the question whether they could be profitably drained. If they cannot be successfully drained, then the water will still remain for the ducks. If they can be, then surely, in the interest of good farming, she should be permitted to do it, and it is not for the court to say whether she can or cannot. We can only determine whether, by virtue of the conveyance of the hunting privilege, she can be permitted to do so, and the same may be said as to the use she can make of the land when drained. She may get much or little off the ground when drained, but this is her affair, and not plaintiffs.

For cutting and burning brush in bad faith, in a manner to injure the hunting, defendant would be liable to plaintiffs in damages. But the deed is not ambiguous nor of doubtful meaning, and plaintiffs have shown no ground for equitable relief.

If defendant is wrongfully destroying plaintiffs' hunting privilege, or in bad faith committing acts that drive or keep away the birds from the lakes, the remedy is adequate and complete at law, where a jury may determine whether cutting and burning brush at the time and place, and in the manner complained of, was done in bad faith, and, if so, plaintiffs can be fully compensated in damages.

The decree is reversed, and the suit is dismissed.

Petition for rehearing denied.
40 L.R.A.(N.S.)

NEW YORK COURT OF APPEALS.

FRANK H. DOWNEY, Respt.,

v.

THOMAS W. FINUCANE et al., Impleaded,
etc., Appts.

(205 N. Y. 251, 98 N. E. 391.)

Corporation — promoter — fraud in sale of stocks — liability.

1. Promoters of a scheme to consolidate several independent corporations into one business enterprise cannot escape liability for fraudulent representations of an agent in the sale of the stock of the consolidated corporation, on the theory that they were merely directors of that corporation, and not personally liable for the fraud of an agent employed to market its stock, if whatever functions they assumed were in furtherance of a common enterprise to market the securities necessary to the success of the enterprise.

Evidence — fraud in sale of corporate stock — separate transactions.

2. In an action by the purchaser of bonds of a consolidated corporation, to hold the promoters liable for fraud in inducing the sale by means of a prospectus which stated that one of the corporations which went into the consolidation owned a franchise acquired under advice of eminent counsel, which if good would be very valuable, evidence is admissible that under the law it was extremely doubtful if it had any value whatever, and that they suppressed the fact that they turned the franchise over to the corporation for more than 150 times what they paid for it.

Same — issuance of stock for property — excessive valuation.

3. In an action to hold promoters liable for fraud in the sale of bonds of a corporation, the jury may consider the question of fraud in a statement of the prospectus that a certain number of shares of stock had been issued, or directed to be issued, when a portion of such stock represented property turned over by the promoters at more than 150 times what they paid for it.

Same — payment of unearned dividends.

4. In an action to hold promoters liable for fraud in selling bonds of a consolidated corporation, the jury may consider statements in the prospectus that dividends had been paid on the stock of one of the constituent corporations, when in fact they were never earned.

Note. — As to the duty and liability of promoters to the corporation and its members, see notes to *Yale Gas Stove Co. v. Wilcox*, 25 L.R.A. 90, and *Lomita Land & Water Co. v. Robinson*, 18 L.R.A.(N.S.) 1106, and later cases *Harrill v. Davis*, 22 L.R.A.(N.S.) 1153, and *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, post, 314.

Corporations — promoters — fraudulent intent — ambiguous language.

5. Promoters of a corporation cannot escape liability for fraud in the sale of bonds by means of ambiguous language in the prospectus, on the ground that they intended no fraudulent misstatement of facts, if the general public would almost inevitably infer the fraudulent meaning from the language used.

Jury — challenge — party — joint defendants.

6. Several defendants joined in one civil action, whose interest is common, whose answers are substantially identical, and whose defense is conducted in the common interest of all, are treated as but one party, within the meaning of a statute allowing a certain number of peremptory challenges to each party in a civil action.

(Hiscock, J., dissents.)

(April 12, 1912.)

APPPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County in plaintiff's favor in an action brought to recover damages for fraud and deceit. Affirmed.

The facts are stated in the opinion.

Mr. John G. Milburn, with Messrs. Taylor & Goodwin, and Walter S. Hubbell, for appellants Sibley et al.:

If the transaction was a company transaction, Fenn was the agent of the corporation, not of the directors. Except under special circumstances, the directors would not be liable to third persons for the acts of such an agent. Those special circumstances are the personal participation of individual directors in the acts which have produced injury to a third person.

Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Arthur v. Griswold, 55 N. Y. 400, 7 Mor. Min. Rep. 46; Cassidy v. Uhlmann, 170 N. Y. 505, 63 N. E. 554; Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; People v. Equitable Life Assur. Soc. 124 App. Div. 714, 109 N. Y. Supp. 453.

It was error to leave to the jury any question respecting the statements of the prospectus relating to the New York Independent Telephone Company.

Ghee v. Northern Union Gas Co. 158 N. Y. 510, 53 N. E. 692; Geneva & W. R. Co. v. New York C. & H. R. R. Co. 163 N. Y. 228, 57 N. E. 498; Purchase v. Matteson, 25 N. Y. 212.

It was error to submit to the jury the question whether the representation that 413,030 shares of the capital stock of the United States Company had been issued or contracted to be issued was fraudulent. 40 L.R.A. (N.S.)

Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159; Old Dominion Copper Min. & Smelting Co. v. Lewisohn, 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634; Goodnow v. American Writing Paper Co. 72 N. J. Eq. 645, 66 Atl. 607; Tompkins v. Sperry, 96 Md. 560, 54 Atl. 254; Atty. Gen. v. Standard Trust Co. [1911] A. C. 498, 80 L. J. P. C. N. S. 189, 105 L. T. N. S. 152; Donald v. American Smelting & Ref. Co. 61 N. J. Eq. 458, 48 Atl. 786; McCarter v. Pitman, G. & C. Gas Co. 74 N. J. Eq. 255, 69 Atl. 211; Danville, H. & W. B. R. Co. v. Kase, 41 W. N. C. 411, 39 Atl. 301.

It was error to submit the representations as to the Stromberg Company to the jury.

Bank of United States v. Davis, 2 Hill, 451; New York v. Tenth Nat. Bank, 111 N. Y. 453, 18 N. E. 618; Atlantic State Bank v. Savery, 82 N. Y. 291.

It was error to submit to the jury the representation concerning the \$17,000,000 of bonds to be issued pursuant to existing contracts, and the \$7,000,000 thereof which had already been sold.

Hallows v. Fernie, L. R. 3 Ch. 467, 18 L. T. N. S. 340, 16 Week. Rep. 873; Smith v. Chadwick, L. R. 9 App. Cas. 187, 50 L. T. N. S. 697, 32 Week. Rep. 687, 48 J. P. 644; Central R. Co. v. Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. N. S. 849, 16 L. T. N. S. 500, 15 Week. Rep. 921, 6 Eng. Rul. Cas. 759; Dwight v. Germania L. Ins. Co. 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654.

To warrant the submission of the case to the jury, there must be evidence of fraudulent conduct on the part of the agents who prepared or issued the prospectus and conducted the sale of the bonds.

Kountze v. Kennedy, 147 N. Y. 124, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414; Lyon v. James, 97 App. Div. 385, 90 N. Y. Supp. 28, affirmed in 181 N. Y. 512, 73 N. E. 1126; Bell v. James, 128 App. Div. 241, 112 N. Y. Supp. 750, affirmed in 198 N. Y. 513, 92 N. E. 1078; Polhemus v. Polhemus, 114 App. Div. 781, 100 N. Y. Supp. 263; Duryea v. Zimmerman, 121 App. Div. 560, 106 N. Y. Supp. 237; Thayer v. Sohley, 137 App. Div. 166, 121 N. Y. Supp. 1064.

The ruling of the court that the five defendants, although appearing by separate counsel, were limited to six peremptory challenges, was error.

Stroh v. Hinchman, 37 Mich. 490; Hundhausen v. Atkins, 36 Wis. 518; State v. Durein, 29 Kan. 688.

Mr. Daniel J. Kenefick, with Messrs. Perkins, Duffy, & McLean for appellant Finucane.

Messrs. Alton B. Parker, Elbridge L. Adams, James M. E. O'Grady, and John Desmond, for respondent:

All the members of the syndicate are liable for the frauds committed by any of the members in the preparation and issuance of the prospectus, for, as to third parties, they were partners.

Smith v. Milliken Bros. 200 N. Y. 21, 93 N. E. 184; King v. Barnes, 109 N. Y. 267, 16 N. E. 332; Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 972; Anderson's Case, L. R. 7 Ch. Div. 75, 47 L. J. Ch. N. S. 273, 37 L. T. N. S. 560, 26 Week. Rep. 442; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; 1 Lindley, Partn. 3d Eng. ed. 54; Story, Partn. §§ 108, 131; Bigelow, Fr. 240, § 6; Walker v. Anglo-American Mortg. & T. Co. 72 Hun, 344, 25 N. Y. Supp. 432; Williams v. Hendricks, 67 Am. St. Rep. 46, note; Page v. Citizens' Bkg. Co. 111 Ga. 73, 51 L.R.A. 463, 78 Am. St. Rep. 144, 36 S. E. 418.

There was no error in the refusal to charge that if Mr. Fenn was selling these bonds for the United States Independent Telephone Company, and not for the syndicate, he was not the agent of the individual directors of the company, and they in that relation only could be liable for personal conduct.

Avery v. Moore, 133 Ill. 74, 24 N. E. 606; Woolery v. Louisville, N. A. & C. R. Co. 107 Ind. 381, 57 Am. Rep. 114, 8 N. E. 226; Lankin v. Palmer, 164 N. Y. 201, 58 N. E. 123; Webber v. Read, 65 Me. 564; Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376; Mack v. Latta, 178 N. Y. 533, 67 L.R.A. 126, 71 N. E. 97; Miller v. Barber, 66 N. Y. 558; Vreeland v. New Jersey Stone Co. 29 N. J. Eq. 195, affirmed in 29 N. J. Eq. 651; Morgan v. Skiddy, 62 N. Y. 319, 7 Mor. Min. Rep. 74; Weir v. Bell, L. R. 3 Exch. Div. 249, 47 L. J. Exch. N. S. 704, 38 L. T. N. S. 929, 26 Week. Rep. 746; Hornblower v. Crandall, 7 Mo. App. 220, affirmed in 78 Mo. 581.

The representation of the prospectus that, as a result of the performance of certain contracts, the company will have \$5,000,000 cash in its treasury in addition to the securities pledged under the mortgage, was a false and fraudulent representation.

Lehman-Charley v. Bartlett, 135 App. Div. 674, 120 N. Y. Supp. 501; Schumaker v. Mather, 133 N. Y. 594, 30 N. E. 755; Arkwright v. Newbold, L. R. 17 Ch. Div. 322, 50 L. J. Ch. N. S. 372, 44 L. T. N. S. 393, 29 Week. Rep. 455; Arnison v. Smith, L. R. 41 Ch. Div. 372, 61 L. T. N. S. 63, 37 Week. Rep. 739, 1 Megone, 338; Smith v. Chadwick, L. R. 9 App. Cas. 189, 53 L. J. Ch. N. S. 873, 50 L. T. N. S. 697, 32 40 L.R.A. (N.S.)

Week. Rep. 687, 48 J. P. 644; Powers v. Fowler, 157 Mass. 318, 32 N. E. 166; Simon v. Goodyear Metallic Rubber Shoe Co. 52 L.R.A. 745, 44 C. C. A. 612, 105 Fed. 573; 20 Cyc. 124, title "Fraud."

The representations of the prospectus touching the prosperity of the Stromberg-Carlson Company and its large dividends were false, to the knowledge of Finucane, whose knowledge is imputable to the members of the syndicate.

Ottinger v. Bennett, 203 N. Y. 554, 96 N. E. 1123, reversing 144 App. Div. 525, 129 N. Y. Supp. 819.

The withholding of the important parts of Haskins & Sells' report was fraudulent and deceitful. It was a suppression of facts which tended to limit and qualify and derogate from the facts stated.

Arkwright v. Newbold, L. R. 17 Ch. Div. 320, 50 L. J. Ch. N. S. 372, 44 L. T. N. S. 393, 29 Week. Rep. 455; Wiser v. Lawler, 189 U. S. 260, 47 L. ed. 802, 23 Sup. Ct. Rep. 624, 22 Mor. Min. Rep. 630; New Brunswick & C. R. & Land Co. v. Muggeridge, 1 Drew. & S. 363, 30 L. J. Ch. N. S. 242, 7 Jur. N. S. 132, 3 L. T. N. S. 651, 9 Week. Rep. 193; Hayward v. Leeson, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656; Central R. Co. v. Kisch, L. R. 2 H. L. 113, 36 L. J. Ch. N. S. 849, 16 L. T. N. S. 500, 15 Week. Rep. 821, 6 Eng. Rul. Cas. 759.

The representations touching the New York Independent Telephone Company and its franchise were fraudulently deceptive, as stating absolutely as true that which was at best doubtful, and known to be, and suppressing and concealing important facts which would have given a different color to what was stated.

Re New York Independent Teleph. Co. 200 N. Y. 527, 93 N. E. 1126; West London Commercial Bank v. Kitson, L. R. 13 Q. B. Div. 360, 53 L. J. Q. B. N. S. 345, 50 L. T. N. S. 656, 32 Week. Rep. 757; Eaglesfield v. Londonderry, L. R. 4 Ch. Div. 693, 35 L. T. N. S. 822, 25 Week. Rep. 190; Wiser v. Lawler, 189 U. S. 260, 47 L. ed. 802, 23 Sup. Ct. Rep. 624, 22 Mor. Min. Rep. 630.

The representation that "413,030 shares of the capital stock of the United States Independent Telephone Company have been issued, or are contracted to be issued," was fraudulent.

See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843; Easton Nat. Bank v. American Brick & Tile Co. 70 N. J. Eq. 722, 64 Atl. 1095, 10 Ann. Cas. 84; Donald v. American Smelting & Ref. Co. 62 N. J. Eq. 729, 48 Atl. 771, 1116; Honeyman v. Haughey, — N. J. Eq. —, 66 Atl. 582; Hebbard v. Southwestern Land & Cattle Co. 55 N. J. Eq. 18, 36 Atl. 122; Edgerton

v. Electric Improv. & Constr. Co. 50 N. J. Eq. 354, 24 Atl. 540; Knickerbocker Importation Co. v. State Bd. of Assessors, 74 N. J. L. 583, 9 L.R.A.(N.S.) 885, 65 Atl. 913; Douglass v. Ireland, 73 N. Y. 104, 4 Mor. Min. Rep. 32; Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544; Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376.

Defendants were collectively entitled to only six peremptory challenges.

Schmidt v. Chicago & N. W. R. Co. 83 Ill. 405; Gordon v. Chicago, 201 Ill. 623, 66 N. E. 823; Stone v. Segur, 11 Allen, 568; Snodgrass v. Hunt, 15 Ind. 274; Bryan v. Harrison, 76 N. C. 360; State v. Reed, 47 N. H. 466; Sodousky v. McGee, 4 J. J. Marsh. 267; Blackburn v. Hays, 4 Coldw. 227; Hargrave v. Vaughn, 82 Tex. 347, 18 S. W. 695; Waters-Pierce Oil Co. v. Burrows, 77 Ark. 74, 96 S. W. 336; United States v. Alexander, 2 Idaho, 386, 17 Pac. 746; McClay v. Worrall, 18 Neb. 44, 24 N. W. 429; Bibb v. Reid, 3 Ala. 88; Moores v. Bricklayers' Union, No. 1, 23 Ohio L. J. 48; Gram v. Sampson, 4 Ohio C. C. 490, 2 Ohio C. D. 666; Thomp. & M. Juries, § 162; 12 Enc. Pl. & Pr. 483; 17 Cyc. 1182.

Willard Bartlett, J., delivered the opinion of the court:

This is a civil action to recover damages for fraud and deceit. There was a general verdict in favor of the plaintiff, and twenty special questions were submitted to the jury to answer.

A curious feature in the record is the form of the verdict as originally rendered. After announcing that the jury had agreed, the foreman said: "We find for the plaintiff in the sum of \$1,212.93, and recommend the clemency of the court for Messrs. Eastman, Sibley, Strong, and Watson."

It is suggested that the nature of the action had not been brought clearly within the comprehension of jurors who could agree upon such a verdict as this, and that they evidently supposed that they were sitting in a criminal tribunal. The appellate division might have granted a new trial on this ground; but the form of the verdict was corrected by direction of the trial judge, and it now presents no legal error cognizable in this court.

The basis of the action is the alleged falsity of a prospectus published to promote the sale of the securities of the United States Independent Telephone Company. This prospectus was not prepared or signed by any of the appellants. The sole signature to the prospectus is that of Albert O. Fenn, care Alliance Bank, Rochester, New York. The plaintiff's right to recover

therefore, rests upon the agency of Fenn to act in their behalf in endeavoring to procure subscriptions by means of the prospectus. The United States Independent Telephone Company was a holding corporation organized to acquire the control of several corporations, through whose powers, rights, and franchises an independent telephone business might be established in New York and other parts of the country. At the time of the publication of the prospectus, it had obtained a majority of the authorized capital stock of two other corporations: First, the New York Independent Telephone Company; and second, the Stromberg-Carlson Telephone Manufacturing Company. The New York Independent Telephone Company had acquired an alleged franchise originally granted to the Mercantile Electric Company, which was supposed to authorize the introduction, construction, and operation of an independent telephone system in the streets of the city of New York; and this alleged franchise plays the most prominent part in the present litigation. The Stromberg-Carlson Telephone Manufacturing Company was a corporation engaged in the manufacture of telephone instruments and appliances in the city of Rochester.

The defendant Finucane was largely interested in the latter company, and in 1904 he and the defendant Eugene Satterlee (now deceased) appear to have formed a scheme to unite the interests of the Stromberg-Carlson Company with a number of telephone operating companies, for the purpose of establishing an independent system to compete with the so-called Bell companies, particularly in the city of New York. With the assistance of Mr. William H. Page, of New York, a lawyer, a syndicate agreement was prepared to carry this design into effect. The plaintiff was not able to procure this agreement or a copy of it to introduce into evidence upon the trial. The original appears to have been kept by Mr. Page, who was not a witness. It was clearly proved, however, that the appellants became parties to this agreement, and that most, if not all, of them, actually signed it. Sibley admits subscribing \$50,000 to the syndicate. Strong admits that he subscribed \$25,000 through Fenn. Eastman admits subscribing \$25,000, although he remembers no paper, and Watson admits subscribing \$50,000. Further proof justified the inference that the defendants Sibley, Strong, Eastman, and Watson entered into this undertaking for the establishment of an independent telephone system, for purposes of individual profit, irrespective of any relation they might assume as directors of such corpora-

tion or corporations as might be contemplated by Mr. Finucane and Mr. Page as necessary or appropriate agencies in carrying out the scheme, these two gentlemen and Fenn, the common agent, being largely trusted to devise and carry out the details of the enterprise. Messrs. Sibley, Strong, Eastman, and Watson, as their own testimony indicated, were quite indifferent as to the methods to be pursued. They confided in the others and contributed their money liberally, apparently convinced that the investment would yield large returns.

If Fenn was the agent of these defendants as members of such syndicate, his acts in furtherance of the enterprise and all that he did in reference to the prospectus must be deemed binding upon them.

The promoter of a company, whether he be a director or not, who knowingly issues or sanctions the circulation of a false prospectus, containing untrue statements of material facts naturally tending to mislead and to induce the public to purchase its stock or other securities, is unquestionably responsible to those who are injured thereby. *Morgan v. Skiddy*, 62 N. Y. 319, 7 Mor. Min. Rep. 74.

Where there are a number of such promoters, all the coadventurers are liable in damages for the fraud of an agent employed by them to effect the sale of the corporate securities, without reference to their own moral guilt or innocence. *Hornblower v. Crandall*, 7 Mo. App. 220, affirmed in 78 Mo. 581. In the case cited it was said that, where an associate in such an enterprise abstains from knowing, and leaves the details to his companions, while the illicit gains go to the common accounts, his ignorance ought not to avail him. "The law would be helpless if its obligations could be avoided by this convenient ignorance. Where the parties sought to be charged might have known, and where it can fairly be inferred that they with the wrongdoers received the benefit of the contrivance, their ignorance cannot avail them."

The appellants, however, contend that Fenn, instead of acting for the individual members of the syndicate, was solely the agent of the United States Independent Telephone Company, and, this being so, that they cannot be held liable for his fraudulent misrepresentations, inasmuch as they were merely directors of that corporation. They invoke the doctrine that the mere fact of being a director is not *per se* sufficient to render a party liable for the fraud and misrepresentation of the active managers of a corporation, or the fraudulent representations of an agent employed to market its stock. *Arthur v. 40 L.R.A. (N.S.)*

Griswold, 55 N. Y. 400, 7 Mor. Min. Rep. 46. This contention is the foundation of the first legal proposition argued in their behalf, namely, that it was error to refuse to charge the jury that "if Mr. Fenn was selling bonds for the United States Independent Telephone Company, and not for the syndicate, then he was not the agent for the individual directors of the company, and they in that relation only would be liable for personal misconduct." The answer to this proposition is that the rule thus limiting the liability of directors of a corporation to cases where they are chargeable with some personal knowledge of the act claimed to be fraudulent has no application here, because the evidence did not permit an inference that Fenn in issuing the prospectus was the agent of the United States Independent Telephone Company, rather than the agent of the appellants as members of the syndicate. Upon all the proof in the case as it stood at the end of the trial, the jury would not have been justified in making the desired distinction between the acts of the appellants as directors of that company, and their acts as individuals. As has already been suggested, their own testimony showed that they were promoters, and that whatever functions they assumed, whether as directors or otherwise, were in furtherance of a common enterprise to market the securities of such corporations as might be formed to introduce and operate an independent telephone system in New York.

The appellants complain of four alleged errors in submitting to the jury questions as to the truth or falsity of statements contained in the prospectus:

(1) It is contended that it was error to leave to the jury any question respecting the statements of the prospectus relating to the New York Independent Telephone Company. This was one of the corporations in which the United States Independent Telephone Company had acquired a majority of the stock, and it was the franchise of this corporation which was held out as the basis of the entire independent telephone scheme. "This company," said the prospectus, "is incorporated under the laws of the state of New York, with an authorized capital of \$50,000,000. It owns a franchise in the city of New York acquired under the advice of eminent counsel, under which it is its purpose to begin as soon as practicable, and in the near future, the construction of an independent telephone system in that city." This so-called franchise had undergone several transfers. It was originally granted in 1894 by the board of electrical control in the city of New York, to a cor-

poration known as the Mercantile Electric Company, and the only business which had ever been done thereunder was the maintenance and operation of a burglar alarm system in a portion of the financial district about Wall street. In 1905 the Mercantile Electric Company was merged with the New York Independent Telephone Company, which acquired all of its capital stock, amounting at par to \$5,000. This stock had been purchased by the promoters for \$250,000, and by them turned over to the New York Independent Telephone Company for \$41,000,000 of its stock. At the time when the prospectus was prepared and published, no permit had been granted by the municipal authorities to the Mercantile Electric Company or its corporate successors in interest for any extension of its lines, and they could not lawfully be extended without such permit. Legal advice of capable counsel had been taken by the promoters as to the validity and sufficiency of the alleged franchise, and the opinions obtained from them, which appear in the record, show that the question was at least doubtful. Their attention had been expressly called to a recent decision by the appellate division in the first department, holding that, before a franchise became effective for any purpose, the consent of the common council of the municipality must first be obtained. *West Side Electric Co. v. Consolidated Tel. & Electrical Subway Co.* 110 App. Div. 171, 96 N. Y. Supp. 609. The representation in the prospectus was unequivocal. It plainly imported the ownership of a franchise which could be exercised without encountering any legal obstacle whatever. The New York Independent Telephone Company did not own such a franchise, and the authors of the prospectus are chargeable with knowledge that such was the fact. Where a prospectus is circulated as an inducement to take stock in a corporate enterprise, the language of the prospectus is to be interpreted by the effect which it would produce upon an ordinary mind. *Wiser v. Lawler*, 189 U. S. 260, 261, 47 L. ed. 802, 23 Sup. Ct. Rep. 624, 22 Mor. Min. Rep. 630. The same case is authority for the proposition that, in estimating the probability of subscribers being misled by a prospectus, the court may take into consideration not only the facts stated therein, but the facts suppressed. In *Hayward v. Leeson*, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656, it was held that the promoters of a corporation were guilty of a fraud in issuing a prospectus to the public inviting subscriptions to the stock, without disclosing the fact that they had caused to be issued to themselves, for their

services as promoters, one third of the whole capital stock by way of remuneration. Here it is obvious that, if the facts which have been stated in regard to the limited use to which the franchise had been put by the original grantees, for burglar alarm purposes only, had been set forth in the prospectus, together with the discrepancy between the cost of the franchise to the promoters and the amount of stock issued therefor, no careful investor would have been induced to put any money into bonds based on such a foundation.

(2) The prospectus stated that "413,030 shares of the capital stock of the United States Independent Telephone Company have been issued or are contracted to be issued." The appellants insist that it was error to submit to the jury the question whether this statement was fraudulent or not. There was abundant evidence to make this an issue for the jury. The statement conveyed the idea that the stock had been issued or contracted to be issued for money or property its equivalent in value. Of course, the so-called franchise is to be included in the property; but the disparity between the \$250,000 at which the franchise was purchased from the Mercantile Electric Company, and the \$41,000,000 of stock which the New York Independent Telephone Company issued on account thereof, was so great as of itself to warrant an inference of fraud. See *Boyn-ton v. Andrews*, 63 N. Y. 93.

(3) There is no sufficient foundation for the complaint that it was error to allow the jury to pass upon the character of the representations in the prospectus with reference to the amount of dividends paid by the Stromberg-Carlson Telephone Manufacturing Company. A declaration that dividends have been paid imports that they have been earned, and the testimony of Mr. Finucane, the treasurer and general manager, showed clearly that these dividends or some of them had not been earned in fact.

(4) In speaking of the bonds which it was the purpose of the prospectus to induce the public to buy, the prospectus contained a statement that \$17,000,000 were to be issued immediately, and the balance of \$8,000,000 was to be held in escrow by the trustees. It continued: "Such \$17,000,000 of bonds are to be issued pursuant to contracts already made by the company and binding on it, and as a result of the performance of said contracts, the company will have \$5,000,000 cash in its treasury in addition to the securities pledged under the mortgage." The truth or falsity of this statement depends on what it means. The appellants contend that it does not mean to convey the idea that contracts had already

been made which obligated anybody to purchase the bonds, but only that contracts had been made binding the company to sell. On the other hand, the respondent insists that it plainly implies the existence of bilateral contracts enforceable at the instance of the corporation, and therefore practically certain to insure the receipt of \$5,000,000 in cash by the treasury. In answer to a specific question on this branch of the case, the jury found that the language of this part of the prospectus fairly meant that contracts had been made which were mutually binding upon both parties, and when performed the company would have \$5,000,000 in the treasury; and, in answer to another question, they found further that the prospectus was falsely worded so as to represent that the contract for the sale of the bonds was bilateral, when the contract with Mr. Fenn did not bind him to take the bonds. The evidence amply warranted these findings. Speaking of an equivocal prospectus which was condemned as fraudulent by the House of Lords in *Aaron's Reefs v. Twiss*, [1896] A. C. 273, 285, Lord Halsbury calls the language "ambidextrous;" and this expression aptly characterizes that in the present case. In the case cited it was argued, as it is suggested here, that there was no specific allegation of fact which is proved to be false; but the lord chancellor protested against this being regarded as the true test, and declared that the question was whether, taking the whole thing together, was there a false representation. "I do not care by what means it is conveyed,—by what trick or device or ambiguous language. All those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression, and induce a person to act upon it, it is not the less false, although, if one takes each statement by itself, there may be a difficulty in showing that any specific statement is untrue." The general reader would almost inevitably infer from this assertion in the prospectus that the United States Independent Telephone Company was a party to contracts with solvent purchasers, which would enable it, within a reasonable time, to realize \$5,000,000 in cash, and the proof shows that nothing could have been further from the truth.

The prospectus was prepared by Mr. Page and issued by Fenn, who conducted the sale of the bonds thereunder. Fenn died before the trial, and the defendants did not call Mr. Page as a witness. Nevertheless, it is argued in their behalf that it was essential for the plaintiff to show fraudulent conduct on the part of these

persons, and that his failure to do so was fatal to the plaintiff's cause of action.

It is enough to say as to this proposition, that a fraudulent intent on the part of the author and publisher of the prospectus may be inferred from the falsity of the statements therein contained, and that alone. See *Meyer v. Amidon*, 23 Hun, 553.

Our attention is called to some alleged errors in rulings on evidence, but we think that such rulings as were incorrect were harmless.

The five defendants claimed to be entitled to six peremptory challenges each, but the court allowed only six peremptory challenges in all, treating the defendants collectively as but one party, within the meaning of § 1176 of the Code of Civil Procedure, which provides that upon a trial of an issue of fact joined in a civil action in a court of record, each party may peremptorily challenge not more than six. The question does not appear to have been considered in any reported case in this state. Numerous authorities from other states are cited in the briefs of counsel, but they are only relevant where statutes exist similar in phraseology to our own; that is to say, where a given number of peremptory challenges is allowed to each party. Such is the statute in Illinois in force since the year 1827, and "during all that time it has been the general practice, and so understood by the entire profession, that each side to the case, without reference to the number of persons in each, in all civil cases, have but three peremptory challenges." *Schmidt v. Chicago & N. W. R. Co.* 83 Ill. 405. The appellants rely upon *Hundhausen v. Atkins*, 36 Wis. 518, where the court was called upon to construe a statute regulating peremptory challenges, which provided that in civil causes each party should be entitled to three. The defendants had appeared by different attorneys and severed their defenses, and the court held that, inasmuch as their defenses were essentially different, and each had a distinct issue to maintain, each was to be considered a party, within the meaning of the statute. The court, however, added this qualification: "Undoubtedly when several defendants in a civil action join in their defense, or severing in their answers set out but one defense common to them all, they constitute one party, limited to the statutory number of challenges given to a party as ruled in this cause in the court below. In such a case they might and perhaps ought to join in one answer setting up the common defense; and they should not be permitted to gain additional challenges by the mere act of severing in their pleadings. They have a community of interests, and should be left

to a community of challenges." Such is the case here. The defendants had a common interest, their answers were substantially identical, and the defense was conducted in the common interest of all. Under the circumstances,—whatever might be the rule if different defenses, possibly antagonistic to one another, had been interposed,—the defendants were properly treated as only one party, within the meaning of § 1176 of the Code.

The judgment should be affirmed, with costs.

Cullen, Ch. J., Haight, Vann, and Chase, JJ., concur.

Hiscock, J., dissents because of error committed by the court in refusing to charge as requested by the defendants, that "if Mr. Fenn was selling the bonds for the United States Independent Telephone Company, and not for the syndicate, then he was not the agent of the individual directors of the company, and they in that relation only would be liable for personal conduct."

Werner, J., not sitting.

MASSACHUSETTS SUPREME JUDICIAL COURT.

OLD DOMINION COPPER MINING & SMELTING COMPANY

v.

ALBERT S. BIGELOW.

(203 Mass. 159, 89 N. E. 193.)

Appeal—findings—equity case.

1. Where the evidence in an equity proceeding is partly oral, the findings of fact of the single justice will not be disturbed by the law court unless plainly wrong.

Trial—evidence—weight—finding.

2. A trial court cannot be said to be plainly wrong in its determination that stock of a corporation was intended to be

issued directly to the general public subscribing therefor, and not to the promoters to be sold to the subscribers, where such intention appears from the contemporaneous acts, entries, and other writings with their natural inferences, although it is opposed to the oral testimony of the promoters.

Corporation—property—subscription—value.

3. The value of a mine which is turned into a corporation organized to operate it in consideration for its stock may be determined from what its former owners sold it for, where they were men of large business operations, not unaccustomed to mining, and were under no compulsion to sell.

Conflict of laws—corporation—stock subscription—consummation.

4. The liability of promoters to the corporation, for transferring property at a fictitious value to it in exchange for stock, is to be determined by the law of the place where the agreements were to be carried out, the deeds delivered, the stock issued, and the corporation to have its principal place of business, although the vote authorizing the purchase of the property from the promoters in exchange for stock was passed in another state.

Appeal—foreign law—finding—conclusiveness.

5. A finding by a single justice that the law of a foreign state is the same as the local law, which is founded entirely upon decisions of the courts of such state, creates no presumption in its favor when it is reviewed by the law court.

Same—Federal decision.

6. The decision of a Federal court sitting in a state on a matter of general law is not evidence of what the law of that state is.

Corporation—promoter—liability—ratification of acts.

7. That, at the time of the sale by promoters of property to a corporation organized to purchase it, they are the owners of all the stock which has been issued, no issue having been made of that intended for the public, or that a ratification of the purchase is secured, does not, if at the time of the ratification a substantial portion of the stock intended for

Note.—The decision in the above reported case, as to the effect of the New York judgment under the "full faith and credit" provision of the Federal Constitution, was affirmed by the United States Supreme Court on writ of error. 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641.

Generally, as to the effect of a judgment against one joint tortfeasor upon the liability of the other, see note to *Blackman v. Simpson*, 58 L.R.A. 410. As to whether a judgment in favor of one who was the immediate actor in an alleged wrong is available as an estoppel to another whose wrong, if any, was derivative, see *Portland Gold Min. Co. v. Stratton's Independence*, 40 L.R.A. (N.S.)

16 L.R.A. (N.S.) 677, and annotation referred to in the note to that case. In this connection, see also notes to *McGinnis v. Chicago, R. I. & P. R. Co.* 9 L.R.A. (N.S.) 880, and *Southern R. Co. v. Harbin*, 30 L.R.A. (N.S.) 404, as to effect of verdict for servant in an action against master and servant for the latter's negligence or misfeasance.

As to duty and liability of promoters of corporations, see the references in the note to *Downey v. Finucane*, ante, 307.

Generally, as to jurisdiction to enjoin an action or proceeding in a foreign jurisdiction, see note to *O'Haire v. Burns*, 25 L.R.A. (N.S.) 267.

the public remains unissued, avoid the operation of the rule that promoters who organize a corporation to purchase property from them for stock the par value of which is largely in excess of the value of the property, and as part of the scheme sell to the general public as original subscribers a portion of the stock for cash at par, to secure a working capital, without providing an independent board of officers to pass upon the wisdom of the purchase, having the purchase ratified by such board, or disclosing their extraordinary profit to purchasers of stock, are liable to account to the corporation for the profit of the proceeding.

Same — ratification by promoters — effect.

8. A promoter of a corporation who has wrongfully sold property to it at an undue profit cannot avoid repayment to the corporation of the profit so secured, on the ground that it will result in a benefit to the stock taken by himself and his co-promoters, who have ratified the act, and whose stock is all but a small part of that issued.

Same — secret dealings — illegality.

9. The law will not approve a transaction by which property is purchased by a promoter of a corporation with money solicited in substantial part from associates by representations that he intends to form a corporation with a specified capitalization, and sell the property to it for a certain amount of stock, followed by its actual sale to the corporation for a much larger amount, the settlement with the associates at the price agreed upon, and the retention by the promoter of the difference as a secret profit, and taking cash subscriptions from the general public, who understand that the corporation is organized under a statute which requires property to be taken for stock only at its true value.

Conflict of laws — Federal decisions.

10. The mere contrary conclusion reached by the Supreme Court of the United States upon a similar state of facts is not alone a sufficient consideration for a state court's overruling one of its own decisions.

Corporation — purchase from promoter — knowledge.

11. The knowledge of promoters of a corporation, who own all its issued stock, when they ratify the purchase by the corporation from them, of the details of the purchase, does not bind the corporation.

Same — promoters' syndicate — rights.

12. Persons joining a syndicate to purchase property for sale to a corporation whose organization for its purchase is under contemplation, with the understanding that the property is to be sold at a certain profit in stock of the corporation, are, as stockholders of the new corporation, entitled to a disclosure, if the promoter actually turns the property over at greater profit, for an increased portion of the corporate stock.

40 L.R.A. (N.S.)

Same — corporate rights — stockholder's combination.

13. The right of a corporation to compel a repayment of illegal promoters' profits for the benefit of all its stockholders is not defeated by the fact that, after the suit was instituted, certain of the stockholders entered into an illegal agreement as to the disposition of the proceeds of the suit.

Same — laches — means of knowledge.

14. There is no laches on the part of a corporation in failing to take steps to compel an accounting for illegal promoters' profits, until they release their absolute control of its affairs, so that it can secure a knowledge of the facts.

Same — limitation of actions — concealment.

15. The statute of limitations does not begin to run against the liability of a promoter of a corporation, to account to the corporation for illegal profits, so long as he remains absolutely in control of the corporate affairs, so that the fact of his breach of trust cannot be discovered.

Promoter — joint wrongdoer — liability.

16. One of two promoters of a corporation, who by joint acts secure an illegal profit in the sale of property to it, is liable *in solido* for the profits so secured, regardless of the division which they may have made between themselves.

Corporation — promoter's profit — recovery.

17. The remedy of a corporation whose promoter has taken an illegal secret profit in a sale of property to it is not limited to a rescission of the transaction, but it may compel a return of it to the corporation.

Damages — measure — promoters' profits.

18. In case a promoter owns property before he undertakes the organization of a corporation to purchase it, the amount which the corporation can recover for secret profits secured by him in the sale is not measured by the difference between what the property originally cost him, and the market value of the stock received by him; nor between the intrinsic value of the property and that of the stock, but by the difference between the market value of the property and that of the stock.

Pleading — supplemental answer — post litem decree.

19. It is not an abuse of discretion for a trial judge to permit the filing of a supplemental answer after a hearing on the merits, which sets up a decree of a court of last resort in another state claimed to be *res judicata* of the matter in controversy, although the decree of the lower court, which was affirmed by the decree sought to be set up, had been entered before such hearing.

Judgment — res judicata — demurrer.

20. A decree on demurrer may, under proper circumstances, be a bar to another suit, as well as one founded on a hearing of evidence.

Same — full faith and credit — privies.

21. The full faith and credit clause of the Federal Constitution does not require the courts of a state in which a party is domiciled to follow the rule of the courts of another state within whose jurisdiction a decree was entered in favor of one having a common interest with him, in a suit to which he was not a party, in determining whether or not he was a privy because he assisted in the defense of the suit, so as to be entitled to the benefit of it as *res judicata* in a subsequent proceeding against him at his domicile.

Same — joint wrongdoer.

22. One of two promoters who take a wrongful secret profit in the sale of the property to a corporation organized by them to purchase it is not a privy to a suit against the executors of the other in another state, to rescind the contract and recover the price, to which he was not made a party, and in which he was not served with process, and did not appear, so as to be entitled to set up the judgment against the corporation in bar of a suit against him at his domicile for the same cause of action, although he assisted through counsel in the defense of the foreign suit.

Recovery — joint wrongdoer.

23. Pursuing one joint tortfeasor will not prevent a subsequent suit against the other on the theory of election.

Injunction — interference with suit.

24. The courts of one state in which a litigation has progressed to a final decree, from which an appeal has been taken, may enjoin the defeated party from maintaining a suit in another state, to enjoin his adversary from proceeding with the prosecution of the cause.

(Knowlton, Ch. J., and Morton, J., dissent.
Hammond, J., dissents in part.)

(September 14, 1909.)

CROSS APPEALS from decrees of the Supreme Judicial Court for Suffolk County in plaintiff's favor in suits to recover secret profits made by promoters of the plaintiff corporation in the sale of their own property to the plaintiff; plaintiff appealing from the amounts given them by the decree; and defendant appealing from the decree holding him liable. Modified and affirmed.

The facts are stated in the opinion.

Mr. Edward F. McClennen, with Messrs. Brandeis, Dunbar, & Nutter, for complainant:

It is not a defense to a promoter that he caused the corporation to vote to acquire the property from him before the remainder of the organization was completed by obtaining the subscription to the balance of the original issue of capital stock.

Hayward v. Leeson, 176 Mass. 310, 49 40 L.R.A. (N.S.)

L.R.A. 725, 57 N. E. 656; Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653; Yeiser v. United States Board & Paper Co. 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 340; Gluckstein v. Barnes [1900] A. C. 240, 69 L. J. Ch. N. S. 385, 82 L. T. N. S. 393, 16 Times L. R. 321, 7 Manson, 321; Re Leeds & H. Theatres [1902] 2 Ch. 809, 51 Week. Rep. 5, 72 L. J. Ch. N. S. 1, 87 L. T. N. S. 488, 10 Manson, 72; Erlanger v. New Sombrero Phosphate Co. L. R. 3 App. Cas. 1218, 39 L. T. N. S. 269, 26 Week. Rep. 65, 6 Eng. Rul. Cas. 777; Pietsch v. Milbrath, 123 Wis. 647, 68 L.R.A. 945, 107 Am. St. Rep. 1017, 101 N. W. 388, 102 N. W. 342; London Trust Co. v. Mackenzie, 62 L. J. Ch. N. S. 870, 3 Reports, 597, 68 L. T. N. S. 380; Re British Seamless Paper Box Co. L. R. 17 Ch. Div. 467, 50 L. J. Ch. N. S. 497, 44 L. T. N. S. 498, 29 Week. Rep. 690; Tompkins v. Sperry, 96 Md. 560, 54 Atl. 254; Central Trust Co. v. East Tennessee Land Co. 116 Fed. 743; Hinkley v. Sac Oil & Pipe Line Co. 132 Iowa, 396, 119 Am. St. Rep. 564, 107 N. W. 629; South Joplin Land Co. v. Case, 104 Mo. 572, 16 S. W. 390; Groel v. United Electric Co. 70 N. J. Eq. 616, 61 Atl. 1061; Morawetz, Priv. Corp. 2d ed. § 292.

Defendant was a promoter. He was also one of the directors. Such a man is a fiduciary.

Erlanger v. New Sombrero Phosphate Co. L. R. 3 App. Cas. 1218, 39 L. T. N. S. 269, 27 Week. Rep. 65, 6 Eng. Rul. Cas. 777; Bagnall v. Carlton, L. R. 6 Ch. Div. 371, 47 L. J. Ch. N. S. 30, 37 L. T. N. S. 481, 26 Week. Rep. 243; Emma Silver Min. Co. v. Grant, L. R. 11 Ch. Div. 918, 40 L. T. N. S. 804; Nanty-glo & B. Ironworks Co. v. Grave, L. R. 12 Ch. Div. 738, 38 L. T. N. S. 345, 26 Week. Rep. 504; Re Westmoreland Green & Blue Slate Co. [1893] 2 Ch. 612, 2 Reports, 509, 69 L. T. N. S. 700; Gluckstein v. Barnes [1900] A. C. 240, 69 L. J. Ch. N. S. 385, 82 L. T. N. S. 393, 16 Times L. R. 321, 7 Manson, 321; Re Leeds & H. Theatres [1902] 2 Ch. 809, 51 Week. Rep. 5, 72 L. J. Ch. N. S. 1, 87 L. T. N. S. 488, 10 Manson, 72; Venezuela C. R. Co. v. Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. N. S. 849, 16 L. T. N. S. 500, 15 Week. Rep. 821, 6 Eng. Rul. Cas. 759; Chandler v. Bacon, 30 Fed. 538; Cortes Co. v. Thannhauser, 45 Fed. 730; Yeiser v. United States Board & Paper Co. 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 340; E. Mission Land & Water Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 25 L.R.A. 90, 42 Am. St. Rep. 159, 29 Atl. 303; Hitchcock v. Hustace, 14 Haw. 232; The Telegraph v. Loetscher, 127 Iowa, 383, 101 N. W. 773, 4 Ann. Cas. 667;

South Joplin Land Co. v. Case, 104 Mo. 572, 16 S. W. 390; *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094; *Woodbury Heights Land Co. v. Loudenslager*, 55 N. J. Eq. 78, 35 Atl. 436; *Colton Improv. Co. v. Richter*, 26 Misc. 26, 55 N. Y. Supp. 486; *Simons v. Vulcan Oil & Min. Co.* 61 Pa. 202, 100 Am. Dec. 628, 6 Mor. Min. Rep. 633; *Bosher v. Richmond & H. Land Co.* 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259, 17 Mor. Min. Rep. 226; *Dickerman v. Northern Trust Co.* 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311.

The breach of fiduciary duty by the promoters was a tort. They committed it together. Their liability for it was, as is usual in torts, joint and several.

Emery v. Parrott, 107 Mass. 95; *Trull v. Trull*, 13 Allen, 407; *Re Westmoreland Green & Blue Slate Co.* [1893] 2 Ch. 612, 62 L. J. Ch. N. S. 975, 2 Rep. rts, 509, 69 L. T. N. S. 700; *Gluckstein v. Barnes* [1900] A. C. 240, 69 L. J. Ch. N. S. 385, 82 L. T. N. S. 393, 16 Times L. R. 321, 7 Manson, 321; *Hayward v. Leeson*, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656; *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653; *Rutland Electric Light Co. v. Bates*, 68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345, 53 Am. St. Rep. 917, 66 N. W. 399; *Bigelow v. Old Dominion Copper Min. & Smelting Co.* 74 N. J. Eq. 457, 71 Atl. 153.

The suit is not barred by laches nor by the statute of limitations.

Dunning v. Bates, 186 Mass. 123, 71 N. E. 309; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328; *Erlanger v. New Sombrero Phosphate Co.* L. R. 3 App. Cas. 1218, 39 L. T. N. S. 269, 27 Week. Rep. 65, 6 Eng. Rul. Cas. 777; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, 22 Week. Rep. 492; *Hayward v. Leeson*, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656; *Bagnall v. Carlton*, L. R. 6 Ch. Div. 371, 47 L. J. Ch. N. S. 30, 37 L. T. N. S. 481, 26 Week. Rep. 243; *Lydney & W. Iron Ore Co. v. Bird*, L. R. 33 Ch. Div. 85, 55 L. J. Ch. N. S. 875, 55 L. T. N. S. 558, 34 Week. Rep. 749; *Alger v. Anderson*, 78 Fed. 729; *First Ave. Land Co. v. Hildebrand*, 103 Wis. 530, 79 N. W. 753; *Nudd v. Hamblin*, 8 Allen, 130; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *The Telegraph v. Loetscher*, 127 Iowa, 383, 101 N. W. 773, 4 Ann. Cas. 667.

The law of New York does not vary on these facts from that of Massachusetts.

Campbell v. Cypress Hills Cemetery, 41 N. 40 L.R.A. (N.S.)

Y. 34; Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159; *Foster v. Seymour*, 23 Fed. 65; *McCracken v. Robison*, 6 C. C. A. 400, 14 U. S. App. 602, 57 Fed. 375; *Hutchinson v. Simpson*, 92 App. Div. 382, 87 N. Y. Supp. 369; *Old Dominion Copper Min. Co. v. Lewisohn*, 136 Fed. 915, 79 C. C. A. 534, 148 Fed. 1020, 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634; *Colton Improv. Co. v. Richter*, 26 Misc. 26, 55 N. Y. Supp. 486; *Brewster v. Hatch*, 122 N. Y. 349; *Erlanger v. New Sombrero Phosphate Co.* L. R. 3 App. Cas. 1218, 39 L. T. N. S. 269, 27 Week. Rep. 65, 6 Eng. Rul. Cas. 777.

The decree in favor of Lewisohn's executors is not a defense to Bigelow.

Hewlett v. Wood, 67 N. Y. 394.

The dismissal of a suit is not a bar to a second suit, unless it appears from the judgment roll itself that the judgment was upon the merits.

Genet v. Delaware & H. Canal Co. 170 N. Y. 278, 63 N. E. 350, 163 N. Y. 173, 57 N. E. 297; *New York Code*, § 1209.

The Lewisohn judgment is not binding in Massachusetts.

Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. ed. 687; *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648; *Phelps v. Brewer*, 9 Cush. 300, 57 Am. Dec. 56; *Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 222; *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225; *Ewer v. Coffin*, 1 Cush. 23, 48 Am. Dec. 587; *Looney v. Reeves*, 5 Kan. App. 279, 48 Pac. 606; *Middlesex Bank v. Butman*, 29 Me. 19.

By the law of Massachusetts, the decree in favor of Lewisohn's executors does not affect Bigelow.

Such judgment is not an estoppel in favor of the other person, when sued by the same person for the same act or transaction.

Sprague v. Waite, 19 Pick. 455; *Lansing v. Montgomery*, 2 Johns. 382; *Marsh v. Berry*, 7 Cow. 344; *Moore v. Tracy*, 7 Wend. 229; *Gittleman v. Feltman*, 122 App. Div. 385, 106 N. Y. Supp. 839; *Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Tyng v. Clarke*, 9 Hun, 269; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Thompson v. Chicago*, St. P. & K. C. R. Co. 71 Minn. 89, 73 N. W. 707; *Three States Lumber Co. v. Blanks*, 118 Tenn. 627, 102 S. W. 79; 1 Freeman, Judgm. § 159; *Larison v. Hager*, 44 Fed. 49; *Townsend v. Riddle*, 2 N. H. 448; *McLelland v. Ridgeway*, 12 Ala. 482; *State Bank v. Robinson*, 13 Ark. 214; *Cameron v. Paul*, 6 Pa. 323; *Berghaus v. Alter*, 9 Watts, 386; *Ligon v. Dunn*, 28 N. C. (6 Ired. L.) 133; *Hazard v. Irwin*, 18 Pick. 108.

Conversely, a judgment against one of

two persons liable jointly and severally is not an estoppel against the other.

Douglass v. Howland, 24 Wend. 35; Bigelow, Estoppels, 5th ed. 112; Booth v. Powers, 56 N. Y. 22; Bath Gaslight Co. v. Rowland, 178 N. Y. 631, 71 N. E. 1127, 84 App. Div. 563, 82 N. Y. Supp. 841; McLelland v. Ridgeway, 12 Ala. 482; Buckingham v. Ludlum, 37 N. J. Eq. 137; Sturges v. Beach, 1 Conn. 507; Moore's Appeal, 34 Pa. 411; Runkel v. Phillips, 9 Phila. 619; Marr v. Southwick, 2 Port. (Ala.) 351; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. ed. 687; Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; D'Arcy v. Ketchum, 11 How. 105, 13 L. ed. 648; State Bank v. Robinson, 13 Ark. 214; Leake & W. Orphan House v. Lawrence, 11 Paige, 80.

A stranger to a judgment cannot take advantage of it.

Brower v. Bowers, 1 Abb. App. Dec. 214; Shipman v. Fanshaw, 15 Abb. N. C. 288; Wallace v. Straus, 113 N. Y. 238, 21 N. E. 66; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 155, 30 L. ed. 620, 7 Sup. Ct. Rep. 472.

Bigelow was not a proper party to the suit against Lewisohn in the sense that Bigelow or Lewisohn could have insisted that he be made a party.

Chapman v. Forbes, 123 N. Y. 532, 26 N. E. 3; Jackson ex dem. Hogarth v. Nelson, 6 Cow. 248; St. John v. Andrews Institute, 192 N. Y. 382, 85 N. E. 143; Jackson v. Griswold, 4 Hill, 522; Douglass v. Howland, 24 Wend. 35; Park v. Ensign, 66 Kan. 50, 97 Am. St. Rep. 352, 71 Pac. 230; McConnell v. Poor, 113 Iowa, 133, 52 L.R.A. 312, 84 N. W. 968; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; Giltinan v. Strong, 64 Pa. 242; Arrington v. Porter, 47 Ala. 714; DeGreiff v. Wilson, 30 N. J. Eq. 435; McKellar v. Howell, 11 N. C. (4 Hawks) 34; Clark v. Montgomery, 23 Barb. 464.

The result is not changed by any participation of Bigelow in the defense of the suit against Lewisohn, or any knowledge thereof on the part of the plaintiff.

Andrews v. National Foundry & Pipe Works, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166; Lane v. Welds, 39 C. C. A. 528, 99 Fed. 286; Cramer v. Singer Mfg. Co. 35 C. C. A. 508, 93 Fed. 636; Westinghouse Electric & Mfg. Co. v. Jefferson Electric Light, Heat & P. Co. 128 Fed. 751, 135 Fed. 365, 71 C. C. A. 481, 139 Fed. 385; Lacroix v. Lyons, 33 Fed. 437; Cannon River Mfrs. Asso. v. Rogers, 42 Minn. 123, 18 Am. St. Rep. 497, 40 L.R.A. (N.S.).

43 N. W. 792; 2 Van Fleet, Prior Adjudication, § 523; 2 Black, Judgm. § 540.

Control of the suit by the person participating is necessary in order to make a judgment binding as an estoppel as to him.

Wilgus v. Germain, 19 C. C. A. 188, 44 U. S. App. 369, 72 Fed. 773; Burr v. Bigler, 16 Abb. Pr. 177; Mankato v. Barber Asphalt Paving Co. 73 C. C. A. 439, 142 Fed. 329; Rumford Chemical Works v. Hygienic Chemical Co. 148 Fed. 862; Wilkie v. Howe, 27 Kan. 518; 2 Black, Judgm. § 540.

An interest of the participant's own in the event of the suit is necessary to make the judgment an estoppel as to him.

2 Black, Judgm. § 540.

Participation for the purpose of obtaining a favorable precedent upon a similar state of facts, or upon an identical state of facts, does not of itself render the judgment binding as to the participant.

Shutesbury v. Hadley, 133 Mass. 242; Jackson v. Griswold, 4 Hill, 522; Stryker v. Goodnow (Stryker v. Crane) 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203; Elliott v. Hayden, 104 Mass. 180; Litchfield v. Goodnow (Litchfield v. Crane) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210; Booth v. Powers, 56 N. Y. 22; People v. Knickerbocker L. Ins. Co. 106 N. Y. 619, 13 N. E. 447; Lowndale v. Portland, 1 Or. 381, Fed. Cas. No. 8,578; Hunt v. Haven, 52 N. H. 162; State ex rel. Kane v. Johnson, 123 Mo. 43, 27 S. W. 399; Central Baptist Church v. Manchester, 17 R. I. 492, 33 Am. St. Rep. 893, 23 Atl. 30; Allin v. Hall, 1 A. K. Marsh. 525; Rumford Chemical Works v. Hygienic Chemical Co. 148 Fed. 862; O'Brien v. Browning, 49 How. Pr. 109; 1 Freeman, Judgm. § 189; 2 Black, Judgm. §§ 540, 541.

Messrs. Alfred Hemenway and John Wells Farley, for defendant:

Bigelow and Lewisohn were the subscribers for and owners of all the stock in the corporation, and their acquiescence bound the corporation and later stockholders who acquired their interest from those who acquiesced.

Re Ambrose Lake Tin & Copper Min. Co. L. R. 14 Ch. Div. 390, 49 L. J. Ch. N. S. 457, 42 L. T. N. S. 604, 28 Week. Rep. 783; Re British Seamless Paper Box Co. L. R. 17 Ch. Div. 467, 50 L. J. Ch. N. S. 497, 44 L. T. N. S. 498, 29 Week. Rep. 690; Salomon v. Salomon & Co. [1897] A. C. 22, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, 4 Manson, 89; Re Baglan Hall Colliery Co. L. R. 5 Ch. 346, 39 L. J. Ch. N. S. 591, 23 L. T. N. S. 60, 18 Week. Rep. 499, 13 Mor. Min. Rep. 261; Old Dominion Copper Min. Co. v. Lewisohn, 136 Fed. 915, 79 C. C. A. 534, 148 Fed. 1020, 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct.

Rep. 634; *Foster v. Seymour*, 23 Fed. 65; *McCracken v. Robison*, 6 C. C. A. 400, 14 U. S. App. 602, 57 Fed. 375; *Stewart v. St. Louis, Ft. S. & W. R. Co.* 41 Fed. 737; *DuPont v. Tilden*, 42 Fed. 87; *Bank of Fort Madison v. Alden*, 129 U. S. 373, 378, 32 L. ed. 725, 727, 9 Sup. Ct. Rep. 332; *Langdon v. Fogg*, 21 Blatchf. 392, 18 Fed. 5; *Flagler Engraving Mach. Co. v. Flagler*, 19 Fed. 469; *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 263, 26 N. E. 145; *Seymour v. Spring Forest Cemetery Asso.* 144 N. Y. 333, 26 L.R.A. 859, 39 N. E. 365; *Thornton v. Wabash R. Co.* 81 N. Y. 462; *Parsons v. Hayes*, 14 Abb. N. C. 419; *King v. Barnes*, 109 N. Y. 267, 16 N. E. 332; *Insurance Press v. Montauk Fire Detecting Wire Co.* 103 App. Div. 472, 93 N. Y. Supp. 134; *Blum v. Whitney*, 185 N. Y. 232, 77 N. E. 1159; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Spaulding v. North Milwaukee Town Site Co.* 106 Wis. 481, 81 N. W. 1064; *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20; *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 633, 15 Pac. 544; *Walburn v. Chenault*, 43 Kan. 352, 23 Pac. 657; *Arkansas River, Land, Town & Canal Co. v. Farmers' Loan & T. Co.* 13 Colo. 587, 22 Pac. 954; *Tompkins v. Sperry*, 96 Md. 560, 54 Atl. 254; *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336, 5 Atl. 534; *Home F. Ins. Co. v. Barber*, 67 Neb. 644, 60 L.R.A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024; *Merchants' & M. Sav. Bank v. Belington Coal & Coke Co.* 51 W. Va. 60, 41 S. E. 390; *Clark v. American Coal Co.* 86 Iowa, 436, 17 L.R.A. 557, 53 N. W. 291; *Divine v. Universal Sewing Mach. Motor Attachment Co.* — Tenn. —, 38 S. W. 93; *Garretson v. Pacific Crude Oil Co.* 146 Cal. 184, 79 Pac. 838; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Cook, Corp.* 5th ed. §§ 46, 47, 649, pp. 125, 135, 139, 1461, 1462; 1 *Morawetz, Priv. Corp.* 2d ed. § 290; 3 *Pom. Eq. Jur.* 3d ed. § 1092, p. 2116.

A man may be a promoter without incurring liability.

Lydney & W. Iron Ore Co. v. Bird, L. R. 33 Ch. Div. 85, 55 L. J. Ch. N. S. 875, 55 L. T. N. S. 558, 34 Week. Rep. 749; *Hutchinson v. Simpson*, 92 App. Div. 382, 87 N. Y. Supp. 369.

The defendant is not liable on the ground that the plaintiff is entitled to the benefit of the original purchase.

Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653; *New Sombrero Phosphate Co. v. Erlanger, L. R.* 5 Ch. Div. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222, 25 Week. Rep. 436; *Ladywell Min. Co. v. Brookes*, L. R. 35 Ch. Div. 400, 56 L. J. Ch. N. S. 684, 56 L. T. N. S. 677, 35 Week. Rep. 785, *St. Louis, Ft. S. & W. R. Co. v.* 40 L.R.A.(N.S.)

Tiernan, 37 Kan. 606, 15 Pac. 544; *Re Cape Breton Co. L. R.* 26 Ch. Div. 221; *Gover's Case*, L. R. 1 Ch. Div. 182, 45 L. J. Ch. N. S. 83, 33 L. T. N. S. 619, 24 Week. Rep. 125; *Re Ambrose Lake Tin & Copper Min. Co. L. R.* 14 Ch. Div. 390, 49 L. J. Ch. N. S. 457, 42 L. T. N. S. 604, 28 Week. Rep. 783; *Burland v. Earle* [1902] A. C. 83, 71 L. J. P. C. N. S. 1, 50 Week. Rep. 241, 85 L. T. N. S. 553, 18 Times L. R. 41, 9 Manson, 17.

The defendant is not liable on the ground of misrepresentation.

New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222, 25 Week. Rep. 436; *Hichens v. Congreve*, 4 Russ. Ch. 562, 6 L. J. Ch. 167, *Beck v. Kantorowicz*, 3 Kay & J. 230, 6 Mor. Min. Rep. 480; *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. Div. 394, 46 L. J. Ch. N. S. 661, 37 L. T. N. S. 9, 24 Week. Rep. 530; *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. Div. 918, 40 L. T. N. S. 804; *Bagnall v. Carlton*, L. R. 6 Ch. Div. 371, 47 L. J. Ch. N. S. 30, 37 L. T. N. S. 481, 26 Week. Rep. 243; *Lydney & W. Iron Ore Co. v. Bird*, L. R. 33 Ch. Div. 85, 55 L. J. Ch. N. S. 875, 55 L. T. N. S. 558, 34 Week. Rep. 749; *Bland's Case* [1893] 2 Ch. 612, 62 L. J. Ch. N. S. 975, 2 Reports, 509, 69 L. T. N. S. 700; *Re Olympia* [1898] 2 Ch. 153, 67 L. J. Ch. N. S. 433, 78 L. T. N. S. 629, 14 Times L. R. 451, 5 Manson, 139; *Gluckstein v. Barnes* [1900] A. C. 240, 69 L. J. Ch. N. S. 385, 82 L. T. N. S. 393, 16 Times L. R. 321, 7 Manson, 321; *Re Leeds & H. Theatres* [1902] 2 Ch. 809, 51 Week. Rep. 5, 72 L. J. Ch. N. S. 1, 87 L. T. N. S. 488, 10 Manson, 72; *Brewster v. Hatch*, 122 N. Y. 349, 19 Am. St. Rep. 498, 25 N. E. 505; *Colton Improv. Co. v. Richter*, 26 Misc. 26, 55 N. Y. Supp. 486; *Chandler v. Bacon*, 30 Fed. 538; *Cortes Co. v. Thannhauser*, 45 Fed. 730; *Yeiser v. United States Board & Paper Co.* 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 340; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 25 L.R.A. 90, 42 Am. St. Rep. 159, 29 Atl. 303; *South Joplin Land Co. v. Case*, 104 Mo. 572, 16 S. W. 390; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259, 17 Mor. Min. Rep. 226.

The defendant is not liable on the ground of having received a secret commission or bribe from the vendor of property sold to the corporation.

Hichens v. Congreve, 4 Russ. Ch. 562, 6 L. J. Ch. 167; *Beck v. Kantorowicz*, 3 Kay & J. 230, 6 Mor. Min. Rep. 480; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, 22 Week. Rep. 492; *McKay's Case*, L. R. 2 Ch. Div. 1, 45 L. J. Ch. N. S.

- 148, 33 L. T. N. S. 517, 24 Week. Rep. 49; De Ruvigne's Case, L. R. 5 Ch. Div. 306, 46 L. J. Ch. N. S. 360, 36 L. T. N. S. 329, 25 Week. Rep. 476; Pearson's Case, L. R. 5 Ch. Div. 336, 46 L. J. Ch. N. S. 339, 25 Week. Rep. 618; Emma Silver Min. Co. v. Grant, L. R. 11 Ch. Div. 918, 40 L. T. N. S. 804; Bagnall v. Carlton, L. R. 6 Ch. Div. 371, 47 L. J. Ch. N. S. 30, 37 L. T. N. S. 481, 26 Week. Rep. 243; Nant-y-glo & B. Ironworks Co. v. Grave, L. R. 12 Ch. Div. 738, 38 L. T. N. S. 345, 26 Week. Rep. 504; Whaley Bridge Calico Printing Co. v. Green, L. R. 5 Q. B. Div. 109, 49 L. J. Q. B. N. S. 326, 41 L. T. N. S. 674, 28 Week. Rep. 351; Eden v. Ridsdales R. Lamp Co. L. R. 23 Q. B. Div. 368, 58 L. J. Q. B. N. S. 579, 61 L. T. N. S. 444, 38 Week. Rep. 55; Re Postage Stamp Automatic Delivery Co. [1892] 3 Ch. 566, 61 L. J. Ch. N. S. 597, 67 L. T. N. S. 88, 41 Week. Rep. 29; Archer's Case [1892] 1 Ch. 322, 61 L. J. Ch. N. S. 129, 65 L. T. N. S. 800, 40 Week. Rep. 212; Re Olympia [1898] 2 Ch. 153, 67 L. J. Ch. N. S. 433, 78 L. T. N. S. 629, 14 Times L. R. 451, 5 Manson, 139; Gluckstein v. Barnes [1900] A. C. 240, 69 L. J. Ch. N. S. 385, 82 L. T. N. S. 393, 16 Times L. R. 321, 7 Manson, 321; Re Leeds & H. Theatres [1901] 2 Ch. 809, 51 Week. Rep. 5, 72 L. J. Ch. N. S. 1, 87 L. T. N. S. 488, 10 Manson, 72; Chandler v. Bacon, 30 Fed. 538; Yeiser v. United States Board & Paper Co. 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 340; Bland's Case [1893] 2 Ch. 612, 62 L. J. Ch. N. S. 975, 2 Reports, 509, 69 L. T. N. S. 700; Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 25 L.R.A. 90, 42 Am. St. Rep. 159, 29 Atl. 303; The Telegraph v. Loetscher, 127 Iowa, 383, 101 N. W. 773, 4 Ann. Cas. 667; Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219, 27 Atl. 1094; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259, 17 Mor. Min. Rep. 226.
- The defendant is not liable on the ground that the corporation's or the stockholders' money was used for the purchase of the property or the profit of the defendant.
- Tompkins v. Sperry, 96 Md. 560, 54 Atl. 254; Gover's Case, L. R. 1 Ch. Div. 182, 45 L. J. Ch. N. S. 83, 33 L. T. N. S. 619, 24 Week. Rep. 125; Re Olympia, [1898] 2 Ch. 153, 67 L. J. Ch. N. S. 433, 78 L. T. N. S. 629, 14 Times L. R. 451, 5 Manson, 139; Re Leeds & H. Theatres [1902] 2 Ch. 809, 51 Week. Rep. 5, 72 L. J. Ch. N. S. 1, 87 L. T. N. S. 488, 10 Manson, 72; Exter v. Sawyer, 146 Mo. 302, 47 S. W. 951; Hayward v. Leeson, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656; Densmore Oil Co. v. Densmore, 64 Pa. 43, 3 Mor. Min. Rep. 569; Boshier v. Richmond & H. Land Co. 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259, 17 Mor. Min. Rep. 226.
- The sale of stock by Bigelow gave the corporation no rights.
- Re British Seamless Paper Box Co. L. R. 17 Ch. Div. 467, 50 L. J. Ch. N. S. 497, 44 L. T. N. S. 498, 29 Week. Rep. 690; Re Ambrose Lake Tin & Copper Co. L. R. 14 Ch. Div. 390, 49 L. J. Ch. N. S. 457, 42 L. T. N. S. 604, 28 Week. Rep. 783; Re Cape Breton Co. L. R. 26 Ch. Div. 221; Getty v. Devlin, 54 N. Y. 403, 7 Mor. Min. Rep. 29; Hutchinson v. Simpson, 92 App. Div. 382, 87 N. Y. Supp. 369; Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159; Langdon v. Fogg, 21 Blatchf. 392, 18 Fed. 5; Flagler Engraving Mach. Co. v. Flagler, 19 Fed. 468; Garretson v. Pacific Crude Oil Co. 146 Cal. 184, 79 Pac. 838; Tompkins v. Sperry, 96 Md. 560, 54 Atl. 254; Insurance Press v. Montauk Fire Detecting Wire Co. 103 App. Div. 472, 93 N. Y. Supp. 134; Carling's Case, L. R. 1 Ch. Div. 115, 45 L. J. Ch. N. S. 5, 24 Week. Rep. 165, 33 L. T. N. S. 645.
- The failure of a trustee, promoter, or director to make full disclosures to the corporation or to shareholders, to whom he is in a fiduciary relation, does not, in the absence of any deceit on his part, raise the basis for any right to recover "profits" or "damages," but only affords the beneficiary the right to rescind the contract.
- New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222, 25 Week. Rep. 436; Lagunas Nitrate Co. v. Lagunas Syndicate [1899] 2 Ch. 392, 68 L. J. Ch. N. S. 699, 48 Week. Rep. 74, 81 L. T. N. S. 334, 15 Times L. R. 436; Re Cape Breton Co. L. R. 26 Ch. Div. 221; Ladywell Min. Co. v. Brookes, L. R. 35 Ch. Div. 400, 56 L. J. Ch. N. S. 684, 56 L. T. N. S. 677, 35 Week. Rep. 785; Re Lady Forrest Gold Mine [1901] 1 Ch. 582, 70 L. J. Ch. N. S. 275, 84 L. T. N. S. 559, 17 Times L. R. 198, 8 Manson, 438; Burland v. Earle [1902] A. C. 83, 71 L. J. P. C. N. S. 1, 50 Week. Rep. 241, 85 L. T. N. S. 553, 18 Times L. R. 41, 9 Manson, 17; Re Ambrose Lake Tin & Copper Min. Co. L. R. 14 Ch. Div. 390, 49 L. J. Ch. N. S. 457, 42 L. T. N. S. 604, 28 Week. Rep. 783; Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362; Insurance Press v. Montauk Fire Detecting Wire Co. 103 App. Div. 472, 93 N. Y. Supp. 134; Barr v. New York, L. E. & W. R. Co. 125 N. Y. 263, 26 N. E. 145; Du Pont v. Tilden, 42 Fed. 87; Coffin v. Ramsdell, 110 Ind. 417, 11 N. E. 20; Re Hess Mfg. Co. 21 Ont. App. Rep. 66; Barr v. Pittsburgh Plate Glass

Co. 6 C. C. A. 260, 17 U. S. App. 124, 57 Fed. 86, 51 Fed. 33; 1 Beach, Mod. Eq. Jur. § 137, p. 151; Pom. Eq. Jur. 3d ed. § 1077, note; Great Luxembourg R. Co. v. Magney, 25 Beav. 586, 4 Jur. N. S. 839, 6 Week. Rep. 711; Smith v. Ferries & C. H. R. Co. — Cal. —, 51 Pac. 710.

The contract now complained of was governed by the law of New York, and by that law is valid.

Carnegie v. Morrison, 2 Met. 382; Ives v. Farmers' Bank, 2 Allen, 236; Akers v. Demond, 103 Mass. 318; Parsons v. Hayes, 14 Abb. N. C. 419; Barr v. New York L. E. & W. R. Co. 125 N. Y. 263, 26 N. E. 145; Seymour v. Spring Forest Cemetery Asso. 144 N. Y. 333, 26 L.R.A. 859, 39 N. E. 365; Hutchinson v. Simpson, 92 App. Div. 382, 87 N. Y. Supp. 369; Insurance Press v. Montauk Fire Detecting Wire Co. 103 App. Div. 472, 93 N. Y. Supp. 134; Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159; Old Dominion Copper Min. Co. v. Lewisohn, 136 Fed. 915.

The plaintiff has so delayed its action that it is not entitled to relief in equity.

Peabody v. Flint, 6 Allen, 52; Royal Bank v. Grand Junction R. & Depot Co. 125 Mass. 490; Snow v. Boston Blank Book Mfg. Co. 153 Mass. 456, 26 N. E. 1116; Johnston v. Standard Min. Co. 148 U. S. 360, 370, 37 L. ed. 480, 485, 13 Sup. Ct. Rep. 585, 17 Mor. Min. Rep. 554; Hammond v. Hopkins, 143 U. S. 224, 250, 36 L. ed. 134, 145, 12 Sup. Ct. Rep. 418; Hanner v. Moulton, 138 U. S. 486, 34 L. ed. 1032, 11 Sup. Ct. Rep. 408; Mackall v. Casilear, 137 U. S. 556, 34 L. ed. 776, 11 Sup. Ct. Rep. 178; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 329, 3 Mor. Min. Rep. 688; Hayward v. Eliot Nat. Bank, 96 U. S. 611, 618, 24 L. ed. 855, 858; Patterson v. Hewitt, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. Rep. 35.

The statute of limitations is applicable.

Farnam v. Brooks, 9 Pick. 212; Dodge v. Essex Ins. Co. 12 Gray, 65; Ela v. Ela, 158 Mass. 54, 32 N. E. 957; Wells v. Child, 12 Allen, 333; Currier v. Studley, 159 Mass. 17, 33 N. E. 709; Harlow v. Dehon, 111 Mass. 195; Johnson v. Ames, 11 Pick. 173; Eddy v. Fogg, 192 Mass. 543, 78 N. E. 549; Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807; Sturgis v. Preston, 134 Mass. 372; Walker v. Soule, 138 Mass. 570; Coffing v. Dodge, 169 Mass. 459, 48 N. E. 840.

The Lewisohn decree is entitled in Massachusetts to the same force and effect which it has by the law and usages of the state of New York.

Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411; M'Elmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177; Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430; Embry v. Palmer, 107 U. S. 40 L.R.A. (N.S.)

3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; Metcalf v. Watertown, 153 U. S. 671, 38 L. ed. 861, 14 Sup. Ct. Rep. 947; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; Dupasseur v. Rochereau, 21 Wall. 130, 22 L. ed. 588; Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Steinbach v. Relief F. Ins. Co. 77 N. Y. 498, 33 Am. Rep. 655; Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 987.

Lewisohn was the trustee, agent, and representative of Bigelow in the transaction complained of.

King v. Barnes, 109 N. Y. 267, 16 N. E. 332; Wilcox v. Pratt, 125 N. Y. 688, 25 N. E. 1091; Getty v. Devlin, 54 N. Y. 403, 7 Mor. Min. Rep. 29, 70 N. Y. 504, 7 Mor. Min. Rep. 119; Castle v. Noyes, 14 N. Y. 329; Tyng v. Clarke, 9 Hun, 269; Carter v. Bowe, 41 Hun, 516; Re Straut, 126 N. Y. 201, 27 N. E. 259; Bracken v. Atlantic Trust Co. 36 App. Div. 67, 55 N. Y. Supp. 506, 42 App. Div. 621, 59 N. Y. Supp. 1099, 167 N. Y. 510, 82 Am. St. Rep. 731, 60 N. E. 772; Kelly v. 42nd Street, M. & St. N. Ave. R. Co. 37 App. Div. 500, 55 N. Y. Supp. 1096; Kerrison v. Stewart, 93 U. S. 155, 23 L. ed. 843; Re O'Hara, 95 N. Y. 403, 47 Am. Rep. 53; Featherston v. Newburgh & C. Turnp. Road, 71 Hun, 109, 24 N. Y. Supp. 603; Lawrence v. Schaefer, 19 Misc. 239, 42 N. Y. Supp. 992, affirmed in 20 App. Div. 80, 46 N. Y. Supp. 719.

Bigelow is bound by his participation in the Lewisohn suit.

Carleton v. Lombard, A. & Co. 149 N. Y. 137, 43 N. E. 422; Van Kroughnet v. Dennie, 68 Hun, 179, 22 N. Y. Supp. 823; Woodhouse v. Duncan, 106 N. Y. 527, 13 N. E. 334; Demarest v. Darg, 32 N. Y. 281; Leavitt v. Wolcott, 95 N. Y. 212; Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360; Port Jervis v. First Nat. Bank, 96 N. Y. 550; Heiser v. Hatch, 86 N. Y. 614; Kelly v. 42nd Street, M. & St. N. Ave. R. Co. 37 App. Div. 500, 55 N. Y. Supp. 1096; Prescott v. Le Conte, 83 App. Div. 482, 82 N. Y. Supp. 411, affirmed in 178 N. Y. 585, 70 N. E. 1108; Bush v. Knox, 2 Hun, 576; Fake v. Smith, 2 Abb. App. Dec. 76; Konitzsky v. Meyer, 49 N. Y. 571; Stedman v. Patchin, 34 Barb. 218; Henck v. Barnes, 84 Hun, 546, 32 N. Y. Supp. 840; Australian Knitting Co. v. Gormly,

138 Fed. 92; Rumford Chemical Works v. Hygienic Chemical Co. 86 C. C. A. 416, 159 Fed. 436; Hauke v. Cooper, 48 C. C. A. 144, 108 Fed. 922.

Rugg, J., delivered the opinion of the court:

These are suits in equity, by which the plaintiff seeks to recover secret profits made by the defendant as one of its organizers, in selling to it, while under the absolute control and management of himself and his associate, one Lewisohn, certain mining properties belonging to him and Lewisohn. The allegations of the bills are set out at length in 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653, where one of the cases was considered upon demurrer. After the overruling of the demurrer the defendant answered, and the cases were heard before a single justice who entered decrees in favor of the plaintiff in both cases, and filed a report of the facts found by him. Except as to matters immaterial so far as the questions of law are involved, he found that the allegations were sustained. Briefly recapitulated, the facts appearing in the report upon which the plaintiff rests its claim are that in April, 1895, the defendant and Lewisohn formed a device to secure the control of the stock (the par value of which was \$500,000) of the Old Dominion Copper Company of Baltimore City, called the "Baltimore company," and the title to certain other neighboring mining properties, called the outside properties, and to cause these properties and the real estate of the Baltimore company to be transferred to a new corporation (which they should procure to be organized with a much larger capital), for an increased price. Options were secured upon these properties, and the price agreed to be paid by the defendant and Lewisohn to the owners was \$1,000,000, divided in the proportion of $\frac{547}{1000}$ by the defendant, and $\frac{453}{1000}$ by Lewisohn. The outside properties were regarded by all parties as of little or no value, and were thrown in as a makeweight in the purchase of the stock of the Baltimore company. The single justice, while finding that they could not be said to be of no value, was satisfied that their value did not exceed \$50,000. No examination to ascertain their value was made by the defendant or Lewisohn, or by anyone in behalf of the plaintiff. For the purpose of providing himself with funds to meet in part his financial obligations for the purchase of the properties, the defendant, before taking up the options, organized an underwriting syndicate and another syndicate called the "Old Dominion Syndicate." It is not necessary to state the details of these arrangements, further than

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to say that it is found as a fact that the defendant did not deal fairly with the members of the syndicate in the division of his profits, and did not disclose to the great majority of them the fact of the secret profit. The obligation of purchase was assumed wholly by the defendant and Lewisohn, and the device for the organization of the new corporation was entirely theirs.

Although, as first conceived, it was the avowed intention of the defendant and Lewisohn (which the defendant expressed to various members of the syndicate) to form a new corporation with a capital stock of \$2,500,000, which should take the property of the Baltimore company and the outside properties for \$2,000,000 of its capital stock, and procure a working capital of \$500,000 by the sale of the rest of the capital stock to the public for cash at par, they proceeded to organize the plaintiff corporation under the laws of New Jersey, with a capital stock of \$3,750,000, divided into 150,000 shares of the par value of \$25 each. But it was the intention of the defendant and Lewisohn (as found by the single justice) that "20,000 shares of the capital stock of the plaintiff should be issued to new subscribers at par; and this was done in the summer and fall of 1895." This organization was conducted and controlled wholly by the defendant and Lewisohn, through themselves and their agents and representatives. Without providing the plaintiff with an independent board of officers or representatives, they, as the responsible and only managers of the plaintiff, acting in its name, contracted with themselves as mine owners to sell to it the real estate of the Baltimore company, for \$2,500,000 of the capital stock of the plaintiff, and the outside properties, of trifling value at best, for \$750,000 of such capital stock, and to sell to the general public for working capital the remaining \$500,000 of capital stock of the plaintiff at par, without disclosing that they had sold property costing them only \$1,000,000 for three and a quarter times its cost.

The first meeting of the stockholders was held on July 7, 1895, at which \$1,000—the lowest amount of capital with which a corporation organized under the laws of New Jersey could begin business—was paid in by Lewisohn. This money, although deposited to the credit of the plaintiff company upon its organization, was afterwards returned by it to Lewisohn in an accounting with him. A meeting of the directors was held in New York on July 11, 1895, at which the defendant became a director and the president of the plaintiff, and Lewisohn a director. Votes were passed to increase the capital stock, and two separate votes

for the purchase of the mining properties for the prices in stock before indicated. The stock, the market value of which was fully as great as its par value, was issued to the defendant and Lewisohn and one Dumaresq, their nominee, by votes of September 18, 1895, on that or the following day. At the same time a certificate for the remaining 20,000 shares of stock of the par value of \$500,000 was made out in the name of "Thomas Nelson, treasurer," but this stock is found to have belonged to the corporation, and Nelson had no right to act respecting it, as it was taken up by direct subscriptions of the public. The conveyances of the mines by the Baltimore company, and of the outside properties by Lewisohn, were not made until December, 1895, or January, 1896. The intrinsic value of the property conveyed by the Baltimore company is found to have been not more than \$1,000,000, although its market value, largely due to the skilful manipulation of the defendant and Lewisohn, and "the ingenious manner in which they created a desire on the part of men interested in mines as investors or speculators, to be allowed to join in the transaction they were carrying out," was something less than \$2,000,000. The report proceeds:

"But taking the most favorable view of the situation possible for the defendant, he and Lewisohn did, by reason of their failure to disclose the real facts as aforesaid, make out of their sale to the plaintiff company a secret profit of 50,000 shares of its capital stock, of which the defendant's portion was 27,350 shares, and Lewisohn's portion was 22,650 shares. If he had fully disclosed the facts to the plaintiff company, and secured for it independent advice, it would not have given to him this secret profit. . . . Lewisohn and he were acting in the formation and execution of the scheme together and in concert. Each of them was doing his part to carry out a joint scheme which was intended to inure to the advantage of both. The control exercised by them over the plaintiff company was a joint control, and was exercised by them for the benefit of both. A proper disclosure of the real facts by either would have frustrated the schemes of both. They both acted together in pursuance of a common design, and for the profit of both." "During all these transactions the full control of the plaintiff company was in the hands of and was exercised by the defendant and Lewisohn, who were its promoters, and who themselves determined upon and dictated, under the advice of their counsel, everything that was done by the plaintiff company or in its behalf. It had no directors, representatives, or advisers other than themselves or their

agents, and they did not disclose to it any of the facts which have been stated. This continued to be the case until April, 1902.

. . . The result of his and Lewisohn's transactions with the plaintiff company was that, for the \$1,000,000 of their own and their associates' money which they invested, they received, subject to the payment of legitimate expenses of not over \$20,000, stock to the par value of \$3,250,000 and of the actual value of at least that amount; that is, at the rate of more than three dollars for one. He gave to the members of his syndicate two dollars for one, either wholly in stock, or half in cash and half in stock, as they elected. With a few individual exceptions he did not disclose the facts to them. The very great majority of the members of his syndicate did not become aware of the details of what he and Lewisohn had done."

The capital stock issued to defendant and Lewisohn was stamped "issued for property purchased." The law of New Jersey required that such stock be issued only "to the amount of the value" of the property so purchased. Pub. Laws of New Jersey, 1889, p. 414, § 4; 1893, p. 444, § 2. The vote of July 11, 1895, to purchase the mining properties, was in fact passed by a majority only of the board of directors, for three do not appear to have been present at that time. At the directors' meeting of September 18, 1895, when the votes to issue \$30,000 full-paid shares to defendant and Lewisohn, and 100,000 like shares to their nominee, Dumaresq, were passed, seven directors were present, the five aside from Bigelow and Lewisohn being their tools, and at the end of the record of that meeting all the directors signed an assent to the acts done; and Bigelow and Lewisohn, signing for 30,000 shares of the capital stock, Dumaresq, signing for 100,000 shares of the capital stock, and "Thomas Nelson, treasurer," signing for 20,000 shares of capital stock, being the whole number of shares, signified a written approval of the acts of that meeting. The single justice found that the 20,000 shares were the property of the plaintiff, and that Nelson had no right to attempt to act as their holder.

1. The defendant strenuously contends that certain facts found by the single justice are not supported by the evidence. He first attacks the finding, vital to the plaintiff's case, that the scheme of the defendant and Lewisohn, as framed and executed, contemplated that 20,000 shares of stock in the plaintiff corporation should be issued to new subscribers at par; and that the defendant and Lewisohn did not agree to take all the stock in the plaintiff corporation in return for the mining properties

conveyed to it, and \$500,000 in cash for a working capital. He argues that the evidence required a finding that Bigelow and Lewisohn agreed, as a part of their scheme, to take all the capital stock in return for the mines and \$500,000 in cash. He also assails the findings that the property conveyed to the plaintiff by the defendant and Lewisohn, for 130,000 of its shares of a par value of \$3,250,000, was worth intrinsically not more than \$1,000,000, and that its market value, due to the skillful manipulation of the defendant and Lewisohn and their ingenious baiting of the stock market, was less than \$2,000,000; and he contends that the evidence demonstrates the truth to be that the plaintiff paid no more than it was worth.

The evidence was oral, documentary, and in depositions. The rule of practice respecting such a contention as this has been often declared. In an appeal in equity from a final decree, where all the testimony is reported, it is the duty of the appellate court to examine the evidence and decide the case on its merits, both as to the facts and the law; but where the evidence upon disputed issues is partly oral, the findings of fact of a single justice will not be disturbed unless plainly wrong. *Jennings v. Vahey*, 183 Mass. 47, 97 Am. St. Rep. 409, 66 N. E. 598; *Lindsay v. Bird*, 193 Mass. 200, 79 N. E. 263. It becomes necessary, therefore, to examine the evidence upon this point somewhat in detail.

The offers of the Baltimore company for the sale of its property to the plaintiff, and of Lewisohn for the sale of the outside properties, were in writing, and the votes of the plaintiff accepting them were spread upon the records of the directors' meeting of July 11, 1895. These provided distinctly for the issue of 130,000 shares of the plaintiff's capital stock in payment for these conveyances. The records of the plaintiff show no vote touching the issue of the remaining 20,000 shares. If, as claimed by the defendant, it was then contemplated that these shares should be issued to him and Lewisohn at par for cash, it seems probable that a vote to this effect would then have been passed. The only vote respecting the issue of these remaining shares was that of the directors on September 18, 1895, when, after a vote authorizing the issue of a certificate for 100,000 shares to Dumaresq (who was the nominee of Bigelow and Lewisohn), and another for 30,000 shares to Bigelow and Lewisohn, it was voted that the treasurer of the company be "instructed to issue 20,000 shares . . . to such parties as have subscribed for the same." If it was then understood that Bigelow and Lewisohn had agreed to take all the shares, including the

20,000, for cash at par, and were the subscribers therefor, no sufficient reason appears for not saying so in the vote, instead of adopting a phrase suited to express an intent to issue the shares to the general public. Moreover, at this time, as shown by the only subscription list of the plaintiff, the general public had subscribed generously for stock. The language of the vote aptly refers to such subscribers. The only paper which appears by the evidence to have been signed by subscribers for stock was dated July 18, 1895, two months before the vote to issue the 20,000 shares was passed. The certificate for the 20,000 shares was issued in the name of "Thomas Nelson, treasurer," he being the treasurer of the plaintiff.

It is ingeniously argued that in this matter Nelson was acting as the treasurer of those who had become subscribers to stock, and not as treasurer of the plaintiff. But he treated their payments as if made to the treasurer of the plaintiff. If this certificate had been in truth issued to the nominee of Bigelow and Lewisohn, in return for their obligation to pay cash for its face value, naturally it would have been issued without any official title attached, as was that to their nominee, Dumaresq. It is a significant coincidence that the form of certificate selected was the same which, in other companies controlled by the defendant, was used when stock was in fact treasury stock. This certificate was subdivided in the autumn of 1895, and 19,650 shares were issued to various subscribers, who paid for them directly to the plaintiff, and not to Bigelow or Lewisohn. The remaining 350 shares, although subscribed for, were not taken by subscribers. They were not taken or paid for by Bigelow or Lewisohn, but about two years later were sold by direction of Nelson, who was still the treasurer of the plaintiff, through brokers, and their face value credited on the plaintiff's books to treasury stock, and the excess above par for which they were sold to the interest account. This sum does not appear to have been the equivalent of interest due from the defendant, and which should have been paid if he originally subscribed for the shares, and his name does not appear in connection with them on the plaintiff's books. The transaction respecting the subdivision of this certificate was conducted in substance on the footing of original subscribers, and not of purchasers from Bigelow. The names of those to whom the shares were issued appear upon the "corrected list" of the plaintiff, which was its only record of subscription, and in which the shares taken by each are described as "allotments." If they were subscribers to the defendant and

Lewisohn merely for stock held by them, there was no reason why their names should appear on the plaintiff's subscription list. Notices were sent to these subscribers by the treasurer of the plaintiff, and not by Bigelow, and checks were returned payable to the order of the treasurer, and were deposited directly to the credit of the plaintiff, although notices and subscriptions to the syndicate formed by Bigelow to aid him in furnishing the purchase price were sent by and returned to Bigelow. Various written statements of Bigelow, as for instance that they proposed "to open the bag just a little to the public," and that the public were "starving" for the shares, appear inconsistent with the theory that he and Lewisohn were the subscribers for the entire capital stock. These and other circumstances are sufficient to warrant the finding of the single justice. Apparently he credited contemporaneous acts, entries, and other writings with their natural inferences, rather than the direct oral and other testimony to the contrary given at the trial. It cannot be said that in this he was plainly wrong.

The finding as to the value of the property conveyed by the defendant and Lewisohn to the plaintiff is also supported by testimony and cannot be disturbed. The evidence touching this matter came from various sources. The former owners had operated the mine with some degree of success on a capitalization of \$500,000. They had greater experience and a more intimate knowledge respecting it than anyone else, and they seemed to have been men accustomed to large business operations, and not unfamiliar with mining. They do not appear to have been under any compulsion to sell. The price for which such owners in fact sold their property might well have been regarded as the best test of its value. But the finding was approximately double this sum. Although other circumstances perhaps might have supported a higher valuation, there is no ground for holding this plainly, or even probably, wrong.

These are the main facts relied upon by the plaintiff. Other findings are controverted by the defendant. Without discussing them in detail, it is enough to say that a careful examination of the voluminous record discloses no reason for doubting their correctness.

2. At the threshold lies the question as to what law determines the character of these transactions and the liability of the defendant therefor. The votes to purchase the real estate of the Baltimore company and the outside properties were passed at a meeting of the plaintiff's board of directors held in New York, but they were not New

York contracts in the sense that they are to be governed necessarily by the law of New York. As found by the single justice: "It was the intention of the parties that these agreements should be carried out and consummated by the delivery of the deeds and the issue of certificates of stock in Massachusetts, where it was intended that the offices of the company should be, and where they were established, in Boston, and where, in fact, they were so carried out. It was intended that the business of the company, outside the actual mining and smelting operations, which were to be conducted in Arizona, should be carried on in Massachusetts; and this was done." Where a contract is made with a purpose by the parties to it, that it shall be performed in a particular place, its validity and interpretation are to be determined by the law of the place where it is to be performed. It is made with a view to that law. *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Hall v. Cordell*, 142 U. S. 116, 35 L. ed. 956, 12 Sup. Ct. Rep. 154; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Hamlyn v. Talisker Distillery* [1894] A. C. 202, 6 Reports, 188, 71 L. T. N. S. 1, 58 J. P. 540; *American Malting Co. v. Souther Brewing Co.* 194 Mass. 89, 80 N. E. 526. The ruling of the single justice that the transaction is to be determined according to the law of this commonwealth appears to have been right.

But, however that may be, the single justice has found as a fact that the law of New York applicable to the case is the same as that of Massachusetts. The only evidence as to the New York law before the single justice was the following cases, decided by the courts of that state: *Blum v. Whitney*, 185 N. Y. 232, 77 N. E. 1159; *Seymour v. Spring Forest Cemetery Asso.* 144 N. Y. 333, 26 L.R.A. 859, 39 N. E. 365; *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 263, 26 N. E. 145; *Brewster v. Hatch*, 122 N. Y. 349, 19 Am. St. Rep. 498, 25 N. E. 505; *Getty v. Devlin*, 54 N. Y. 403, 7 Mor. Min. Rep. 29; *Campbell v. Cypress Hills Cemetery*, 41 N. Y. 34; *Colton Improv. Co. v. Richter*, 26 Misc. 26, 55 N. Y. Supp. 486. And there were also admitted *de bene* Old Dominion Copper Min. & Smelting Co. v. Lewisohn, 79 C. C. A. 534, 148 Fed. 1020, s. c. (C. C.) 136 Fed. 915, and *McCracken v. Robison*, 6 C. C. A. 400, 14 U. S. App. 602, 57 Fed. 375, decided in the United States circuit court for the district of New York. The defendant's attack upon this finding stands upon a somewhat different basis from that upon the other findings of fact, because this rests wholly upon documentary evidence, and the appellate court stands precisely as did the justice who

heard the case, in respect of opportunities to weigh evidence and draw inferences from it. The trial court has not here the advantage of seeing the witnesses and judging of their credibility by personal observation. Hence no special presumption exists in favor of his finding. *Harvey-Watts Co. v. Worcester Umbrella Co.* 193 Mass. 138, 78 N. E. 886. But the decision must be made upon the evidence which was before the single justice. The cases in the Federal courts are not evidence as to the law of New York, for the reason that, this being a question of general law, the Federal courts declare the law upon their own views, and are not bound by decisions of state courts. *Olcott v. Fond Du Lac County*, 16 Wall. 678, 689, 21 L. ed. 382, 386; *Burgess v. Seligman*, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; *Pleasant Twp. v. Aetna L. Ins. Co.* 138 U. S. 67, 73, 34 L. ed. 864, 867, 11 Sup. Ct. Rep. 215. Moreover, the Federal cases cited do not purport to declare what is the law of New York. While none of the decisions of the New York courts is based upon facts precisely like those in the case at bar, *Brewster v. Hatch*, 122 N. Y. 349, 19 Am. St. Rep. 498, 25 N. E. 505, and *Campbell v. Cypress Hills Cemetery*, 41 N. Y. 34, are so nearly akin in essential features, and the statement of legal principles in each is such, as to lead to the conclusion that the finding of the single justice was correct.

Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159, is relied upon by the defendant as announcing a different doctrine; but it does not so appear to us. Several corporations and their officers there joined in a written contract for the formation of a new corporation with a fixed capitalization, and for the transfer of their several properties to it for a definite amount of its stock. The maximum amount that might be paid for the capital stock of a certain other corporation was fixed by implication in the agreement. All the persons contemplated, and none others, became members of the new corporation. These were treated by the court as together constituting the organizers of the corporation. The fact that the maximum price permitted by the agreement was in fact paid for the capital stock of the other corporation, and that a great profit was obtained by some of the organizers, was regarded not as a fraud upon the corporation, but upon the associates in the organization. It was held not to be a case for the application of the law governing promoters. This case cannot be considered as stating a rule in conflict with the finding of the single justice.

In its practical results it is not of much consequence whether the law of the situs, 40 L.R.A. (N.S.)

either of Massachusetts or New York, or of the forum, governs, for upon this record and the findings before us the law of this commonwealth controls the rights and obligations of the parties.

3. The next inquiry is as to the liability of the defendant. The plaintiff seeks to establish this on the ground that the defendant and Lewisohn framed a scheme which was an entirety, and which as a whole comprised the organization and continued management of the plaintiff by themselves, their agents, and representatives, until the completion of the project. This scheme was the capitalization of the plaintiff for \$3,750,000; the sale to it of their property, costing and intrinsically worth \$1,000,000, but having in the market a value not over \$2,000,000, for \$3,250,000; the sale to the general public at par for cash, of the remaining \$500,000 of stock; and all this without providing the plaintiff with any independent board of officers or advisors to pass upon the wisdom of the purchase, and without disclosing the substance of the transaction and their extraordinary profit to the purchasers of its stock for cash at par. This scheme was an entity, one part of it was just as essential as any other part, and one part was the procurement of \$500,000 in cash from the unenlightened public, as a working capital for the new company.

It has been decided, apparently by a unanimous court, that such a transaction creates a liability on the part of the defendant to account for his profits to the plaintiff in this proceeding. *Hayward v. Leeson*, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656. One of the present suits was before the court as reported in 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653, and after an elaborate review of the authorities and examination of the grounds, for judgment, it was held that the defendant was liable, notwithstanding the opposing decision on the precise point by the United States circuit court in *Old Dominion Copper Min. Co. v. Lewisohn*, 136 Fed. 915. Since the decision reported in 188 Mass. 315, the above-entitled case against Lewisohn has been considered by the United States circuit court of appeals (79 C. C. A. 534, 148 Fed. 1020) and by the supreme Court of the United States (210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634) and without dissent a conclusion has been reached contrary to that of this court. The deference due to a decision by the highest court in the land, and the intrinsic importance of the question at issue, require a reconsideration of our own cases, a re-examination of the authorities, and a careful consideration of the principles involved.

The plaintiff seeks to recover a secret profit made by the promoters in the sale of their own property to the corporation, basing its claim on the general and well-recognized proposition that a promoter cannot take lawfully a secret profit, and will be held to account for it if he does.¹ Fundamentally the action is to recover profits obtained by a breach of trust. There is a distinct finding by the single justice that the defendant and Lewisohn were the promoters of the plaintiff. This finding is amply justified by the evidence. In their brains it was conceived, by their direction the formalities of its incorporation were carried out, their resources provided its mines, their influence and reputation with those desiring to invest in mines procured its working cash capital. The word "promoter" has no precise and inflexible meaning in this country. In England it is defined by statute. Stat. 7 & 8, Vict. chap. 110, § 3. See also Stat. 30 & 31 Vict. chap. 131, § 38. But even there the duties of promoters as fiduciaries to the company are matters of common-law cognizance. *Erlanger v. New Sombrero Phosphate Co.* L. R. 3 App. Cas. 1218, 1269, 30 L. T. N. S. 269, 27 Week. Rep. 65, 6 Eng. Rul. Cas. 777. In a comprehensive sense, "promoter" includes those who undertake to form a corporation and to procure for it the rights, instrumentalities, and capital by which it is to carry out the purposes set forth in its charter, and to establish it as fully able to do its business. Their work may begin long before the organization of the corporation, in seeking the opening for a venture and projecting a plan for its development, and it may continue after the incorporation by attracting the investment of capital in its securities, and providing it with the com-

mercial breath of life. It is now established without exception that a promoter stands in a fiduciary relation to the corporation in which he is interested, and that he is charged with all the duties of good faith which attach to other trusts. In this respect he is held to the high standards which bind directors and other persons occupying fiduciary relations.²

That the promoter stands in the relation of a fiduciary to the corporation which he organizes seems to be conceded in *Old Dominion Copper Min. & Smelting Co. v. Lewisohn*, 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634. The questions to be answered are whether this rule is applicable, and, if it is, whether the plaintiff is in a position to assert its claim.

Notwithstanding this fiduciary relation, the promoter may sell property to the company which he is promoting. But in order that the contract may be absolutely binding, he must pursue one of four courses: (a) He may provide an independent board of officers in no respect directly or indirectly under his control, and make full disclosure to the corporation through them. (b) He may make a full disclosure of all material facts to each original subscriber of shares in the corporation. (c) He may procure a ratification of the contract after disclosing its circumstances, by vote of the stockholders of the completely established corporation. (d) He may be himself the real subscriber of all the shares of the capital stock contemplated as a part of the promotion scheme. The defendant does not contend upon this report that either of the first two courses was followed. He does rest his claim chiefly upon the third and fourth courses. As applied to the facts of this case these two come to the same

¹ *Parker v. Nickerson*, 112 Mass. 195, 196; *Parker v. Nickerson*, 137 Mass. 487, 497; *Bagnall v. Carlton*, L. R. 6 Ch. Div. 371, 47 L. J. Ch. N. S. 30, 37 L. T. N. S. 481, 26 Week. Rep. 243; *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. Div. 918, 936, 40 L. T. N. S. 804; *Nant-y-glo & B. Ironworks Co. v. Grave*, L. R. 12 Ch. Div. 738, 38 L. T. N. S. 345, 26 Week. Rep. 504; *Lydney & W. Iron Ore Co. v. Bird*, L. R. 33 Ch. Div. 85, 109, 55 L. J. Ch. N. S. 875, 55 L. T. N. S. 558, 34 Week. Rep. 749; *Whaley Bridge Calico Printing Co. v. Green*, L. R. 5 Q. B. Div. 109, 49 L. J. Q. B. N. S. 326, 41 L. T. N. S. 674, 28 Week. Rep. 351; *Chandler v. Bacon (C. C.)* 30 Fed. 538; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 119, 120, 25 L.R.A. 90, 42 Am. St. Rep. 159, 29 Atl. 303; *Hinkley v. Sac Oil & Pipe Line Co.* 132 Iowa, 396, 402, 403, 119 Am. St. Rep. 564, 107 N. W. 629; *Fred Macey Co. v. Macey*, 143 Mich. 138, 152, 5 L.R.A. (N.S.) 1036, 106 N. W. 722; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 40 L.R.A. (N.S.)

845, 79 N. W. 229; *Pietsch v. Milbrath*, 123 Wis. 647, 68 L.R.A. 945, 107 Am. St. Rep. 1017, 101 N. W. 388, 102 N. W. 342; *Cox v. National Coal & Oil Invest. Co.* 61 W. Va. 291, 305, 56 S. E. 494.

² *Dickerman v. Northern Trust Co.* 176 U. S. 202, 44 L. ed. 434, 20 Sup. Ct. Rep. 311; *Yeiser v. United States Board & Paper Co.* 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 340; *Chaffee v. Berkley*, 141 Iowa, 344, 118 N. W. 267; *Getty v. Devlin*, 54 N. Y. 403, 7 Mor. Min. Rep. 29, s. c. 70 N. Y. 504, 7 Mor. Min. Rep. 119; *Loudenslager v. Woodbury Heights Land Co.* 58 N. J. Eq. 556, 560, 43 Atl. 671; *Exter v. Sawyer*, 146 Mo. 302, 322, 47 S. W. 951; *Johnson v. Sheridan Lumber Co.* 51 Or. 35, 93 Pac. 470; *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523; *Cox v. National Coal & Oil Invest. Co.* 61 W. Va. 291, 305, 56 S. E. 494; *The Telegraph v. Loetscher*, 127 Iowa, 383, 101 N. W. 773, 4 Ann. Cas. 667; *Hayward v. Leeson*, 176 Mass. 310, and cases cited at page 318, 49 L.R.A. 725, 57 N. E. 656.

thing, for the reason that on the findings of the single justice the defendant and his associate were subscribers for only 130,000 shares out of a total 150,000, and in the light most favorable to them they held all the shares which had been issued at the time of the ratification, but not all which it was proposed to issue as a part of the scheme of promotion. The point to be determined, therefore, is whether the promoter is immune from liability if he and his associates are owners of all the issued stock at the time of the act complained of, although intending as a part of their plan the immediate issue of further stock to the public without disclosure, and whether, while a substantial portion of the stock intended to be issued to the public remains unissued, a vote of ratification of the breach of trust will protect him.

A review of the authorities seems to demonstrate that there is a liability of the promoter to the corporation when further original subscribers to capital stock contemplated as an essential part of the scheme of promotion came in after the transaction complained of, even though that transaction is known to all the then stockholders, that is to say, to the promoters and their representatives.

Erlanger v. New Sombrero Phosphate Co. L. R. 3 App. Cas. 1218, 39 L. T. N. S. 269, 27 Week. Rep. 65, 6 Eng. Rul. Cas. 777, is one of the most important and thoroughly considered cases, and, as it has been said to be a case often misunderstood (Lord Davey in *Salomon v. Salomon & Co.* [1897] A. C. 22-67, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, 4 Manson, 89), it is well to consider it at length. It was first heard by Vice Chancellor Milans under the name of *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73, 36 L. T. N. S. 222, 46 L. J. Ch. N. S. 425, 25 Week. Rep. 436, then by the justices of appeal (L. R. 5 Ch. Div. 102), and finally by the House of Lords, where it was twice argued. The facts were these: Erlanger and his associates, hereafter spoken of as the "syndicate," bought of the official liquidator of a broken-down company the lease of a phosphate island for £55,000. The agreement for purchase was signed on September 11th, and was subject to the approval of the judge, which was given on September 15, 1871. By its terms the contract was to be completed on November 15, 1871. The syndicate then organized the New Sombrero Phosphate Company under Stat. 25 & 26 Vict. chap. 89 (L. R. 3 App. Cas. 1264). The articles of association of the new corporation were signed on September 20, 1871, and the company registered on September 20th or 21st (L. R. 5 Ch. Div. 40 L.R.A. (N.S.)

76). On registration the corporation was created under Stat. 25 & 26 Vict. chap. 89, § 18 of which provided that upon registration "the subscribers . . . shall thereupon be a body corporate, . . . capable forthwith of exercising all the functions of an incorporated company." The signers of the articles of association were tools of the syndicate. The members of the first board of directors were named in the articles of association. Two were out of the country and would not attend meetings; others were an employee of Erlanger, a retired admiral of the English navy, whose shares necessary to qualify him as a director were paid for by Erlanger (L. R. 5 Ch. Div. 107, 108), and the mayor of London; three directors made a quorum, and the last three named attended the meetings. The syndicate anticipated its payments required by its contract, and acquired the lease of the island on September 21, 1871. The first meeting of the directors was held on September 29, 1871, at which was produced, and approved by resolution, an agreement between one Evans (in whose name, in behalf of the syndicate, the contract for the purchase of the lease from the official liquidator was made) and one Pavy (acting for the new company), dated September 20, whereby Evans sold, and Pavy for the company bought, the lease of the island for £80,000 in cash and £30,000 in paid-up stock. In the discussion of this case in 210 U. S., at page 216, 52 L. ed. 1080, 28 Sup. Ct. Rep. 638, this contract is stated to have been "provisional on the shares being taken and the company formed," but we do not so understand it as set forth in L. R. 5 Ch. Div. 75, 76, and 95. It was subject to the new company being registered (which was done on September 20th or 21st), and to the contract with the official liquidator being approved by the judge (which was done on September 15th), and duly performed (which was done on September 21st), and to the confirmation by the company (which was given by vote of the directors on September 29th, who were in this regard clothed by the articles of association with all the authority of the corporation itself [L. R. 3 App. Cas. 1273-1274]), but it contained no other provisional features. The directors adopted the contract between Evans and Pavy without investigation into its merits, and in ignorance of the profits made by the syndicate, except as Evans had such knowledge. After this the public over-subscribed. The stock was issued, £30,000 to the syndicate and £100,000 to the public; and on November 2d £80,000 was paid to the syndicate by the company. (L. R. 5 Ch. Div. 96). Respecting this agreement for sale by the syndicate, it is further said

in 210 U. S., at page 217, that "the contract seems to have reached forward to the moment when they [the public] subscribed. As it is put in 2 [1 is meant] Morawetz, Priv. Corp. 2d ed. § 292, there was really no company till the shares were issued," and on this ground it is stated by the court at page 216 of 210 U. S., that the English case "seems to us far from establishing a different doctrine for that jurisdiction."

We cannot accede to this interpretation. The company was fully formed the moment it was registered. The subscription for the shares required as a prerequisite to registration under the English statute established the company as fully as the forty shares subscribed, and the \$1,000 for capital stock paid into the plaintiff's treasury on or before July 11, 1895, established it. It was enabled to make any contract within the scope of its powers. That is settled by the plain language of Stat. 25 & 26 Vict. chap. 89, § 18, quoted above. But it also has been expressly so decided. It was said in *Salomon v. Salomon & Co.* [1897] A. C. 22, at page 51: "When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate 'capable forthwith,' to use the words of the enactment, 'of exercising all the functions of an incorporated company.' Those are strong words. The company attains maturity on its birth. There is no period of minority,—no interval of incapacity." This apparently demonstrates the error of the further statement in 1 Morawetz, Priv. Corp. 2d ed. p. 279, that "before any shares were issued the existence of the corporation was a fiction." The remark of Lord Cairns (L. R. 3 App. Cas. at page 1239) to the effect that the contract for the sale of the island was "provisional on the shares being taken and the company completely formed" was made in connection with the defense of laches, and not in the discussion as to the liability of the defendants (which he had concluded on an earlier page), and refers only to the fact that the scheme of the defendants to get £80,000 in cash out of the new company under their contract with it was dependent as a practical matter on the shares being taken by the public, and does not and cannot apply to the phraseology of the contract itself, for respecting that it is not correct. The only conditions named in the contract were that the company should be registered and confirm the contract, and the contract of the syndicate with the official liquidator be performed. See L. R. 5 Ch. Div. 75, 76, 95.

The distinction which appears to be established between the Erlanger Case and the present one, by the decision of the United States Supreme Court, 210 U. S. 40 L.R.A. (N.S.)

206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634, is that if promoters organize a company with a capital of \$3,750,000, and sell to it, through their dummy directors, property bought by them for this purpose, for \$3,250,000 in paid-up shares, and then get by public subscription \$500,000 for working capital, the transaction is valid. But if promoters, having bought property for \$55,000, organize a company with a capital of £130,000, and while they are the only bona fide stockholders, by vote of their directors, sell to it their property for £110,000, to be paid £80,000 in cash, and £30,000 in paid-up shares, £100,000 being subscribed in cash by the public, the transaction is void. The only difference between the two cases is that in the Erlanger Case the promoters were paid a part of the purchase price in money, the proceeds of public subscription, and received paid-up shares which they took in payment of the balance of the purchase price when the stock was issued to subscribers, while in the present case the whole purchase price was paid in stock, which was issued before any stock was issued to the public, although after a substantial public subscription. In other words, the order in which the transaction is carried out, and not its substantial nature, makes the difference between liability and immunity of the promoter. It is true that in the Erlanger Case, until after ratification by the company of the contract previously made in its behalf for the purchase of the lease of the island, the mayor of London, by acting as a director, was liable to take shares of stock, and intended to, and did subsequently, take and pay for fifty shares. He, and possibly one other (L. R. 3 App. Cas. 1228), appear to have been the only persons up to that time connected with the company, who subsequently became stockholders, who were not agents of the promoters. But it is also the fact (as stated by Jessel, M. R., in L. R. 5 Ch. Div. at page 112) that "up to that time there was not really a single bona fide shareholder distinct from the promoters," and, of course, all these assented to the transaction. If this is a vital circumstance, that case is distinguishable in principle from the one at bar, and from the case decided by the United States Supreme Court. This appears to us to be a difference upon an immaterial matter. It is of no consequence whether in fact the dummy directors know of the terms of sale and the breach of trust of the promoters. It does not appear in the present case that the nominees of Bigelow and Lewisohn knew any more about the profit the latter were making than did the directors of the New Sombrero Company of the profits of the syndicate. The point is that in both cases the

directors were selected with the purpose that they should be the mere instruments of the promoters, and they carried out the will of their masters. Under the English statute the instruments of the promoters in the New Sombrero Company, while its directors, were as fully clothed with all the powers of the corporation and as much the holders of all its stock, as were the seven directors of the plaintiff, holding in all forty shares of the plaintiff at the time the contract of sale in the present case was made. If the assent of all the stockholders is good in the one case, by the same token it should be equally good in the other; and the breach of trust in the one is equally a breach of trust in the other. This case seems to us an authority in favor of the plaintiff.

In *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73, 123, it was said by Baggallay, J. A.: "The syndicate were in substance not only the vendors of the property, but also the promoters of the company, and in such a case, the syndicate, as promoters, being in a fiduciary relation to the company, it was essential that the public, who were invited to become, and who were expected to become, the shareholders of the company, and to constitute the company, should have the fullest information as to all the surrounding circumstances." See also *Jessel, M. R.*, at page 113. In *Re British Seamless Paper Box Co.* L. R. 17 Ch. D. 467, at page 471, it was said by *Jessel, M. R.*: "If promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after. In both cases it is intended to cheat the future shareholders; and, of course, it makes no difference whatever, that the persons who, at the time the allotment was made, were in fact the promoters or their nominees, knew of the fraud. You can defraud future allottees as well as present allottees." In the same case on appeal, *Cotton, L. J.*, said (L. R. 17 Ch. Div. at page 470): "The directors stand in a fiduciary relation to the whole company; that is, not only to the existing members, but to all whom they intend to bring in." In *Broderip v. Salomon* [1895] 2 Ch. 323, at page 329, it was said by *Vaughan Williams, J.* (whose conclusion was approved in *s. c. sub nom. Salomon v. Salomon & Co.* [1897] A. C. 22, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, 4 Manson, 89): "Of course, purchasing at an exorbitant price may be a fraud even if all the shareholders know of it, if there is an intention to allot

further shares at a later period to future allottees." This point was apparently left open in the House of Lords [1897] A. C. at page 37. In *Re Leeds & H. Theatres* [1902] 2 Ch. 809, at page 823, occurs this language: "At first there were only four directors . . . and the seven necessary signatories of the memorandum of association. When it is said that the promoters stood in a fiduciary position towards the company, that does not mean that they stood in such a relation to these directors and these seven signatories. It means that they stood in a fiduciary relation to all future allottees of shares,—to the persons who were invited to come and take up the shares of the company." In *Gluckstein v. Barnes* [1900] A. C. 240, 257, *Lord Robertson* says: "The people for whom these gentlemen [the promoters] were bound to act were their coming constituents, the persons out of whose money they proposed to make their gain."

In *Densmore Oil Co. v. Densmore*, 64 Pa. 43, at page 50, 3 Mor. Min. Rep. 569, it is said: "Where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such a company, and then sell it at an advance, without a full disclosure of the facts." This language is quoted with approval and applied in *Burbank v. Dennis*, 101 Cal. 90, 98, 35 Pac. 444, and in *South Joplin Land Co. v. Case*, 104 Mo. 572, 580, 16 S. W. 390. To the same point, *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 321-323, 17 Am. St. Rep. 149, 42 N. W. 259, 17 Mor. Min. Rep. 226. In *Pietsch v. Milbrath*, 123 Wis. 647, at page 656, 68 L.R.A. 945, 107 Am. St. Rep. 1017, 101 N. W. 388, 391, 102 N. W. 342, it is held that "persons who act as promoters of a corporation do not necessarily cease to be such when the corporation is organized to do business. . . . So long as there are prospective original subscribers for stock, and the promoters and those concerting with them remain in control of the corporation, it is in a situation to be deceived. . . . It is deceived in a legal sense when it is rendered helpless by its managers as to protecting those invited to subscribe for its stock, and is then used to aid in defrauding them." This is supported by *Fred Macey Co. v. Macey*, 143 Mich. 138, 152, 5 L.R.A.(N.S.) 1036, 106 N. W. 722, a case singularly like the one at bar in its essential features, where relief was granted to the corporation against the promoters, although they subscribed for all the capital stock. Other

cases which in principle reach the same result are *Yeiser v. United States Board & Paper Co.* 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 340, 348; *London Trust Co. v. Mackenzie*, 62 L. J. Ch. N. S. 870, 3 Reports, 597, 68 L. T. N. S. 380; *Hinkley v. Sac Oil & Pipe Line Co.* 132 Iowa, 396, 119 Am. St. Rep. 564, 107 N. W. 629. It was said in *Groel v. United Electric Co.* 70 N. J. Eq. 616, 622, 61 Atl. 1061, 1063: "There can be no question that promoters are liable to the corporation for profits secretly made by them in its promotion, and that such liability arises in cases where future allottees of stock are concerned. *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094; *Loudenslager v. Woodbury Heights Land Co.* 58 N. J. Eq. 556, 43 Atl. 671, affirming the principle established in the court of chancery in *Woodbury Heights Land Co. v. Loudenslager*, 55 N. J. Eq. 78, 35 Atl. 436." In *Central Trust Co. v. East Tennessee Land Co.* (C. C.) 116 Fed. 744, and *Camden Land Co. v. Lewis*, 101 Me. 78, 95, 63 Atl. 523; *Hayward v. Leeson*, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656, to this point is cited with approval. *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 606, 15 Pac. 544, and *Stewart v. St. Louis Ft. S. & W. R. Co.* (C. C.) 41 Fed. 736, were both decided on the assumption that the promoters took all the stock, although it appears that later some stock was issued to municipalities through which the tracks of the promoted railroad corporation ran, but whether as a part of the original plan of promotion does not appear, and no weight is attached to this circumstance in the opinions.

Numerous other cases which have been cited do not bear upon this point, for the reason that in each of them the owners of the property conveyed have owned either the entire capital stock of the corporation, or all that it was contemplated to issue. See *Foster v. Seymour* (C. C.) 23 Fed. 65; *McCracken v. Robison*, 6 C. C. A. 400, 14 U. S. App. 602, 57 Fed. 375; *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 263, 26 N. E. 145; *Blum v. Whitney*, 185 N. Y. 232, 77 N. E. 1159; *Re Ambrose Lake Tin & Copper Min. Co.* L. R. 14 Ch. Div. 390, 49 L. J. Ch. N. S. 457, 42 L. T. N. S. 604, 28 Week. Rep. 783; *Salomon v. Salomon & Co.* [1897] A. C. 22, 75 L. T. N. S. 426, 65 L. J. Ch. N. S. 35, 45 Week. Rep. 193, 4 Manson, 89; *Re British Seamless Paper Box Co.* L. R. 17 Ch. Div. 467, 50 L. J. Ch. N. S. 497, 44 L. T. N. S. 498, 29 Week. Rep. 690; *Seymour v. Spring Forest Cemetery Asso.* 144 N. Y. 333, 26 L.R.A. 859, 39 N. E. 365; *Hutchinson v. Simpson*, 40 L.R.A. (N.S.)

92 App. Div. 382, 87 N. Y. Supp. 369; *Tompkins v. Sperry*, 96 Md. 560, 54 Atl. 254; *Langdon v. Fogg* (C. C.) 21 Blatchf. 392, 18 Fed. 5; *Flagler Engraving Mach. Co. v. Flagler* (C. C.) 19 Fed. 468; *Insurance Press v. Montauk Fire Detecting Wire Co.* 103 App. Div. 472, 93 N. Y. Supp. 134; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Re Baglan Hall Colliery Co.* L. R. 5 Ch. 346, 39 L. J. Ch. N. S. 591, 23 L. T. N. S. 60, 18 Week. Rep. 499, 13 Mor. Min. Rep. 261. In all these cases it was also true that no shares were ever issued (so far as appears) other than those to the promoters, except that in *Re British Seamless Paper Box Co.* L. R. 17 Ch. Div. 467, 50 L. J. Ch. N. S. 497, 44 L. T. N. S. 498, 29 Week. Rep. 690, at a time considerably subsequent to the organization of the corporation, a change in the scheme was made in good faith, by which others were brought in as subscribers.

In this respect the question is one of intention of the promoters. If they actually intend at the time the company is brought out to remain its sole owners, and that it shall not receive the money of innocent shareholders in the future, then, although thereafter the exigencies of the company may be such as to require the issue of additional stock, they may not be responsible. *Re British Seamless Paper Box Co.* supra, is an illustration of this principle. There it was found that the promoters were, and intended to remain, the sole proprietors of the property of the company and the sole members of the company. *Cotton, L. J.*, at page 479, said: "Here it is an established fact that when the company was formed it was intended to be a private company, that is, it was intended to carry it on without calling in the public, or issuing any shares except to the then existing shareholders. Therefore the doctrine that directors may not make a profit for themselves is inapplicable, because all the members knew that they intended to make a profit. It is true that some new members were subsequently taken in. If shortly after this transaction a prospectus had been issued, and the public had been invited to come in and take shares, no court would have listened to directors who said that it was not intended to take in fresh members; but this was commenced and carried on entirely as a private company, and a considerable time elapsed before they asked anyone to join them." In *Wills v. Nehalem Coal Co.* 51 Or. 70, 96 Pac. 528, a corporation was organized by promoters with a capital of \$150,000. More than half was issued to promoters and their tools in return for property of one of them conveyed at an overvaluation.

Afterwards shares were sold to the public without disclosure of the great profit made by promoters. Relief was granted. The contention that the corporation had assented with full knowledge of the facts by all who were the stockholders at the time of the sale was disposed of on the ground that in substance a wrong was done the corporation in diminishing the common fund held for the benefit of all the stockholders, by issuing a part of its capital stock for property worth less than its face value. In *Richlands Oil Co. v. Morris*, 108 Va. 288, 61 S. E. 762, the facts as stated in the opinion were that the promoters, having acquired the control of certain oil leases for an insignificant price, "proceeded to transfer these leases to a company which they organized upon a capitalization of 1,000,000 shares [the par value of each share being \$1], and distributed 600,000 of those shares among themselves; and, having perfected the organization of the company by making themselves the president, secretary, treasurer, and directors, undertook to market the residue of the shares of stock, amounting to 400,000 shares, without informing the public as to the true condition." The suit of the corporation was upheld. Upon the point we are now discussing, these two cases are indistinguishable in principle from the cases at bar.

This review of decisions seems to establish abundantly the proposition that promoters stand in a fiduciary position toward the corporation, as well when, as a part of the scheme of promotion, uninformed stockholders are expected to come in after the wrong has been perpetrated, as when at that time there are shareholders to whom no disclosure is made. We find no authority opposed except the *Lewisohn Cases* in the Federal courts. 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634.

If the question is examined on principle apart from authority; the same result appears clear. The starting point is that a promoter is a fiduciary to the corporation. To use the words of Lord Cairns in *Erlander v. New Sombrero Phosphate Co.* L. R. 3 App. Cas. 1218, at page 1236, 6 Eng. Rul. Cas. 777: Promoters "have in their hands the creation and molding of the company. They have the power of defining how and when and in what shape and under what supervision it shall start into existence" and begin business. The corporation is in the hands of the promoter like clay in the hands of the potter. It is to this person, absolutely helpless and incapable of independent initiative or uncontrolled action, that the promoter stands as trustee. It is not necessary to inquire

how far he may be trustee also for shareholders or associates. In the present case the inquiry relates wholly to his obligation to the corporation. The fiduciary relation must in reason continue until the promoter has completely established according to his plan the being which he has undertaken to create. His liability must be commensurate with the scheme of promotion on which he has embarked. If the plan contemplates merely the organization of the corporation, his duties may end there. But if the scheme is more ambitious, and includes beside the incorporation not only the conveyance to it of property, but the procurement of a working capital in cash from the public, then the obligation of faithfulness stretches to the length of the plan. It would be a vain thing for the law to say that the promoter is a trustee, subject to all the stringent liabilities which inhere in that character, and at the same time say that, at any period during his trusteeship, and long before an essential part of it was executed, or his general duty as such ended, he could, by changing for a moment the cloak of the promoter for that of director or stockholder, by his own act alone, absolve himself from all past, present, or future liability in his capacity as promoter. The plaintiff was fully organized and authorized to do business on July 8 and 11, 1895, when only \$1,000 in capital stock had been paid in. It would be an idle ceremony indeed to establish for promoters the obligations of trustees, and at the same time hold that, by their tools and with only \$1,000 paid in, and that as a mere form (for it was soon after repaid to one of them), they could vote to themselves a wholly unwarranted profit of \$1,250,000, kept secret from other initial shareholders, because at that moment they were the only stockholders. By such a course the law would be holding out apples of Sodom to the wronged corporation. Corporation can be formed through irresponsible agents with ease. If these agents can vote away a substantial part of the capital stock for property of comparatively small value, and still, with immunity to themselves and their principals, receive from the uninformed public cash subscriptions for the rest of the capital stock, the organization and management of corporations might readily become a "system of frauds." *Peabody v. Flint*, 6 Allen, 52-55. It is answered that the plaintiff has assented to the transaction with full knowledge of the facts. But it has not assented when it stood where it could act independently. The assent to the wrongful act of the promoters was given at the behest and by vote of the promoters themselves,

while still occupying the position of protectors to their own creature, while it was bound hand and foot by them, and prevented from taking any action except through them as a step in its farther exploitation, and while their trust was uncompleted. The corporation, although by law fully organized, was still in its swaddling clothes, so far as the plans of the promoters were concerned. The value of their stock taken in return for their mining property was dependent in a substantial degree upon the corporation having \$500,000 in cash for a working capital. They could not perfect their plans nor reap their contemplated profit, except by retaining their hold upon the corporation until the public had made this contribution. In one sense it is true that the plaintiff was completely organized on July 11 and on September 20, 1895. It was fully competent to be bound by its contracts and ratification of contracts with those dealing with it at arm's length. But it was not free from its wardship to its promoters, whose scheme from the first looked forward to a corporation with treasury filled by subscriptions from the unenlightened public. The corporation was not dealing with these fiduciaries upon an independent ground. The plaintiff, although a legal corporation from July 8th, leaned wholly upon its promoters, because they made it so to lean, until long after the events here in controversy. An assent under those conditions can be of no greater effect than the assent of a minor under guardianship to the breaches of trust of his guardian.

The situation is akin to the conveyance of property by a man solvent, but in contemplation of insolvency. Such conveyance is not wrong until the contemplated indebtedness is incurred, which makes him an insolvent. Then the executed evil intent stretches back and invalidates the original conveyance. Here the conveyance to the corporation with the secret profit, when there are no uninformed subscribers to stock, if nothing more is ever done, is not an actionable tort. But the vicious intent looks forward to the procurement of money from the ignorant public by means of original subscriptions, and the execution of this evil intent extends backward to contaminate the sale and its profit.

Stress has sometimes been laid upon the fact that the promoters were paid a part of their purchase price out of the public subscriptions. But there is no difference in principle between such a case and the present, where a substantial part of the value of the stock taken by the defendant and Lewisohn depended upon the cash subscriptions to be made by the public for the

remaining shares not issued to the promoters.

But it is further argued that the entire capital stock outstanding at the time being in the hands of the promoters, the sale of the property to the corporation was merely changing the form of title of the promoters from owners of real estate to that of shares of stock, and that, there being then no other shareholders, no wrong was done. It has been decided that where persons own the entire authorized capital stock of the company, and take it in payment for the conveyance of their property at a grossly exaggerated price, nobody can be heard to complain. The leading English cases upon this point are *Re Gold Co.* L. R. 11 Ch. Div. 701, 48 L. J. Ch. N. S. 281, 40 L. T. N. S. 5, 27 Week. Rep. 341; *Re Ambrose Lake Tin & Copper Min. Co.* L. R. 14 Ch. Div. 390, 49 L. J. Ch. N. S. 457, 42 L. T. N. S. 604, 28 Week. Rep. 783; *Re British Seamless Paper Box Co.* L. R. 17 Ch. Div. 467, 50 L. J. Ch. N. S. 497, 44 L. T. N. S. 498, 29 Week. Rep. 690; and *Salomon v. Salomon & Co.* [1897] A. C. 22, 75 L. T. N. S. 426, 65 L. J. Ch. N. S. 35, 45 Week. Rep. 193, 4 Manson, 89. But these and many other like cases cited on page 331, ante, are where the promoters owned all the outstanding capital stock and intended to remain the sole proprietors, and did not purpose that there should be, as a part of the promotion plan, a substantial issue of stock for cash to the public. This is pointed out in *London Trust Co. v. Mackenzie*, 62 L. J. Ch. N. S. 870, 875, 3 Reports, 597, 68 L. T. N. S. 380. The distinction is clear between cases of that class and those like the present, where the promoters took for themselves a large number of shares of stock without adequate consideration and without disclosure, to the detriment of the corporation and all its future shareholders, at the same time planning that there should be immediate public subscriptions. It is one thing to take all the shares of a corporation in payment for physical property conveyed. It does not much matter to the stockholders in such a case whether the total is 130,000 shares or 150,000 shares. But it is a very different thing to take 130,000/150,000 of capital stock of a corporation whose assets consist of the same physical property, and, in addition, \$500,000 in money subscribed by others. The latter course affects the other stockholders and the corporation itself, and it gives the promoters something appreciably more valuable than what they contribute. It is true that in *Salomon v. Salomon & Co.* and in some other cases there was a part of the authorized capital stock which was not issued, but it was not proposed to be issued.

as a part of the scheme of promotion, and the original shareholders intended to remain the only shareholders. It was to be issued or not in the remote future, as the exigencies of the corporation in the actual conduct of its business might require, but, in any event, it was not to be issued for the purpose of starting the corporation on its course. This circumstance materially affects the question here to be considered. Most, if not all, corporation laws provide in some form for an increase of capital stock. It is of no consequence upon such a point as this, whether the capital stock originally authorized is large, but not all issued, or whether it is at first small and subsequently an increase is authorized. This seems to be the view taken by the English courts, for it is said by James, L. J., in *Re British Seamless Paper Box Co.* L. R. 17 Ch. Div. 476: "If they [the promoters] were intending, although then constituting the whole company, that other people should come in afterward, to whom what had been done would be injurious, the court would feel no difficulty in saying, as Lord Langdale did in *Society for Illustration of Practical Knowledge v. Abbott*, 2 Beav. 559, 9 L. J. Ch. N. S. 307, 4 Jur. 453, that they intended to commit a fraud."

The fundamental reasoning upon which these cases can rest is not that no wrong has been committed, but there is no one to enforce the remedy. All courts recognize the soundness of the doctrine that no man can be on both sides of the same bargain with justice to all interests. The principle that one cannot rightfully sell property belonging to him in his private right, to himself in a trust capacity, is universal.

If this aspect alone is looked at, and the corporation is regarded as a distinct person, it cannot be said that the corporation is not wronged by such a breach of duty by promoters. It is only when the corporate personality is disregarded, and its component elements as stockholders alone are considered, that it can be said that no harm is done, on the ground (as was said in *Salomon v. Salomon & Co.* [1897] A. C. at page 57) that "the company is bound in a matter *intra vires* by the unanimous agreement of its members." But looking through the form of the corporation to the stockholders, and treating them as the corporation, is an exception to the otherwise firmly established universal rule that the corporation is a separate legal entity for all purposes, even though all its stock be held by a single interest, and it be to all practical intents merely the instrument of the stockholder. *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *Peterson v. Chicago*, 40 L.R.A. (N.S.)

R. I. & P. R. Co. 205 U. S. 364-390, 51 L. ed. 841-851, 27 Sup. Ct. Rep. 513. We perceive no reason for extending this exception in a case like the present.

The real ground of the decisions of which *Salomon v. Salomon & Co.* is a type is that the corporation is estopped by the circumstance that all persons with financial concern in the matter have assented with knowledge, and thus the lips of everybody are sealed. It is not that no wrong has been done, but that whatever wrong has been done has been condoned. The maxim, *Volenti non fit injuria*, is invoked. This, however, is setting up confession and avoidance, and not a bar to the main cause of action.

The theory upon which corporations are founded is that they are artificial persons, distinct and separate from officers and stockholders. Corporate liabilities do not attach to the latter. The wrong which the defendant and his associate did in this case was in selling property worth intrinsically \$1,000,000, and in the market at most \$2,000,000, for \$3,250,000, without revealing that they were making a secret profit. The wrong was done to the corporation. It affected all its shareholders, present and future alike. It is generally admitted that, if there are existing stockholders ignorant of the wrong, redress may be had. But it is had through the corporation or for the benefit of the corporation, and not by the stockholder in his own right. The wrong is not done to the shareholders as individuals, nor to the shareholders collectively. It is done to the corporation as an independent being, and thus indirectly the rights of those who are or who may become stockholders are affected. In buying the promoters' mine, the directors of the corporation acted for the corporation, as such, without regard to who were the then stockholders, or even if there were no stockholders. Whoever becomes an originally contemplated shareholder coming in afterwards has as much right to say that the rights of the corporation were not protected, and to assert that it should assert its remedy for the wrong done it, as one in at first, but not informed. Subsequent subscriptions to original stock, as a part of the scheme of promotion, do not change the identity of the corporation, but remove an impediment to the enforcement of a remedy for a wrong previously done the corporation. The wrong is not done when the innocent public subscribes, but when the sale was made to the corporation at a grossly exaggerated price with secret profit. The occasion for complaining of this wrong comes when the promoters issue to the public the balance of the stock, in order to

provide the money necessary to set the corporation on its feet and to give thereby the contemplated value to the stock taken by themselves in payment for their mines. The exemption of the promoter from liability to the corporation for a sale without disclosure, when he takes the entire issue of capital stock, is an exception to the general rule imposing upon him the liabilities of a trustee. If this exception is to be extended to a case like the present, it leaves nothing of substantial value in the original rule. It might still reach small and grosser forms of want of fidelity to corporations, but would leave unharmed the vastly greater and more refined variety illustrated by the present case. It would point the way to general immunity for the wary.

It is also urged that the maintenance of this suit works an injustice to the defendant in requiring a repayment to the corporation which will result in a benefit to the $\frac{13}{15}$ of the capital stock taken by the defendant and Lewisohn (who condoned the wrong), as well as to the $\frac{2}{15}$ subscribed for by the innocent public. The size of the repayment which may be required of the defendant is due to the enormous profit taken at the outset. Apart from the unjust profit taken by the promoters, their interest in the plaintiff was only $\frac{5}{17}$, or, tested by the cost and intrinsic value of the property conveyed, $\frac{4}{17}$. The true answer, however, is given by Jessel, M. R., in *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. at page 114: "It is said that is not doing justice, and that the suit cannot be maintained in this form, because it will not do justice. But that argument goes too far, because it would apply to a case of the grossest fraud in every instance in which one or more of the actual shareholders of a company took part in that fraud. If the argument were once allowed to prevail, it would only be necessary to corrupt one single shareholder in order to prevent a company from ever setting the contract aside. It may be said, you give to the shareholder, who was a party to the fraud, a profit, because he will take it in respect of his shares, and since, as between co-conspirators, there is no contribution, therefore his brother conspirators, who are made liable for the fraud, cannot make him repay his proportion. But the doctrine of this court has never been to hold its hand and avoid doing justice in favor of the innocent, because it cannot apportion the punishment fully amongst the guilty. A dozen parties to a fraud may be defendants, and one decree or judgment go against all, and if it is a fraud of such a character that none of them can bring an action for contribution, the plaintiff may, at his will 40 L.R.A.(N.S.)

and pleasure, enforce that judgment against any one of them, and perhaps pass over the most guilty of them; still there is no remedy as between those who commit the fraud. It is one of the punishments of fraud that there is no such remedy, and that a guilty party, though not the most guilty, may suffer the greatest amount of punishment. It is one of the deterrents to men to prevent their committing fraud." See also *Stockton v. Anderson*, 40 N. J. Eq. 486, 4 Atl. 642.

It is said further that the result reached is harsh from the business man's point of view. A discussion of this aspect of the case involves ethical considerations. Courts are constantly dealing with the various relations of the business world. Legal principles are applied to these transactions, but such principles have "almost always been the fundamental ethical rules of right and wrong." *Robinson v. Mollett*, L. R. 7 H. L. 802, 817, 44 L. J. C. P. N. S. 362. Upon its distinctly moral side, there is little to the credit of the defendant and his associate. The offering by the defendant as promoter, for public subscription for cash at par, a substantial part of the capital stock of a corporation, the rest of whose capital stock had been issued for property conveyed to it under a law which permitted such stock to be issued only for the real value of property, was equivalent to a representation that no fictitious value had been placed upon the property so acquired. But the distinct finding of the single justice is that the real value was less than one third the price for which the defendant and Lewisohn sold it. Nothing can be said in support of a business enterprise carried on by promoters, which involves the purchase by them of mines costing and intrinsically worth \$1,000,000, with money in substantial part solicited from associates on representations that a corporation is to be formed with a capitalization of \$2,500,000, of whose stock \$2,000,000 is to be issued for conveyance to it by them of the mines, and the rest for cash; the actual organization of the corporation under the laws of a state which permitted the issuance of capital stock for property conveyed only to the real value of the property, with a capital stock of \$3,750,000, of which \$3,250,000 is issued as fully paid for conveyance of the mines; the settlement with a very great majority of the associates on the basis of a sale for \$2,000,000 of stock as at first represented, the promoters retaining \$1,250,000 of shares as a secret profit, intending also to procure from the public subscriptions for \$500,000 of stock in cash at par, and actually carrying out this purpose, the promoters themselves during

all these manipulations having entire control of all executive offices of the corporation. In the absence of compelling authority, we cannot set the seal of judicial approval upon such business policies. See *Bigelow v. Old Dominion Copper Min. & Smelting Co.* 74 N. J. Eq. 457, 71 Atl. at pages 176, 177.

Both on authority outside of our own cases, and on principle, it appears to us that the defendant should be held liable. But in this jurisdiction the matter does not stand quite on the basis of an original proposition. In two thoroughly considered opinions in recent years (*Hayward v. Leeson*, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656, and *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653), this court has held that liability existed in a case like this. It is not necessary to repeat the arguments of these decisions. There is thus added to considerations which otherwise exist, the force of the doctrine of *stare decisis*. One or both of these cases have frequently been cited by courts of other jurisdictions, and always with approval until *Old Dominion Copper Min. & Smelting Co. v. Lewisohn*, 79 C. C. A. 534, 148 Fed. 1020, s. c. 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634. No arguments have been adduced not considered in those cases, and no points now brought forward were not there discussed. While the rule of *stare decisis* does not prevent the overruling of those cases, they should not be disturbed unless they now appear to be so clearly wrong as to have no sound support. *Ma-bardy v. McHugh*, 202 Mass. 148, 23 L.R.A. (N.S.) 487, 132 Am. St. Rep. 484, 88 N. E. 894, 16 Ann. Cas. 500. It must appear that the law was "misunderstood or misapplied." 1 Kent. Com. 475. There was no misconception of the points involved when these cases were decided, nor any lack of discernment in their application to the affairs of corporations. It does not appear that they have become archaic or inapplicable by reason of business evolutions since they were announced. On the contrary, the tendency of custom since the first case was decided has been rather in the direction of more strict accountability of those owing duties to corporations and their stockholders. At all events, we perceive no occasion to relax these principles of accountability for breaches of trust. The mere fact that the Supreme Court of the United States has since decided the question differently is not alone a sufficient consideration for reversing our decisions. It is only when the reasoning of its decision is of convincing power, and compels the conclusion that our cases were wrongly decided, 40 L.R.A. (N.S.)

that it must command our support in other branches of the law than those where it is supreme under the Federal Constitution. With great respect to the decision in 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634, we are constrained to adhere to the laws as laid down in the earlier cases in this commonwealth.

We have discussed the question as if the same legal principles are involved now as were presented upon the demurrer. There are, however, certain aspects of the evidence which seem to us to make it essentially different and materially stronger for the plaintiff. When the votes to purchase the mines of the promoters were passed on July 11th, only forty shares of stock had been subscribed for or issued. The votes were passed by the directors alone, and there was no vote by the stockholders at this time. It is true that the directors comprised all the stockholders, but on that date they were acting wholly in their capacity as directors,—that is, as trustees. They did not attempt, so far as any records show, to shift their character as trustees for that of individual stockholders. They did not pursue the careful course of separation of these dual capacities by calling a stockholders' meeting, which was followed in *North-West Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589, 50 L. J. P. C. N. S. 102, 57 L. T. N. S. 426, 36 Week. Rep. 647; nor did they assent in writing as stockholders. So far as the records show up to this point, there was only a directors' vote for the purchase. Moreover, the records of the plaintiff show that at the opening of this meeting only six of the seven directors were present. Four of these six directors resigned, as did also the absent seventh director; their resignations were accepted and their successors were chosen. But of the five newly chosen directors, only two were present and took their seats. Thus there were four directors, a bare quorum and majority, present when the offers for the sale of the mines were presented and the votes for their purchase were passed. These votes to purchase were not consummated until December, 1895, and January, 1896, when the deeds were delivered to the plaintiff. The vote to issue the certificates of stock in payment for the conveyances of mines was passed on September 18, 1895. Under date of July 18, 1895, the only subscription list of the plaintiff was signed. Upon this list appear the names of those outside persons who subscribed for the \$500,000 of working capital for the plaintiff. The money was paid by some of the outside stockholders before September 18, and at least as early as September 10, 1895. Stock certificates were

made out for the number of shares allotted to each under date of September 18th. The rights of all these persons as subscribers had become fixed at least as early as September 10, 1895, before which date the subscriptions were all received, and when notices of their acceptance and demands for payment were sent out. These circumstances amply support the finding of the single justice that issuance of the 20,000 shares to the public was in the summer or fall of 1895. These stockholders were entitled to have a disclosure made to the corporation through independent officers. There is no pretense that any disclosure was made to these subscribers. On September 18, 1895, the directors of the plaintiff voted to issue the stock as before stated,—30,000 shares to Bigelow and Lewisohn, 100,000 to the nominee Dumaresq, and there was made out the certificate for the remaining 20,000 shares to Thomas Nelson, treasurer,—and these four, professing to represent all the stock of the plaintiff, signed the written approval of all previous acts of the directors. This is the first attempt of the stockholders to act respecting this subject.

As before pointed out, the certificate to Nelson was wrongfully issued; except as it belonged to outside subscribers, it was treasury stock. There were then other stockholders of the plaintiff who had paid for their stock, although they had not received their certificates, but the plaintiff had their money and they were entitled to be treated as stockholders. *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Chaffin v. Cummings*, 37 Me. 76; *Hawes v. Anglo-Saxon Petroleum Co.* 101 Mass. 385-395. Their certificates were dated September 18, 1895, and issued directly. These circumstances show that at the first and only time when there was an effort on the part of the promoters to secure a ratification of their wrongful acts, there were certain shareholders who were not represented, and who did not themselves sign in assent, and who were in fact ignorant of the wrong done the corporation. Further, they do not show that at any time from the organization of the corporation onward was there a moment when all the stockholders or directors knew of the material facts as to the defendant's relation to the corporation. In this view of the facts, which is supported fully by the evidence, there appears to be no assent by the corporation, with knowledge of the facts by all those who at any time constituted all the stockholders, except by assuming the knowledge of Bigelow and Lewisohn on July 11, 1895, when there were only forty shares of stock, for which the latter had paid, to be the

knowledge of all the stockholders, although there were then seven shareholders as to whose actual knowledge of the scheme there is no evidence, although all were the tools of the defendant and Lewisohn. It is only by treating these subscriptions as a sham that knowledge even of the owners of the forty shares can be found. But these subscriptions were necessary to the organization under the New Jersey law. Hence the rule of *Salomon v. Salomon & Co.* [1897] A. C. 22, 75 L. T. N. S. 426, 65 L. J. Ch. N. S. 35, 45 Week. Rep. 193, 4 Manson, 89, and like cases, has no application to these facts, nor does the difficulty meet "the petitioner at the outset that it has assented to the transaction with a full knowledge of the facts" (210 U. S. 211, 212, 52 L. ed. 1028, 1029, 28 Sup. Ct. Rep. 634, 636), unless it is said that in fact knowledge by the plaintiff's dominant stockholders is knowledge by the corporation. But the defendant was committing a breach of trust on his principal, the plaintiff, and where one is committing a wrong in his own interest, his knowledge does not bind the corporation, which might in an innocent transaction be affected by his knowledge. *Indian Head Nat. Bank v. Clark*, 166 Mass. 27, 43 N. E. 912; *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577-588, 58 N. E. 162. These considerations mark the case as different in material respects from that which was stated in *Old Dominion Copper Min. & Smelting Co. v. Lewisohn*, 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634, and bring it clearly within the well-recognized rule of promoter's liability, laid down in the numerous and undisputed cases before cited. The Supreme Court of the United States has never passed upon these facts nor upon such a case as is thus presented. We know of no authority which countenances a different decision upon them than that here reached. The conflict between the Federal courts and this court in this respect appears to be not upon the merits of the case as disclosed upon the present record. See *Bigelow v. Old Dominion Copper Min. & Smelting Co.* 74 N. J. Eq. 457, 71 Atl. 153-175.

But there is still another aspect in which the case differs from that presented in the Federal court and in our previous decision. The defendant held out to subscribers of his syndicate, before the incorporation of the plaintiff, that its capital stock was to be \$2,500,000, and that they would get for one share in the Baltimore company two in the new company, and that the rest would be sold to furnish the working capital. The right of these parties to become stockholders in the plaintiff company was fixed before its first meeting of stockholders was

held, because they had signed the syndicate agreement and had made two payments on account of their subscriptions. They were sharers thus in the profit of \$1,000,000 above the costs of mines. But they were also entitled to disclosure of the secret profit of \$1,250,000 more, taken by the defendant and Lewisohn, and it is found that most of them were ignorant of it. Respecting any sale to the plaintiff in which they had agreed to become shareowners on any other basis than that of two for one, they were entitled to disclosure. This is quite aside from any rights they may have had against Bigelow for not treating them fairly on the division of profits. It stands on different ground. In that relation they were sharers in promoters' profits, and they received what they expected. But they had also agreed to be subscribers to stock of the plaintiff. In that character they were not promoters, but stockholders and entitled to all their rights. That they knew there was to be a sale for \$2,000,000 and a profit of two for one was no reasonable ground for expectation that the defendant would take a large additional secret profit. As to this secret profit, the members of the syndicate had the same rights as the outside public; that is, they were entitled to a disclosure to an independent and impartial board of officers who should be in a position to act for the interests of the corporation as opposed to those of the promoters. In this regard the case is like *Arnold v. Searing*, 73 N. J. Eq. 262, 67 Atl. 831, where the defendants were held liable.

4. It is argued that even though the ratification in writing be disregarded, still the acts of the stockholders of the plaintiff, after some of them knew of the fact that there was some profit to Bigelow and Lewisohn beyond that accruing to all the other members of the syndicate, have amounted to a ratification. The complete answer to this argument is that the single justice has found, until shortly before the bringing of these suits, neither the stockholders nor the company had gained any knowledge as to the facts upon which the claim is now based; that the very great majority of the stockholders never knew or assented to the operations by which the secret profit was obtained, and did not have knowledge of or access to the books or records of the corporation. The votes of ratification of 1899 and 1901, being passed under these conditions, do not bind the plaintiff.

5. Several other objections are made to the granting of relief to the plaintiff. It is urged that the plaintiff ought not to recover because, a larger majority of its stock being held by a Maine corporation, an

agreement has been entered into by that corporation and certain trustees, by which it was attempted to provide for the conduct of these suits and sequester the proceeds to holders of negotiable certificates. But this agreement is one to which the plaintiff is not a party, and it was made long after these suits were instituted. If it is illegal, it may be set aside in appropriate proceedings; but the rights of the plaintiff for the benefit of all its stockholders cannot be refused enforcement on such ground.

6. The defense of laches cannot prevail. It is found as a fact that as soon as the defendant and his associates released their absolute control of the plaintiff, the action was seasonably begun. The plaintiff is held to the exercise of diligence after the discovery of the facts, but there can be no laches so long as there is no knowledge of the wrong complained of, and no failure to avail one's self of reasonable opportunities to ascertain the facts. So long as the plaintiff was wholly in the power of the defendant, it could not be charged with knowledge. Mere lapse of time is no bar to relief under these circumstances. *Lydney & W. Iron Ore Co. v. Bird*, L. R. 33 Ch. Div. 85, 55 L. J. Ch. N. S. 875, 55 L. T. N. S. 558, 34 Week. Rep. 749; *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899] 2 Ch. 392-433, 68 L. J. Ch. N. S. 699, 48 Week. Rep. 74, 81 L. T. N. S. 334, 15 Times L. R. 436; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328.

7. Nor is the statute of limitations a bar. The time limited by the statute does not begin to run against a breach of trust, where there is a fiduciary duty to disclose the facts on which the cause of action rests, until the facts have or ought to have been discovered. *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *Rev. Laws*, chap. 202, § 11. The ground of the defendant's liability is his breach of trust as a promoter.

8. It follows, from what has been said as to the nature of the wrong done by the defendant, that he is liable *in solido*. The act of the defendant and Lewisohn was a joint act for the benefit of both. Their subdivision of the profits made cannot affect the right of the plaintiff. The breach of trust which they as promoters committed was in the nature of a tort. This renders them liable severally as well as jointly, and for the whole damage. *Hayward v. Leeson*, 176 Mass. 310-324, 49 L.R.A. 725, 57 N. E. 656, and cases cited; *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 188 Mass. at page 328, 108 Am. St. Rep. 479, 74 N. E. 659; *Feneff v. Boston & M. R. Co.* 196 Mass. 575-581, 82 N. E. 705; *Gluckstein v. Barnes* [1900] A. C. 240, 69 L. J. Ch. N.

S. 385, 82 L. T. N. S. 393, 16 Times L. R. 321, 7 Manson, 321; Bigelow v. Old Dominion Copper Min. & Smelting Co. 74 N. J. Eq. 457, 71 Atl. 153-176.

9. As to the character of relief which can be afforded, it is said, first, that rescission is the only remedy open to the petitioner. The single justice has found that the situation of the parties and the properties is not such as to make it just at this time to order a rescission. The evidence justifies this finding. It was decided in this case at its earlier stage (188 Mass. 315-329, 108 Am. St. Rep. 479, 74 N. E. 653) that rescission is not the only remedy. *Hayward v. Leeson*, 176 Mass. 310-321, 49 L.R.A. 725, 57 N. E. 656; *Parker v. Nickerson*, 137 Mass. 487. We are not disposed to question the correctness of the decision upon this point. When one has committed a breach of trust, there is no occasion to be oversolicitous to see that the faithless fiduciary should not make reparation for the wrong done. *Re Olympia* [1898] 2 Ch. 153-169, 67 L. J. Ch. N. S. 433, 78 L. T. N. S. 629, 14 Times L. R. 451, 5 Manson, 139; *Lydney & W. Iron Ore Co. v. Bird*, L. R. 33 Ch. Div. 85-94, 55 L. J. Ch. N. S. 875, 55 L. T. N. S. 558, 34 Week. Rep. 749. The essence of the suit is that a secret profit was taken by the promoters. The obvious reason is a return of the secret profit. The difficulty of ascertaining the amount of that profit, which troubled the court in *Re Cape Breton Co.* L. R. 29 Ch. Div. 795, 54 L. J. Ch. N. S. 822, 33 Week. Rep. 788, 53 L. T. N. S. 181, does not exist here. See *Cavendish-Bentinck v. Fenn*; L. R. 12 App. Cas. 652, 57 L. J. Ch. N. S. 552, 57 L. T. N. S. 773, 36 Week. Rep. 441; *Gluckstein v. Barnes* [1900] A. C. 240, 69 L. J. Ch. N. S. 385, 82 L. T. N. S. 393, 16 Times L. R. 321, 7 Manson, 321; *Re Leeds & H. Theatres* [1902] 2 Ch. 809, 51 Week. Rep. 5, 72 L. J. Ch. N. S. 1, 87 L. T. N. S. 488, 10 Manson, 72; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 25 L.R.A. 90, 42 Am. St. Rep. 159, 29 Atl. 303.

10. The plaintiff has also appealed from the decrees in its favor. It presses its appeals on the ground that it is entitled to recover the difference between the market value of the shares received by the defendant and Lewisohn, and the cost to them of the property conveyed to it. This is the measure of recovery where there is a fiduciary relation at the time of the purchase. But there is no finding here that such relation existed at the time the defendant and Lewisohn purchased the property. There is no evidence which requires such a finding. The corporation was not organized until a considerable period after the options had been secured. The defendant and Lewisohn were, during all this time, free to do as they

chose with their purchase so far as the plaintiff was concerned. This has been before decided. 188 Mass. 321, 108 Am. St. Rep. 479, 74 N. E. 653. The plaintiff contends in the alternative that its measure of damage is the difference between the intrinsic value of the property conveyed, and the value of the stock issued therefor. Market value is the standard commonly applied where property has such value. It is only in cases where the value of property cannot be fairly ascertained by the application of this test that resort is had to any other. The single justice appears to have experienced no difficulty in determining that value of these mines. There are no exceptional circumstances which call for the application of any other than the ordinary rule.

11. Since the decision of this case on demurrer, reported in 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653, and the entry of the decrees by the single justice after a full hearing upon the facts, the defendant has been permitted to file a supplementary answer. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 199 Mass. 488, 86 N. E. 660. He there sets up, as a bar to the plaintiff's claim, a judgment of the circuit court of the United States for the southern district of New York, entered on July 23, 1908, in favor of the defendants in a suit like one of the present suits in all particulars, except that it was prosecuted against the executors of the will of Lewisohn, the defendants' demurrer to the plaintiff's bill being sustained and the final decree being entered, whereby the claim against Lewisohn was held to be without foundation; and he contends that the matters is thereby *res judicata* as to himself. The supplemental answer further avers that the issues were the same as those here involved, and that the present defendant was a privy to the judgment in that case, and participated in the defense, and acted with Lewisohn's executors throughout the entire pendency of the suit. The Lewisohn suit was heard in the circuit court of the United States, and on appeal in the United States circuit court of appeals, and afterwards upon certiorari in the Supreme Court of the United States, 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. 634. On these supplemental answers a hearing was had before a single justice, who reserved questions arising thereon for the consideration of this court upon the pleadings and all the evidence.

One of the two suits before us seeks to set aside the conveyance of the outside properties and secure the return of the 30,000 shares of capital stock issued therefor, and the other to recover damages resulting from the conveyance to the plaintiff of the mines

and other real estate of the Baltimore company for the excessive valuation of 100,000 such shares. In other respects the two bills are alike. Two suits (the bills in which have the same allegations as these, *mutatis mutandis*) were brought against the executors of Lewisohn in the United States circuit court for the southern district of New York. The one relating to the outside properties and the issue of the 30,000 shares was decided ultimately by the United States Supreme Court, and final decree was entered dismissing the suit. In the other suit, respecting the issue of the 100,000 shares for the mines and other real estate of the Baltimore company, no decree has been entered, and it appears to be still pending. Separate offers of sale were presented, and separate votes were passed by the directors of the plaintiff for the purchase of the outside properties for 30,000 shares of its full paid nonassessable capital stock, and for the purchase of the property of the Baltimore company for 100,000 like shares. Separate votes were also passed to issue the 30,000 shares to defendant and Lewisohn, and to issue the 100,000 shares to Dumaresq. Probably the defense of *res judicata* cannot apply to the suit respecting 100,000 shares, for the suit touching those shares against Lewisohn's executors has never gone to judgment and is still pending. The *res* at issue in that suit, which appears to be somewhat different from that involved in the other, has therefore never become *judicata*. This circumstance is noted in passing. In some aspects of the case it may be important and perhaps decisive. In view of the ground upon which this opinion is based, however, it makes no difference in the result, and we do not further advert to it. It appears that the fundamental questions in the suit in the Federal court were precisely the same as those raised in the present suit, relating to the 30,000 shares, and passed upon in 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653. The present defendant was not a party to the suit in the Federal court, but there is evidence that he participated in the defense of it.

The plaintiff objects that the order of the single justice allowing the defendant to file the supplemental answers was erroneous. This order was made in the exercise of judicial discretion, and unless such discretion was wrongly exercised it must stand. The facts averred in these answers could not have been pleaded when the original answers were filed, for the events they set up have occurred since. It is urged that the decree in favor of the executors of Lewisohn was entered in the United States circuit court before the trial upon the merits in this

court, and might have been pleaded in bar, notwithstanding the proceedings in the Supreme Court of the United States upon a writ of certiorari. But even if this be the law, the single justice cannot be said to have erred in permitting the defendant to set up a decree which rests upon a decision of the court of last resort, made after the close of the hearing upon the merits in the present suits. The decree in the Federal court, although founded upon a demurrer, may under proper circumstances be a bar to another suit, as well as one founded upon a hearing of evidence. *Yates v. Utica Bank*, 206 U. S. 181-183, 51 L. ed. 1015, 1016, 27 Sup. Ct. Rep. 646; *Northern P. R. Co. v. Slaght*, 205 U. S. 122, and cases cited at page 130, 51 L. ed. 738, 741, 27 Sup. Ct. Rep. 442. In the view that we take of the case, it is not necessary to discuss other objections urged by the plaintiff to the force of this decree, or the similarity of the issues in the two sets of suits.

12. The most important and difficult question is whether the contention of the defendant is sound that the decree of the Federal court is a complete bar to the present suits. His argument is that, under the law of New York, the decree of the circuit court of the United States is a bar to the maintenance of another suit for the same cause of action by the same plaintiff against him, and that, under article 4, § 1, of the Constitution of the United States, the effect given by the law of New York to the decree must be given by this court, in order that it receive the constitutionally required full faith and credit. The constitutional provision is as applicable to a decree of the circuit court in the southern district of New York as to a decree in the state courts. *Deposit Bank v. Frankfort*, 191 U. S. 499-515, 48 L. ed. 276-382, 24 Sup. Ct. Rep. 154; *Central Nat. Bank v. Stevens*, 169 U. S. 432-460, 42 L. ed. 807-817, 18 Sup. Ct. Rep. 403. The general effect of the decree (except as to matters of law or practice arising under the statutes of the United States, which have no bearing in the present case) is governed by the law of the state of New York, where the Federal court was sitting. *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 645, 44 L. ed. 619, 621, 20 Sup. Ct. Rep. 506, citing *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 147, 30 L. ed. 614, 617, 7 Sup. Ct. Rep. 472; *Metcalf v. Watertown*, 153 U. S. 671, 676, 33 L. ed. 861, 863, 14 Sup. Ct. Rep. 947; *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238.

But before we reach the consideration of the effect of the decree and the interpreta-

tion that should be given to it under the laws of New York, there is a preliminary and fundamental question as to the precise meaning of the full faith and credit clause of the Federal Constitution as applied to the circumstances of this case. An analysis of the defendants' contention shows that his defense of estoppel by *res judicata* rests upon the ground that he was either a party or privy to the New York judgment. It is not and cannot be urged that the New York suit was a proceeding *in rem* as to the plaintiff's cause of action. It was a personal suit. Except in proceedings *in rem*, there is no such thing known to the law as an adjudication of a cause of action, which can be availed of as *res judicata* by any others than by parties and their privies. The doctrine of *stare decisis* stands on a wholly different ground. The contention is that, even though the court was convinced that its former decision upon the merits was erroneous, and desired to correct the mistake by deciding the later cases differently, the decision against the plaintiff would prevent such correction of error. The fact that a party has fully litigated his cause of action in one suit, and has been defeated, is of no avail in another suit to which a stranger to the first suit is a party, involving precisely the same issues. This principle is illustrated by many cases. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 155, 30 L. ed. 614, 619, 7 Sup. Ct. Rep. 472; *Moore v. Albany*, 98 N. Y. 396; *Trimmer v. Rochester*, 130 N. Y. 401, 29 N. E. 746; *Stone v. State*, 138 N. Y. 124, 33 N. E. 733; *Wallace v. Straus*, 113 N. Y. 238, 21 N. E. 66; *Collins v. Hydorn*, 135 N. Y. 320, 32 N. E. 69; *Groth v. Washburn*, 39 Hun. 324; *Furlong v. Banta*, 80 Hun. 248, 29 N. Y. Supp. 985.

The defendant can prevail on his supplementary answers only upon the ground that he was either a party or privy to the judgment rendered in the United States circuit court. The defendant Bigelow was not a party to that suit, and he does not assert that he was. The extent of his contention is that he was in privity with the executors of Lewisohn, and therefore entitled to the benefit of the judgment in their favor. The first matter for determination is this: Does the full faith and credit clause require the courts of all other states to give effect to the law of any particular state, where a judgment may be entered, as to who are privies to such judgment; or does it permit or require the courts of the state where a third person sets up the defense that he is privy to a judgment entered in the courts

of another state, to decide that question according to its own law? Hence it becomes necessary to inquire what has been decided by the Supreme Court of the United States, whose decisions upon this, as a Federal question, are binding upon all state courts.

It was said in *Smithsonian Inst. v. St. John*, 214 U. S. 19, at pages 28, 29, 53 L. ed. 892, 897, 898, 29 Sup. Ct. Rep. 601, at page 603: "Without doubt the constitutional requirement (art. 4, § 1), that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,' implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813, in *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411, and steadily adhered to even since.' *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 642, 44 L. ed. 619, 620, 20 Sup. Ct. Rep. 506." But the broad language of this decision, as well as the comprehensive phrase of the Constitution itself, and of the act of Congress in pursuance thereof, is to be read and interpreted in the light of the thing intended to be accomplished, and "of some established principles which they were not intended to overthrow." *Huntington v. Attrill*, 146 U. S. 657-685, 36 L. ed. 1123-1134, 13 Sup. Ct. Rep. 224. Many cases have arisen in which this phase of the subject has been discussed. It has been generally held that, no matter how clear may be the language of the statute, nor how decisive the decisions of the courts, of the sister state, as to the scope and effect of judgments upon residents of other states, yet in certain aspects such judgments may and ought to be narrowly scrutinized, and the constitutional injunction given a reasonable interpretation. It was said in *Board of Public Works v. Columbia College*, 17 Wall. 521, at page 528, 21 L. ed. 687, 691; "The clause of the Federal Constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction, the records are not entitled to credit." This was a case where three of five partners appeared in an action against the copartnership, the other two members being nonresidents, not served with process and not appearing, and under the law of New York a judgment could be rendered under these circumstances against the copartnership. But it was held that the absent partners were not bound by a judgment so entered. In *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648, a

judgment was entered against a nonresident defendant who had not appeared or been served with process, in accordance with a statute of New York permitting such course where joint debtors were sued and one only appeared. This statute had been adjudged valid by the courts of New York. It was admitted that the defendant was a joint debtor with the person served in New York, yet it was held that the Constitution and act of Congress did not purport to give effect to state judgments as binding upon nonresident defendants not served with process and not appearing. See *Goldey v. Morning News*, 156 U. S. 518-521, 39 L. ed. 517, 518, 15 Sup. Ct. Rep. 559.

It was said in the recent case of *Brown v. Fletcher*, 210 U. S. 82-88, 52 L. ed. 966-970, 28 Sup. Ct. Rep. 702, 703, that "the constitutional provision does not preclude the courts of a state in which the judgment . . . is presented from inquiry as to the jurisdiction of the court by which the judgment was rendered. See the elaborate opinion by Mr. Justice Bradley, speaking for the court, in *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897. That opinion has been followed in many cases. . . . Even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts." *Old Wayne Mut. Life Asso. v. McDonough*, 204 U. S. 8, 15, 51 L. ed. 345, 348, 27 Sup. Ct. Rep. 236. These principles are illustrated in application to a variety of facts, for example, as to whether attachment of property gives power to enter a judgment of effect beyond the property attached (*Pennoyer v. Neff*, 95 U. S. 714-730, 24 L. ed. 565-571); as to the limits of jurisdiction of parish courts in the settlement of estates (*Simmons v. Saul*, 138 U. S. 439-448, 34 L. ed. 1054-1059, 11 Sup. Ct. Rep. 369); as to whether the return of service is sufficient to confer jurisdiction (*Knowles v. Logansport Gaslight & Coke Co.* 19 Wall. 58, 22 L. ed. 70); as to whether the judgment is responsive to the issues tendered (*Reynolds v. Stockton*, 140 U. S. 254-265, 35 L. ed. 464-467, 11 Sup. Ct. Rep. 773); as to whether an attorney had authority to appear (*Cooper v. Newell*, 173 U. S. 555-566, 43 L. ed. 808-811, 19 Sup. Ct. Rep. 506; *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271); as to whether the cause of action was such as to give the state court jurisdiction to render a judgment entitled, according to settled principles of public and international law, to enforcement by other courts (*Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370); as to whether judgment rendered upon appearance by prothonotary, authorized by 40 L.R.A.(N.S.)

statute of state where judgment was entered, was within the terms of a power of attorney (*Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 295, 34 L. ed. 670, 672, 11 Sup. Ct. Rep. 92); as to validity of decree of foreign court respecting devolution of real estate within another state (*Clarke v. Clarke*, 178 U. S. 186-195, 44 L. ed. 1028-1032, 20 Sup. Ct. Rep. 873); as to effect of decree for future payment of alimony (*Lynde v. Lynde*, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555); as to whether divorce obtained by the court having jurisdiction of persons of both parties must be recognized in their domiciliary state (*Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; *German Sav. & L. Soc. v. Dortmitzer*, 192 U. S. 125-128, 48 L. ed. 373, 376, 24 Sup. Ct. Rep. 221); as to effect of foreign divorces obtained *ex parte* (*Bell v. Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; *Streitwolf v. Streitwolf*, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553; *Atherton v. Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544; *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1); as to whether one was "holder" of note within the meaning of a warrant of attorney authorizing confession of judgment (*National Exch. Bank v. Wiley*, 195 U. S. 257-269, 49 L. ed. 184-190, 25 Sup. Ct. Rep. 70); as to whether determination of domicile of deceased person, by appointment of personal representatives, foreclosed similar inquiry in other states (*Thormann v. Frame*, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446); as to whether service on public officer impliedly authorized to receive service for a foreign corporation, in respect of business transacted by it in one state, was also impliedly authorized to the same extent as to business not there transacted (*Old Wayne Mut. Life Asso. v. McDonough*, 204 U. S. 8-22, 51 L. ed. 345-351, 27 Sup. Ct. Rep. 236); as to whether a corporation is really doing business in the state in which service is made, within the rule that it is essential to jurisdiction over a foreign corporation having neither property nor agent in the state, that it be doing business there (*Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 245, and cases cited at page 255, 53 L. ed. 782, 787, 29 Sup. Ct. Rep. 445, 448; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. ed. 540, 25 Sup. Ct. Rep. 375); as to whether administration could be granted upon the estate of a living person (*Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108); as to the sufficiency of service by publication (*Smith v. Woolfolk*, 115 U. S. 143, 29 L. ed. 357, 5 Sup. Ct. Rep. 1177, and cases cited; *Clark v. Wells*, 203 U. S.

164-171, 51 L. ed. 138-141, 27 Sup. Ct. Rep. 43); as to whether in fact hearing had been granted to one alleged to be an alien enemy (*Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914); as to judgment of foreclosure against alien enemy (*Lasere v. Rochereau*, 17 Wall. 437, 21 L. ed. 694); as to sufficiency of scire facias to keep alive a judgment (*Owens v. Henry* (*Owens v. McCloskey*) 161 U. S. 642, 40 L. ed. 837, 16 Sup. Ct. Rep. 693); as to legality of constructive service (*Brooklyn v. Aetna L. Ins. Co.* 99 U. S. 362, 25 L. ed. 416; *Freeman v. Alderson*, 119 U. S. 186, 30 L. ed. 372, 7 Sup. Ct. Rep. 165; *Empire Twp. v. Darlington*, 101 U. S. 87, 25 L. ed. 878; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704); as to validity of statute imposing personal liability for local assessment upon nonresident landowner (*Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379); as to sufficiency of any steps necessary to confer jurisdiction (*Howard v. De Cordova*, 177 U. S. 609, 44 L. ed. 908, 20 Sup. Ct. Rep. 817); as to validity of statute authorizing collection of execution for unpaid balance due on stock subscriptions from foreign stockholders in a corporation (*Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541); as to whether recital of settlement of cause in a judgment rested on an unfulfilled promissory agreement (*Jacobs v. Marks*, 182 U. S. 583, 45 L. ed. 1241, 21 Sup. Ct. Rep. 865); as to whether the state court, having once rendered final judgment, could without notice reopen case and enter a different judgment (*Wetmore v. Karriek*, 205 U. S. 141-149, 51 L. ed. 745-748, 27 Sup. Ct. Rep. 434). In all these cases it was held that judgments of the courts of sister states, valid there, might be refused recognition elsewhere, without doing violence to the Federal Constitution. This review of some of the decisions of the Supreme Court of the United States shows how full and complete is the inquiry permitted into the circumstances by which it is contended that the judgment of the court of the sister state binds the person as to whom it is invoked. Such judgments do not stand upon the same footing as domestic judgments. They may be attacked collaterally. *Huntington v. Attrill*, 146 U. S. 657, 685, 36 L. ed. 1123, 1134, 13 Sup. Ct. Rep. 224. There is nothing in the Federal Constitution or laws to prevent the most searching investigation "into the jurisdiction of the court in which the judgment is rendered over the subject-matter or the parties affected by it, or into the facts necessary to give such jurisdiction." *Fuller, Ch. J., in Thormann v. Frame*, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446
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The present contention is that the judgment in favor of the executors of Lewisohn avails the defendant because they were privies respecting the subject-matter of the suit. We do not find it to be the law of New York that in a suit in New York the defendant would be entitled to prevail on any other ground. The underlying question is one of jurisdiction. The defendant was not a party to the suit against Lewisohn. He was not served with process. No attempt was made by himself or by the plaintiff to join him as a party. Indeed, the bill in the Lewisohn suit alleges that Bigelow cannot be made a party by reason of residence outside the jurisdiction, and this fact is not controverted. It follows that the United States circuit court for the district of New York acquired no jurisdiction to render a judgment binding upon or in favor of Bigelow, unless he was a privy with Lewisohn. It has been several times said that a judgment concludes, and may be invoked by, one who is a privy. *Minneapolis Agri. & M. Asso. v. Canfield*, 121 U. S. 295, 308, 30 L. ed. 962, 966, 7 Sup. Ct. Rep. 887; *Mitchell v. First Nat. Bank*, 180 U. S. 471-480, 45 L. ed. 627, 21 Sup. Ct. Rep. 418, and cases cited. These are general statements, however, and we do not find that the precise point has ever been decided as to the effect which must be given to the judgment in the courts of one state touching privies nonresident in the first state, and domiciled in the one where the question arises. Strong arguments can be conceived to support the proposition that, except as to property rights arising by succession, only those can be bound as privies who are domiciled within the state where the judgment is rendered. But we do not pursue this inquiry. For the purposes of this discussion we assume, without deciding, that such a judgment binds privies of this description. Whether or not he was a privy is fundamental to the jurisdiction of the United States circuit court to enter judgment which as to Bigelow was capable of becoming *res judicata*. At the outset it is to be observed that the domicile of the defendant is in this commonwealth, and that "domicil generally determines the particular territorial jurisprudence to which every individual is subjected." *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 288, 34 L. ed. 670, 11 Sup. Ct. Rep. 92.

The foundation of the doctrine of *res judicata* is that there has been a judicial inquiry into the subject-matter in which the person to be affected by the judgment has had an opportunity by representative to be heard fully. The inquiry as to jurisdiction is, in its last analysis, whether one was in such relation to the action in the sister

state as to be bound by its judgment. Ordinarily, the question of jurisdiction is whether one was in law a party to the judgment. Whether a court has jurisdiction of a person depends upon whether he was really a party to it. The cases we have reviewed show that this is to be determined by the courts of the government where it arises, according to its jurisprudence, subject to the duty imposed by the Constitution of the United States. The law of the state whose courts entered the judgment does not control. Where it is not contended that one was a party, it is equally an inquiry as to jurisdiction to determine whether he was a privy to one who was a party. By parity of reasoning, whether one is a privy to a judgment rendered in a sister or foreign state must also be determined by the law of the sovereignty where the question arises. Privy was not a matter in issue in the suit, judgment in which is pleaded, nor can it be determined by an inspection of the judgment roll. It must be decided by evidence outside the record. It is not to be settled according to the law of the state where the judgment is rendered. This plainly appears from *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648. The substance of the New York statute there decided not to be entitled to full faith and credit when followed by the courts in entering judgment was that, in cases of joint debtors, all nonresidents should be privies with any domestic fellow or joint debtor duly served with process and bound by the judgment. See, to substantially the same effect, *Harris v. Hardemann*, 14 How. 334, 14 L. ed. 444; *Ewer v. Coffin*, 1 Cush. 23, 48 Am. Dec. 587; *Stone v. Wainwright*, 147 Mass. 201, 17 N. E. 301; *Phelps v. Brewer*, 9 Cush. 390, 57 Am. Dec. 56. The same principle is illustrated in *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271, and *Board of Public Works v. Columbia College*, 17 Wall. 521, 21 L. ed. 687, where, by statute or usage, all partners were treated as so much in privy that appearance and defense by one bound all his copartners. Yet such a statute or usage was held not entitled to full faith and credit in the sister state.

We understand those Federal cases in principle to cover the question before us, and to decide in substance that legislation or judicial determination of one state, that its domestic judgments shall bind nonresidents decided by it to be privies, have no extraterritorial force, and are not entitled to recognition under the full faith and credit clause of the Federal Constitution. The same conclusion follows from the cases above cited, which permit inquiry into the extent of the powers of an agent to subject

his principal to the jurisdiction of a foreign court.

But whether or not we interpret these decisions aright, as being decisive against this contention of the defendant, it seems to us that on reason it must be the law that the ascertainment of those nonresidents not served with process nor appearing, who are bound by the judgment of a sister state as privies, must be by the courts of the jurisdiction where the question arises, and not by those of the state in which the judgment is rendered. This rests primarily upon the considerations touching the constitutional provision and the reason for its enactment. Its purpose was not to enlarge or change the jurisdiction of the courts of the several states. It was a recognized principle of international law, at the time the Constitution was adopted, that where parties had once fairly litigated a dispute in the courts of any civilized government, the same question ought not to be tried anew. But such judgments were commonly regarded as *prima facie* evidence of the matter decided, and might be re-examined under some circumstances; the whole subject resting in comity, and not in obligation. *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88; *Hilton v. Guyot*, 159 U. S. 113-181, 40 L. ed. 95-114, 16 Sup. Ct. Rep. 139. In this regard the several colonies, before the Declaration of Independence, were as to each other foreign nations. Differences of practice grew up as to the way in which judgments of foreign courts should be proved, and the precise weight to be attached to them. It was in this state of the law that the Constitution was adopted. Diversity of practice was turned into uniformity by the Constitution, which prescribed the effect to be given to judgments of courts, and empowered Congress to legislate further as to forms of proof. But it was not intended to enlarge the jurisdiction of the courts of the several states, or confer any new power upon them. It has simply made certain and of universal application between the several states that which before rested only in comity, and does still as to judgments of courts of foreign nations. It was intended merely to be regulative. It "establishes a rule of evidence rather than of jurisdiction." *Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92; *Cole v. Cunningham*, 133 U. S. 107, 112, 33 L. ed. 538, 541, 10 Sup. Ct. Rep. 269; *Bissell v. Briggs*, 9 Mass. 462-467, 6 Am. Dec. 88. "Judgments recovered in one state of the Union, when proved in the courts of another [government, whether state or national], differed from judgments recovered in a foreign country in no other respect than in not being re-examinable on

their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 292, 32 L. ed. 239, 344, 8 Sup. Ct. Rep. 1370; *Hanley v. Donoghue*, 116 U. S. 1, 4, 29 L. ed. 536, 539, 6 Sup. Ct. Rep. 242; *Hilton v. Guyot*, 159 U. S. 113-185, 40 L. ed. 95-115, 16 Sup. Ct. Rep. 139; *Union & Planters' Bank v. Memphis*, 49 C. C. A. 455-465, 111 Fed. 561, and cases cited. This is further illustrated by what was said by Mr. Justice Gray in *Lynde v. Lynde*, 181 U. S. 183, at page 186, 45 L. ed. 810, 814, 21 Sup. Ct. Rep. 555, at page 556: "By the Constitution and the act of Congress requiring the faith and credit to be given to a judgment of the court of another state that it has in the state where it was rendered, it was long ago declared by this court: 'The judgment is made a debt of record not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit.'"

In other words, the question whether the plaintiff can try its case here against Bigelow, after failing against the estate of Lewisohn, arises after full faith and credit have been given to the New York decree, and is not included in giving it full faith and credit. The decree does not have the effect contended for by the defendant *proprio vigore*. Whether it should bar the plaintiff from another suit is a question of public policy. Such a question must be decided according to the law of the state where it arises.

This conclusion is strongly supported by the argument of convenience. It is a principle of the common law that a judgment binds the parties and their privies. But there is no generally prevailing definition of privy which can be automatically applied to all cases. Who are privies requires careful examination into the circumstances of each case as it arises. Its determination is often difficult for a court possessed of plenary jurisdiction. But if the question who are privies is to be decided as a fact under the law of a foreign jurisdiction, upon such evidence as the parties may be able to produce, complication is multiplied. The present case furnishes a capital illustration of the evil workings of such a rule. The courts of authority in New York seem not to have decided the precise question we now have to pass upon. Eminent lawyers have been called by both parties to testify as experts. But no two of them agree in their

definition of privies, although several think that the executors of Lewisohn and the defendant were privies. There is great diversity in the details of the views expressed by those called by the defendant, as to the exact grounds upon which they say the plaintiff would be barred in the courts of New York in a suit against Bigelow. We cannot conceive that it was the intent of the framers of the Constitution to put parties to the expense, inconvenience, and unsatisfactory method of resorting to this class of testimony in order to establish their rights, when courts exist in every state, which could with much less difficulty determine the question according to the law of the forum. There is nothing inconsistent with this result in *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 447, and *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506. These cases decided that the liabilities imposed upon stockholders in Kansas corporations, by the Constitution and laws of that state, were contractual in their nature, and were enforceable in the courts of other jurisdictions. These decisions in effect hold that the laws of a sovereign power, as to the rights and liabilities arising out of the relations between a domestic corporation and its stockholders, are binding upon the latter as contracts, because they assented to be so bound by voluntarily becoming such stockholders. *Bernheimer v. Converse*, 206 U. S. 516-529, 51 L. ed. 1163-1174, 27 Sup. Ct. Rep. 755; *Tilt v. Kelsey*, 207 U. S. 43-47, 52 L. ed. 95-97, 28 Sup. Ct. Rep. 1, simply decided in substance that a judgment *in rem* by a court having jurisdiction thereof binds everybody interested in it. *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366, held that on the facts shown the state court had jurisdiction of all persons sought to be charged. None of these decisions are apposite to the point now under discussion.

We are therefore of opinion that whether Bigelow was in such privy with the executors of Lewisohn, respecting the litigation in New York, as to be able to invoke, in his own defense, the judgment there rendered, is a jurisdictional question to be determined by the law of this commonwealth, subject to the Federal Constitution.

It remains to inquire whether, according to the law of this commonwealth, the circuit court for the district of New York had such jurisdiction of the defendant as to enable him to invoke its judgment as a bar in the present suit, on the ground of *res judicata*. This in turn depends upon the question whether the defendant was a privy with the defendants, in the Lewisohn suit,

or in such relation to it that he can plead the judgment in favor of the Lewisohn estate as an estoppel against the plaintiff. The evidence shows that he knew of the suit, and through his counsel gave such assistance in the preparation of the briefs for the arguments of that suit as might have been expected. But as he was not a party, this fact is not of much importance. It is treated by most of the expert witnesses called by the defendant as to the New York law, as of no consequence. Privity depends upon the relation of the parties to the subject-matter, rather than their activity in a suit relating to it after the event. Participation in the defense because of general or personal interest in the result of the litigation does not make one privy to the judgment. *Stryker v. Goodnow* (Stryker v. Crane) 123 U. S. 527-540, 31 L. ed. 194-199, 8 Sup. Ct. Rep. 203; *People v. Knickerbocker L. Ins. Co.* 106 N. Y. 619, 13 N. E. 447. The liability of the defendant, as has been pointed out, according to the law of this commonwealth, is one arising *ex delicto*. The wrong committed was a tort, in which the defendant and Lewisohn acted in concert. The finding of the single justice, supported by the evidence, is, in substance, that they were joint tortfeasors. The inquiry then is whether one of several joint tortfeasors can plead a judgment in favor of his joint tortfeasor, against a plaintiff claiming to have been injured by their joint act, as an estoppel in a suit by the same plaintiff against himself. This can hardly be regarded as an open question in this commonwealth. In *Sprague v. Oakes*, 19 Pick. 455, which was an action for trespass *quare clausum fregit*, it was said, respecting such a defense: "The defendant was neither a party nor privy to that judgment, was not bound by it, nor could he take advantage of it." This case has never been overruled or questioned, and must be regarded as stating the law of this commonwealth. There are other authorities to the same point. *Lansing v. Montgomery*, 2 Johns. 382; *Marsh v. Berry*, 7 Cow. 344; *Moore v. Tracy*, 7 Wend. 229; *Gittleman v. Feltman*, 122 App. Div. 385, 106 N. Y. Supp. 839; *Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Tyng v. Clarke*, 9 Hun, 269; *Calkins v. Allerton*, 3 Barb. 171, 174; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Thompson v. Chicago, St. P. & K. C. R. Co.* 71 Minn. 89, 73 N. W. 707; *Three States Lumber Co. v. Blanks*, 118 Tenn. 627, 102 S. W. 79. The reason upon which these decisions rest is that there can be no estoppel arising out of a judgment, unless the same parties have had their day in court touching the matter litigated, and 40 L.R.A. (N.S.)

unless the judgment is equally available to both parties. It requires no discussion to demonstrate that a judgment in the Lewisohn suit against the defendants would not have fixed liability upon the present defendant. Hence there can be no estoppel under our law or under the general principles of jurisprudence, because it is not mutual. *Brigham v. Fayerweather*, 140 Mass. 411-415, 5 N. E. 265; *Dallinger v. Richardson*, 176 Mass. 77-83, 57 N. E. 224; *Worcester v. Green*, 2 Pick. 425, 429; *Biddle & S. Co. v. Burnham*, 91 Me. 578, 40 Atl. 669; *Moore v. Albany*, 98 N. Y. 396. "Estoppels to be good must be mutual." *Litchfield v. Goodnow* (Litchfield v. Crane) 123 U. S. 549-552, 31 L. ed. 199-202, 8 Sup. Ct. Rep. 210; *Nelson v. Brown*, 144 N. Y. 390, 39 N. E. 355.

Bigelow could not have appeared as of right and made a defense in that suit. No judgment can be regarded as *res judicata* as to any matter where the rights in the subject-matter arise out of mutuality, and not by succession, unless the party could, as matter of right, appear and defend, even though he may have had knowledge of the suit. Otherwise, he might be bound by a judgment as to which he had never had the opportunity to be heard, which is opposed to the first principles of justice. *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228, 233, 6 Am. Rep. 222. There is no privity between joint wrongdoers, because all are jointly and severally liable. *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69; *Feneff v. Boston & M. R. Co.* 196 Mass. 575, 581, 82 N. E. 705; *Pinkerton v. Randolph*, 200 Mass. 24, 28, 85 N. E. 892. There is no right of contribution between joint wrongdoers, where they are *in pari delicto* with each other. *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355. They are equally culpable, and the wrong complained of results from their joint effort. The right of recovery over by a municipality against a person whose wrong created a defect in the highway (*Holyoke v. Hadley Water-Power Co.* 174 Mass. 424, 54 N. E. 889) is no exception to this rule, because the tort committed by each of the wrongdoers is diverse in character, and rests upon a different basis of liability, and there is a right of indemnity in favor of the municipality. *Lowell v. Glidden*, 159 Mass. 317-319, 34 N. E. 459. We are aware of no instance of joint participation in a common tortious enterprise where there is any right of contribution. One comprehensive definition of privies is such persons as are "privies in estate, as donor and donee, lessor and lessee, and joint tenants; or privies in blood, as heir and ancestor; or privies in representation, as executor

and testator, or administrator and intestate; or privies in law, where the law without privity in blood or estate casts land upon another by escheat." *Buckingham v. Ludlum*, 37 N. J. Eq. 137, 141; *Douglass v. Howland*, 24 Wend. 35-53. Joint tort feassors come within none of the classes thus described. The definition in 1 Greenleaf on Evidence, § 535, adopted by the Supreme Court of the United States in *Litchfield v. Goodnow* (*Litchfield v. Crane*) 123 U. S. 549-551, 31 L. ed. 199-201, 8 Sup. Ct. Rep. 210, 211, namely, "Mutual or successive relationship to the same rights of property" equally fails to include joint tort feassors.

If we turn to the law of privity as illustrated in actions against partnership and joint debtors, the soundness of this conclusion is confirmed. It has been repeatedly decided that an administrator of a decedent in one jurisdiction is not in privity with an administrator of the same estate appointed in another jurisdiction, and that a judgment against one such administrator is not *res judicata* to the other. *Ingersoll v. Coram*, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92, and cases cited; *Johnson v. Powers*, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525. In *Chase v. Henry*, 166 Mass. 577, 55 Am. St. Rep. 423, 44 N. E. 988, it was held that discharge in insolvency in this commonwealth did not bar the debt of a copartnership, one member of which was a nonresident, although two were residents and the copartnership had a regular place of business here. It has been several times held that judgment against one surviving partner upon a claim against the partnership was not admissible in evidence against the executors of a deceased partner, although the existence of the partnership was not disputed. *Buckingham v. Ludlum*, 37 N. J. Eq. 137; *Moore's Appeal*, 34 Pa. 411; *Sturges v. Beach*, 1 Conn. 507; *Larison v. Hager* (C. C.) 44 Fed. 49. The converse, which is exactly parallel to the present case, namely, that a judgment in favor of one partner or joint and several debtor will not avail his associate in liability, has often been decided. *Townsend v. Riddle*, 2 N. H. 448; *McLelland v. Ridgeway*, 12 Ala. 482; *State Bank v. Robinson*, 13 Ark. 214-221; *Detroit v. Houghton*, 42 Mich. 459, 460, 4 N. W. 171, 287. It is difficult to conceive of persons more closely identified with their common business than joint debtors and partners, and if judgments against one do not bind his associate, we do not see how persons occupying the less intimate relation to each other, which Bigelow and Lewisohn did, can be found as privies. See also 40 L.R.A. (N.S.)

Williams v. Bankhead, 19 Wall. 563-570, 22 L. ed. 184, 187.

Apart from authority and on principle, the same result seems necessary. Joint tort feassors act in unison respecting a common wrongful enterprise. It is one of the penalties which the common law (differing in this respect from the civil law) inflicts upon those who jointly engage in intentional violation of the rights of others, that each shall be left to bear the natural results of his conduct. Courts will not lend their aid in adjusting the conflicting claims of wrongdoers touching their own turpitude. An injured party is given the right to pursue his remedy, either singly or together, against those who thus cause injury, and may proceed to judgment against all in separate actions. He is barred only by a satisfaction. An inevitable corollary of these generally undisputed propositions, and one consonant with a fundamental sense of justice, is that a party has a right to try his case against everybody who has done him a wrong by immediate and direct culpable action. He is not precluded by a failure against one alleged joint wrongdoer from attempting to pursue another. He is entitled to his day in court against a particular adversary. We believe there are no exceptions to this rule stated in this form. The cases where judgment in favor of an active agent or servant avails a passive principal or master (*Portland Gold Min. Co. v. Stratton's Independence*, 16 L.R.A. (N.S.) 677, 85 C. C. A. 393, 158 Fed. 63, and cases cited), or where the relation of indemnitor and indemnitee exists (*Port Jervis v. First Nat. Bank*, 96 N. Y. 550), do not constitute exceptions to this rule, but stand on a different ground.

For another reason the New York judgment in favor of Lewisohn seems not to be a bar. The joint actor with the defendant was not the defendant in the New York suit, but it was prosecuted against his executors. If it be assumed that there was a kind of privity between the two who acted in concert, that privity was broken by the death of one. There is no privity between Lewisohn's executors and Bigelow. *Ela v. Edwards*, 13 Allen, 48, 90 Am. Dec. 174; *Merrill v. New England Mut. L. Ins. Co.* 103 Mass. 245-249, 4 Am. Rep. 548; *Thomson v. American Surety Co.* 170 N. Y. 109, 62 N. E. 1073. It cannot be said that the plaintiff has elected to pursue his remedy against the estate of Lewisohn to the exclusion of his rights against Bigelow. As between joint tort feassors the doctrine of election has no application, and moreover the plaintiff sought the New York forum voluntarily only in the sense of being compelled to go there that a court might

acquire jurisdiction of those defendants. The determination that the relation between Lewisohn and Bigelow was that of joint tortfeasors respecting a cause of action arising *ex delicto* disposes also of the argument pressed by the defendant, that Lewisohn was trustee, agent, or representative of Bigelow to such an extent that he was in privity with him. See *Bigelow v. Old Dominion Copper Min. & Smelting Co.* 74 N. J. Eq. 457, 71 Atl. 153-176. The conclusion is therefore that the matters set up in the supplemental answers do not preclude the plaintiff from continuing the prosecution of the present suits.

Both parties have introduced a large amount of evidence as to the law of New York touching the effect which would by its courts be accorded to the judgment against the plaintiff in the Lewisohn litigation, in a suit like the present pending in its courts against the defendant. In the view which we take of this case that question has become wholly immaterial, and we do not pass upon it.

13. The defendant has briefly argued that a decision for the plaintiff in these suits involves a denial to him of due process of law, the equal protection of the laws, and an impairment of the obligation of contracts. It does not seem necessary to discuss these arguments further than to say that they do not appear to us to have any application to the issues here pending.

14. The present cases were upon the calendar of the full court for argument at its January sitting, 1908. Upon motion of the defendant, based upon representations as to the need of delay to enable him to prepare a brief, they were assigned as the first cases for argument at the March sitting of this court, 1908. A few days before the coming in of the court at that sitting, the present defendant applied to the court of chancery in the state of New Jersey, where the plaintiff is domiciled, and secured a temporary injunction against its prosecution of these suits. The suit in New Jersey was decided adversely to the plaintiff by the chancellor, in whose elaborate opinion one of the vice chancellors concurred, on August 8, 1908. *Bigelow v. Old Dominion Copper Min. & Smelting Co.* supra. This decision was not by the court of last resort, and the present defendant, the plaintiff there, asserted that he intended to prosecute and appeal to the highest court in the state of New Jersey. Thereupon, on motion, an interlocutory decree was entered by a single justice of this court, restraining the defendant, "his attorneys, agents, and servants, from further prosecuting the action commenced by said Bigelow against the plaintiff in the court of chancery of the state of

New Jersey, . . . and from commencing or prosecuting any other suit or proceeding, either in law or in equity, except in this court, against the plaintiff to prevent it from obtaining the final decision and decree of this court, or in any manner to delay or impede the presentation of said case." These suits were then pending before the full court under Rev. Laws, chap. 159, § 19. This statute, however, does not prevent the entering by a single justice of decrees respecting interlocutory matters which may call for a speedy hearing and decision, but in no wise affecting the questions covered by the final decree. Rev. Laws, chap. 159, §§ 17, 21, 22; *Parker v. Nickerson*, 137 Mass. 487, 491. The defendant appealed from this interlocutory decree and from a refusal of the single justice to modify or vacate it.

It is a general principle of chancery jurisprudence that, as between courts of co-ordinate and concurrent jurisdiction, the court which first obtains possession of a transaction shall dispose of it without interference from other courts. *Riggs v. Johnson County*, 6 Wall. 166, 196, 18 L. ed. 768, 776; *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238. The jurisdiction of courts of equity to restrain a citizen suitor from prosecuting litigation in another state is well settled. *Cunningham v. Butler*, 142 Mass. 47, 56 Am. Rep. 657, 6 N. E. 782; *s. c. sub nom. Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269. The present suits were begun October 7, 1902. This court plainly had jurisdiction of the subject-matter and the parties. The defendant made no contest in these respects, but proceeded to hearing upon the merits, and accepted the jurisdiction of the court up to the point of argument before the full bench. It was manifestly proper that at this stage of the proceedings, in view of his conduct of the suits theretofore, he should be restrained from attempting to interfere in courts of other jurisdiction with the conclusion of this litigation. It is hardly necessary to say that the interlocutory decree does not purport to restrain him from enforcing whatever rights he may have to a writ of error from the Supreme Court of the United States to the final judgments which may be entered in this court. His full rights under the Federal Constitution are preserved.

The decrees are to be so modified as to include the costs of these appeals, and as modified are affirmed.

So ordered.

Knowlton, Ch. J., dissenting:

This is an important case. The decrees from which the appeal was taken to this

court call for the payment of considerably more than \$2,000,000. The questions of law involved are far-reaching. As I do not agree to the opinion of the majority of the court, I deem it my duty to state the reasons for my dissent.

The fundamental question is: What right and power has a corporation to bind itself, acting through its stockholders in confirmation of the doings of its directors, in the transaction of business, after it has been completely organized under the law of the state of New Jersey, and after the amount of the capital required to authorize it to do business under the statute has been paid in, but before the whole of its capital stock has been issued or subscribed for? The plaintiff corporation was established under the laws of the state of New Jersey. Its rights and powers, and the rights of its stockholders, depend upon the law of that state. Unless it has suffered a wrong as a corporation of that state, it has no standing here.

To organize a corporation under the laws of New Jersey, articles of association in writing must be signed by not less than three persons, stating the name of the company, the place or places where its business is to be conducted, the object for which it is to be formed, "the total amount of the capital stock of such company, which shall not be less than \$2,000 the amount with which they will commence business, which shall not be less than \$1,000, and the number of shares into which the same is divided, and the par value of each share." It must also contain a statement of the names and residences of the stockholders and the number of shares held by each, with the "periods at which such company shall commence and terminate, not exceeding fifty years." 1 Gen. Stat. (N. J.) 1895, pp. 912, 946, "Corporations" §§ 10, 11, 189. The certificate must be proved and acknowledged, and then recorded as deeds of real estate are required to be recorded. It must also be filed in the office of the secretary of state. When this has been done, the company is a corporation from the time of the commencement of the period fixed in the certificate.

The report of the single justice, with the evidence, shows that the plaintiff corporation was organized in all respects in compliance with the statute, that the requisite amount of capital to qualify it to commence business was paid in in cash, and that the corporation was legally authorized to do any business within the purposes of its organization. Although by a small part of its authorized capital had been paid in or subscribed for, it was permitted by law to exercise all the powers of a corporation and

to perform all its contemplated functions for fifty years, if it could obtain money or credit sufficient for the purpose. It then made contracts with the defendant, Bigelow, and his associate, Lewisohn, who were the promoters of it, and who therefore stood in fiduciary relations to it, which contracts would be voidable as fraudulent for that reason, unless there was a full and fair disclosure of the facts to the corporation, as represented either by an independent board of directors, who were in a position properly to protect its rights, or by its existing stockholders, who were the owners of it. The directors were selected by the defendant and Lewisohn, and they were not impartial and independent officers, qualified properly to represent the corporation in matters where its interests might be adverse to those of the promoters. Indeed, as stockholders, they were then the representatives of the promoters. The capital which they paid in under their subscriptions was paid with money furnished by the promoters, and the beneficial interest in all the stock of the company, as it was then organized, was in the defendant and Lewisohn, who were the real owners of the entire corporation. Under these contracts, and in payment for property conveyed to the corporation, 30,000 shares of stock were issued to the defendant and Lewisohn, and taken in their names, and 100,000 shares were issued to Philip E. Dumaresq, "who took them as the nominee, and for the benefit and subject to the orders, of the defendant and Lewisohn." These shares "were held for and controlled by the defendant and Lewisohn." Twenty thousand shares more, which made up the total authorized capital of the company, were found by the judge to have been still the property of the corporation itself, and they were intended to be issued to independent subscribers for a working capital. They then stood in the name of Thomas Nelson, treasurer. More than two months after the original contracts were made, and while the ownership of the stock was as above stated, all the directors of the corporation signed, in the record book, a statement approving of the previous action of the board in making these contracts, and a similar statement was signed by the defendant and Lewisohn and Dumaresq as stockholders, and by Nelson as a stockholding treasurer.

Upon these findings the defendant and Lewisohn were the owners of all the authorized capital stock of the corporation, except the 20,000 shares in the treasury, which belonged to the corporation, and through the corporation they owned that also. As stockholders, they knew all the facts affecting the validity or propriety of

the contracts which they had made with the company. At that time they had no interest adverse to that of the corporation, for they were the sole owners of the corporation. One question is whether this ratification with full knowledge, by all the stockholders, was binding upon the corporation. Another question is whether the contracts were valid when originally made, having been agreed to with full knowledge by the only persons beneficially interested in the corporation. More specifically, the broad question is whether a corporation, which has full power to make every other kind of a contract within the purposes of its organization, is powerless to make a contract, or through its stockholders to ratify a contract, with one standing in a fiduciary relation to it.

There is no question of fraud upon the corporation; for all of the owners of it were fully informed in regard to the transactions and approved of them. Under such circumstances there can be no fraud. After a corporation is fully organized, the stockholders for the time being own and control it. In a broad sense, they are the corporation, although the corporation as a separate entity may exercise its powers as an individual, under their direction and for their benefit. The power of a corporation through its stockholders, choosing proper agents, to deal formally with those in a fiduciary relation to it, is established beyond the possibility of question. It matters not that the fiduciaries are themselves stockholders, if the other stockholders are not misled. And it matters not whether they constitute all of the stockholders, or only a part of them, if all the stockholders know all the facts and consent to the transaction.

The only question that seems to me debatable on this branch of the case is whether the power of the corporation, or of its stockholders, to act in matters of this kind, is taken away by the fact that its stock is not all issued, and that a part of it is retained to be issued to obtain working capital or for other purposes. On principal, it is difficult to see how this can affect its right under the law to do business of this kind, as it may do business of every other kind.

It is suggested that to make contracts with one in a fiduciary relation may be detrimental to the interests of the corporation, and constitute a fraud upon persons subsequently subscribing for stock not then issued, even if the existing stockholders know all the facts and are content. But it is to be noticed that, under the law of New Jersey, the organization of a corporation does not necessarily give any indica-

tion or suggestion as to the value of its stock. It does not indicate that more than \$1,000 of capital has been actually paid in, if that sum is fixed in the articles of association as the amount necessary to qualify it to do business. As to the balance of the shares, it does not show whether much, or little, or nothing at all, has been paid upon them. It does not indicate that contracts have or have not been made with the corporation, and, if they have been made, whether they are advantageous or disadvantageous to it. Under this system, everybody is bound to know that, apart from the general facts of organization which appear of record, one buying stock or subscribing for it must ascertain by inquiry if he would know whether it is of large value or of no value. Evidently the statute was intended to give very broad latitude to organizers of corporations, and to give corporations full powers to contract while only a small amount of stock has been issued, which may be owned by a very few persons.

Promoters, as well as directors, stand in a fiduciary relation to a corporation. They do not stand in such a relation directly to particular stockholders, or to a particular class of stockholders. Their relation to stockholders is only as the stockholders claim through the corporation by virtue of their ownership of it. Through the corporation, promoters and directors stand in this relation to those who own stock while their fiduciary relation to the corporation continues. They are never in such a relation to those who become stockholders after their relation to the corporation has ended. Their fiduciary relation to the corporation extends through it to all the owners of it. The stockholders for the time being are all the owners of it. These stockholders can sell its property, or wind it up, or control it, as they please. No one else has any interest in it, and the directors or promoters have no relations as such, to anyone else. If additional stock is issued after their relations to the corporations are terminated, they are not, and they never were, in fiduciary relations to the takers of this new stock. In this respect there is no difference between directors and promoters. All this is said in reference to corporations which are regularly and completely organized, and are authorized to do business and fully to exercise their powers and franchises under the law, notwithstanding that a part of their authorized capital has not been taken. Of course, if a corporation is merely in an inchoate condition, and has not acquired the power to exercise its franchises, a different rule would apply. So, too, promoters may enter into ar-

rangements with underwriters or syndicates or single persons who expect to take stock, and may thus assume obligations. In the present cases I do not intimate that the defendant might not be held liable to some of the persons who arranged with him to take a part in the enterprise.

But whatever may be thought of the conduct of promoters who made contracts with a corporation while they are the sole owners of it, and whether it be held that their fiduciary relations extend to future stockholders or only to those who are the owners while this relation exists, the question before us is whether, under the law of New Jersey, a corporation is powerless to bind itself as to such contracts, when they are entered into with the assent of the existing stockholders, all of whom have full knowledge of the facts. On principle, I think that a corporation organized in that state is not so crippled. Let us consider the authorities.

Re Ambrose Lake Tin & Copper Min. Co. L. R. 14 Ch. Div. 390, 49 L. J. Ch. N. S. 457, 42 L. T. N. S. 804, 28 Week. Rep. 783, was a case in which a sale of property was made to a corporation by the promoters of it, which would have been voidable for fraud if the promoters had not been the owners of its stock. It was held that, inasmuch as the vendors were themselves the stockholders of the company and knew all the facts, there was no fraud upon the corporation. In this case the judges thought that one of the purposes of these promoters was to obtain profit from future purchasers of the stock who were ignorant of the transaction; but under the circumstances the corporation could not avoid the contract. In *North-West Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589, a contract of purchase of property by a corporation was entered into by directors with one of their number. It was held that the vendor was entitled to exercise his voting power as a stockholder to ratify the contract. He controlled a majority of the votes through ownership of his stock, acquired in a manner authorized by the constitution of the company. It was held that his exercise of his power could not be deemed oppressive for this reason. Sir Richard Baggallay, in delivering the unanimous opinion of the privy council, said: "Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company. And every shareholder has a perfect right to vote 40 L.R.A.(N.S.)

upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company." Referring to dealings with a director acting in a fiduciary capacity, he said: "Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmation or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it." In this case ratification was by only a small majority of the stockholders.

Salomon v. Salomon & Co. [1897] A. C. 22, was a case in which the proprietor of a business organized a corporation with a capital stock of 40,000 shares, of the par value of £1 each. He, his wife, his daughter, and his four sons took (1) share each. With only (7) shares taken, he sold out his business to the corporation for a price which might be found to be much more than it was worth. He then took 20,000 shares more of the stock. The remaining 19,993 shares never were issued. The company soon became insolvent, and a receiver, in the interest of creditors, sought to hold this organizer and promoter for fraud upon the corporation. It was held upon these facts that there was no fraud and no liability. Lord Chancellor Halsbury quoted from the headnote in *Erlanger v. New Sombrero Phosphate Co.* L. R. 3 App. Cas. 1218, 39 L. T. N. S. 269, 26 Week. Rep. 65, 6 Eng. Rul. Cas. 777, and then said: "But if every member of the company—every shareholder—knows exactly what is the true state of the facts (which for this purpose must be assumed to be the case here), *Vaughan Williams's J.*, conclusion seems to me to be inevitable, that no case of fraud upon the company could here be established." He said this in a case in which only seven shares of stock out of an authorized capital of 40,000 shares had been issued when the contract with the promoter was made. This case seems to me fully to cover the case at bar, in which the only fraud proved was the constructive fraud of a sale to a corporation from one in a fiduciary relation to it.

Other cases establish the proposition that it makes no difference that not all the stock of the company has been issued, if the holders of all outstanding stock agree. In *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 606, 15 Pac. 544; and *Stewart v. St. Louis, Ft. S. & W. R. Co.* (C. C.) 41 Fed. 736, a part of the stock, although not a large amount, was issued to municipalities after the transaction to which the stockholders agreed. In *Hutchinson v.*

Simpson, 92 App. Div. 382, 87 N. Y. Supp. 369, a large amount of stock was held in the treasury for other corporate uses. The same was true in *Blum v. Whitney*, 185 N. Y. 232, 77 N. E. 1159, which, in its reasoning and the authorities cited, is a very strong case for the defendant. Only a part of the authorized stock had been issued when the contract was made in *Re British Seamless Paper Box Co. L. R. 17 Ch. Div. 467*, 50 L. J. Ch. N. S. 497, 44 L. T. N. S. 498, 29 Week Rep. 690, and more was issued about a year and a quarter afterwards. *Tompkins v. Sperry*, 96 Md. 560, 54 Atl. 254, is an important case supporting the proposition that stockholders may bind the corporation in transactions of this kind, which are voidable for constructive fraud. Except as I shall state hereafter, I know of no case which holds that it makes any difference that not all the stock has been issued, if the corporation is completely organized and authorized to go on with its ordinary business. There are *dicta* of some English judges, indicating that such a transaction, when it is expected that a prospectus will be issued under the English practice inviting subscriptions for stock from the public, would be fraudulent as against future stockholders. These are in opinions in which the judges hold that there is no fraud upon the corporation, as there was knowledge and consent of the stockholders, and they seem to assume that the corporation is not fully organized and qualified to do business. But they are without discussion or seeming consideration of the question when a corporation and its stockholders become competent to make binding contracts as to such matters. Other cases which support the defendant's position are *Foster v. Seymour* (C. C.) 23 Blatchf. 107, 23 Fed. 65, *McCracken v. Robison*, 6 C. C. A. 400, 14 U. S. App. 602, 57 Fed. 375, and *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 263, 26 N. E. 145.

This court, in *Hayward v. Leeson*, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656, in dealing with a corporation established under the laws of Tennessee, held that the receivers of the company might maintain a suit for fraud against promoters, notwithstanding that the stockholders, at the time of the transaction, knew all the facts and agreed to the contract. The particulars of the statute of Tennessee as to the organization of corporations do not appear in the report of the case. When the present suits came before the court upon a demurrer, *Hayward v. Leeson* was followed and held to govern them. 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653. The precise questions which were then before us have been considered by the circuit court 40 L.R.A. (N.S.)

of the United States and the United States circuit court of appeals in the second circuit, in a suit brought by this plaintiff against *Lewisohn's* heirs, and upon a demurrer to averments of fact against *Lewisohn* substantially identical with those against the defendant in the present suits, there was a decision for the defendants. *Old Dominion Copper Min. Co. v. Lewisohn* (C. C.) 136 Fed. 915, s. c. 79 C. C. A. 534, 148 Fed. 1020. As appears by the record before us, five judges of the Federal courts in that circuit, at different stages of the proceeding, agreed in their view of the law of the case. The suit was then carried to the Supreme Court of the United States, and the justices of that court were unanimous in sustaining the defendants' demurrer. Upon the averments of the bill, they treated *Bigelow* and *Lewisohn* as the real owners of the corporation when the contracts were made, through their appointees, who took the stock which they paid for. The judge who wrote the opinion sat as chief justice with those other members of this court who took part in the decision of *Hayward v. Leeson*. The view expressed in the opinion of the Supreme Court of the United States is at variance with a part of the reasoning and with the decision in *Hayward v. Leeson*. This latest decision must be treated as establishing the law for the Federal courts. The cases cited show that the law is settled in the same way in some of the state courts.

In addition to the deference that a unanimous opinion of the justices of the Supreme Court of the United States should receive in any other court, it is for me a very important consideration that, upon questions which will often be litigated in the Federal tribunals by reason of the divorce citizenship of the parties, the law ought to be the same in the state courts as in the Federal courts. It would be unfortunate if, in this large class of cases, the rights of a suitor should depend upon whether he is finally held subject to the jurisdiction of a Federal court or to that of a state court.

It seems to me that the great weight of authority upon the turning point of this case is in favor of the defendant. I do not regard the case of *Erlanger v. New Sombrero Phosphate Co. L. R. 3 App. Cas. 1218*, 39 L. T. N. S. 269, 26 Week. Rep. 65, 6 Eng. Rul. Cas. 777 (L. R. 5 Ch. Div. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222, 25 Week. Rep. 436), relied on by the plaintiff, as having any bearing upon the question on which the present case turns, namely, when is a corporation so far organized that its stockholders, acting with full knowledge, can bind it? No such question arose in that case, and there was no oc-

casation to consider such a question. So far as appears, the question was never thought of. The court was dealing with a fraud upon a corporation whose stockholders were ignorant of the facts that constituted the fraud, and took no action in regard to the matter. It seems to me that the *dicta* of certain English judges relied on by the majority of the court overlook the fact that the fiduciary relation of promoters of a corporation is of no practical consequence if the promoters are the sole owners of the corporation, and if, at the time of the transaction in question, the corporation is legally organized and qualified to do every kind of business, although this fact is generally recognized by the English courts. I also think that the judges uttering the *dicta* were influenced by the statutory provision in the English law for the issuing of a prospectus to the public, inviting subscriptions to the stock after the corporation is organized in other particulars. There is no such provision in the statute of New Jersey.

It is also to be remembered that the *dicta* were uttered in connection with decisions that the corporation was bound by the knowledge and action of all its existing stockholders, notwithstanding that only a part of the authorized stock had been taken. One or two of the *dicta* are in other cases in which no question in regard to action by all the stockholders with knowledge arose. In *Pietsch v. Milbrath*, 123 Wis. 647, 651, 68 L.R.A. 945, 107 Am. St. Rep. 1017, 101 N. W. 388, 102 N. W. 342, it appears that the plaintiffs took their stock upon grossly false representations as to the organization of the corporation, and they were allowed a remedy. *Yeiser v. United States Board & Paper Co.* 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 340, 348, was a case of gross, active fraud, and some stockholders who were ignorant of the facts were brought in before the transaction in question was consummated. Of course, this decision is of no effect as against the later adjudication in 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634, covering the precise question before us. Neither of these two cases seems to me important in reference to the question on which the present decision depends. I think the corporation in the present case is bound by the knowledge and consent of its stockholders.

The defendant relies upon the independent defense that the decision against the plaintiff, upon the same averments of fact in the suit against the other of the two joint actors, is a bar to the present claim, as *res judicata*. Evidence was introduced to 40 L.R.A. (N.S.)

prove the law of New York, where the decree was entered. The defendant called thirteen witnesses of the greatest eminence and distinction, who testified as experts in law that, in their opinion, under the law of New York, the decree would be a bar to these suits, if they were brought against this defendant in the courts of that state. Many of these witnesses had had a long judicial experience. Three of them had sat in the court of appeals, two of them for long terms, and one as a chief judge. Several others had served a long time in the supreme court of New York, sitting in the general term and in the appellate division. Others had held other high positions in their profession, and all of them were lawyers whose opinions are entitled to great weight. The plaintiff called two eminent lawyers, who expressed a contrary opinion. Many decisions of the courts of New York were also put in evidence. The defendant contended that, if the decree is a bar under the law of New York, it is equally so when pleaded in Massachusetts.

If it were necessary to consider this branch of the defense, it perhaps would be a grave question whether the defense was or was not made out. But as to that I express no opinion, preferring to rest this opinion on the other ground.

I am authorized to say that Mr. Justice Morton concurs in this opinion.

Hammond, J., dissenting:

Upon the questions (1) whether the facts found by the single justice are supported by the evidence and should stand; (2) whether "the transaction is to be determined by the law of Massachusetts;" (3) whether the plaintiff has been guilty of laches; (4) what shall be the nature of the relief (if there is any relief); (5) what effect shall be given to the judgment rendered in the *Lewisohn Case* by the circuit court of the United States for the southern district of New York; (6) whether a decision for the plaintiff in these suits involves a denial to the defendant of due process of law, or the equal protection of the laws; and (7) whether the interlocutory order entered by a single justice enjoining the defendant from further prosecuting his suit against the plaintiff elsewhere except in this court should stand,—I agree with the majority of the court.

But upon the question on the merits, namely, whether upon the facts found the defendant is answerable to the plaintiff, I agree with the dissenting opinion filed by the chief justice; and for the reasons stated

therein I think that the bills should be dismissed.

Petition for rehearing denied.

Affirmed by the Supreme Court of the United States, May 27, 1912, 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641.

NORTH DAKOTA SUPREME COURT.

STATE OF NORTH DAKOTA EX REL.
THOMAS H. POOLE, Resp't.,

v.

AMASA P. PEAKE, Adjutant General,
Appt.

(— N. D. —, 135 N. W. 197.)

Certiorari — court-martial proceedings — review.

1. Relator, Thos. H. Poole, as Brigadier General (retired) of the National Guard of this state, was tried and convicted by a general court-martial of certain alleged felonies claimed to have been committed by him in violation of the Articles of War of the United States. The judgment and sentence of such court-martial, which dismissed him from the National Guard, were approved by the Governor and Commander in Chief of the militia, by the issuance of an order accordingly. Relator sued out a writ of certiorari in the district court of Bur-

Headnotes by FISK, J.

Note. — Are state militias subject to the Articles of War of the United States.

It is clear that state militias are not subject to the Articles of War of the United States in times of peace, unless such Articles have been adopted or promulgated by the state as a part of the state regulations. This was the rule adhered to in *STATE EX REL. POOLE v. PEAKE*, and it finds support in the following additional decisions:

Thus, in *Manley v. State*, — Tex. Crim. Rep. —, 137 S. W. 1137, it was held that where the Governor, who alone was authorized to prescribe regulations for the state militia, had not adopted and promulgated the United States Army regulations, such regulations were not applicable thereto in times of peace, and that therefore an officer of the state militia could not be court-martialed thereunder.

And in *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537, it was held that a state militiaman who has refused to obey an order of the President, calling him into the public service, was not, in the sense of the act of Congress of 1795, chapter 101, "employed in the service of the United States," so as to subject him to the rules and Articles of War; thus, in effect, holding that such Articles do not apply to militiamen 40 L.R.A. (N.S.)

leigh county for the purpose of obtaining a review of such judgment and order. This appeal is from the judgment of that court holding the judgment and order aforesaid null and void as being without and in excess of jurisdiction. Held, that certiorari is a proper remedy to review the proceedings of a court-martial for the purpose of determining whether it exceeded its jurisdiction.

Militia — Articles of War — binding effect.

2. The Articles of War of the United States do not govern the militia or National Guard of this state in times of peace, and consequently relator was not amenable to general court-martial for the alleged violations of such Articles of War. Hence, the district court properly held that the judgment and sentence of such court-martial and the order of the Governor and Commander in Chief approving the same were null and void, because in excess of jurisdiction.

(January 6, 1912.)

APPEAL by defendant from a judgment of the District Court for Burleigh County, annulling, upon certiorari, a judgment of a court-martial dismissing relator from service in the National Guard. Affirmed.

The facts are stated in the opinion.

Messrs. Andrew Miller and Melvin A. Hildreth for appellant.

Messrs. Engerud, Holt, & Frame for respondent.

except when they are in the actual service of the United States. And in *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19, it was held that the mere calling forth of the militia by the President does not render them subject to the Articles of War. See also 1 Winthrop, *Military Law & Precedents*, p. 126.

And it has been held that a refusal to obey an order to arms emanating from the Governor of a state does not render a delinquent amenable to the Articles of War. 1 Ops. Atty. Gen. 473.

But the Articles of War of the United States may be adopted and incorporated in a state code of regulations, and in case of such an adoption the state militia is subject thereto. *McGorray v. Murphy*, 80 Ohio St. 413, 88 N. E. 881, 17 Ann. Cas. 444. And see *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19, wherein it was held that a state may provide that the state militia shall be subject to the Articles of War of the United States, and may also provide for the trial of such militiamen by a state court-martial, and that such a suit is not repugnant to the laws and Constitution of the United States.

As to superintending control of civil courts over courts-martial, see note to *State ex rel. Poole v. Nuchols*, 20 L.R.A. (N.S.) 413.

G. J. C.

Fisk, J., delivered the opinion of the court:

While fully realizing that we are in no manner responsible either for the facts or the law which must control in disposing of this appeal, the duty which has been assigned the writer of giving expression to the views of the court is not a pleasant one, owing to the nature of the litigation, and more especially in view of the fact that our conclusion does not coincide with the views entertained by the Chief Executive of the state, as well as by prominent officers of the National Guard, who were instrumental in instituting and prosecuting the proceeding before the general court-martial, hereafter mentioned, out of which proceeding this litigation arose. Although the views of these high officials of a co-ordinate branch of the state government are entitled in case of doubt to much respect and weight relative to the extent of the powers delegated to them by the Constitution and statutes, yet such views, when clearly erroneous, must be declared so by the courts, and the acts of such officials, when manifestly in excess of jurisdiction, must be adjudged null and void whenever their legality is properly challenged in court, for otherwise the court would not be discharging its constitutional duty.

The facts necessary to a full understanding of the questions involved are correctly stated in appellant's brief, and in substance are as follows: This cause comes to this court on appeal from a judgment of the district court of the sixth judicial district, entered on the 8th day of January, 1911, which in effect vacates and annuls the findings and sentence of a general court-martial which found the respondent, Thomas H. Poole, guilty of having violated the Military Code of this state, and dismissing him from the service of the National Guard of the state. The respondent was tried before a general court-martial on the 12th day of January, 1909. He was found guilty of having violated both the twenty-first and the sixty-first Articles of War, and sentenced by the court "to be dismissed from the service of the National Guard of the state of North Dakota." This sentence was approved by the Governor of the state. On the 7th day of August, 1909, on application of respondent, a writ of certiorari was issued, directed to Amasa P. Peake, as Adjutant General of the state, requiring him to certify and transmit to the district court of the sixth judicial district a true and full record of all the proceedings of said general court-martial and the orders of the Governor, and praying that all the said proceedings be declared null and void, and that the respondent be restored to his

rank of a Brigadier General (retired) in the North Dakota National Guard. The court made findings and an order for judgment, which adjudged and determined that "the order made and issued by Hon. John Burke, as Governor and Commander in Chief of the National Guard of the state of North Dakota, on the 12th day of January, 1909, directing and ordering that a general court-martial be convened to hear and try certain charges and specifications against the relator, Thomas H. Poole, be and the same is hereby held to be null and void and without jurisdiction. And said court-martial convened and held pursuant to said order, and all its proceedings and acts, sentence, and judgment are hereby set aside and annulled. And it is further adjudged, determined, and decreed that the order of the Honorable John Burke, as Governor and Commander in Chief, made March 1, 1909, approving the proceedings, findings, sentence, and judgment of said court-martial and purporting to remove and discharge said Thomas H. Poole from the organized militia of this state, and depriving him of his rank as Brigadier General on the retired list, is hereby declared null and void and of no effect."

The assignments of error challenge the jurisdiction of the court below to inquire into the validity of the proceedings before the general court-martial, or to enter the judgment appealed from. Notwithstanding the statement to the contrary in appellant's additional memorandum brief filed herein, no question was raised in that court that certiorari is not an appropriate remedy, but appellant's contention there was merely as above stated. In such additional brief counsel assert that such question was squarely raised in the court below on the motion to quash the writ. In this they are clearly in error. In the first place, such motion and the ruling thereon are not properly before us, as no statement of the case was settled. *Mooney v. Donovan*, 9 N. D. 93, 81 N. W. 50. In the second place, conceding, for the sake of argument, that they are properly before us, such motion to quash did not raise such question. The grounds of the motion are, in substance, as follows: (1) It appears on the face of said writ that the general court-martial complained of was legally assembled, organized, and constituted; (2) that said Thomas H. Poole was at the time a member of the National Guard of the state of North Dakota; (3) that said court-martial had jurisdiction over the person of Thomas H. Poole; (4) that said court-martial had jurisdiction over the subject-matter; (5) that said court-martial, acting within its jurisdiction, rendered judgment finding the defendant guilty as charged

in the specifications; (6) that his excellency, the Governor, as Commander in Chief of the National Guard, approved said judgment; and (7) that this court is without jurisdiction to inquire into, review, or question the proceedings of said court-martial, or the orders of the Governor and Commander in Chief in relation thereto.

It is therefore clearly apparent from the above that no question as to the correctness of the remedy invoked was made in the court below, as each ground of the motion went to the merits, and consequently appellant is not in a position to raise such question for the first time in this court. But if we could brush aside these well-settled rules of practice, we would nevertheless be obliged to overrule appellant's contention, for it is entirely clear that certiorari is an appropriate writ to review the proceedings of such court-martial for the purpose of determining whether it exceeded its jurisdiction. While it is no doubt true that it was not a "court" within the meaning of §§ 85 and 86 of our state Constitution, nor within the meaning of § 7810, Rev. Codes, it was a "tribunal" within the meaning of the statute aforesaid, and its acts may be inquired into through the use of such writ, not for the purpose of correcting any mere errors which may have been committed by it, but solely for the purpose of determining whether such tribunal exceeded its jurisdiction. It would be strange, indeed, if this could not be done, for otherwise great injustice might be inflicted on a person by such tribunal while acting wholly without jurisdiction, and yet such aggrieved person might have absolutely no redress. Our attention has been called by counsel to no authority sustaining appellant's contention. The case of *State ex rel. Poole v. Nuchols*, 18 N. D. 237, 20 L.R.A.(N.S.) 413, 119 N. W. 632, cited by appellant, is not in point. In that case we held, it is true, that a court-martial is not an inferior court within the meaning of § 86 of the Constitution, as it belongs to the executive, and not to the judicial, department of the state; but we also there said: "Of course, if it exceeds its jurisdiction or acts without jurisdiction, its judgments are a nullity and any person aggrieved thereby may seek proper redress in the civil courts having jurisdiction, and such courts will furnish appropriate relief." See, in this connection, the valuable note to said case as reported in 20 L.R.A.(N.S.) 413, wherein the authorities are reviewed at length, and they will be found to support our views as above expressed. One of the leading cases is that of *People ex rel. Smith v. Hoffman*, 166 N. Y. 462, 54 L.R.A. 597, 60 N. E. 187, wherein that great court, speaking through 40 L.R.A.(N.S.)

Judge Vann, most thoroughly considered this point, which was the sole question before it, and reached the conclusion that certiorari will lie. The appellant's contention in the case at bar is there most effectually answered, and the reasoning and conclusion of the court meet with our full approval.

This brings us to the merits, which involve the question whether the general court-martial had any jurisdiction to try the relator for the alleged offenses charged against him, and render its judgment and sentence dismissing him from the National Guard. If this question must be answered in the negative, it, of course, necessarily follows that such judgment, as well as the order made March 1, 1909, by the Governor as Commander in Chief, approving the findings and judgment of such general court-martial, and purporting to dismiss relator as an officer in the National Guard, are nullities, and he would still retain his rank in the Guard as before.

We will now notice some of the principal contentions of the respective parties. They are widely and radically at variance and involve numerous propositions of law; but we shall consider only those which we deem controlling and decisive of the appeal. Relator's chief contention is that he was not amenable to a court-martial at all, because he was not a militiaman in active service, and there was no war or public danger. In other words, he plants himself squarely on the constitutional guaranty found in § 8 of the state Constitution, and also in the 5th Amendment to Federal Constitution. Section 8 reads: "Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. . . ." He asserts that said sections clearly forbid prosecutions of militiamen for felonies by court-martial, except when such militiamen are in actual service in time of war or public danger; and that the charges on which he was thus convicted are felonies; also, that at the time of such trial and conviction there was no law in this state authorizing a court-martial for the trial of a person charged with any crime; that the Articles of War do not govern the militiamen except while in actual service.

It is needless to detail appellant's contentions. They are squarely opposed to those of the relator. We are compelled to uphold relator's contentions, and will proceed to point out what we deem to be the basic fallacy in appellant's argument. His counsel apparently wholly ignore the radi-

cal and fundamental distinction between the militia of the state and the regular Army and Navy of the United States, and the laws governing each. Such distinction is perfectly clear and is recognized in both the Federal and state Constitutions as well as in the statutes. Neither of such Constitutions forbids prosecutions for felonies otherwise than by presentment or indictment in cases arising in the land and naval forces (Army and Navy) even in times of peace; but they each clearly forbid such prosecutions in cases arising in the militia, except when such militia is in actual service, in time of war or public danger. The regular Army is at all times governed by the Articles of War, and its officers and soldiers are amenable to courts-martial for any violations thereof, as well in times of peace as in times of war. Not so, however, with the state militia. The latter is governed thereby only while in actual service in time of war or public danger, or when expressly so provided by local state law. A moment's reflection will serve to demonstrate the wisdom of such distinction. As said by Judge Vann, in *People ex rel. Smith v. Hoffman*, supra: "There is a wide distinction between the regular Army of the nation and the militia of a state when not in the service of the nation, for discipline which is ample for the latter will not answer for the former. A member of the state militia belongs to civil life, has a civil avocation, and only occasionally engages in the exercise of arms. A member of the United States Army, on the other hand, has no employment except that of a soldier, and arms constitute the business of his life. Hence more rigid rules and a higher state of discipline are required in the one case than in the other. Moreover, the state militia is organized by statutes of the state, and the legislature, under the limitations of the Constitution, has power to regulate the entire subject, to invest boards of examination with such authority and to give the civil courts such power to reiew as it sees fit."

As we understand the position of appellant's counsel, it is that the Articles of War govern and control our state militia in times of peace the same as they govern and control the regular Army. The charges against the relator on which he was convicted by the court-martial are based on alleged violations of the Articles of War. It is perfectly manifest to our minds that such proceedings were a nullity for the obvious reason that our legislature had not, in its wisdom, seen fit to thus ordain. The Military Code in force in this state at the time relator was tried and convicted, being chapter 21, Political Code 1905, expressly provided that "the militia while in active service shall be governed by the military law 40 L.R.A.(N.S.)

of the state, and the rules and Articles of War of the United States" (§ 1717); but such Code will be searched in vain for any provision adopting the Articles of War for its government when not in active service, or, in other words, in time of peace, and such statute nowhere defines any military offenses punishable by court-martial or otherwise in time of peace. But appellant's counsel quote § 1752 of the Code, which pertains to the drill, discipline, and uniform of the National Guard, and say: "By what Military Code are the powers and duties to be measured of an officer in the National Guard of this state? The respondent concedes that there are no military regulations of the state. The legislature having adopted the rules and articles that govern the Armies of the United States have therefore said in the most solemn manner that the National Guard of this state shall be governed by the same rules and regulations. Therefore, if the commanding officer of the company, whether in command or not, should commit a misdemeanor or a felony, he certainly could be tried by general court-martial under the laws of this state." Right here is, in our opinion, the basic fallacy in appellant's contention. Counsel wholly misinterpret said statute. It deals merely with matters relating to drill, discipline, and uniforms, and it merely adopts the regulations of the army, Articles of War, and acts of Congress as authority and to govern in such matters in cases not provided by the laws of the state, etc. The word "discipline," as there used, means "system of drill;" "systematic training;" "training to act in accordance with established rules; accustoming to systematic and regular action." See Webster's New International Dictionary, and also 27 Cyc. 496. This is apparent, for if § 1752 be given the broad meaning contended for by appellant, it would conflict with, or at least render superfluous, § 1717, which provides that the militia while in active service shall be governed by the rules and Articles of War of the United States. Furthermore, to attribute to the legislature such an intent would be absurd. No state in the Union has ever enacted such a law to our knowledge, nor could it be done in this state as to felonies without an amendment to the state Constitution, and we apprehend that the suggestion of such a thing as subjecting members of our state militia to trial by court-martial for felonies in time of peace would shock citizens.

But counsel for appellant earnestly argue that, if this court should hold that it cannot be done, "the National Guard ought to disband and pile their uniforms and equipment in the public streets and set fire to

them, because there would be no power whatsoever to control either officers or men; and there would be greater danger from men who could not be controlled in time of peace than there would be from men in time of war." We fear counsel are unduly alarmed. This is, so far as we are aware, the first and only time in the entire history of this state that a resort to a court-martial was deemed necessary or advisable. Furthermore, the remedy, if one is needed, lies with the legislature, and no doubt will be furnished if applied for. In 1909 the legislature of this state enacted a new and very comprehensive Military Code (chapter 165, Laws 1909); but it did not see fit, in its wisdom, to confer on a court-martial the power to try a militiaman for a felony in time of peace. It is, however, provided by such Military Code that certain by-laws, rules, and regulations may be adopted by associations therein authorized to be formed, also rules may be adopted by the Governor as Commander in Chief, and that for violations thereof enlisted men may be tried by court-martial and also expelled from the organization. Section 12 of such new Code expressly provides when the Articles of War shall be in force as governing the militia, and it is a significant fact that such new statute limits the times in which they shall apply to the occasions when such militia is on duty pursuant to the orders of the Governor, or when ordered to assemble for duty in time of war, insurrection, invasion, public danger, or to aid the civil authorities.

In many of the states the legislatures have seen fit to provide for the enforcement of discipline in the organized militia by fine and imprisonment imposed by courts-martial for infractions of rules and regulations, even in times of peace. The right so to do is undoubted, but it was not exercised in this state until the new Military Code of 1909 was adopted. See, in this connection, 27 Cyc. 496, from which we quote: "The laws of nearly all the states have been revised with a view of conforming the organization and discipline of the organized militia to that of the regular Army, and violations of military laws or regulations are now generally dealt with by military courts within the scope of their jurisdiction as defined by the state laws,"—citing *State ex rel. Madigan v. Wagoner*, 74 Minn. 518, 42 L.R.A. 749, 73 Am. St. Rep. 369, 77 N. W. 424. The case of *State ex rel. Madigan v. Wagoner*, supra, seems to be a leading authority, and we commend the opinion of Judge Mitchell, as a clear and sound statement of the law. The opinion recognizes the right of the state legislature, within constitutional restrictions, to provide cer-

tain rules and regulations for the government of the organized militia, and, as disciplinary measures, to authorize courts-martial to impose fines and imprisonment for violations thereof, and it is therein stated that in many, if not most, of the states, this has been done.

It goes without saying that courts-martial are courts of special and limited jurisdiction, and that they possess no powers not expressly conferred on them. 27 Cyc. 498; 22 Ops. Atty. Gen. 137; *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838; *Deming v. McClaughry*, 51 C. C. A. 349, 113 Fed. 639.

That the terms "actual service" and "active service," as used in the Constitution and Military Code, mean service in time of war or public danger, etc., is clear. It is likewise clear that the words "when in actual service in time of war or public danger," in § 8 of our Constitution, apply to the militia only. *Johnson v. Sayre*, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773. That the words "actual service" and "active service" are used in such restrictive sense in our Military Code is entirely clear from a reading of §§ 1716, 1761, 1762, 1774. See also *State v. Josephson*, 120 La. 433, 45 So. 381, and *Bryant v. Brown*, 98 Ky. 211, 32 S. W. 741. It must necessarily follow, therefore, that, being in time of peace, the Articles of War in no manner governed the militiamen, and consequently Brigadier General Poole (retired) could not be tried for alleged violations thereof.

Entertaining the above views, it becomes unnecessary to notice the other points in controversy.

We conclude, therefore, that the judgment appealed from, in so far as it adjudges that the orders therein enumerated, as well as the acts and judgment of such court-martial, are null and void, must be affirmed.

Spalding, Ch. J.:

I concur fully in the opinion of my associate covered by paragraph 1 of the syllabus; and while I concur in the opinion that the court-martial in question was without jurisdiction, I reach my conclusion by a method differing from that pursued by my associates, and cannot concur in all that is said in the majority opinion. I prefer to confine my conclusions as to the jurisdiction of the court-martial to the case before us, viz., its jurisdiction over a retired officer not on duty of any kind. The relator had been retired by operation of law, under provisions of the Code of this state. A retired officer of our militia bears a relation to the organized militia differing materially from that borne by a retired Army officer to the regular Army. The latter is made, by statute, subject to trial by

court-martial. U. S. Rev. Stat. § 1256, U. S. Comp. State 1901, p. 888. A retired militiaman is not made subject to trial by such court, and the character of his position as fixed by the Code renders it inappropriate that he should be subject to court-martial, at least, when not on detail by order of the Governor. Relator was not on any kind of duty, and the decision need go no farther than to cover the case of such an officer. I rest my concurrence on the ground that an officer retired by operation of law is not subject to be tried by court-martial when not on duty under detail by order of the Governor. I express no opinion farther than this.

A petition for rehearing having been filed, *Flisk, J.*, on March 23, 1912, handed down the following response:

We have carefully considered the petition for a rehearing filed by appellant, and find nothing therein to cause us to change our views as above expressed.

In denying such petition we deem it advisable to briefly notice some of the principal contentions made in such petition. It is manifest that appellant's counsel are laboring under a misapprehension regarding the court's holding, for they start the petition with the following assertion: "The decision of the court proceeds upon the theory that the militia of a state can only be subject to trial by court-martial when they are in the actual service of state or nation." This is very far from the fact, for the exact contrary is true. We held that the Articles of War do not govern the state militia in times of peace, for the legislature has not thus ordained, and consequently the officers and members of such militia are not subject to court-martial in time of peace for alleged violations of such Articles of War. But we distinctly said that the power of the legislature to provide for the enforcement of discipline in the organized militia by fine and imprisonment imposed by courts-martial for infractions of rules and regulations, even in times of peace, is undoubted.

Counsel in their petition again call our attention to §§ 188 to 193 of our state Constitution and insist that we have overlooked the same. In this they are again mistaken. There is no room for doubt that "all able-bodied male persons residing in the state between the ages of eighteen and forty-five years," with certain exceptions, constitute the militia of the state, nor is there any room for doubt that the organized militia or National Guard constitutes the "active militia." But the terms "active militia" and "the militia when in actual

service in time of war or public danger" are entirely distinct and of different meaning, and the basic fallacy in counsel's contention apparently is their failure to distinguish the difference between these terms. Section 8 of our Constitution, which provides that no person shall for a felony be proceeded against criminally otherwise than by indictment, does not except from its provisions the active militia in time of peace, but it excepts "the militia when in actual service in time of war or public danger." No doubt the framers of the Constitution contemplated that the legislature would prescribe rules and regulations for the government of the organized or active militia in time of peace as well as when called into active service for the state in time of public danger, etc., for § 192 clearly contemplates that there may be trials by courts-martial; but it is perfectly manifest that until such time as the legislature has made provision therefor no such trials could be had. Our attention is called to § 1753, Rev. Codes, which makes certain acts a misdemeanor, and concludes with the statement, "and upon conviction shall be fined in a sum not less than \$50 nor more than \$100, or may be cashiered." This section is somewhat vague; but, conceding all that is claimed for it by appellant's counsel, the most that can be said is that in cases falling within the provisions of said section, members of the militia may be court-martialed, but this does not aid appellant in this case, for respondent is not charged with a violation of said section, but is, as we have seen, charged with a violation of the twenty-first and sixty-first Articles of War.

Our attention is called in the petition to the fact that in three instances during statehood prosecutions by court-martial have taken place in this state; but this fact is in no manner controlling, nor does it operate in the least to change our views of the law as above expressed.

Counsel evidently do not understand the decision in *State ex rel. Poole v. Nuchols*, for they criticize the special concurring opinion of the chief justice in the case at bar, and assert that it is contrary to the holding in that case. In this, counsel are grievously in error. We did not hold in the *Nuchols* Case that the court-martial had jurisdiction, but we held merely that no power has been conferred by the Constitution on the supreme court to issue the writ of prohibition in a case like that, and the relators therein should seek relief, if at all, in the proper court. See opinion in 18 N. D. 233, 20 L.R.A.(N.S.) 413, 119 N. W. 632.

The petition is denied.

OHIO SUPREME COURT.

HENRY H. FLANDERMEYER, Plff. in
Err.,
v.
LILLIAN M. COOPER.

(85 Ohio St. 327, 98 N. E. 102.)

Husband and wife — loss of consortium — liability for causing.

1. Husband and wife are entitled to the affection, society, co-operation, and aid of each other in every conjugal relation, and either may maintain an action for damages against anyone who wrongfully and maliciously interferes with the marital relationship, and thereby deprives one of the society, affection, and consortium of the other.

Same — sale of morphine to husband — liability to wife.

2. One who with knowledge that a husband, by the constant and continued use of morphine, has become so weakened in body and mind that he is unable to resist his cravings for the drug, and who after the repeated protests of the wife, continues to sell morphine to the husband until by the use thereof his mind becomes so impaired and destroyed that it is necessary to confine him in an insane asylum, is liable to the wife for damages for her loss of consortium.

Definition — implied malice.

3. Hatred, ill-will, or actual malice towards the injured party is not a necessary ingredient of legal malice as applied to torts; nor is it necessary that the act com-

Headnotes by the COURT.

Note. — Wife's right of action at common law against one selling drugs or liquor to husband.

So far as the illegal sale of liquor is concerned, the above question has already been discussed in the note in 34 L.R.A. (N.S.) 1036. On the remaining aspects of this question, namely injuries from the sale of drugs or from liquor lawfully sold, practically no authorities have been found in addition to *Hoard v. Peck*, 56 Barb. 202, and *Holleman v. Harward*, 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972, which are sufficiently set out in *FLANDERMEYER v. COOPER*.

No further reference to the matter has been found beyond a declaration in *Cruse v. Aden*, 127 Ill. 231, 3 L.R.A. 327, 20 N. E. 73, that the sale of intoxicating liquor was not at common law such a tort as would support an action by a wife for the consequent injury to her support.

Of course, no light is thrown on the present question by cases like *Schlosser v. State*, 55 Ind. 82, holding that a wife may maintain an action upon a liquor dealer's bond conditioned that the obligors therein shall pay all damages which shall be suffered either in person or property or means of 40 L.R.A. (N.S.)

plained of proceed from a spiteful, malignant, or revengeful disposition. If it be wrongful, unlawful, and intentional, and the natural and probable result of the act is to accomplish the injury complained of, "malice" is implied.

(February 6, 1912.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment affirming a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover damages for plaintiff's loss of consortium. Affirmed.

Statement by Donahue, J.:

On the 12th day of October, 1907, Lillian M. Cooper filed her amended petition in the court of common pleas of Cuyahoga county against Henry H. Flandermeyer, averring, in substance, that she was the wife of Charles A. Cooper, living and consorting with him as her husband, as the defendant well knew, until the peace and welfare of her home was destroyed by the unlawful, wilful, negligent, malicious, and wrongful acts of the defendant, in this: That about the month of June, 1905, the defendant was a pharmacist, the proprietor of and conducting a drug store in the city of Cleveland; that, with the full knowledge of the poisonous effects of morphine to create a growing desire and craving for additional quantities thereof, and without complying with the statutes of the state of Ohio, and without due inquiry as to whether

support by reason of any sale of liquor. And no attempt has been made to get the cases on the liability of a druggist for negligence in filling a prescription. In some of the cases dealing with civil damage acts, it is stated that the act created a new right of action which did not exist at common law. And it is that fact that would seem to have created the occasion for such acts. The question of the right of a wife to sue for personal injuries to the husband is reserved for future annotation, to be published in connection with the case of *Brown v. Kistelman*, ante, 236.

As to right of the husband or wife at common law to recover for loss of services or consortium, against a person negligently causing the death of the other, see the notes in 19 L.R.A. (N.S.) 633, and 24 L.R.A. (N.S.) 1024.

As to the right of the husband to recover for loss of consortium through personal injury to the wife, see the note in 33 L.R.A. (N.S.) 1042.

As to right of the husband at common law to recover for loss of time and funeral expenses necessitated by the negligent killing of his wife, see the note in 9 L.R.A. (N.S.) 1193.

L. A. W.

the said Charles A. Cooper was aware of the insidious and dangerous character of said morphine, or whether said Cooper was then in fact practically ignorant of the effect of morphine, well knowing that this plaintiff was his wife, and that she was using every available means to cure and counteract her husband's act of using morphine, did knowingly, wrongfully, and unlawfully sell and administer morphine to the said Charles A. Cooper, although she frequently protested to the defendant against his further selling and administering such morphine, and expressly warned and prohibited said defendant from continuing said sales or administrations of morphine to her husband, well knowing that the constant use of this drug had created an irresistible appetite on the part of Cooper, well knowing that said drug was not being used for medicinal purposes, but through and on account of the craving that had fastened itself upon him by long use thereof, whereby he was becoming, and had become, a morphine fiend, and was thereby wrecking his mind and body; that said defendant, notwithstanding the protests and warning of plaintiff, continued to sell and administer quantities of morphine to Charles A. Cooper, said sales becoming more frequent until they occurred almost every day, and being in bulk quantities less than the minimum original package of $\frac{1}{2}$ ounce, as provided by law, so that said Cooper became a slave to the morphine habit, and that he was thereby deprived of moral sensibility, and was unfitted and incapable to give the affection, society, companionship, and consortium which he had formerly given, and which were due to plaintiff as his wife, and thereby knowingly, wilfully, and wrongfully depriving plaintiff of the affection, society, companionship, and consortium of her husband; and that finally, in consequence of defendant's unlawful and wilful act, the said Charles A. Cooper, on the 16th day of June, 1906, was committed to an asylum and there detained for about one year; and alleged that she had been damaged by reason of the defendant's unlawful and wilful act in the sum of \$2,000, for which she prayed damages. To this amended petition the defendant filed a general demurrer, which was overruled by the court and exceptions noted.

The defendant in his amended answer filed April 13, 1909, admitted that the plaintiff was the wife of Charles A. Cooper, and was his wife in June, 1905, and prior thereto. He admits that he was a pharmacist, duly registered, that he was the proprietor of and conducted a drug store in Cleveland, Ohio, and denied every other allegation, averment, and statement in the

amended petition. For a second defense he averred that Charles A. Cooper presented himself at the defendant's pharmacy and represented that he had theretofore become addicted to the habitual use of morphine; that he was suffering from the toxic effect of the same to such an extent that he was unable to work and support his family, and otherwise perform his marital obligations to his wife and family, and asked to purchase morphine for the relief of his immediate sufferings, and for relief of the necessities of his family; that the defendant always warned him against the dangers attendant upon the use of morphine, and, believing and relying upon his representations as true, and believing that the same was to be used medicinally for the relief of the suffering of Cooper, and to enable him to support his wife and family, and in a desire to befriend him, and for no other cause, reason, or purpose, did sell Cooper some morphine, but never unlawfully. He further avers that he is informed and believes that said morphine so purchased by him was taken by Cooper, used medicinally, and was beneficial to him. It is further averred that the plaintiff knew of said sales and acquiesced in the beneficent acts of this defendant in making them, and accepted the good results flowing therefrom; that said sales were made in the usual course of trade and exercise of due care. He denied all malice, negligence, and all unlawful and wrongful intention on defendant's part, and denied that he ever administered any morphine to Cooper, and prays that the action may be dismissed.

The plaintiff, by way of reply to this answer, denied that Cooper represented he was suffering from toxic effects of morphine to such an extent that he was unable to work or support his family, or otherwise perform his marital obligations to his family; denies that he asked to purchase morphine for the relief of the necessities of his family; denies that the defendant warned him of the dangers attendant upon the use of morphine; denies that the defendant believes that the morphine so sold was to be used medicinally for the relief of the sufferings of Cooper, or was sold with intent to befriend his family, or that said morphine was used medicinally and was beneficial to Cooper; denies that she acquiesced in the act of defendant in the sale of morphine to Cooper, and that said sales were made in the usual course of trade and in the exercise of due care.

Trial was had upon the issues so joined, and the jury returned a verdict for the plaintiff in the sum of \$500. With its general verdict the jury, at the request of the defendant, returned the following answers

to interrogatories: "(1) At the time of the sales of morphine to Charles A. Cooper by the defendant from June, 1905, to June, 1906, was said defendant, Henry H. Flantermeyer, actuated by any feeling of hatred or actual malice toward the plaintiffs in this case, Lillie M. Cooper? No. (2) Was there a real or apparent need for morphine medicinally on the part of Charles A. Cooper, at the various times at which the defendant and his clerks sold him morphine? No. (3) Was Charles A. Cooper addicted to the habitual use of morphine prior to 1905? Yes. (4) Was Charles A. Cooper addicted to the use of morphine habitually prior to any purchases from defendant, and while living with his wife, the plaintiff? Yes. (5) Was Charles A. Cooper cured of the morphine habit at the end of the Dr. Peck treatment, in 1905? Yes. (6) Was the mere sale of morphine to Charles A. Cooper by the defendant, without the additional act of the said Charles A. Cooper after he had become possessed by said morphine, in introducing it into his system, the cause of any injury to the plaintiff, Lillie M. Cooper? No. (7) Did the defendant or any of his clerks sell any morphine to the plaintiff's husband, Charles A. Cooper, after plaintiff had notified them not to do so? If so, when were said sales made? Yes. Between June, 1905, and June, 1906. (8) Was the act of Charles A. Cooper in introducing the morphine sold to him by the defendant into his system the independent act of said Charles A. Cooper alone? Yes. (9) Did the defendant or any of his clerks ever administer any morphine to said Charles A. Cooper? No." A motion for judgment for defendant on the special findings was overruled, as was also a motion for a new trial, and judgment entered upon the verdict. Error was prosecuted to the circuit court of Cuyahoga county, and that court affirmed the judgment of the common pleas court. This proceeding in error is brought in this court to reverse the judgment of both the lower courts.

Mr. Alexander H. Martin, for plaintiff in error:

'No recovery can be had in this state for an indirect injury to a plaintiff except by virtue of the assistance of an enabling statute, altering the common-law rule of *causa proxima, non remota, spectatur*.

Schneider v. Hosier, 21 Ohio St. 113; Kirchner v. Myers, 35 Ohio St. 85, 35 Am. Rep. 698; Davis v. Justice, 31 Ohio St. 359, 27 Am. Rep. 514; Ware v. Brown, 2 Bond, 267, Fed. Cas. No. 17,170; Wells v. Cook, 16 Ohio St. 72, 88 Am. Dec. 436. 40 L.R.A.(N.S.)

Messrs. John A. Nieding and A. Frank Counts, for defendant in error:

A wife may maintain an action for the loss of the society, companionship, and consortium of her husband, against one who wrongfully and maliciously interferes with the marital relationship and deprives her of such society, companionship, and consortium.

Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Clow v. Chapman, 125 Mo. 101, 26 L.R.A. 412, 46 Am. St. Rep. 468, 28 S. W. 328; Bennett v. Bennett, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; Hoard v. Peck, 56 Barb. 202; Holleman v. Harward, 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972.

Defendant's act in the sales of morphine to Cooper was a direct interference with the marriage relationship.

Hoard v. Peck, 56 Barb. 202; Holleman v. Harward, 119 N. C. 150, 34 L.R.A. 806, 56 Am. St. Rep. 672, 25 S. E. 972.

The acts of defendant were malicious.

Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Brown v. Brown, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320.

Donahue, J., delivered the opinion of the court:

The primary and most important question presented by this record is whether a wife has a common-law right of action against one who wrongfully and maliciously interferes with the marital relationship, and deprives her of the society, companionship, and consortium of her husband. In the absence of a statute authorizing such recovery, her right to maintain this action rests wholly on the common law, and if the common law does not afford her a right of action, then she cannot maintain this suit, and the demurrer to the petition should have been sustained.

It is very clear that originally the common law recognized no such right in the wife. By the primitive law, the only member of the family deemed to be harmed by an unjustifiable disturbance of the family relation was the head of the family. Blackstone, in his Commentaries (vol. 3, pp. 142, 143), says that these torts directed against the peace and tranquillity of domestic relations are actionable only when committed against the husband. In the case of Lynch v. Knight, 9 H. L. Cas. 577, 8 Eng. Rul. Cas. 382, Lord Wensleydale held that no recovery could be had without joining the husband in the suit, who himself must receive the money, which would not advance the wife's remedy, and to allow her to recover in such an action would involve

the absurdity that the husband might also sue for such a cause.

It must be remembered, however, that this interpretation of the common law with reference to the wife's right to maintain an action of this character obtained upon the theory that the wife's personality merged in that of her husband's, and that she was not then entitled to hold property separate and apart from her husband, and not authorized to bring suit in her own name. Now the legal status of the wife has been changed by legislation. Her legal personality is no longer merged in that of her husband. By force of the several statutes in this state in reference thereto, a husband has no longer any dominion over the separate property of his wife, and she may maintain an action in her own name, without joining her husband in the suit. The right of action growing out of an injury to her personal rights is her separate property, for which she may maintain an action in her own name. The right of the wife to the consortium of the husband is one of her personal rights. It therefore follows that the principle of the common law which allowed a right of action to the husband for the invasion of this right, now, under the changed condition of affairs, and in view of the present legal status of the wife, applies to her equally with the husband.

It is said by Burdick, in his *Law of Torts*, at page 276, that "with this change in her legal status came naturally a change in the judicial conception of her marital wrongs. As she could maintain an action in her own name, and damages recovered would be her sole and separate property, one of the chief objections urged by Lord Wensleydale disappeared. As the law now recognized her legal equality with her husband, Blackstone's reasoning, based upon the superiority of one party, and the inferiority of the other party, to the marital relation, had no longer the foundation of even a fiction."

A statutory right cannot change except by action of the lawmaking power of a state. But it is the boast of the common law that "its flexibility permits its ready adaptability to the changing nature of human affairs." So that whenever, either by the growth or development of society, or by the statutory change of the legal status of any individual, he is brought within the principles of the common law, then it will afford to him the same relief that it has theretofore afforded to others coming within the reason of its rules. If the wrongs of the wife are the same in principle as the wrongs of the husband, there is now no reason why the common law should

withhold from her the remedies it affords to the husband.

Hale on *Torts*, on page 278, says: "In natural justice, no reason exists why the the right of the wife to maintain an action against the seducer of her husband should not be coextensive with his right of action against her seducer. The weight of authorities and the tendency of the legislation strongly incline to the latter opinion."

1 Cooley on *Torts*, 3d ed. p. 477, says: "Upon principle this right in the wife is equally valuable to her as property, as is that of the husband to him. Her right being the same as his in kind, degree, and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him. . . . The gist of the action is the loss of consortium, which includes the husband's society, affection, and aid. The wife may have the action though she continues to live with her husband, and it is held that she may maintain it after a divorce from him."

This question, however, is fully settled in this state in the case of *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397. The first paragraph of the syllabus is as follows: "A wife may maintain an action for the loss of the society and companionship of her husband, against one who wrongfully induces and procures her husband to abandon or send her away." In the opinion, on page 627 of 34 Ohio St. Gilmore, Ch. J., says: "If, in this state, the common-law dominion of the husband over the property and personal rights of the wife has been taken away from him and conferred upon her, and remedies in accordance with the spirit of the civil law have been expressly given to the wife for the redress of injuries to her person, property, and personal rights, all of which I hope to show has been done, then it must follow that she may maintain an action in her own name for the loss of the consortium of her husband against one who wrongfully deprives her of it, unless the consortium of her husband is not one of her personal rights. . . . Under our legislation, the benefit which the wife has in the consortium of the husband is equal to that which the husband has in the consortium of the wife. If, at common law, the husband could maintain an action for the loss of the consortium of the wife, I can see no reason why, under our law, the wife cannot maintain an action for the loss of the consortium of the husband. . . . Each acquires a personal as well as legal right to the conjugal society of the other, for the loss of which either may sue separately."

There can be no reasonable contention but that the wife suffers the same injury

from the loss of consortium as the husband suffers from that cause. His right is not greater than hers. Each is entitled to the society and affection of the other. The rights of both spring from the marriage contract, and in the very nature of things must be mutual, and while this was always true of the marriage relation, yet there was a time in the history of our jurisprudence when the legal status of the wife was such that she could not, at common law, maintain an action of this character. Now her legal status is the same as that of her husband. She has the same right to the control of her separate property, the same right to sue in her own name, and, in a word, is in the full enjoyment of every right that her husband enjoys, so that she comes clearly within the principles of the common law that allow a right of action by the husband for damages for the loss of the consortium of his wife. Either we must hold that the common law is fixed, unchangeable, and immutable, that it possesses no such flexibility as will permit its ready adaptability to changing conditions of human affairs, or that, when every reason and every theory for denying the wife the same rights as the husband have entirely disappeared from our jurisprudence, that she is now equally entitled with her husband to every remedy that the common law affords, and we have no hesitation in adopting the latter view.

It is insisted, however, that neither husband nor wife would have a right of action under the facts and circumstances of this case, and our attention is called to the fact that an enabling statute was necessary in order to permit a wife to recover damages to means of support by reason of intoxication caused by sales of liquor to the husband. This, however, is not a similar case. This is not an action for damages for loss of support, or loss of the earning capacity of the husband, but is wholly an action for damages for loss of consortium. Consortium is defined to be the conjugal fellowship of husband and wife, and the right of each to the company, co-operation, and aid of the other in every conjugal relation. *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307. This right is invaded whenever a third person, through machination, enticement, seduction, or other wrongful, intentional, and malicious interference with the marriage relation, deprives the husband or wife of the consortium of the other. The remedy for an invasion of these rights is not in the nature of the action for damages to means of support, provided by the statutes relating to the sale of intoxicating liquors. It is said by Tiffany on Persons and Domestic Relations, 40 L.R.A. (N.S.)

2d ed. page 80: "Whatever may have been the principle, originally, upon which this class of actions was maintained, it is certain that the weight of modern authority bases the action on the loss of the consortium. . . . The suit is not regarded in the nature of an action by a master for the loss of the services of his servant, and it is not necessary that there should be any pecuniary loss whatever." No enabling statute was necessary to authorize a husband to maintain an action for the loss of consortium, and if we are right in our conclusion that the wife is now equally entitled to maintain this action, this contention of the plaintiff in error is completely answered.

The further claim is made by counsel for plaintiff in error that, to sustain an action for injury to one's consortium, the alleged injury must be the result of a force exerted directly upon the marriage relation for the purpose of injuring the plaintiff's consortium, and the act of the consort responding to that force must not be voluntary, citing *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791. In that case this court declared that, "where damages are asked for the alienation of affection, each case must stand on its own facts." If the proposition that "the act of the consort responding to that force must not be voluntary" were to be adopted as an arbitrary rule of law in this state controlling each and every case, then few or no such actions as this could be maintained. In the case of *Bigaouette v. Paulet*, supra, the court held that "a husband may maintain an action for the loss of the consortium with his wife against a person who has criminal conversation with her, whether such conversation is with or without her consent, and although the act caused no actual loss of her service to him."

The case of *Hart v. Knapp*, 76 Conn. 135, 100 Am. St. Rep. 989, 55 Atl. 1021, was a suit by the wife against another woman for the alienating of her husband's affection by acts of illicit intercourse. In that case the claim was made by the defendant that the wrong was not her wrong, but that of the husband; that her misconduct was induced by the persuasion of plaintiff's husband; but the court disposes of this contention in this language: "In what she did with the husband, she did with full knowledge that it was wrongful and that it would, as the plaintiff claims it did, result in harm to the plaintiff. The gist of the defense set up in the requests is that the defendant did a great wrong by the persuasion of the husband. We know of no rule of law, civil or criminal, that absolves her from liabil-

ity for such wrong because of such persuasion."

It is claimed that the selling of this drug to Cooper was not the proximate cause of the damages to plaintiff, but that the independent act of Cooper in injecting this morphine into his system was the proximate cause producing the injury complained of. The jury, in its answer to the interrogatories, found that neither the defendant nor any of his clerks administered any morphine to Cooper, and that the morphine sold by defendant to Cooper was introduced into Cooper's system by the independent act of Charles A. Cooper alone. These are, undoubtedly, the physical facts; but they are not all the facts upon which the defendant's liability to the wife depends.

The record discloses that, notwithstanding Cooper had been a victim of the morphine habit for many years, in the year 1905 he was completely cured of this habit, and the jury so finds in its answer to the interrogatories propounded. The wife, however, realizing that because of his former experiences with this drug he would be weaker than the ordinary man who had never been enslaved by its use, called personally at defendant's place of business, explained to him the fact, requested him not to sell any morphine to her husband, and, according to her testimony, defendant told her that she could not prevent him making such sales if her husband desired to purchase the same. The jury found in its answer to the interrogatories that the defendant continued to sell morphine to Charles A. Cooper after the plaintiff had notified him not to do so. It is true that the sale of morphine is lawful in this state, but it does not necessarily follow that every sale of morphine may be a legal one. The general assembly of this state has by statute provided certain restrictions, and imposed upon the seller certain duties, in reference to this and kindred poisons, and while the right of the wife to maintain this action does not rest upon these statutes, yet if, by reason thereof, the sale to her husband was unlawful and resulted in depriving her of the consortium of her husband, the case would present every element necessary to a recovery; but plaintiff's rights under the facts and circumstances of this case rest upon a broader foundation than the violation of these statutes, for if, in the making of these sales, these statutes had been observed to the very letter, the sale might nevertheless be wrongful, and the defendant responsible to the plaintiff for the injuries complained of in her petition.

If it be conceded that after Cooper became cured of the habit of using morphine, 40 L.R.A. (N.S.)

he possessed sufficient intelligence and discretion to control his own actions and safeguard his own welfare, and that under these conditions the defendant had a legal right to disregard the appeal of the wife and to sell morphine to the husband, upon the theory that the independent act of the husband of injecting it into his veins was the proximate cause of the injury complained of, yet the evidence is very clear that there came a time in the history of these sales when Cooper was no longer a free agent capable of controlling his own conduct, and capable of exercising an independent judgment in reference to the use of this drug, but, on the contrary, his intellect had become so weakened and infirm that his power of resisting his craving therefor was entirely destroyed, and he became merely the instrument or the conduit through which this treacherous poison was transferred from the druggist's hands into his own system. We are not concerned with the moral wrong of one who turns a deaf ear to the appeals of a wife trying to save her husband from destruction, and for greed of gain sells to that husband a drug that is sure to spell his mental and physical ruin; rather are we concerned with the legal aspect of the claim that it is the right of an individual to control his personal affairs regardless of consequences to others. The underlying purpose of our whole social compact is to prevent that very thing, and the principle is as old as the law itself that every person must control his own conduct and his own property so as to do as little injury as possible to his fellow. From the facts found by the jury, the defendant must have known the growing imbecility of Cooper and the gradual impairment of his power of resistance to the use of this drug. He must have known that Cooper had reached that stage in his course of mental and physical destruction that, just so sure as he sold him the poison, Cooper would inject it into his veins. In view of this condition of affairs, any warning to Cooper of the dangerous qualities of the drug would be but an absurd attempt to evade responsibility for his own wrongful act. As well might he intentionally detach a heavy weight from its support on high, that in falling would necessarily strike and injure another, and then say it was not my act in detaching this weight, but it was the force of gravity that caused it to fall to earth, and its falling was the proximate cause of the injury. Individuals must be held to have contemplated the natural and probable result of their own acts purposely and intentionally committed, and it would be just as reasonable to say that due regard for the rights of others would not require the

individual in the ordering of his own affairs, to take into account the force of gravity, as to say that one who sells morphine to a person known by the seller to be a helpless victim of this drug is not required to contemplate the natural and probable result of the use, the unfortunate purchaser is sure to make of it.

In the case of *Wells v. Cook*, 16 Ohio St. 74, 88 Am. Dec. 436, this court declared that "the influences of human conduct, good or bad, are far-reaching, and are often seen and felt in consequences exceedingly remote, but uncertain and complicated. It is simply impossible that municipal law should take cognizance of all these consequences." But in this case the consequences are not exceedingly remote. They are the natural and necessary consequences that follow from the defendant's total disregard not only of his moral but his legal duty to his fellow man.

In the case of *Holleman v. Harward*, 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972, it was held that "the sale of laudanum as a beverage to a married woman, knowing that it is destroying her mind and body and causing loss to her husband, when continued after his repeated warnings and protest, renders the seller liable to him for the damages which he sustains on account of the loss of her services." In that case it was argued on behalf of the defendant that there was no legal obligation resting upon him not to sell the drug, nor upon the wife not to use it; that the husband could not prevent his wife from buying and using it; that the duty of the wife to give to her husband her love and companionship was a moral duty, but that this moral duty could not be enforced by any power of the law. The court answered this contention in the following language: "Notwithstanding the claim of the defendants, we think this action rests upon a principle, a principle not new, but one sound and consistent. The principle is this: 'Whoever does an injury to another is liable in damages to the extent of that injury. It matters not whether the injury is to the property or the person or the rights, or the reputation of another.' . . . The defendants owed the plaintiff the legal duty not to sell to his wife opium in the form of large quantities of laudanum as a beverage, knowing that she was, by using them, destroying her mind and body, and thereby causing loss to the husband."

In the case of *Hoard v. Peck*, 56 Barb. 202, it was held that the husband could maintain a right of action for damages against a druggist for selling laudanum to his wife to be used by her as a beverage, in consequence of which use by the wife

she became sick and emaciated, and her mind was affected so that she was unable to perform her duties as a wife, and her affection became alienated from the husband, and he lost her society and was compelled to expend money in medical and other attendance upon her. In that case the claim was made by the defendant that the selling of laudanum is a legal business, and that the husband could have no right of action for damages for such sale; but the court held that, although there was no statute in the state of New York prohibiting the selling of laudanum, either as a beverage or for any other purpose, it did not necessarily follow that every sale of it in all cases is legal, but, on the contrary, that its lawfulness or unlawfulness depends on the circumstances of the sale, and the use and purposes to which it is applied. It was further held in that case that it was no defense to the action "that it was her hand that held the potion to her lips; [that] the druggist, by the act of handing it to her for that purpose, is as much responsible for the consequences as though he assisted her directly in pouring it down her throat. . . . If one furnishes the means, with the knowledge that it is to be unlawfully used, assenting to such use, he is answerable for the consequences, if the design is carried out."

The jury, in its answer to interrogatories propounded by the defendant, found that the defendant was not actuated by any feeling of hatred or actual malice towards the plaintiff. That might be true in every action for damages for loss of consortium, and is probably true in every case where loss of consortium is accomplished by seduction or alienation of affection, but hatred and ill-will of the injured person is not necessarily an ingredient of legal malice. If the conduct of the defendant was intentional and wrongful and without any just cause or excuse, malice would be implied. "The term malice, as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another. *Weckerly v. Geyer*, 11 Serg. & R. 39, 40." This definition fully comprises all the elements of malice as applied to torts, and was adopted by this court in the case of *Westlake v. Westlake*, supra.

The jury, upon the issues joined by the pleadings, returned a general verdict in favor of the plaintiff. There is nothing in the special findings of the jury that conflicts with this general verdict. Therefore the motion of the defendant for judgment

upon the special findings was properly overruled.

The judgment of the Circuit Court is affirmed.

Spear, Price, and Johnson, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

SNARE & TRIEST COMPANY, Plff. in Err.,
v.
FANNY FRIEDMAN.

(84 C. C. A. 369, 169 Fed. 1.)

Trial — amendment.

1. The Federal court may, after the conclusion of the evidence, permit the amendment of a declaration in an action to recover damages for negligent injuries, so as to charge negligent maintenance of a dangerous condition as shown by the evidence, rather than dangerous creation of it.

Appeal — striking plea — error.

2. It is not reversible error to strike out a plea of the statute of limitations sought to be made available before trial, where all facts bearing upon the availability of the pleading are stated in the declaration, and the determination of the court upon the question is reviewable at whatever stage of the trial it is made.

Limitation of actions — infancy — institution of proceedings — effect.

3. The institution by an infant of an action for personal injuries does not set in motion the statute of limitations so that, in case it is discontinued, another action cannot be begun after the expiration of the statutory period, where the statute provides that if any person entitled to an action is at the time it accrues within the age of twenty-one years, such person shall be at liberty to institute the same within the time limited after his coming of full age.

Negligence — material in street — duty to children.

4. One piling building material in the street owes a duty to children of such tender years as to be incapable of contributory negligence or trespass, who to his knowledge are accustomed to play in the vicinity, to use ordinary care to prevent the piles from being in such unstable condition as would be likely to cause injury to

Note. — See note post, 380, on questions of state law as to which the Federal courts are bound to follow the decisions of the state court.

As to doctrine of attractive nuisance, see note in 19 L.R.A.(N.S.) 1094. And, generally as to duty of property owner to trespassing children, see note in 32 L.R.A.(N.S.) 559.
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such of the children as might come in contact with them.

Courts — Federal — state decisions — effect.

5. The Federal courts, in exercising their jurisdiction founded on diverse citizenship, in cases involving the administration of the common law, do not hold themselves bound by the decisions of the courts of the state in which they are sitting, unless such decisions have so clearly established a settled rule in the premises as to make it a part of the peculiarly local law of the state, but will resort to the same sources of information as to what such law is as are open to the state courts.

Res judicata — discontinuance of former suit.

6. The right to bring an action in a Federal court is not barred by the fact that plaintiff recovered a judgment upon the same cause of action in the state court, and subsequently discontinued his action upon the court's granting a new trial.

Courts — state decision — Federal court.

7. A single decision of the highest court of a state which follows no line of precedents in that jurisdiction, that one piling building material in a street owes no duty to pile them so as to avoid injury to children of tender years accustomed to play in the vicinity, is not binding on a Federal court sitting in the same state, in which an action involving such question, and growing out of the same accident as that involved in the case in which such decision was made, is brought on the ground of diverse citizenship, after discontinuance in the state court because of such ruling.

(February 15, 1909.)

ERROR to the Circuit Court of the United States for the District of New Jersey to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Argued before Gray and Buffington, circuit judges, and Archbald, District Judge.

Mr. H. M. Hitchings for plaintiff in error.

Mr. Gilbert Collins for defendant in error.

Gray, Circuit Judge, delivered the opinion of the court:

The case brought before us by this writ of error is as follows:

Suit was brought in the court below by the defendant in error (hereinafter called the plaintiff), against the plaintiff in error (hereinafter called the defendant), to recover for personal injuries received through the alleged negligence of the said defendant. At the time of the occurrences in

question, certain persons, trading under the firm name of Colgate & Company, were the owners of lands, and the buildings thereon erected, in the city of Jersey City, in the state of New Jersey, bordering on a public street or highway of said city. The lands and buildings were located on the south side of the street, and were used and occupied by the firm for manufacturing purposes. At the time of the acts complained of, the firm was engaged in constructing an addition to its buildings, and for that purpose had contracts with the defendant, by which the defendant, among other things, was to furnish and set in place the iron and steel work for the foundation of certain tanks, including cast-iron columns and girders. The defendant, in the course of its performance of this contract, and in the furnishing, delivery, and setting in place of the cast-iron columns and girders, caused to be piled and placed certain iron girders, or I-beams, upon the sidewalk in front of the premises of the said Colgate & Company, for use, from time to time, in the prosecution of its said work. These beams were 22 feet long, 15 inches high, with flanges 4 inches wide, and weighed about 1,000 pounds each. They were, before and at the time of the accident, stored in two piles, one next to the building line and the other next to the curb line of the street, and parallel therewith, leaving a passageway on the sidewalk between the two piles. It was shown in the evidence that they could be piled so as to be measurably secure, by placing a row of three beams upon their sides, and superimposing two others so as to lock with those under them, with their flanges, and one on top locking with the two underneath; or, by placing four or five in the bottom row, and building up in the same manner. The sidewalk in front of these premises was asphalted. There was no curbing, but the asphalt pavement sloped into the street, forming a concave gutter, so that teams could drive from the street across the sidewalk into the premises in question.

There was some testimony in the court below, touching an alleged transfer of the original contract by the defendant to another construction company, and some controversy consequent thereupon, as to whether this company was responsible for the piling of these beams upon the sidewalk. The court below, however, correctly construed the written agreement in question as not in terms transferring the contract, and properly left to the jury the question whether such other company was in charge of the work, or was merely in what it did the agent of the defendant. As to this, the jury has found in favor of the plaintiff, 40 L.R.A. (N.S.)

and the point may therefore be dismissed from further consideration. For the purposes of the case before us, therefore, the defendant is to be considered as an independent contractor, subject to whatever responsibilities attach to it, as such, in the prosecution of its work.

There was evidence tending to show that, at the time of the accident in question, an I-beam on the pile next to the street had become dislocated from its parallel position with the other beams, and was in a position diagonally along the side of the pile, edgewise or nearly edgewise, instead of flat, with the upper end on a piece of plank or joist, and the lower end near the bottom of the pile. It was, at all events, in a state of unstable equilibrium. Several little girls were playing about the pile, some skating on the asphalt pavement and two or more were on the pile, when the plaintiff, Fannie Friedman, four and one half years old, ran across the street to where the other girls, including her two older sisters, were playing. The testimony tends to show that she sat down on the lower end of the beam just described, and that another girl just then jumped across the upper end of the beam onto the plank on which that end was resting, causing the beam to fall over, crushing the foot of the plaintiff beneath it.

The testimony was somewhat confusing as to the exact position of the I-beam, and as to just how the accident occurred, but there can be no doubt that the beam was in a position dangerous to all who came near it, and especially to those who came in contact with it. There was evidence tending to show that this beam was in this situation, or something like it, for two or more days prior to the accident; that it was noticed by, or should have been noticed by, defendant's servants, and that it had remained in this dangerous position long enough to affect defendant with notice. There was no testimony that directly accounted for this dislocation of the beam in question. There was testimony tending to show that these piles had been in place for several weeks, and that a short time before the accident, the number of beams on the pile was less than formerly. How this particular beam came into its dangerous position was a matter, therefore, of conjecture. Whether it had been dislocated from its original position by taking other beams from the pile, for use in the structure under erection, or had been partly moved for the purpose of such use, and then temporarily abandoned, it is not necessary here to determine, even if it were capable of being determined. The evidence as to its dangerous situation, and its exist-

ence in that situation for two or more days before the accident, was properly submitted to the jury, and there can be no objection to the charge of the court in that regard.

The charge of negligence principally insisted upon at the trial was, not for the original careless piling of the beams, as was charged in the declaration, but for the maintaining of the pile in the dangerous condition testified to after notice of such condition, or after a long enough time had elapsed for notice to be presumed. After the conclusion of the evidence, the learned judge of the court below permitted an amendment to the plaintiff's declaration, charging the defendant with negligence in the latter respect. The defendant excepted to this action of the court and assigned the same as error. We may dispose of it in passing, however, by saying that the action of the court appears to us to have been the exercise of a sound discretion, and not to have transcended the liberal rules in regard to amendments to pleadings which obtain in the practical administration of justice. There was also testimony admitted over the objection of the defendant, tending to show that the asphalt pavement on the north side of the street, near the Colgate factory and these piles, was much resorted to by children of the neighborhood for roller skating and other plays, and that these piles were attractive to such children, as evidenced by the fact that they constantly played thereon, to the knowledge of the defendant. Under the laws of New Jersey, Colgate & Company, were the owners of the fee of the street to its center, subject to the public easement for purposes of travel, and it is not disputed that either by state law or municipal ordinance, they, or their subcontractor by their permission, had the right to a reasonable use of the sidewalk, temporarily, for the storing of material to be used in building, or repair of buildings, on their adjoining property.

The learned judge of the court below instructed the jury, in effect, that not only was the defendant bound to exercise ordinary care in originally piling these girders upon the street, but also in maintaining the piles so that they might not endanger the safety of those lawfully using the sidewalk, and that, if from the weight of the evidence the jury found that the girders so piled on the sidewalk were, at the time of the accident, calculated to tempt and attract little children accustomed to play on the street, to use them for play or rest, and that this was known to the defendant, then, if one of the beams, though originally secure in the pile, became dislo-

cated, and was allowed to remain in the dangerous position described in the testimony for a time long enough to presume notice to the defendant, it became responsible for the damage caused to the plaintiff, who was without fault. A verdict was found for the plaintiff, and upon the judgment entered thereon, this writ of error was sued out.

The assignments of error are very numerous, but they are for the most part covered by the few principal contentions urged at the bar, upon the determination of which the case must turn. The first contention to be noticed is that the court erred in striking out before the trial, and against the objection of the defendant, the plea of the statute of limitations, and in holding that it was not available to the plaintiff in error. Brief notice only is required of defendant's point that it had an absolute right to interpose said plea, and have it disposed of when it was sought to be availed of during the trial, and that the action of the court in striking it out before trial was contrary to the rules of practice and procedure in New Jersey. We think, however, that the granting of the motion to strike out was a matter within the discretion of the court below. All the facts bearing upon the availability of the pleading were stated in the plaintiff's declaration. Even if the granting of the motion to strike out was at variance with practice and procedure in such cases, no possible harm could come to the defendant by reason of such premature striking out, as by the law of the state the action of the court in the premises was reviewable at whatever state of the trial it was had.

This brings us to the substantial question raised by this assignment of error, whether the action brought by the plaintiff was, under the facts set forth in the pleadings, barred by the statute of limitations of the state of New Jersey. The relevant portions of that statute are as follows: "All actions hereafter accruing for injuries to persons caused by the wrongful act, neglect, or default of any person or persons, firm or firms, individual or individuals, corporation or corporations within this state, shall be commenced and instituted within two years next after the cause of such action shall have accrued, and not after." 2 Gen. Stat. (N. J.) 1895, p. 1975 § 3, as amended by Laws 1896, p. 119.

Section 4 (same statute and page) reads: "That if any person or persons who is, are, or shall be entitled, to any of the actions specified in the three preceding sections of this act, is, are, or shall be at the time of any such cause of action

accruing within the age of twenty-one years, or insane, that then such person or persons shall be at liberty to bring the said action so as he, she, or they institute or take the same within such time as is before limited, after his, her, or their coming to or being of full age or of sane memory, as by other person or persons having no such impediment might be done."

It appears from the pleadings that the plaintiff, Fannie Friedman, then being between the ages of four and five years, brought an action in the state court of New Jersey, in 1903, shortly after the accident, which, after a verdict in her favor and pending a motion for a new trial, was, for reasons that will hereafter appear, discontinued, and that the present action was begun in January, 1906, two years and six months after the former action, and when the plaintiff was something over six years of age. The contention of defendant's counsel is: "That an infant may remain quiescent after the cause of action accrues, until majority, and may then bring and maintain the action within two years thereafter, or he may bring his action as an infant, issue a summons in the infant's name, and apply thereafter for the appointment of a next friend to prosecute the action so brought, but, in this case, immediately upon the commencement of his action, he sets the statute running and assumes the same legal position as one of full age."

We cannot agree with this construction of these sections of the New Jersey statute. The learned judge of the court below was of opinion that "a proper construction of these sections of the New Jersey statute allows the infant all the time intervening between the accrual of the cause of action and its majority, plus a period thereafter equal to the prescribed limitations of the statute."

In the case of *Smith v. Felter*, 61 N. J. L. 104, 38 Atl. 746, Mr. Justice Gummere, of the supreme court of New Jersey, in discussing § 4 of the statute, as above quoted, says: "It seems to me clear that the effect of this provision is to stay the running of the statute while the disabilities mentioned therein continue to exist, and that a party suffering from any of such disabilities may maintain an action at any time during their continuance, or within the six years afterward."

This is practically the opinion of the learned judge of the court below. There can be no doubt that one who was under no disability could bring such an action as we have here, at any time within the limitation of two years prescribed by the statute, discontinue it, and bring another ac-

tion, provided it also be within the period of limitation. We can see no reason why an infant under twenty-one years of age, against whom the statute is not running at all, should not be able to do the same thing, that is, bring an action, discontinue the same, and bring another or successive actions during his minority. We can find nothing in the express words of the statute, or in any reasonable interpretation thereof, that justifies the contention of the defendant as above stated, and no case in the state of New Jersey or elsewhere has been called to our attention which supports the same.

This brings us to the important question in the case, *viz.*, whether defendant owed any duty to the plaintiff for neglect for which it should be held responsible to her in this action. In its consideration, we assume (1) that the defendant, as an independent contractor with the owner of the premises, might lawfully use such portions of the sidewalk of the public street as it actually did use, for the temporary storage of the I-beams in question, or other material to be used in the structures it had contracted to erect; (2) that defendant, being responsible for placing the I-beams on the street and maintaining them there, owed a duty to the public, including the plaintiff, to place and maintain them with reasonable care, so that those lawfully on the street, and without fault on their part, might not be injured thereby.

Conceding all this for the sake of argument, defendant denies liability, by reason of the premises, contending that plaintiff was at fault (1) in that she was an active trespasser upon the girders at the time she received her injury, the trespass contributing thereto; (2) in that she was playing upon the girders at the time of the injury, and not using the sidewalk for purposes of travel, and that such playing contributed to the injury complained of; (3) in that the use which she was making of the girders at the time the injury occurred was unlawful, and therefore defendant owed no duty to her.

The foregoing, of course, are different forms of the same contention. It may be admitted that if one *sui juris* had, in using this sidewalk, without reasonable excuse, stepped upon the pile of beams while in this condition, and had been injured by the falling of the displaced beam in the manner described, defendant would not have been liable therefor, on the ground of such person's contributory negligence, or possibly on the ground that defendant owed no duty to one who might be considered a trespasser, to see that the pile of beams was properly constructed. The defendant, however, ig-

nore the distinction which we think is inherent in this case, between those who are and those who are not *sui juris*, or rather between those who have and those who have not arrived at years of discretion. In the case before us, it is not necessary to consider at what age an infant may be of such discretion as to be responsible in a case like the present for contributory negligence, or for conduct which, in case of sufficient discretion, would make him or her a trespasser. Fannie Friedman, the plaintiff, at the time of the accident, was only four and one half years old, and there can be no question that, in the eyes of the law, by reason of her age, she lacked that discretion which would make her responsible for her conduct. She was legally incapable of contributory negligence, or of being a trespasser. The question then arises, whether defendant owed to such a child, under the circumstances disclosed by this record, any duty other than that owed to those who were *sui juris*, or who at least had arrived at years where discretion may be presumed. We think there was a peculiar duty of this kind incumbent upon the defendant in relation to this plaintiff, under the circumstances of this case. Why should not one who has a dangerous structure or appliance, whether on his own land or lawfully on a public highway, use ordinary care to protect not only those who are able to protect themselves by the use of their faculties, and who are bound to make such use of them as the ordinary experience of mankind justifies us to expect, but also those of such tender years as may, without fault on their part, come within the danger to which the owner of such appliance or structure has exposed them? We think, in reason and in consonance with the legal principles by which the duty of individuals to protect others from the dangers that may result from the use of their own property is determined, and by which they are held responsible for their negligent acts in that regard, this defendant owed a duty to the children of tender years who, to its knowledge, were accustomed to play on the public street in the vicinity of these piles of beams, and also to play and sit thereon, to use due care under the circumstances to prevent the piles from being in such an unstable condition as would be likely to cause injury to such of these children as might come in contact therewith. *Peirce v. Lyden*, 85 C. C. A. 312, 157 Fed. 552.

In charging the jury upon this branch of the case, the learned judge of the court below said: "I shall adopt the language of the late Judge Dixon, who charged the jury in a suit between those same parties

when it was on trial in the supreme court of this state [New Jersey]. Speaking of the public, he said: 'The public consists of two classes for the present purpose of this suit: People grown up, adults, people come to years of discretion, and the little children, who have not yet come to years of discretion, who have not yet the ability to take care of themselves as older people do; and the law regards their rights and privileges in the streets as well as those of older persons, and when you are dealing with the safety of things left in the streets, you have to regard children as well as older people. The propensity of little children to play upon the street, and to rest from their play in the public streets, is one with which we are all more or less familiar, and that is also to be taken into consideration (and I may say by way of parenthesis that upon this trial there is evidence tending to show that little children were accustomed to play in the street in the vicinity of where the girders were placed both before and after they were placed), and if things are left in the street in such condition that they will tempt children to make use of them, either for play or for rest, and will be dangerous to little children if they do so make use of them, those things are not in proper condition.'"

This statement of the legal duty resting upon those in the situation of the defendant, we think is as sound as it is humane, and it is supported by decisions of the Supreme Court of the United States, as well as by numerous decisions of the state courts. These decisions are controlling in the present case. The leading case of *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, was a case in which the plaintiff, a child of tender years, was injured while playing with other children on a railroad turntable. This turntable was ordinarily held secure from movement by a heavy cast-iron latch. This latch had been for some time broken, so that the table could be easily turned on its pivot by the children who played on and near it. The turntable was on the uninclosed land of the railroad company. There was evidence tending to show that small children were in the habit of playing around and upon this turntable, to the knowledge of defendant's servants. Dillon, Circuit Judge, in the court below, had, in charging the jury on the question whether there was negligence on the part of the railroad company in allowing the turntable to remain in the condition in which it was said "that to maintain the action it must appear by the evidence that the turntable in the condition, situation, and place where it then was, was a dangerous machine, one which, if un-

guarded or unlocked, would be likely to cause injury to children; that if, in its construction and the manner in which it was left, it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was on the defendants' property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

The Supreme Court approved of this statement of the law, and decided that the case had been properly submitted to the jury. The principle of this case has been adhered to by the Supreme Court in subsequent cases, as also by many cases in the highest courts of the states, and though there is some conflict in the decisions of the state courts, the decided weight of their authority is on the side of what has come to be called the "Doctrine of the Turntable Cases."

In *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619, the railway company operated a coal mine, and was in the habit of depositing the slack on an open lot belonging to it, between the mine and the station, in such quantities that the slack was in a permanent state of combustion, a fact known to the servants of the company. The lot was open and unguarded. A lad of twelve years of age, in running across this lot, fell onto the slack and was badly burned. It was held that the lad was not a trespasser, under the circumstances, and had not been guilty of contributory negligence, and he was allowed to recover. Mr. Justice Harlan, in delivering the elaborate opinion of the court in this case, approves of the judgment in *Sioux City & P. R. Co. v. Stout*, and quotes with approval the following from Judge Dillon's charge to the jury in that case: "The machine in question is part of the defendant's road and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that if they resorted there they would be likely to get injured thereby, then you cannot find a verdict against them. But if the defendants did know, or had good reason to believe, under the circumstances of the case, that the children of the place would resort to the turntable to play, and that if they did they would or might be injured,

then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence."

Mr. Justice Harlan then proceeds, as follows: "That charge was held by this court to be an impartial and intelligent one. And after observing that the jury were at liberty to find for the plaintiff if, from the evidence, it could justly be inferred that the railroad company, in the construction, location, management, or condition of the turntable, had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, Mr. Justice Hunt, delivering the unanimous judgment of this court, said: 'That the turntable was a dangerous machine which would be likely to cause injury to children who resorted to it might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injure him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents.'"

That this is recognized as the common law by the English courts is shown by Mr. Justice Harlan's discussion of the cases of *Lynch v. Nurdin*, 1 Q. B. 29, 36, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797; *Mangan v. Atterton*, L. R. 1 Exch. 239, 35 L. J. Exch. N. S. 161, 14 L. T. N. S. 411, 14 Week. Rep. 771, 4 Hurlst. & C. 388; and *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 19 Eng. Rul. Cas. 28. See *Pollock, Torts*, **382. 383. The doctrine of those cases, which relate to structures dangerous, as well as attractive, to children, maintained on defendant's own land, is *a fortiori* applicable to cases like the present, where the defendant has maintained the dangerous thing, structure, or condition upon a public street or highway.

The defendant, however, earnestly contends that the decision of the court of errors and appeals of New Jersey, in *Friedman v. Snare & T. Co.* 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 Ann. Cas. 497, is binding upon the court below and this court, and settles the law for this case. This contention involves the important question of how far decisions of a state court are conclusive upon the circuit courts of the United States in the exercise of their concurrent jurisdiction

with state courts. This question has received the consideration from the Supreme Court which its importance demanded. It is unnecessary to cite all the decisions in which that court has enunciated the principles by which determination of this question must be guided. These decisions have been founded upon the broad meaning and intent of article 3 of the Constitution, and of the legislation of Congress in pursuance thereof, conferring upon the circuit courts of the United States "original cognizance concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, . . . in which there shall be a controversy between citizens of different states," and have been made in conformity to that spirit of comity and practical good sense by which, in the administration of this concurrent jurisdiction, "unseemly conflicts" with the state courts have been avoided. These principles, for our present purpose, may be summarized as follows:

There is no common law of the United States, and the 34th section of the judiciary act (Act Sept. 24, 1789, chap. 20, 1 Stat. at L. (92), as embodied in § 721 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581), provides: "That the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

So that, in any trial common law, a circuit court of the United States, where its jurisdiction is founded on diverse citizenship, has to inquire what the law of the state in which its jurisdiction is exercised may be, and it is the law of that state, whether statute or common law, that it is called upon to administer. So far as the constitutional or statute law of a state is concerned, the Constitution and statutes speak for themselves, and it is a rule well settled that where a question arises upon the construction of a state Constitution or statute, the courts of the United States will feel themselves bound by the construction given to them by the supreme court of the state. So, also, as to what may be the common law of the state, as applicable to a case before a Federal court, the ordinary evidence is to be found in the decisions of the state's tribunal of last resort.

The question in the class of cases we are now considering, being what the law of the state is which is to be administered by the court, if there can be found in the decisions of the highest court of that state, intrusted with the construction of its statutes and the interpretation and application of

its common law, a well-settled rule, that generally will be deemed the law of that state. Especially is this true whenever the decisions of the state courts relate to some law of a local character which may have become established by those courts as part of the law of the state. And generally, where in an ordinary trial, in an action at common law in a United States court, we speak of the common law, we refer to the common law of the state as it has been adopted by statute or recognized by the courts, as the foundation of legal rights, so that, though a United States circuit court having jurisdiction in a given state is an independent forum, and distinct from that of the state, it administers no new or different law from that administered in the state court. But the jurisdiction exercised by those Federal courts in such cases is concurrent, and not subordinate, and they are called upon to exercise, and do exercise, an independent judgment as to what the law of the state may be.

As to the constitutional and statute law of a state, and the construction given thereof by the highest state tribunals, there is little or no difficulty. And as to what the common law of a state may be, the best evidence is generally found in the settled line of decisions of the state court, so accepted and recognized as to constitute a general rule of property or conduct. More latitude, however, is practised in questions that depend upon a common law, not merely part of the local and customary law of the state, but common to all states and countries where what is known as the "common law" prevails. On these questions, the courts of the United States do not hold themselves bound by the decisions of the courts of the state, unless, perchance, such decisions have so clearly established a settled rule in the premises as to make it part of the peculiar and local law of that state. In deciding what the common law of a state may be, they will resort to the same sources of information as are open to the state courts, and find the evidence of the law where the state courts must seek it, in that general jurisprudence of which we have spoken. State courts are accustomed, in discussing such questions, to refer not only to decisions of their own states, but to those of other states in this country, as well as to decisions in that country from which we originally derived the common law. The circuit courts of the United States may therefore, in forming their independent judgment in questions where the common law of the state is derived from the principles of general jurisprudence common to all the states, at times feel compelled to differ from the conclusions arrived

at by the state court. In other words, they may differ from a state court in determining what the common law of the state thus derived, and applicable to the given case, may be. *Swift v. Tyson*, 16 Pet. 1, 8, 10 L. ed. 865, 867.

It is to be remembered, however, that this diversity of opinion will not be indulged in by the courts of the United States where, as we have just said, in the ordinary administration of the law by the state courts, and by the settled course of their decisions, certain rules are established which have become rules of property and conduct in the state, and have all the effect of law, which it would be wrong to disturb. *Burgess v. Seligman*, 107 U. S. 20, 37, 27 L. ed. 359, 366, 2 Sup. Ct. Rep. 10; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Etheridge v. Sperry*, 139 U. S. 267, 275, 35 L. ed. 173, 175, 11 Sup. Ct. Rep. 563.

This contention makes it necessary to refer to the somewhat peculiar history of the litigation between the parties to this suit, as disclosed in the record. From the facts stated in the fifth plea filed by the defendant, and afterwards stricken out by the court upon motion of the plaintiff, it appears that the defendant in error, Fannie Friedman, and her father, Samuel Friedman, on July 20th, 1903, brought two separate actions against the present plaintiff in error, in the supreme court of New Jersey, to recover damages for the same injury and upon the same state of facts for which the present action was brought in the court below. The two actions came on for trial, and, by stipulation and consent, were tried as one before a justice of the supreme court and a jury. A verdict was rendered in favor of Fannie Friedman for \$7,000, and for Samuel Friedman, who sued *per quod servitium amisit*, for \$800. On the judgment in the case of Samuel Friedman, a writ of error was sued out by the defendant company, from the court of errors and appeals of the state of New Jersey, and in Fannie Friedman's case a judgment nisi being entered, a rule to show cause why the verdict should not be set aside was granted, returnable before the New Jersey supreme court. The Samuel Friedman Case was duly argued before the said court of errors and appeals, and the judgment appealed from was finally reversed. The ground of this reversal, as stated in the opinion of the court, was that the defendant company owed no duty to the children of tender years to whom, to its knowledge, these piles of beams might be attractive for playing upon or resting upon, to keep them in a reasonably safe condition, other than it owed to those who

were *sui juris*. It was held that Fannie Friedman was a trespasser upon these materials of the defendant, and that for the injury suffered by her, as such, no cause of action or recovery could accrue to her father.

After this judgment of the court of appeals in the case of Samuel Friedman, as was inevitable, the rule to show cause why a new trial should not be granted in the case of the infant plaintiff against the same defendant was made absolute by the trial court, and the suit was thereafter discontinued by plaintiff, and a new action was brought in the court below, the judgment and record in which, by writ of error, are now before this court for review. The objection made by plaintiff in error, that the suit in the state court barred the right of action in the second suit in the United States court, does not seem to have been seriously pressed, and requires but a word in passing. *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99, was a case where a nonsuit in the state court had been granted on defendant's motion, and a new action was subsequently instituted in the circuit court of the United States, where it was contended that the former judgment was a bar, and a request made to direct a verdict for defendant. The court denied the request and overruled the objection. Upon error to the Supreme Court, these rulings were held to be correct, and that "a trial upon which nothing was determined cannot support a plea of *res judicata* or have any weight as evidence at another trial." And in *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140, the plaintiff sued defendant in the state court of Michigan, and a verdict and judgment were in plaintiff's favor. This judgment was reversed by the supreme court of the state, and a new trial ordered. When the case was remanded, plaintiff voluntarily withdrew his action, and then commenced suit in the circuit court of the United States on the same cause of action. The defendant contended that the plaintiff was precluded from bringing this action by the judgment in the state court rendered for the same cause of action and on the same state of facts. This contention was overruled by the circuit court of the United States, and the Supreme Court of the United States, in the case cited, held that this ruling of the circuit court was correct.

We recur, therefore, to the contention that the decision of the court of errors and appeals of New Jersey in *Friedman v. Snare & T. Co.* is binding on this court, and settles the law for this case. We have al-

ready stated at sufficient length the principles that should guide this court in determining how far it should consider itself bound by this decision of the court of errors and appeals of New Jersey. The question whether the defendant owed any duty, as respected the children of tender years on said street and near said piles of beams, which, to the knowledge of the defendant, had proved attractive to such children to rest or play upon, other than and different from that which it owed to persons using the street and who were *vis juris*, was clearly a question of the common or unwritten law of the state of New Jersey. It was not a question of statute law, or of title to land, or of merely local law or custom, but belonged to that domain of jurisprudence to which we have above alluded, which prevails generally in all states and countries where the common law is recognized, and is so often referred to in the decisions of the Supreme Court. It is well settled that the general question of liability for negligence, when not modified or regulated by statute law, belongs to this domain. In *Gardner v. Michigan C. R. Co.* supra, Chief Justice Fuller, in speaking for the Supreme Court, says: "But in the present case, only the responsibility of a railroad company to its employees was involved, and it is settled that that question is a matter of general law, and that, in the absence of statutory regulations by the state in which this cause of action arises, this court is not required to follow the decisions of the state courts. *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Myrick v. Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914."

In ascertaining what this unwritten or common law prevailing in New Jersey, as well as widely elsewhere, requires in the premises, the court below had the right to exercise its independent judgment. In doing so, it might explore the sources and scrutinize the evidence of that law, precisely as the state court has done. However reluctant it may be to differ with, it was not bound by, the decision of the state court in such a case, although judicial comity might require it to bow to a line of decisions so uniform and well settled, and extending through so long a time, as to establish a rule of conduct which "it would be wrong to disturb." The only question, then, is, Was the judgment of the court of errors and appeals of New Jersey, in the

case referred to, declaratory of a rule of law so established as to be peculiar to that state? In accordance with the principles above stated, its decision that the title of the abutting owners on a street in New Jersey extends to the middle thereof, subject to the public easement, and that, by the law of that state, such abutting owners have the right to the temporary and reasonable use of the street for storing materials to be used in building and repair of structures on such abutting land, as a matter of local law, should be and was respected as conclusive by the circuit court, especially as its decision in this respect was supported by the authority of a uniform line of state decisions.

With reference, however, to the general question of negligence, and the duty owed under the circumstances by defendant to plaintiff, the only New Jersey cases referred to by the learned justice who delivered the opinion of the court of errors and appeals are the cases of *Turess v. New York, S. & W. R. Co.* 61 N. J. L. 314, 40 Atl. 614, decided by the supreme court, and *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 682, decided by the court of errors and appeals.

The case first cited was in the supreme court, not the court of last resort. It was a turntable case, and squarely took issue with the doctrine of *Sioux City & P. R. Co. v. Stout* and the *Turntable Cases*, so called, that have followed it. The case was decided in 1898, and it was said by Chief Justice Magie, who rendered the opinion, that the question was for the first time presented for consideration to the courts of New Jersey.

The second case was in the court of errors and appeals, and was also a turntable case. Mr. Justice Gummere, in delivering the opinion of the court, in speaking of the doctrine of the *Turntable Cases*, said that "although this doctrine has received the support of many courts of high distinction, it has been absolutely repudiated by other courts whose decisions rank equally high."

He also says that "this court," the court of errors and appeals, "has, up to the present time, never been called upon to decide the question, and we are free to adopt either the view taken by the United States Supreme Court in *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, and the cases which have followed it, or that taken by" other courts. It was accordingly held by the court that the owner of the turntable and of the land on which it was built owed no duty to a child of tender years who was hurt by playing thereon, on

the ground that it was a trespasser at the time of the accident.

In addition to these, counsel for the plaintiff in error has referred us to the cases of *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Fitzpatrick v. Cumberland Glass Mfg. Co.* 61 N. J. L. 378, 39 Atl. 675, and *Taylor v. Haddonfield & C. Turnp. Co.* 65 N. J. L. 102, 46 Atl. 707. These cases all refer to the duties of landholders with reference to persons *sui juris* who enter upon their lands as licensees, and do not at all touch the question with which we are here concerned. It is evident, therefore, that there is no such settled rule of law established by the decisions of the new Jersey tribunal of last resort, as would be binding upon the United States circuit court, or relieve it from the duty of forming an independent judgment as to what the unwritten or common law of New Jersey required of the defendant in the premises. That the law was not so settled in New Jersey is further evidenced by the strongly reasoned dissenting opinion of Fort and Bogert, JJ., in the case of *Friedman v. Snare & T. Co.* 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 Ann. Cas. 497, and by the view taken by that eminent jurist, the late Mr. Justice Dixon, in the trial of this same case in the supreme court, and whose opinion, as approved by the learned judge of the court below, we have already quoted. With the highest respect for the court of errors and appeals of the state of New Jersey, and for the learned members of that court who announced its opinion in the case referred to, we are compelled to the conclusion that the rule of law, as announced in the case of *Sioux City & P. R. Co. v. Stout*, *supra*, and in the subsequent approving cases, is the law applicable to the present case and the assignments of error in that regard must be overruled.

It is only necessary in conclusion to refer briefly to the contention of the plaintiff in error, that because the case of *Friedman v. Snare & T. Co.* in the court of errors and appeals of New Jersey, grew out of the identical facts and circumstances upon which the present case is founded, it was in some peculiar sense binding upon this court, as well as upon the court below. In view of what has already been said, we can give no weight to this suggestion. It still remains a matter in which two courts of concurrent and independent jurisdiction have arrived at a different view of the law.

In the case of *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974, the plaintiff in error was plaintiff below in the circuit court of the United States, and sought to recover from defendants for injuries which he sustained by

reason of their negligence, while traveling upon their roads. The court on the trial substantially instructed the jury that the plaintiff could not recover, because the injury complained of occurred while he was traveling upon the Sabbath day, in violation of the law of the state of Massachusetts. A suit between the same parties in regard to the same transaction had been brought in the supreme court of that state, in which, on a trial before a jury, the plaintiff obtained a verdict. This was carried to the court in banc, and was there reversed and sent back for a new trial. The plaintiff then became nonsuit in the state court, and brought his action in the circuit court of the United States. Mr. Justice Miller, in delivering the opinion of the Supreme Court, discussed the general question as to the binding effect of decisions of the state courts upon the courts of the United States, and we have already cited a passage from his opinion. He nowhere, however, gives any weight to the fact that there had been an opinion of the Massachusetts court of last resort, in the very case then before the Supreme Court, but confines himself to the inquiry whether any settled rule in the premises had been established by the decisions of the Massachusetts courts. He concludes as follows: "The decisions on this subject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule, so far as they can establish it, and we think that, taken in connection with the relation which they bear to the statute itself, though giving an effect to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts on that subject."

In the case at bar, no statute of the state was involved.

As we have seen in the case of *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140, there was the same situation to be dealt with. The Supreme Court of the United States refused to be bound by the decision of the supreme court of Michigan, on the same facts and between the same parties, and said: "We therefore conclude that the opinion of the state supreme court should be given only such weight as its reasoning and the respectability of the source from which it proceeds entitle it to receive."

Nearly all the other contentions founded upon the assignments of error are disposed of by what we have already said, and as to those that are not so disposed of, we content ourselves with saying that they are without merit and present no reversible error. We think the questions we have discussed were properly submitted to the

jury by the learned judge of the court below, and the judgment below is therefore affirmed.

Petition for writ of certiorari denied by Supreme Court of the United States, May 3, 1909 (214 U. S. 518, 53 L. ed. 1065, 29 Sup. Ct. Rep. 700).

**UNITED STATES CIRCUIT COURT
OF APPEALS, EIGHTH CIRCUIT.**

**CHARLES A. GUERNSEY, Plff. in Err.,
v.**

IMPERIAL BANK OF CANADA.

(110 C. C. A. 278, 188 Fed. 300.)

**Courts — state and Federal — effect of
decisions.**

1. It is a duty which the Federal courts may not renounce to form independent opinions and render independent decisions upon question of commercial or general law and of right under the Constitution and laws of the nation of which they have jurisdiction, and the decisions of the state courts are not controlling, but persuasive thereon.

**Conflict of laws — commercial paper —
notice of dishonor.**

2. The manner of giving and the sufficiency of a notice of dishonor, in a case where commercial paper is indorsed in one jurisdiction and is payable in another, are governed by the law of the place where it is payable.

Same — indorsement — contract.

3. The laws of the place where the indorsement is signed or is delivered, so that it becomes a contract, govern the validity and extent of the contract, and therefore the necessity of some presentment, demand, protest, and notice of dishonor.

**Same — payment — grace — present-
ment — protest — notice.**

4. The law of the place where commercial paper is payable governs the days of grace, the time and the manner of making the presentment, the demand, and the protest, and of giving the notice of dishonor.

(May 31, 1911.)

ERROR to the Circuit Court of the United States for the District of Wyoming to review a judgment in plaintiff's favor in an action brought to recover an amount

Headnotes by SANBORN, Circuit Judge.

Note. — See note post, 380, on questions of state law as to which the Federal courts are bound to follow the decisions of the state courts.

For conflict of laws as to negotiable paper, see notes in 61 L.R.A. 193, and 19 L.R.A. (N.S.) 665.
40 L.R.A. (N.S.)

alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Argued before Sanborn and Van Devanter, Circuit Judges, and William H. Munger, District Judge.

Messrs. Gibson Clark and William A. Riner, with Mr. John D. Clark, for plaintiff in error.

Mr. Charles W. Burdick, with Mr. Edgar M. Morsman, Jr., for defendant in error.

Sanborn, Circuit Judge, delivered the opinion of the court:

This is an action by the owner of a promissory note payable in Canada, made and indorsed in Illinois, to recover the amount due upon the note from the indorser. Presentment, demand, and protest were made, and notice of dishonor was given in compliance with the law of Canada, but the indorser claims, and it is conceded, but neither admitted nor decided, that the notice would have been insufficient to charge the indorser if the note had been payable in Illinois. The court below held that the notice was good and rendered a judgment against the indorser. The latter's counsel insist that this ruling is error, on the ground that the sufficiency of the notice is governed by the law of the place of indorsement, and not by the law of the place of payment. To this contention there is a short and conclusive answer. The place of the indorsement was the state of Illinois. The law of that state was, when the indorsement was made, and it still is, that when commercial paper is indorsed in one jurisdiction and is payable in another, the law of the place where it is payable governs the time and mode of presentment for payment, the manner of protest, and the time and manner of giving notice of dishonor, and the law of the place of indorsement is inapplicable to them. *Wooley v. Lyon*, 117 Ill. 248, 250, 57 Am. Rep. 867, 6 N. E. 885, 886. If, therefore, as counsel contend, the law of the place where the indorsement was made, the law of Illinois, governs the sufficiency of the notice of dishonor in this case, that notice was good, for it was sufficient under the law of Canada where the note was payable, and the law of Illinois was that in a case of this character the law of the place where the note was payable governed the time and manner of giving the notice of dishonor.

There is another reason why the position of counsel for the indorser is not sound. The rule that the manner of giving and the sufficiency of the notice of dishonor are governed by the law of the place of indorsement is impractical, unfair, and un-

just, because the notary at the place of payment must give the notice, and it is often impossible, in the time allowed to him by the law, for him to find out where each indorsement was made and what the law of the place of each indorsement is upon the subject of notice of dishonor. On the other hand, commercial paper shows on its face where it is payable. Each indorser, when it is presented to him for his indorsement, has time and opportunity before he signs it to learn where it is payable, to ascertain if he desires the law of that place, and to decide for himself, with full knowledge and upon due consideration, whether or not he will agree to pay the amount specified therein if the maker fails to do so, and the paper is presented, the payment is demanded, the protest is made, and the notice of dishonor is given, according to that law. In the decisions upon this question there is a direct and irreconcilable conflict. The established rule in England, the rule in Illinois, and the stronger and better reasons, are that, where an indorsement is made in one jurisdiction, and the commercial paper is payable in another, the manner of giving notice of dishonor and the sufficiency thereof are governed by the law of the place where the paper is payable. *Rothschild v. Currie*, 1 Q. B. 43, 49, 50, 4 *Perry & D.* 737, 10 L. J. Q. B. N. S. 77; *Rouquette v. Overmann* L. R. 10 Q. B. 525, 44 L. J. Q. B. N. S. 221, 33 L. T. N. S. 420, 4 Eng. Rul. Cas. 287; *Hirschfield v. Smith*, L. R. 1 C. P. 340, 350, 352, 1 *Harr. & R.* 284, 35 L. J. C. P. N. S. 177, 12 *Jur. N. S.* 523, 14 *Week. Rep.* 455; *Wiseman v. Chiappella*, 23 *How.* 368, 380, 16 L. ed. 466, 470; *Pierce v. Indaeth*, 106 U. S. 546, 550, 27 L. ed. 254, 256, 1 *Sup. Ct. Rep.* 418; *Wooley v. Lyon*, 117 *Ill.* 248, 250, 57 *Am. Rep.* 867, 6 N. E. 885, 886; *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 543, 57 *L.R.A.* 513, 88 *Am. St. Rep.* 614, 62 N. E. 672. This rule commends itself to the judgments of the writers of the text-books; they approve it and urge its maintenance in preference to its opposite. *Wood's Byles, Bills & Notes*, 8th ed. 404, 405; 2 *Parsons, Bills & Notes*, 2d ed. 344, 345; 1 *Dan. Neg. Inst.* 5th ed. § 901. There are, however, many authorities to the contrary. *Aymar v. Sheldon*, 12 *Wend.* 439, 444, 27 *Am. Dec.* 137; *Huse v. Hamblin*, 29 *Iowa*, 501, 504, 4 *Am. Rep.* 244; *Allen v. Merchants' Bank*, 22 *Wend.* 215, 34 *Am. Dec.* 289; *Carroll v. Upton*, 2 *Sandf.* 171; *Snow v. Perkins*, 2 *Mich.* 238, 241.

But the question is one of commercial law upon which the decisions of the state courts, though persuasive, are not controlling, in the national courts. It is a duty of the Federal courts which they may not

renounce, to form independent opinions and to render independent judgments upon questions of commercial law, of general law, and of right under the Constitution and laws of the nation. Every citizen of the United States who has the right to prosecute his suit in a Federal court has also the right to the independent opinion and decision of that court upon every determining question of commercial or general law which he presents for its consideration. *Independent School Dist. v. Rew*, 55 *L.R.A.* 364, 49 C. C. A. 193, 208, 111 *Fed. 1*, 11; *New York C. R. Co. v. Lockwood*, 17 *Wall.* 357, 368, 21 L. ed. 627, 636; *Swift v. Tyson*, 16 *Pet.* 1, 10, 10 L. ed. 865, 868; *Burgess v. Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 *Sup. Ct. Rep.* 10.

Upon the question in hand the decisions of the state courts are in conflict. The decisions of the Supreme Court tend toward the adoption of the more reasonable and practicable rule. In *Musson v. Lake*, 4 *How.* 262, 278, 11 L. ed. 967, 973, cited by counsel for the plaintiff in error, the only question presented for decision was whether or not the certificate of a notary of New Orleans that he had there protested a note payable in that city, but indorsed in Mississippi, was evidence in a Mississippi court of the presentment of the note when the certificate failed to mention the presentment, and the court held that it was not such evidence. It is true that there is a statement in the opinion in that case that the contract of indorsement was made and was to be performed in Mississippi, and that the construction of the contract and the diligence necessary to be used by the plaintiffs to entitle them to a recovery must be governed by the law of that state. But this remark was unnecessary to the decision of the case, and, if it referred to the manner of charging the indorser by protest and notice of dishonor, it has been overruled by the subsequent decisions of that court. Thus, in *Wiseman v. Chiappella*, 23 *How.* 368, 380, 16 L. ed. 466, 470, in an action by the holder of an acceptance drawn by *Durden & Company* in Mississippi, payable in New Orleans and indorsed by the payees, against the notary, for negligence in presenting the paper and demanding its payment, the Supreme Court said:

"There has always been a requirement in both countries, and everywhere acknowledged in the United States, which protects the defendant in this suit from any responsibility to the plaintiff. The requirement is this: That the protest was made in this case in conformity with the practice and law of Louisiana, where the bill was payable."

And the court cited in support of this

proposition, *Rothschild v. Caine*, 1 Ad. & El. 43 (which is the same case cited above as *Rothschild v. Currie*, 1 Q. B. 43, 4 Perry & D. 737, 10 L. J. Q. B. N. S. 77, wherein the court of Queen's bench held that the manner of giving and the sufficiency of the notice of dishonor of a bill of exchange indorsed in England, payable in France, was governed by the law of France); *Chew v. Read*, 11 Smedes & M. 182.

In *Pierce v. Indseth*, 106 U. S. 546, 550, 27 L. ed. 254, 256, 1 Sup. Ct. Rep. 418, an acceptance drawn in Minnesota on a bank in Norway, payable in Norway, was presented and protested according to the law of Norway, and the Supreme Court decided that the law of the place where the bill was payable, and not the law of the place where it was drawn, governed the time and manner of the presentation of the bill and of its protest, and added: "It sometimes happens that the several parties to a bill, as drawers or indorsers, reside in different countries, and much embarrassment might arise in such cases if the protest was required to conform to the laws of each of the countries. One protest is sufficient, and that must be in accordance with the laws of the place where the bill is payable."

For the same reasons one manner of giving notice of dishonor, and that in accordance with the laws of the place where the bill is payable, is sufficient, and notices in the different methods prescribed by all the laws of all the countries and states in which drawers or indorsers may happen to sign bills or notes are not required to charge them with their intended liability. The conclusion is that, where a bill is drawn or a note is indorsed in one jurisdiction, and is payable in another, the laws of the place where it is payable govern the manner of giving and the sufficiency of the notice of dishonor, the time and manner of the presentation and demand, and the manner of the protest thereof.

The argument for the opposite rule is based on the conceded fact that the indorsement is an independent contract that, on condition that the paper is presented, demanded, and protested, and notice of dishonor is given, the drawer or indorser will pay the note if the drawee or the maker fails so to do. The next step in the argument is the assertion which is sustained by many and respectable authorities, that the indorser does not agree to pay the note where it is payable, but at the place where he signs or delivers it. *Dan. Neg. Inst.* 5th ed. § 899. From this statement, without more, the argument jumps to the conclusion that the manner of giving and the sufficiency of the notice of dishonor is 40 L.R.A.(N.S.)

governed by the law of the place of the making or of the delivery of the indorsement. It is not easy, however, to find in the contract of indorsement an agreement not to pay at the place where the note is payable, or at any other place except at the place where the indorsement happens to be signed and delivered. Take the case in hand. This note was payable on its face at the bank in Canada, and the indorser must have known it when he signed it. He resided in Wyoming, he made his indorsement in Chicago, he did not write into his contract of indorsement any limitation to the effect that he would pay the note where he signed it, but would not pay it where it was payable, and no sound reason occurs to us why his contract was not to pay the note in Canada, where it was payable by its plain terms, if the maker failed to do so and he was properly charged as indorser. The purpose of an indorsement is the promise to do what the maker undertakes to do if the latter fails, and that is to pay the note where it is payable. After the maker failed to pay this note, and the protest had been made and the notice had been given, it was not necessary to the maintenance of an action against the indorser, to present this note or to demand payment of it in the state of Illinois. An action against him could have been maintained immediately wherever process could have been served upon him, in Canada, in Illinois, or in Wyoming. For these reasons the position that the indorser agrees to pay the note where he happens to sign or deliver it, and not where it is payable, when the note is a contract of the maker to pay it at the specified place, does not commend itself to our judgment. If, however, that were the import of the indorsement, it would not follow that the manner of giving and the sufficiency of the notice of dishonor are governed by the law of the place of indorsement, and not by the law of the place where the note is payable. The authorities which relate to the laws applicable to the validity and extent of indorsements, the necessity of presentment, demand, protest, and notice of dishonor, and the manner of making the presentment, demand, and protest, and of giving the notice, are too numerous for review; but from the stronger and better reasons, and from these decisions, these rules may be safely deduced.

The laws of the place where the indorsement is signed or is delivered so that it becomes a contract govern the validity and extent of the contract, and therefore the necessity of some presentment, protest, and notice of dishonor. *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137. It is a curious

fact that the remark in the opinion in this case, that notice of dishonor is governed by the law of the place of indorsement, which is the real foundation of that doctrine announced in subsequent cases, was an *obiter dictum*. The question did not arise in the case at all. Story, Conf. L. 7th ed. § 360; Musson v. Lake, 4 How. 262, 11 L. ed. 967; Columbia Finance & T. Co. v. Purcell (C. C.) 142 Fed. 984; Hatcher v. McMorine, 15 N. C. (4 Dev. L.) 122; Raymond v. Holmes, 11 Tex. 54; Briggs v. Latham, 36 Kan. 255, 259, 59 Am. Rep. 546, 13 Pac. 393; Williams v. Wade, 1 Met. 82; Am-sinck v. Rogers, 189 N. Y. 252, 257, 12 L.R.A.(N.S.) 875, 121 Am. St. Rep. 858, 82 N. E. 134, 12 Ann. Cas. 450; Givens v. Western Bank, 2 Ala. 397, 400; Holbrook v. Vibbard, 3 Ill. 465, 468; Artisans' Bank v. Park Bank, 41 Barb. 599; Commercial Nat. Bank v. Simpson, 90 N. C. 467, 471; Douglas v. Bank of Commerce, 97 Tenn. 133, 36 S. W. 874.

But the law of the place where the note is payable governs the days of grace,

the time and the manner of making the presentment, the demand and the protest, and the time and manner of giving the notice of dishonor. Rothschild v. Currie, 1 Q. B. 43, 49, 50, 4 Perry & D. 737, 10 L. J. Q. B. N. S. 77; Rouquette v. Overmann, L. R. 10 Q. B. 525, 44 L. J. Q. B. N. S. 221, 33 L. T. N. S. 420, 4 Eng. Rul. Cas. 287; Hirschfeld v. Smith, L. R. 1 C. P. 350, 1 Harr. & R. 284, 35 L. J. C. P. N. S. 177, 12 Jur. N. S. 523, 14 Week. Rep. 455; Wiseman v. Chiappella, 23 How. 368, 380, 16 L. ed. 466, 470; Pierce v. Indseth, 106 U. S. 546, 550, 27 L. ed. 254, 256, 1 Sup. Ct. Rep. 418; Wooley v. Lyon, 117 Ill. 248, 250, 57 Am. Rep. 867, 6 N. E. 885, 886; Union Nat. Bank v. Cnapman, 169 N. Y. 538, 543, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672.

Other questions were presented and argued in this case, but the conclusion which has been reached renders them all immaterial, and the judgment below must be affirmed.

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Scope.

It will be observed that the scope assigned to the note by its title confines it exclusively to questions of *state* law as distinguished from *Federal* law, that is, to questions that would concededly have been controlled by local state precedents if the action had been in the state court, or as to which a state statute explicit in terms would concededly have bound the Federal courts as well as the state courts. Hence, questions as to the constitutionality, construction, or effect of Federal statutes are beyond its scope. Many cases that might upon first impression seem to be within the scope of the note, because they held the decisions of the state court were not binding, are excluded for the reason that the question was one of Federal law, so that even an explicit state statute on the point would not have been controlling. It is obvious that to be of any value on the distinctive point under annotation, a case must proceed upon the assumption that an explicit state statute expressly covering the point would have been binding upon the Federal courts as well as upon the state courts. The note is not therefore concerned with any question as to respective domains of the Federal and state governments.

For the most part the cases here considered are those in which the jurisdiction of the Federal court was dependent not upon the existence of a Federal question, but simply upon diversity of citizenship of the parties.¹ It, however, includes some cases which, though involving a Federal question sufficient to confer jurisdiction, presented also questions of state law whose character as such was entirely unaffected by the Federal question. For example, bankruptcy cases are included so far as they involve the point whether the decisions of the state court are binding upon the Federal courts in determining those questions which, by the express terms of the bankruptcy act, are referred to the law of the states.² The question, however, as to the extent to which the state laws apply in bankruptcy cases, as distinguished from the question how the state law, when concededly applicable, is to be ascertained, is entirely beyond the scope of the note. So the note includes some cases where the Federal court had jurisdiction because one of the parties was a corporation chartered by the Federal government. Even when a case originating in a Federal court involves a question that in itself is one of state, *e. g.*, the construction of a state statute, it may be excluded for the reason that such question may be so associated with the ultimate Federal question decisive of the case as to partake of its character and become, for the purposes of the case, a question of Federal law. A convenient illustration is afforded by a United States Supreme Court case³ which, while conceding that, if no Federal law were involved, the question whether a log boom was authorized by a state law, or complied with its provisions, would be a state question, said in effect that it became a Federal question when considered in its bearing on the ultimate question whether the boom was exempt from the Federal river and harbor act.

Again, cases coming before the Federal Supreme Court on writ of error to the state court do not present the distinctive question under annotation, and are not included, or are mentioned merely incidentally in order to note distinctions. In such cases, a question that would otherwise be one of state law, either becomes a Federal question by its association with the Federal question that confers jurisdiction upon the

¹ The jurisdiction originally conferred by § 11 of the judiciary act of September 24, 1789 (U. S. Rev. Stat. § 629) U. S. Comp. Stat. 1901, p. 503, with subsequent amendment and changes (now Judicial Code, chap. 2, § 24, act of March 3, 1911, 36 Stat. at L. 1091, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 135).
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² For example, the question of exemptions. No attempt has been made to classify the bankruptcy cases by themselves, and they are distributed according to the particular questions involved.

³ United States v. Bellingham Bay Boom Co. 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343.

Supreme Court, or is concluded by the very judgment of the state court which is sought to be reviewed, and therefore presents nothing for the decision of the Supreme Court. A convenient illustration of the first alternative is afforded by the decisions to the effect that when the jurisdiction of the Federal Supreme Court is invoked on the ground of an unconstitutional impairment of the obligation of a contract, that court may determine for itself, without reference to the state decisions, the existence of the contract rights claimed to have been impaired.⁴

As to the second alternative: The distinction is obvious between accepting a decision of the state court for the reason that it is not subject to review at all by the Federal court, and determining, by reference to state court decisions, a question that must be decided by the Federal court. Even when the language employed by the court in such cases, if taken literally, would imply that the question was disposed of under the rule that the Federal courts must follow the state court decisions on questions of state law, rather than that it was concluded by the very judgment sought to be reviewed, it is clear that they do not stand on the same footing as cases which come up from the lower Federal courts. The distinction is well illustrated by two cases that came before the Federal Supreme Court at the same time, and were passed upon in a single opinion,⁵ one arising on writ of error to the state court, and the other on appeal from a lower Federal court, upon substantially the same state of facts, in habeas corpus proceedings instituted in those respective courts. The Supreme Court remarked that in the case brought before it by writ of error, its jurisdiction was limited to the question whether there had been a denial of a right under the Federal Constitution, laws, and treaties, and the

question whether the imprisonment was illegal under the state Constitution and laws was not open, but that the latter question might be considered on the appeal from the decision of the lower Federal court, although it was of the opinion that the judicial propriety was best consulted by accepting the judgment of the state court upon that point. While the decisions of the state court were thus practically decisive in both cases as to the question arising under the state Constitution and statutes, it is apparent that this was so in the first case, because the question was not before the Federal Supreme Court at all, whereas in the second case the question was legitimately before that court, and the decision of the state court served merely as a judicial precedent.

The question whether the Federal court should follow an earlier decision of the state court in the same case or between the same parties, on the ground that it is the "law of the case," or on the principle of *res judicata*, is also beyond the scope of the note.^{5a}

The note, being concerned merely with the nature or character of questions of state law as to which the Federal courts must follow the decisions of the state court, presupposes that the state decisions in question were rendered by the highest court of the state, and were in other respects sufficient to establish a rule of decision for the Federal courts, if the nature of the questions involved, and the time of their rendition relatively to the transactions involved in the case before the Federal courts, were sufficient to make them such. Hence, questions in relation to decisions of intermediate appellate courts, opinions by divided courts, dissenting opinions, and the like are not discussed, though the point may be occasionally referred to by way of explanation. It is also,

⁴ See numerous cases to this effect, cited in note in 63 L.R.A. 578. A more recent illustration is *J. W. Perry Co. v. Norfolk*, 220 U. S. 472, 55 L. ed. 548, 31 Sup. Ct. Rep. 465.

Upon this precise point it was said in *Percy Summer Club v. Astle*, 90 C. C. A. 527, 163 Fed. 1: "The decisions of the Supreme Court which review upon writ of error the decision of a state court upholding a statute which is alleged to impair a contract are not here in point. There the Supreme Court exercises no right of general review, but must affirm the judgment of the state court unless it contravenes the Constitution of the United States. Hence, the Supreme Court in those cases neither follows, nor refuses to follow, the course of decisions of the state court, but, having a particular judgment of that court before it, 40 L.R.A. (N.S.)

reverses the judgment or leaves it undisturbed, according as it does or does not contravene the Federal Constitution."

⁵ *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

^{5a} The distinction between the effect of judgments of the state court as *res judicata*, and decisions of the state court as rules of decision for the Federal court, is clearly brought out in the opinion in *Fuller v. Hamilton County*, 53 Fed. 411, and the court there points out that a judgment of the state court between the same parties on the same issue is binding on the Federal court, even though based on general principles of commercial law as to which the Federal courts are not bound to follow the state court decisions merely as rules of decision.

of course, to be understood that the subject under annotation is confined to the duty of the Federal court to follow the decisions of the courts of the state in which the Federal action originated, or at least those of the state in which the transaction in question had its situs. The note is in the main confined to cases which expressly pass upon the question as to the duty of the Federal court to follow the state court decisions, as a distinct point, to the exclusion, in general, of cases that merely follow, or decline to follow, such decisions, without any statement as to the duty of the Federal court in this respect.

And, finally, the note proceeds upon the assumption that the rules established by the state decisions which the Federal court is asked to follow are not in conflict with any provision of the Federal Constitution or statutes. Of course, in the event of such a conflict, local precedents cannot be given effect.

I. Introduction.

Of the many legal anomalies and practical difficulties incident to our dual system of state and Federal courts, none is more curious or more serious in its consequences

than the refusal of the Federal courts, when exercising the jurisdiction which they enjoy merely by reason of the adventitious circumstance of diversity of citizenship, to follow the decisions of the highest court of the state in which the action originates, in determining the law of that state, and their assertion in many cases of their right and duty to determine that law, when nonstatutory, according to their own independent views.

That the Federal courts, even when they decide general questions of common law for themselves, and decline to follow the decisions of the highest court of the state in which they sit, nevertheless profess to ascertain and apply the true rule of law of the state, is apparent from the reasoning by which they seek to justify such course, and from the concession that a state statute in explicit terms upon the point in question would necessarily control.⁶

The result, both in theory and practice, is that in the event of a difference of views between the Federal and state courts upon questions of general law, it is impossible for the parties to determine with certainty in advance what substantive rights and incidents will attach to a particular contract

⁶ In *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, the court said that the question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the state in which the cause of action arises; *but the law to be applied is none the less the law of the state*, and may be changed by its legislature, except so far as restrained by the Constitution of the state or by the Constitution or laws of the United States. (Italics ours.)

In *Washburn & M. Mfg. Co. v. Reliance M. Ins. Co.* 106 Fed. 116, after stating that the policy of marine insurance involved was a Massachusetts contract, the court said: "So far, therefore, as any local usages which have become a part of the subject-matter of underwriting marine risks in Massachusetts are concerned, this court would be bound to adopt the law as established by the decisions of the state court; yet, so far as a question comes up which is not one of mere local usage, but of general law, or a question of the interpretation of a commercial instrument, like a policy of insurance, *although what we are seeking to discover is, of course, the law in Massachusetts*, yet, nevertheless, we are not governed by the decisions of the courts of Massachusetts, 40 L.R.A. (N.S.)

but by those of the Supreme Court of the United States, so far as we can find decisions bearing on the questions involved, and, so far as we do not find them, by the general trend of authority." (Italics ours.)

In *SNARE & T. Co. v. FRIEDMAN*, Gray, J., said: "There is no common law of the United States. . . . In any trial at common law, a circuit court of the United States, where its jurisdiction is founded on diverse citizenship, has to inquire what the law of the state in which its jurisdiction is exercised may be, and it is the law of that state, whether statute or common law, that it is called upon to administer. . . . And as to what the common law of a state may be, the best evidence is generally found in the settled line of decisions of the state court, so accepted and recognized as to constitute a general rule of property or conduct. More latitude, however, is practised in questions that depend upon a common law, not merely part of the local and customary law of the state, but common to all states and countries where what is known as the 'common law' prevails. . . . In deciding what the common law of a state may be, they [Federal courts] will resort to the same sources of information as are open to the state courts, and find the evidence of the law where the state courts must seek it, in that general jurisprudence of which we have spoken. . . . In other words, they may differ from a state court in determining what the common law of the state, thus derived, and applicable to the given case, may be." (Italics ours.)

or transaction, since that will depend on the court in which the question may be presented. Again, under such a practice, it is possible for one in effect to create against another an obligation which is denied by the uniform course of decisions of the courts of the state in which the transaction occurred, and in which both parties resided at the time, by acquiring a bona fide residence in another state, and thus qualifying himself to bring an action in the Federal court.

There seems to be no parallel in jurisprudence for the practice of the Federal courts in this respect, with the exception of a few sporadic cases that have not been consistently followed, even in the states in which they were decided, where a court of one state under the influence of, and in supposed analogy to, the Federal practice, has assumed the right to determine for itself, and according to its own precedents, the true rule of the common law, irrespective of the decisions of the courts of another state in which the contract or transaction in question had its situs, and whose law, if statutory, would concededly have governed.⁷ It is true that the dual system of courts, deriving their powers from different sovereignties, but sitting within the same territorial boundaries, enjoying a partially concurrent jurisdiction within those limits, and professing to administer the same law, is itself unique; and it is to be conceded that on the theoretical side there are some arguments that may be advanced for the Federal practice that do not apply to the occasional practice of the state courts to which allusion has just been made. But even so, and in spite of the vast array of authority in its support, it seems to open to serious doubt,—a doubt which has often been voiced, and with notable ability in a recent article⁸ by Professor William M. Meigs, whether the Federal practice is sound either in theory or practice.

With the exceptions just alluded to, it is the universal rule for a court of the state or country in which an action is brought, if it determines that the contract or transaction in question had its situs in another state or country, and is properly governed by its law, to determine the substantive rights of the parties not according to the precedents at the forum, but as nearly as may be in the way in which the courts of the other state or country would determine

them, and to that end it will abide by a foreign statute, or by the decisions of the foreign courts in the absence of statute, if they are properly proved in the case, and would be accepted in the courts of the foreign jurisdiction as embodying the law of that jurisdiction on the subject. The only apparent exceptions are when the proper law is not proved, and the court is obliged either to apply its own law, because it is the only law before it, or to proceed upon presumptions as to the foreign law; or when, in a particular case, it is deemed contrary to the public policy of the forum to give effect to the foreign law. In neither of these exceptional instances, however, is there any pretense, like that indulged by the Federal courts with reference to the state law, that the court is asserting and applying the true rule of law of the foreign state or country. While it is to be conceded that the determination even of the substantive rights of the parties to a contract or transaction having international or interstate features may vary with the jurisdiction in which the action is brought, that is generally due either to one of the exceptional causes just mentioned or more often to differences of opinion as to what jurisdiction should furnish the governing law, and not to any theory that the decisions of the courts of the forum, rather than those of the other state or country, embody the true rule of law of the latter. For example, the courts of the state in which a contract is made may be of the opinion that the *lex loci contractus* should govern, and if the action is brought in that state, the decision will naturally be in accordance with its judicial precedents, but the courts of the state in which the contract is performable may be of the contrary opinion, that the *lex loci solutionis* should govern, and if the action is brought in the state where the contract is performable, the decision will be in accordance with its precedents, and they may be opposed to those of the other state. But the difference in results is due to a difference of opinion as to what state or country should furnish the governing law, and not to any difference of opinion as to how the law of the state or country chosen is to be ascertained. If it were otherwise, the function of the elaborate and complicated system of principles and rules comprehended under the general phrase "Conflict of laws" would

⁷ See notes in 6 L.R.A. (N.S.) 212, and 18 L.R.A. (N.S.) 880. Especially see criticism of this course by the Pennsylvania supreme court in *Forepaugh v. Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L.R.A. 508, 15 Am. St. Rep. 672, 18 Atl. 503. Some reasons are suggested in those notes for the 40 L.R.A. (N.S.)

belief that the supposed analogy between this occasional practice of the state court, and the well-established practice of the Federal courts, is not sound, even if the Federal practice were conceded to be well founded in principle.

⁸ 45 Am. L. Rev. 47.

be very much curtailed, and of no practical importance in the many cases in which the particular point in question is conceded to be one of general jurisprudence, dependent in each of the jurisdictions involved upon the unwritten law, even if it were also to be conceded that rules on the point as established by the courts of the respective jurisdictions were diametrically opposed, since there can be no practical purpose served in referring a contract or transaction to the law of its proper jurisdiction, if that law is in any event to be determined by reference to the precedents at the forum. The possibility of a diversity of results dependent upon the forum in which the action happens to be brought is sufficiently deplorable, and has been frequently deplored as a reproach to jurisprudence even when it results from the causes alluded to; but how much more to be deplored, both from a theoretical and practical standpoint, is the Federal theory which makes the substantive rights of the parties depend upon the court in which the action happens to be brought, even though the transaction involved bears no interstate or international features at all, and there is therefore no possible difference of opinion as to what jurisdiction should furnish the governing law, but merely a difference of opinion as to what the true rule of law of that jurisdiction is, and how it shall be ascertained. It would seem that the desirability, even the necessity, of a practice that shall insure the application of the same rule of decision to questions of substantive law in whatever court the action is brought, to a transaction concededly governed by the law of a particular state, must be conceded. To accomplish that result, however, either the Federal court must yield to the state court decisions, or the state court must yield to the Federal court decisions. As the very thing which the Federal court attempts to determine in the class of cases now under consideration, *i. e.*, those in which the Federal court's jurisdiction rests simply upon the diversity of citizenship, and not upon the existence of a question of Federal law,—is the law of the state, although it professes to find it not in the judicial precedents of the courts of the state, but in its own precedents or those of other states or in general principles having no local habitation, it is not apparent why the state courts should yield, especially as all such cases may be litigated in the state courts, and the great majority of them must be, owing to the lack of diversity of citizenship necessary to take them into the Federal courts. As Prof. Meigs ably argues in the article already referred to, there is no reason to suppose that concurrent jurisdiction was conferred upon the Federal

courts in case of diversity of citizenship to enable those courts to apply a different rule in case of a nonresident litigant than in case of a resident litigant, or to give the nonresident either a larger or smaller measure of justice than the resident. The natural supposition is that the purpose in conferring such jurisdiction was to protect the nonresident against possible inequality with residents in the application of the general rules of law in individual cases, owing to possible partisanship of the state courts, or their subjection to local and sectional influences and antagonisms.⁹

Surely a nonresident has no just cause of complaint if his rights are measured by the same rule that has been adopted as a standard for residents in the same situation, particularly as he may insist that the rule shall be applied by the Federal court; but the application of a shorter measure aggrieves the nonresident, and the application of a longer one aggrieves the resident, and thus brings about the very result intended to be guarded against by conferring jurisdiction upon the Federal courts, or at least one that is equally mischievous.

If it be feared that local prejudices or sectional interests may influence state courts to establish precedents which, though nominally applicable alike to residents and nonresidents, will in practice operate mainly or exclusively against nonresidents, as perhaps, may have been true of some decisions of the state courts adverse to the validity of municipal or county bonds largely in the hands of foreign holders, the mischief would at most seem only to justify the Federal courts in refusing to abide by state court precedents established after rights had vested under pre-existing contracts and transactions. As will subsequently appear, however, the Federal courts go far beyond this, and in cases of diverse citizenship assert their independence of the state court precedents on questions of general law, even though they antedated the contracts or transactions in question, and had established well-settled rules of law

⁹ In *Independent School Dist. v. Rew*, 55 L.R.A. 364, 49 C. C. A. 198, 111 Fed. 1, however, the court said: "Jurisdiction of such cases was conferred upon them [the Federal courts] for the express purpose of securing their independent opinions upon the questions arising in the litigation remitted to them. And a citizen of the United States who has the right to prosecute his suit in the national courts has also the right to the opinions and decisions of those courts upon every crucial question of general or commercial law, or of right under the Constitution or statutes of the nation which he presents."

applied by the state courts without discrimination between residents and nonresidents. The theory frequently invoked to justify the refusal of the Federal courts to follow the state court decisions, that such decisions are not themselves the law, but merely evidence of the law, has often been plausibly supported in argument, and has received other practical applications, as, or example, in the doctrine that a change of judicial decisions after the making of a contract cannot be regarded as impairing the obligation of the contract, within the meaning of the Federal Constitution.¹⁰ It is not the purpose here to re-examine or discuss that general theory. Conceding it to be sound, it might afford a foundation in principle for a rule of decision found to be expedient in practice, but it can scarcely require a rule of decision found to be practically inexpedient. Adherence to the state decisions might be justified consistently with that theory by adopting the position that the decisions of the state court, if not the law of the state, are at least to be accepted for the purpose in hand as the exclusive and conclusive evidence of the law of the state.

Since, with the possible exception above noted, there can be no real apprehension that a general rule established by the decisions of the state court, and on its face applicable to residents and nonresidents alike, will in practice work a discrimination against nonresidents, especially as the latter are secured against possible prejudice on the part of the state court in its application, by their right of recourse to the Federal courts, the reasons for the Federal practice, apart from the theory above referred to and the cumulative weight of precedent, seem to be (1) the feeling that it is beneath the dignity of the Federal court to decide a case according to the decisions of the state court, when it is convinced that those decisions are wrong on principle; (2) the hope that what is deemed the better opinion of the Federal court may induce the state court to overrule the decisions which the Federal court regard as erroneous; (3) the possible apprehension that deference to the decisions of the courts of the particular state in which the action arises will create an apparently conflicting body of Federal precedents, and destroy uniformity of decision in that court; (4) the hope that a uniform body of Federal precedents unvaried by the state in which the action originates, and which the contract or transaction in question had its situs, may in time form the nucleus of a general and uniform body of nonstatutory

law, to which the state courts as well as the Federal courts may gradually conform.

The first reason has doubtless exerted a very considerable influence in determining the departure from the rule of following the state decisions, but seems to have no basis in fact, and in any event is hardly a justification for the departure. It is not apparent why it is any more derogatory to the dignity of a Federal court to decide a case in accordance with the common-law precedents of the state courts on a question which is concededly one of state law, than it is to follow the decisions of the state courts as to the construction of a state statute, when, as an independent proposition, the court would reach a different result, or the decisions of the courts of a foreign country on a question of foreign law.

The validity of the second reason rests upon two assumptions, neither of which is likely to be conceded by the state courts, viz., that the Federal courts are more likely to reach a correct result than the state court, and that the latter court will act upon that probability.

The third reason has perhaps some apparent justification. Upon the hypothesis there assumed, however, the Federal decisions should be treated as no value as precedents other than their interpretation of the decisions of the state court, and in this view the apparent conflict is entirely innocuous. At all events that reason can hardly justify a practice which entails such a diversity of results dependent upon the more adventitious circumstance of a diversity of citizenship. And this applies also to the fourth reason above suggested, which in any event is probably too visionary to merit serious consideration.

It is true that decisions of the state courts, at least those upon questions of general common law, have been declared by the United States Supreme Court not to be "laws" within the 34th section of the original judiciary act,¹¹ which declares that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."¹² But the duty of the Federal

¹¹ 1 Stat. at L. 92, chap. 20, § 34, U. S. Rev. Stat. § 721, U. S. Comp. Stat. 1901, p. 581.

¹² *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61. This is, also, of course, necessarily implied in every case where the Federal declines to follow the decision of the state court on a question

¹⁰ See notes in 5 L.R.A.(N.S.) 860, and 23 L.R.A.(N.S.) 500.
40 L.R.A.(N.S.)

court to follow decisions of the state court on questions which would concededly be governed by those decisions, if the action had been brought in the state court, may safely be allowed to rest upon the same principles of comity by virtue of which the courts of one state or country follow the decisions of the courts of another, in determining substantive questions of law arising under contracts or transactions having their situs in the latter.¹³

Comity, it is true, implies a certain freedom of action that may justify a court in refusing to abide by the decisions of the courts of another jurisdiction, upon the ground that the enforcement of the rule of law established by them would be contrary to the public policy of the forum; but can scarcely justify a uniform practice of refusing to abide by the decisions of the courts of the jurisdiction in which the contract or transaction had its situs, upon the theory that the true rule of law of that jurisdiction is to be found not in the pronouncements of its own courts, but in general principles whose interpretation and application are to be determined by refer-

ence to precedents established by the courts of the forum, or by precedents borrowed from such other sources as those courts may select.

The objection to the Federal practice, because of the impossibility of determining one's substantive rights until it is determined in which court the action is to be brought, has been alluded to; but there is another serious objection which, in a large number of cases, survives the determination to bring the action in the Federal court, *viz.*, the extreme difficulty, not to say impossibility, of forecasting with any degree of certainty whether the Federal court will regard a particular question as one of general law, as to which it is not bound to follow the decisions of the state courts, or one of local law, as to which it is bound to follow them. The difficulty is easily illustrated by observing the conflicting opinions of Federal courts and judges in the same case as it passes from one court to another.¹⁴

But in spite of the very serious contribution which the practice makes to the uncertainties and perplexities of substantive

conceded to be one of state law and which comes before the Federal court merely because of the diversity of citizenship of the parties.

¹³ Prof. Meigs, in the article previously referred to, concedes that the duty of the Federal court to follow the decisions of the state court on nonstatutory questions cannot be deduced from the 34th section of the judiciary act; and he places that duty solely upon the principles of comity.

¹⁴ For example, in *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* involving the validity, as affected by public policy, of a stipulation in a lease exempting a railroad company from liability for negligence in setting fire to a storage warehouse on the railroad right of way, Shiras, J., sitting in circuit (62 Fed. 904), held that the question did not affect the title to real property and, was one of general law, as to which the Federal court must exercise its own judgment. The same view was expressed by Sanborn, J., in the circuit court of appeals (30 L.R.A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201), with the apparent concurrence of Thayer, J. Judge Caldwell, however, dissented from the statement in the majority opinion on that point, and remarked that it was unnecessary to decide the point, since there was no difference of opinion between the state court and the Federal court on the question. The Supreme Court in 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33, declared the question to be one as to which the decision of the highest court of the state would be binding upon the Federal courts, remarking that the validity of the agreement did not depend upon any principle of commercial or mer-

cantile law, or of general jurisprudence. As it happened the stipulation was held valid in all three courts, as there was no conflict between the Federal rule and the state rule as applied to this particular stipulation.

Again, when the *Kuhn Case* was before the circuit court (152 Fed. 1013), Dayton, D. J., expressed the opinion that no better case could be found to illustrate the wisdom of the rule that state court decisions must be followed on questions in relation to the title to real property. When the case came before the circuit court of appeals, that court, apparently being in doubt as to whether or not it was bound to follow the state court decision, certified it to the United States Supreme Court; and the majority of that court (*Kuhn v. Fairmont Coal Co.* 215 U. S. 349, 44 L. ed. 228, 30 Sup. Ct. Rep. 140), held that the state court decision was not controlling; but to this there was a vigorous dissenting opinion by Mr. Justice Holmes, in which Mr. Justices White and McKenna concurred. When the case was returned to the circuit court of appeals (102 C. C. A. 457, 179 Fed. 191), that court, despite the ruling of the Supreme Court, was so impressed with the practical disadvantages incident to the existence of one rule in the state court for residents, and another rule in the Federal court for non-residents, that it remarked that even if it did not find itself in accord with the state court as to the principle of its decision, it would be inclined to follow the same, and as a matter of fact did follow it. The history of this case suggests the famous exploit of the "King of France and 10,000 men."

law, and notwithstanding the many practical difficulties which attend its operation, it is not to be disputed that there is a wide range of questions of state law which seems to expand, rather than contract, as to which the Federal courts feel bound, neither by the provisions of the judiciary act nor by the principles of comity, to follow the decisions of the state courts. Their right to pursue this course is as well established by precedent as any point of law of doubtful justification in principle, and apparent expediency in practice, can be. Commentators may at most but point out the objections to the practice, and aid in their measure to create a sentiment, if not for narrower restrictions, at least against further extension of the practice. The main purpose of the note, however, is to show, without bias or prejudice, the extent to which the practice has been carried by the courts, and to note the tendencies indicated either toward its restriction or extension.

II. Unwritten or common law

a. In general.

Originally, the United States Supreme Court seems tacitly to have assumed that the Federal courts, in the exercise of their jurisdiction based on diversity of citizenship, were bound by the decisions of the highest courts of the state in which the action originated, if there were such decisions on the point in question, whether they rested upon local statute or upon general principles of common law.¹⁵

Thus, in a case¹⁶ decided as early as 1803, Chief Justice Marshall, though relying on his own reasoning—apparently because there were no state decisions on the point—in support of his conclusion that an assignee of a note made in Virginia could not maintain an action at law thereon against a remote assignor, clearly assumed that the Virginia decisions had conclusively established the liability of the assignor to the

assignee as the law of that state, although that was a question of general commercial law; and, in a later case¹⁷ between the same parties on the same note, accepted that proposition, apparently as a point conclusively established, as the basis of his conclusion that a suit would lie in equity.

In many of the early cases the Federal courts not only followed the state decisions, but expressly declared that it was their duty to do so.¹⁸

In a case¹⁹ decided in 1827, the court said: "This court adopts the state decisions because they settle the law applicable to the case, and the reasons assigned for this course apply as well to the rules of construction growing out of the common law as the statute law of the state, when applied to the title of lands;" and in a case²⁰ decided in 1833, we find the following language: "Now the relation in which our circuit courts stand to the states in which they respectively sit and act is precisely that of their own courts, especially when adjudicating on cases where state lands or state statutes come under adjudication. When we find principles distinctly settled by adjudications, and known and acted upon as the law of the land, we have no more right to question them or deviate from them, than could be correctly exercised by their own tribunals." It will be noted that the language just quoted implies, or at least suggests, a doubt whether the rule announced applies with similar force to general questions of common or commercial law, as to statutory questions or questions of a simply local character, like those in relation to real property; and even before *Swift v. Tyson*,²¹ there were occasional intimations that the rule did not apply to questions of general unwritten law.²² But it was not until that case that the right and duty of the Federal courts to depart from the decisions of the state court on such general questions received the formal sanction and approval of the Federal Supreme Court, and became a recognized rule of de-

¹⁵ It is true that in one of the very first cases decided by this court (*Brown v. Van Braam*, 3 Dall. 344, 1 L. ed. 629), in which the court announced its opinion that, under the laws and the practical construction of the courts of Rhode Island, the judgment of the Federal circuit court ought to be affirmed, Chase, J., observed that he concurred in the opinion on common-law principles, and not in compliance with the law and practice of the Rhode Island courts. The point, however, was one of practice, and not of substantive law.

¹⁶ *Mandeville v. Riddle*, 1 Cranch, 291, 2 L. ed. 112.

¹⁷ *Riddle v. Mandeville*, 5 Cranch, 322, 3 L. ed. 114.

⁴⁰ L.R.A. (N.S.)

¹⁸ See, for example, *Taylor v. Brown*, 5 Cranch, 255, 3 L. ed. 94; *Massie v. Watts*, 6 Cranch, 165, 3 L. ed. 187; *Polk v. Wendal*, 9 Cranch, 87, 3 L. ed. 665; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. ed. 289; *Green v. Neal*, 6 Pet. 291, 8 L. ed. 402.

¹⁹ *Jackson ex dem. St. John v. Chew*, 12 Wheat. 153, 6 L. ed. 583.

²⁰ *Livingston v. Moore*, 7 Pet. 469, 8 L. ed. 751.

²¹ 16 Pet. 1, 10 L. ed. 865.

²² See, for example, *Thomas v. Hatch*, 3 Sumn. 176, Fed. Cas. No. 13,899, and *Groves v. Slaughter*, 15 Pet. 449, 10 L. ed. 800.

cision for Federal courts. The question involved in that case related to commercial paper, but Justice Story's opinion reaches far beyond questions of commercial law and embraces practically all general questions of common law. Indeed, the only questions the language of that opinion seems to leave under the binding effect of the state decisions are those in relation to "rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and interterritorial in their nature and character."

While the doctrine declared in that case has steadily advanced beyond the class of questions then before the court, and has drawn within operation one question after another, its progress has been marked all along its course by doubt and uncertainty as to its practical application. Nor is the difficulty confined to nonstatutory or common-law questions. Many exceptions have in course of time been ingrafted upon the rule that the decisions of the state courts construing or interpreting state statutes must be followed by the Federal courts. The realization of the difficulties experienced by the courts and the profession generally, both in respect to statutory and nonstatutory questions, and the consciousness of conflicting and ambiguous statements to be found in the opinions, have led the courts, from time to time, to attempt a restatement of the doctrine in somewhat formal and precise terms, with the idea of defining accurately its scope and extent and definitely marking its limitations and boundaries. That these attempts have not been entirely satisfactory is apparent from the differences of opinion on the part of courts and judges, sometimes reflected in the same case as it passes from court to court, as to whether a particular question is to be deemed one of local law, concerning which the decisions of the state court are controlling, or of general law, as to which the Federal court may decide according to its independent views.²³ The practical impossibility, as to many questions, of deducing from the general principles and criteria on the subject, whether the decisions of the state court will be regarded as establishing a local rule or rule of property binding upon the Federal courts, or a rule of general law, as to which the Federal courts are not bound, has rendered it necessary in the later parts of the note to set forth in some detail the actual results as to different classes of questions. In the meantime, however, attention is directed to some of the general statements that have been formulated on the subject, with the cau-

tion that boundary lines that are well marked in one case frequently disappear in the next. Though the present division of the note is concerned primarily with unwritten or common law, the statements in question are presented in the form in which they were made, without attempting to eliminate at this point the portions thereof that refer to constitutional law. In a later case presenting the same question of commercial law that was involved in *Swift v. Tyson*, the Federal Supreme Court, in declaring its independence of the rule as declared by the New York courts, said: "It is a law not peculiar to one state, or dependent upon local authority, but one arising out of the usages of the commercial world."²⁴ In a case decided shortly afterwards,²⁵ that court, for the express purpose of obviating any misapprehension that might arise from language used in previous decisions, undertook to state the rule on the subject somewhat formally, thus: "Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state Constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor

²⁴ *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61.

²⁵ *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

²³ See illustrations *supra*, note 14.
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to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the every object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

A little later the same court,²⁶ after remarking that the utterances of the court on this subject had not been entirely harmonious, and that the subject had not been ascertained and defined with that uniformity and precision desirable in a matter of such great importance, said: "It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that state by the Federal courts. . . . There are, undoubtedly, exceptions to the principle that the decisions of the state courts as to what are the laws of that state are in all cases binding upon the Federal courts. The case of *Swift v. Tyson*, which has been often followed, established the principle that if this court took a different view of what the law was in certain classes of cases which ought to be governed by the general principles of commercial law, from the state court, it was not bound to follow the latter. There is therefore a large field of jurisprudence left, in which the question of how far the decisions of state courts constitute the law of those states is an embarrassing one."

In another case, involving the question of fellow servants, the court thus indicates the nature of a general question as to which the decisions of the state courts are not conclusive.²⁷ "According to the decisions of this court, it is not open to doubt that the responsibility of a railroad company to its employees is a matter of general law. . . . But passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it

rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect, as in others; but in the absence of such legislation, the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. . . . Whatever may be accomplished by statute,—and of that we have now nothing to say,—it is obvious that the relations between the company and employee are not in any sense of the term local in character, but are of a general nature and to be determined by the general rules of the common law."

In one of its latest utterances on the subject,²⁸ the court, speaking by Harlan, J., said that the following principles can be no longer questioned: "1. When administering state laws and determining rights accruing under those laws, the jurisdiction of the Federal court is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the state courts. 2. Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the Federal court as authoritative declarations of the law of the state. 3. *But where the law of the state has not been thus settled*, it is not only the right, but the duty, of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into, and rights have accrued under a particular state of the local decisions, *or when there has been no decision by the state court on the particular question involved*, then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal court should always

²⁶ *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974.

²⁷ *Baltimore & O. R. Co. v. Baugh*, 140 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

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²⁸ *Kuhn v. Fairmont Coal Co.* 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140, Holmes, J., wrote a vigorous dissenting opinion in this case, in which White and McKenna, JJ., concurred. The italics indicated in the text were those employed by the majority opinion itself.

lean to an agreement with the state court if the question is balanced with doubt."

Even when a question of nonstatutory law is in its nature local, so that a settled line of state court decisions with reference to it will be binding upon the state courts, there is authority for the position that a single decision of the state court is not controlling, in other words that more than one decision is essential to establish a rule as a rule of property binding upon the Federal courts.²⁹ And a recent decision of the United States Supreme Court³⁰ asserts the same right of the Federal court to refuse to follow a decision of the state court on the question of unwritten law,—otherwise one of a local character, as to which the state court decisions would be controlling,—ren-

dered after the rights of the parties had accrued, that has been frequently exercised in respect of decisions under state statutes.³¹

b. Local rules; rules of property.

So far as nonstatutory law is concerned, it may be safely deduced from the statements of general principles in the cases cited in the last subdivision, that the Federal courts are not bound to follow the decisions of the state courts on questions of general law,³² but are bound to follow the decisions of those courts on questions of local law³³ and decisions constituting rules of property.³⁴ The difficulty however is to determine what questions are general, and

²⁹ As a precedent the decision of the supreme court of a state, though single, is entitled to peculiar respect in a case involving questions in relation to real property, but it is not conclusive in the courts of the United States unless it has become a rule of property. *Gibson v. Lyon*, 115 U. S. 439, 29 L. ed. 440, 6 Sup. Ct. Rep. 129; *Fretts v. Shriver*, 181 Fed. 279.

A well-defined distinction exists between the establishment of a rule of property by means of the interpretation of the highest court of a state, of the general principles of the common law, and the construction by such a court of a local statute. In the former case, a settled course of decisions of the state court is generally requisite. A single decision, though always persuasive, may not be controlling. *Yocum v. Parker*, 67 C. C. A. 227, 134 Fed. 205, holding that a decision of a state court construing a statute of wills was binding upon the Federal court, although rendered in a case involving the same devise that was before the Federal court. This, of course, upon the assumption that the judgment of the state court was not *res judicata*.

In *Messinger v. Anderson*, 96 C. C. A. 445, 171 Fed. 785, the circuit court of appeals, speaking by Lurton, J., stated that an additional reason for refusing to retract a previous decision in the Federal court construing a will, and follow a subsequent construction placed upon the same will by the state court, was found in the fact that at the time of the earlier Federal decision there was no settled line of state decisions applicable to the devise in question, saying: "This was a controversy between citizens of different states, and when, as was our duty, we reached a conclusion upon common-law principles in the exercise of our independent judgment, we are now under no obligation to recede from that opinion merely because in another case the supreme court of Ohio has since reached a different result." (*Citing Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359.) See cases cited in opinion on this point. This case, however, was reversed by the Supreme Court. See *infra*, III. d. note.
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³⁰ *Kuhn v. Fairmont Coal Co.* 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140.

³¹ See *infra*, III. c.

³² See, for example, *Watson v. Tarpley*, 18 How. 517, 15 L. ed. 509; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. ed. 548; *Pine Grove Twp. v. Talcott*, 19 Wall. 666, 22 L. ed. 227; *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612. This list could be extended almost indefinitely, and the general proposition of the text is exemplified by practically all the cases in which the Federal courts, in cases where the jurisdiction was dependent upon diversity of citizenship, have held that they were not bound to follow the decisions of the state court. So far as precedents are concerned, there is no doubt whatever as to the rule, and to state the rule is for practical purposes merely to state the question under investigation in a different form, since the real difficulty is to determine whether or not a particular question is general within the meaning of the rule.

³³ See, for example, *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327, and other cases cited in preceding note. Here, again, the difficulty is not to sustain the rule, but to determine what questions are local within its meaning.

³⁴ See, for example, *Pleasant Twp. v. Aetna L. Ins. Co.* 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215; *Olcott v. Bynum*, 17 Wall. 44, 21 L. ed. 570; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359; *Bacon v. Northwestern Mut. L. Ins. Co.* 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787; *Chicago v. Robbins*, 2 Black. 418, 17 L. ed. 298; *Christy v. Pridgeon*, 4 Wall. 196, 18 L. ed. 322; *Amis v. Smith*, 16 Pet. 303, 10 L. ed. 973, and many others cited throughout the note. Here, again, there is no doubt as to the rule; the difficulty is to determine when the decisions of the state courts are to be regarded as establishing rules of property.

what are local, within the meaning of these principles,³⁵ and what is meant by the phrase "rules of property" as here used. The difficulty of distinguishing between general and local questions may be illustrated by a comparison of a few cases. In one case³⁶ the United States Supreme Court held that the liability of a municipality for injuries from defects in sidewalks was a local question, as to which the decisions of the state court were controlling, though those decisions did not involve any specific statute, and turned upon the distinction between the public and private functions of municipalities,—a distinction that is by no means peculiar to the law of the particular state in which the action originated, but is very generally recognized as the test of municipal liability in this class of cases. Upon the other hand, as subsequently shown,³⁷ the fact that the state court decisions on questions of common law, *e. g.*, those in relation to commercial contracts or the liability of master to servant, turn upon considerations that are of general applicability and recognition, is regarded as a sufficient reason for holding that they relate to questions of general law rather than local law, and so are not binding upon the Federal courts. If it be supposed that it was the fact that the rule in the former case related to municipalities, that impressed it with a local character, we are confronted with a case holding that the question, "What is a public purpose for which a county or municipality may issue bonds," is one of general law, as to which the decisions of the state court are not controlling.³⁸

Occasionally, language is used by the courts that state decisions, even upon a question of common law which in its nature is general, and which arises in substantially the same way in all common-law jurisdictions, may have so clearly established a settled rule in the premises as to make it a part of the peculiar and local law of the

state.^{39a} This limitation of the rule, if it were sustained by the cases, would remove or at least mitigate one serious objection to it, which lies in the possibility that one who has contracted or otherwise acted in reliance upon the decisions of the highest state court upon a question of general law may find that his reasonable expectations are defeated by the accidental circumstance that the action is brought in the Federal court. The view, however, that a question which in its nature is a general question of common law, *e. g.*, questions in relation to commercial papers or in relation to a master's liability for injury to a servant, may become a local question, as to which the Federal court is bound to follow the state court decisions, merely because those decisions have established a settled rule on the point, has but little support from the cases. And it will be observed that in general the Federal courts justify their refusal to follow the state court on general questions of common law, because they are in their nature general questions, and not because they have not been settled by the decisions of the state court. In many cases, of course, it was the very fact that the state court decisions had settled the question contrary to the doctrine of the Federal cases, that made it necessary to invoke that doctrine. It may be, however, that the fact whether or not a question has been settled by a uniform and recognized course of decisions in the state courts may exert some influence in determining whether it should be regarded as general or local within the rule under discussion, if, from its nature and the elements which enter into it, its character in that respect might otherwise be open to doubt.

Again, the significance of the expression "rules of property" in the statements of the principles governing the duty of the Federal courts to follow the decisions of the state court is not entirely clear. Rules established by the decisions of the state courts in respect of tangible real or personal property are doubtless in general rules of property within the meaning of those general principles. Occasionally, the expression seems to be used in a broader sense and as the equivalent of rules of action or conduct,³⁹ in which event it would seem to embrace general rules as to the validity, construction, or effect, even of personal con-

³⁵ In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, the court said: "Whatever differences of opinion may have been expressed have not been on the question whether a matter of general law should be settled by the independent judgment of this court, rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or of general law."

³⁶ *Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012.

³⁷ *Infra*, IV, a; IV. q. 2 (a).

³⁸ *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382.

⁴⁰ L.R.A. (N.S.)

^{39a} See, for example, *SNARE & T. Co. v. FRIEDMAN*.

³⁹ See, for example, *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 350, 2 Sup. Ct. Rep. 10; *Pleasant Twp. v. Ettna L. Ins. Co.* 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215.

tracts, which have become so established by the decisions of the state courts that they may be assumed to have been generally acted upon. The expression, however, cannot, for the purposes now under consideration, be ordinarily given that broader significance, as is apparent from the well-established rule that the Federal courts are not bound to follow the decisions of the state court with respect to common-law questions in relation to commercial contracts. Doubtless, a rule established by the decisions of the state courts on a question of unwritten law in relation to intangible personal contractual rights may be regarded as a local rule, and so binding upon the Federal courts if based on conditions or considerations peculiar to the state in which the action originates; and it may be that in some instances a rule established by the decisions of the state court in the relation to such rights will be regarded as a rule of property by which the Federal courts are bound notwithstanding that it rests upon general reasoning and considerations not peculiar to the particular state. For the purposes of a general rule, however, it is not safe to extend the expression "rules of property" as employed in the statement of principles in relation to the subject under consideration, beyond rules in relation to tangible real or personal property.⁴⁰ But upon the other hand, according to a recent decision of the United States Supreme Court,^{40a} the mere fact that a decision of the state court relates to tangible real or personal property is not in itself sufficient to characterize it as a "rule of property" binding upon the Federal court; it must, in addition, be a decision, or part of a line of decisions, antedating the accrual of the rights under investigation. In other words, to bear the undoubted and unquestioned character of a rule of property binding upon the Federal court, it would seem that a decision must not only relate to tangible real or personal property, but must also have acquired the character of a rule of action or rule of conduct.⁴¹

As a matter of fact, however, while the courts, even when speaking of decisions of

the state courts in relation to tangible real or personal property, frequently employ language implying that a rule of property which is binding upon the Federal courts is the product of repeated decisions, or a line of decisions, in reliance upon which parties may be assumed to have acted, yet it is believed that, with the exception just noted, the courts have rarely declined—perhaps because they have had no occasion to do so—to follow decisions of the state courts in relation to tangible real or personal property solely upon the ground that they were rendered after the rights of the parties had accrued, though, as as subsequently shown, this course is frequently pursued with respect to decisions in relation to state Constitutions or statutes. The rule⁴² that Federal courts are not bound to follow decisions of the state court construing particular wills (assuming, of course, that the decisions are not *res judicata*), as they are the decisions of courts construing particular state statutes, can hardly be regarded as an application of the exception under consideration, since such decisions, when they deal merely with the peculiar language of the particular will before the court,—and that is as far as the rule goes,—scarcely purport to be judicial precedents, even for subsequent cases in the state court, and in that respect are unlike the decision of the state court involved in the Kuhn Case, which purported to decide a general question in relation to real property, and concededly established a binding precedent for subsequent cases in the state court, irrespective of any question whether the rights in question accrued before or after the decision.

III. Constitutional and statutory questions.

a. In general.

It was early recognized by the United States Supreme Court that a "fixed and received construction by state courts of their respective statute laws" makes in fact a part of the statute law of the country, however we may doubt the propriety of that construction.⁴³

⁴⁰ See statement previously quoted from *Bucher v. Cheshire R. Co.* supra, II. a, note 26, as to meaning of "rules of property" in this connection.

^{40a} *Kuhn v. Fairmont Coal Co.* 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140.

⁴¹ In *Keene Five Cent Sav. Bank v. Read*, 59 C. C. A. 225, 123 Fed. 221, writ of certiorari denied in 191 U. S. 867, 48 L. ed. 305, 25 Sup. Ct. Rep. 841, the court declares, generally, that the "proper interpretation of a private contract presents a

question of general law, concerning which the Federal courts are entitled to express an independent judgment, unless the contract is one relating to the sale or conveyance of real or personal property, and it contains words or phrases that, in virtue of local decisions, have acquired a definite meaning, and have thus become rules of property within the state."

⁴² See *infra*, jji.

⁴³ *Shelby v. Guy*, 11 Wheat. 361, 6 L. ed. 495. And see other early cases: *Pollard*

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And Chief Justice Marshall in an early case,⁴⁴ after observing that if the point in question, which related to the construction of a Kentucky statute, were to be decided by the court for the first time, there would be a considerable contrariety of opinion, remarked that if the point shall appear to have been settled in Kentucky, it would be unnecessary to discuss it; and added: "This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or of France or of any other nation had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled." And this rule of decision had become so firmly fixed by 1832 that, in a case⁴⁵ decided in that year, the Federal Supreme Court accepted and followed the last construction placed upon a state statute by the state supreme court, which had become a rule of property in the state, notwithstanding that, in reliance upon earlier state decisions, it had previously placed a contrary construction upon the very statute. And Chief Justice Marshall, while sitting in circuit,

v. Dwight, 4 Cranch, 421, 2 L. ed. 666; M'Dowell v. Peyton, 10 Wheat. 454, 6 L. ed. 364; Luther v. Borden, 7 How. 1, 12 L. ed. 581; Ross v. M'Lung, 9 Pet. 283, 8 L. ed. 400; Bank of United States v. Daniel, 12 Pet. 32, 9 L. ed. 989.

⁴⁴ Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289.

⁴⁵ Green v. Neal, 6 Pet. 291, 8 L. ed. 402.

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—in marked contrast to the disposition manifested by the courts in the later Federal cases to restrict the rule which calls upon them to follow the decisions of the state upon questions arising under state Constitutions and statutes,—expressed his reluctance to construe state statutes, even when there has been no construction thereof by the state courts. Thus: "It is always with much reluctance that I break away in expounding the statute of a state; for the exposition of the acts of every legislature is, I think, the peculiar and appropriate duty of the tribunals created by that legislature."⁴⁶

But this rule, like the rule in relation to nonstatutory questions, though not to the same extent, has been gradually restricted in its scope until there are now a variety of circumstances that may defeat its operation. In one case, the Federal Supreme Court went so far as to declare that it had never hesitated in cases brought there under the 25th section of the judiciary act, to determine for itself the construction and effect of any statute of a state brought under review, without reference to the previous adjudications of the highest courts of the state, though it added that what it had said did not apply where the settled decisions in relation to a statute local in its character have become rules of property.⁴⁷ And in a case involving the constitutionality of a state statute, it was declared by the United States Supreme Court that "in matters of contract especially, the right of citizens of different states to litigate in the Federal courts of the various states is a right to demand the independent judgments of those courts."⁴⁸ Some of these cases, taken by themselves,

⁴⁶ Coates v. Muse, 1 Brock. 539, Fed. Cas. No. 2,917.

⁴⁷ Butz v. Muscatine 8 Wall. 575, 19 L. ed. 490, followed in United States ex rel. Amy v. Burlington, 154 U. S. 568, and 19 L. ed. 495, 14 Sup. Ct. Rep. 1212. There was a vigorous dissenting opinion by Miller, J., in which Chase, Ch. J., concurred, pointing out that Swayne, who wrote the prevailing opinion, had previously held in Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261, that the Federal court would follow the latest settled adjudications of the state courts, and in Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520, had only claimed to modify that doctrine so far as to hold contracts valid which had the support of some prior decisions of the state court.

⁴⁸ Pleasant Twp. v. Aetna L. Ins. Co. 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215. In this case, however, the Supreme Court approved of and followed, or at least reached the same result as, the state decisions, holding the statute unconstitutional.

would certainly lend color to the view that the general rule is for the Federal courts to decide for themselves questions arising under state Constitutions and statutes, and the exception is to follow the decisions of the state courts when the state decisions have become rules of property. In spite, however, of the constant tendency of the Federal courts to deny the conclusive effect of state decisions under various circumstances, it may be said that to follow the state decisions is the general rule, and to refuse to follow them the exception, so far as questions under state Constitutions and statutes are concerned. That respect for rules of property is not the ground, and does not define the limits, of the duty of the Federal courts to follow state decisions under state Constitutions or statutes, but may in some circumstances afford a justification for a departure therefrom is illustrated by a comparison of the cases subsequently cited,⁴⁹ in which the Federal courts have declined to follow the latest decisions of the court as to the validity or effect of a statute, when they would have the effect to invalidate contracts valid according to the earlier state decisions in force when they were made, with cases⁵⁰ where later state decisions upholding the validity of the contracts were followed, even upon the assumption that the earlier state decisions would have invalidated them. As the later decisions were rendered after the contracts in question were made they could hardly be regarded as rules of property. The reason they were followed was that there was nothing to prevent the application of the gen-

eral rule, which has been formulated as follows: "In determining what the laws of the several states are, which will be regarded as rules of decision, we are bound to look not only at their Constitutions and statutes, but at the decisions of their highest courts giving construction to them. . . . If there be any inconsistency in the opinions of these courts, the general rule is that we follow the latest settled adjudications in preference to the earlier ones."⁵¹

Other statements of the rule as to state court decisions in respect of questions arising under state Constitutions and statutes are comprehended in the formulation of the general principles on this subject covering both written and unwritten law, to be found in the text of subdivision II. a. It is to be remembered, as stated at the beginning of the note, that we have reference only to questions as to which a state statute explicit in terms would concededly govern. The exceptions to the general rule, however, are numerous and of constant application. They embrace two classes: (1) Those depending not upon the nature of the question, but upon the time of the state decisions relatively to the accrual of the right of the parties, or to other earlier decisions, and (2) those depending upon the nature of the question, or at least upon the nature or ground of the state court's decisions. The form and scope of the exception applied in a given case are apt to be determined by the necessities of the case.

The general rules and exceptions apply equally to the question whether the statute is in conformity to or in violation of the

al, although they were rendered after the contracts in question were made in reliance upon the statute.

⁴⁹ See *infra*, IV. a, 3.

⁵⁰ *Ibid*.

⁵¹ *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715. The general rule has been thus stated by the United States Supreme Court: "The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the supreme court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions." *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665. See to the same effect, *Com. v. International Harvester Co.* 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703.

"When the validity, meaning, and effect of a state statute involves no question arising under the Constitution or laws of the United States, a court of the United States should accept the meaning and effect given
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to such law by the highest court of the state, except in the limited class of cases when rights have vested or contracts have been made under such statute before it has received interpretation by the state court." *Lurton, J., in Hager v. American Nat. Bank*, 86 C. C. A. 334, 159 Fed. 396. And see opinions of state courts to same effect. *Com. v. International Harvester Co.* *supra*; and *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 50 L.R.A. 142, 35 S. E. 994.

"It is a cardinal rule in the courts of the United States that the judicial department of each state is the appropriate organ to construe its legislative enactments, and that in cases depending on the laws of a particular state, and 'not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application,' the construction which the highest judicial tribunal of the state has given to the laws of the state is controlling." *York v. Washburn*, 64 C. C. A. 132, 129 Fed. 564.

state Constitution, as to the question of its construction and effect.⁵² It has been held that the Federal courts are not bound by the decisions of the state court as to private acts, ^{52a} and that they will adopt what appears to them to be the correct view as to the constitutionality of a state statute where the state courts are not agreed upon a settled construction.^{52b}

b. Change of state decisions after rights of parties accrued.

The original exception, and the one that has perhaps been most frequently applied, though it is by no means the most comprehensive in its scope, is that which asserts the right of the Federal courts to decline to follow the latest decisions of the state courts as to the validity or construction of a state statute, which overrule earlier decisions that were in force when the rights of the parties in question accrued.⁵³ It was at one time supposed that the decisions of the Federal court in such situation rested upon the ground that the change of

decisions of the state court as applied to rights that had already accrued impaired the obligation of contracts, in violation of the Federal Constitution; but later decisions were explained as resting not upon the provision of the Federal Constitution referred to, but upon an exception to the rule that the Federal courts are bound to follow the decisions of the state courts. And while there have been intimations in some of the recent opinions of a disposition to return to the earlier view, that view can hardly be regarded as re-established.⁵⁴

The most frequent application of this exception has been in cases dealing with state, county, or municipal bonds, and is discussed in detail in the subdivision dealing with that class of contracts. The exception is applied only for the protection of rights which have become vested in conformity with the earlier decisions. The mere fact that the earlier decisions were in force at the time of the transaction or events out of which the case before the Federal court arose does not necessarily call for an application of the exception. Thus, in one case

⁵² This is apparent from the many cases cited in subsequent sections dealing with the validity of state statutes under state constitutions. Among the many cases that formally declare the general rule that the Federal courts are bound to follow the construction placed on the state Constitution by the highest state courts, the following may be mentioned: *Indianapolis & St. L. R. Co. v. Vance*, 96 U. S. 450, 24 L. ed. 752; *Nesmith v. Sheldon*, 7 How. 812, 12 L. ed. 925; *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667, 26 L. ed. 1204; *Gilman v. Sheboygan*, 2 Black, 510, 17 L. ed. 305; *Webster v. Cooper*, 14 How. 488, 14 L. ed. 510; *Kane v. Erie R. Co.* 68 L.R.A. 788, 67 C. C. A. 653, 133 Fed. 681.

^{52a} *Williamson v. Berry*, 8 How. 495, 12 L. ed. 1170.

^{52b} *Southern P. R. Co. v. Orton*, 6 Sawy. 157, 32 Fed. 457.

⁵³ See *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Wilson v. Ward Lumber Co.* 67 Fed. 674, appeal dismissed in 28 C. C. A. 689, 49 U. S. App. 779, 84 Fed. 1023; *Westinghouse Air Brake Co. v. Kansas City Southern R. Co.* 71 C. C. A. 1, 137 Fed. 26; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; and many other cases cited in subdivisions of this note, especially IV. a, 3; IV. c, note 26.

⁵⁴ See, on this subject, notes in 5 L.R.A. (N.S.) 860, and 23 L.R.A. (N.S.) 500.

In a recent case (*Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174) Harlan, J., speaking of the rule that the Federal courts, in determining contract rights as affected by a state Constitution, will enforce the contract in accordance with the Constitution of the state as interpreted at the time the contract was

made, by the highest court of the state, without regard to a contrary interpretation made by such court after the contract was made,—said that that doctrine was not in any wise changed or impaired by the decision in *Central Land Co. v. Laidley*, 159 U. S. 103, 111, 40 L. ed. 91, 16 Sup. Ct. Rep. 80, holding that a mere change of decision in the state court does not present a question of Federal right, under the clause of the Federal Constitution prohibiting a state from passing any law impairing the obligation of contracts; and added: "As, however, the circuit courts of the United States are courts of 'an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws, . . . they may, in suits within their jurisdiction, properly hold, as in numerous cases this court has held, that the rights of parties arising under contracts not involving questions of a Federal nature are to be determined in accordance with the settled principles of local law as maintained by the highest court of the state at the time such rights accrued. The statutory provision that the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply (U. S. Rev. Stat. § 721, U. S. Comp. Stat. 1901, p. 581), has not been construed as absolutely requiring conformity in such cases to decisions of the state courts rendered after the rights of parties have accrued under the previous decisions of those courts of a contrary character."

the Federal court followed the latest decision of the state court, placing a construction upon a statute in relation to wills, which had the effect, as against the issue of the devisee, to give the latter the fee, although under the construction placed upon the statute by the earlier decisions which were in force at the time the will took effect, the devisee would have taken but a life estate with remainder in fee to the issue.⁵⁵ And so, notwithstanding an earlier Federal decision holding a statute void as in violation of the state Constitution, it has been held that a later state decision upholding the statute will be followed by the Federal court in a subsequent case involving no rights of contract entered into on faith of the prior decision of the Federal court.⁵⁶

c. Questions decided for the first time after rights of parties accrued.

Another exception that has not been so frequently applied as the one considered in the last subdivision, but which is more comprehensive in its scope, because it is not dependent upon a change of decisions in the

state courts, is found in the assertion by the Federal courts of their right to decline to follow decisions of the state courts rendered after the accrual of the rights of the parties in question, although there were no decisions of the state court on the subject when those rights accrued. In statement this exception has not always been differentiated from the one considered in the last subdivision, and sometimes the courts, while declining to follow state decisions because rendered after the rights in question had accrued, although there was no change of decisions upon the part of the state court, have apparently relied upon Federal cases where there was a change in the state decisions after the accrual of the rights in question. Nevertheless this exception, as a distinct exception, in addition to that based upon a change of decision in the state court, is now well established.⁵⁷ The Federal court will, however, follow decisions of the state court, even as to prior transactions, where they are sustained by earlier decisions in force at the time of such transactions, establishing the general principle, though not rendered with reference to the particular constitutional pro

⁵⁵ *Yocum v. Parker*, 67 C. C. A. 227, 134 Fed. 205. It will be observed that the decision was against the children (issue) of the devisee, who claimed directly under the will, and not by virtue of any contract or conveyance. A different point would have been presented if the question had arisen between the purchaser of the devisee's interest and one who had purchased the supposed interests of the children in assumed reliance on the earlier state court decisions; or if the situation had been reversed, and the earlier decisions had been favorable to the purchaser of the devisee's interest and the later decisions had been unfavorable. In either of those events, it would seem that the case would have fallen within the exception. See, in this connection, *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715, *infra*, IV, a, 3.

⁵⁶ *Sandford v. Poe*, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546. Opinion by Lurton, J.

⁵⁷ *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Bolles v. Brimfield*, 120 U. S. 759, 30 L. ed. 786, 7 Sup. Ct. Rep. 736; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *Julian v. Central Trust Co.* 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; *Westinghouse Air Brake Co. v. Kansas City Southern R. Co.* 71 C. C. A. 1, 137 Fed. 26; *Speer v. Kearney County*, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 760; *Anderson v. Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413; *Chicago, B. & Q. R. Co. v. Appanoose County*, 170 Fed. 665, affirmed in 31 L.R.A. (N.S.) 1117, 104 C. C. A. 573, 182 Fed. 40 L.R.A. (N.S.)

291; *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; *Ryan v. Staples*, 23 C. C. A. 541, 40 U. S. App. 427, 76 Fed. 721; *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; *Pleasant Twp. v. Aetna L. Ins. Co.* 138 U. S. 67, 72, 34 L. ed. 864, 866, 11 Sup. Ct. Rep. 215; *Bartholomew v. Austin*, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359; *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, reversed on another ground in 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; *Southern Pine Co. v. Hall*, 44 C. C. A. 363, 105 Fed. 84; *Adelbert College v. Wabash R. Co.* 96 C. C. A. 465, 171 Fed. 805, 17 Ann. Cas. 1204.

In *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, Lurton, J., said: "(1) That such decisions [decisions of the highest state court] are not necessarily obligatory upon courts of the United States where they affect contracts which were valid under the Constitution and laws of the state as interpreted and enforced by its highest judicial tribunals at the time they were entered upon. . . . (2) Neither are such decisions obligatory upon courts of the United States when thereby the validity of contracts between a citizen of the state and a citizen of another state is affected, which were executed before there was any judicial construction of the statute or Constitution which seemed to authorize the contract in question."

vision or statute in question.⁵⁸ And to entitle one to invoke this exception and procure the independent opinion of the Federal court, his rights must have rested upon the constitutional or statutory provision in question; in other words the Constitution or statute must have entered into the contract or transaction and be necessary to the support of the right claimed.⁵⁹

d. State court decision rendered after earlier Federal decision.

Sometimes earlier Federal decisions rendered before any decision of the state court on the subject,⁶⁰ or before a change in state decisions,⁶¹ are advanced as reasons why the later state decisions should not be followed. Thus, the United States Supreme Court has declared that it would not feel bound in any case in which the point was first raised in the courts of the

United States, and has been decided in a circuit court, to reverse the decision contrary to its own conviction, in order to conform to a state decision made in the meantime.⁶² And the fact that the state decision was not rendered until after the Federal case had been tried and submitted,⁶³ or until after the Federal case had been argued on appeal, and the court had agreed upon their decision, though before that decision had been rendered,⁶⁴ has been assigned as a reason for refusing to follow the state court decisions. It may be doubted, however, whether the mere fact of prior Federal decisions, either in the same cases or in other cases, constitutes an independent ground of exception to the general rule that the Federal courts must follow the decisions of the state courts construing their own Constitution and statutes, or does more than to furnish an additional reason for the application of one or

⁵⁸ O'Brien v. Wheelock, 37 C. C. A. 309, 95 Fed. 903. (opinion by Harlan, J.), affirmed in 184 U. S. 450, 46 L. ed. 636, 22 Sup. Ct. Rep. 354; Peters v. Broward (Peters v. Gilchrist) 222 U. S. 483, 56 L. ed. 278, 32 Sup. Ct. Rep. 122.

⁵⁹ Sioux Falls v. Farmers Loan & T. Co. 69 C. C. A. 373, 136 Fed. 721, declining to apply the exception in favor of the owner of a waterworks plant constructed under a contract with the municipality, who was seeking to enjoin the municipality from issuing bonds for the purpose of constructing a plant of its own, upon the ground that they would violate the constitutional limit of indebtedness,—that contention being opposed to a decision of the state court construing the constitutional provision in question, though that decision was rendered after the making of the contract under which the complainant plant was constructed. See for similar point, *supra*, note 55.

⁶⁰ Rowan v. Runnels, 5 How. 134, 12 L. ed. 85; Pease v. Peck, 18 How. 595, 15 L. ed. 518; Perrine v. Thompson, 17 Blatchf. 18, Fed. Cas. No. 10,997; Fleischmann Co. v. Murray, 161 Fed. 162. But see *contra*, The Princess Alexandria, 8 Ben. 209, Fed. Cas. No. 11,430, and Woolsey v. Dodge, 6 McLean, 142, Fed. Cas. No. 18,032. And Andrews v. National Foundry & Pipe Works, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166, 36 L.R.A. 153, 23 C. C. A. 454, 46 U. S. App. 619, 77 Fed. 774, certiorari denied in 166 U. S. 721, 41 L. ed. 1188, 17 Sup. Ct. Rep. 996.

⁶¹ Mohr v. Manierre, 101 U. S. 417, 25 L. ed. 1052. And see Stryker v. Grand County, 23 C. C. A. 286, 40 U. S. App. 583, 77 Fed. 567, although the state decision there involved was by an intermediate appellate court. This position was also taken in National Foundry & Pipe Works v. Oconto Water Co. 68 Fed. 1006, which, however, was reversed (36 L.R.A. 139, 22 40 L.R.A. (N.S.)

C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166) upon the general ground that the first direct ruling of the state supreme court was controlling.

⁶² Pease v. Peck, 18 How. 599, 15 L. ed. 520; Morgan v. Curtenius, 61 U. S. 1, 15 L. ed. 823; Roberts v. Bolles, 101 U. S. 119, 25 L. ed. 880; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10. And see, to same effect, Frankfort v. Deposit Bank, 59 C. C. A. 539, 124 Fed. 18; and Murray v. Wilson Distilling Co. 92 C. C. A. 1, 164 Fed. 1 reversed on another ground in 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458.

⁶³ Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; Chicago, B. & Q. R. Co. v. Appanoose County, 170 Fed. 665, affirmed in 31 L.R.A. (N.S.) 1117, 104 C. C. A. 573, 182 Fed. 291.

⁶⁴ Forsyth v. Hammond, 18 C. C. A. 175, 34 U. S. App. 552, 71 Fed. 443. This decision was reversed by the United States Supreme Court in 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665, both on the ground that the judgment of the state court was *res judicata* in the Federal action, and on the ground that in any event the decision was one which the Federal court was bound to follow. The latter point, however, seems to have been made on the assumption, contrary to the fact as stated in the lower court, that the state court decision was rendered before the commencement of the action in the Federal court. But in Southern R. Co. v. North Carolina Corp. Commission, 99 Fed. 162, a Federal court changed its decision upon a question relating to the repeal of a statute when a contrary decision of the highest state court was brought to its attention, remarking that it must recede from its former ruling made contemporaneously with the state decisions, but not then brought to its attention.

the other of the exceptions considered in the last two subdivisions that is, where there was a change in the state decisions after the rights of the parties had accrued, or no state decisions at all upon the point in question until after such rights had accrued. And so, in cases that were not deemed to fall within either of these exceptions, we find the higher Federal courts reversing the decisions of the lower Federal courts on the strength of the decisions of the state court rendered after the decisions in the lower Federal court.⁶⁵ It is apparent, however, that where the Federal decisions, whether in the same or in other cases, were rendered prior to the latest state decision, the case is likely to fall within one or the other of the exceptions thus referred to. That, however, is not necessarily true, since it may be that, though the Federal decisions were first in point of time, the contrary state court decisions were nevertheless rendered prior to the accrual of the rights of the parties in question. It has been held that the pendency of an action in the state court, in which the construction of a state statute is involved, is no defense to an action in the Federal court between the

same parties, involving the same question,⁶⁶ though doubtless in some circumstances the Federal court may deem it advisable to defer its decision until the state court has passed upon the point.⁶⁷ It should be observed that an entirely different point, and one not within the scope of the present note, is presented by the question as to the effect of a subsequent reversal by a state court of a judgment of a lower court which a Federal court has in the meantime held to operate as an estoppel.⁶⁸

e. Effect as distinguished from construction; decisions resting on general reasoning; scope of decision.

The exception, previously discussed, to the general rule that the Federal courts will follow the latest decisions of the state courts as to the validity and construction of state statutes, rests upon considerations affecting the time of the state decisions relatively to earlier decisions or to the accrual of the rights of the parties. There are, however, two exceptions, or perhaps two variations of the same exception, that have been applied in a number of cases, that do not depend at all upon these

⁶⁵ Thus, in *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715, the United States Supreme Court reversed decisions of the Federal circuit court of appeals and of the circuit court, adverse to the validity of the county bonds in the hands of a bona fide holder, in consequence of a decision of the state supreme court favorable to the validity of such bonds, rendered after the decisions in the lower circuit court. If the circumstances had been reversed, and the decisions in the lower Federal courts had been in favor of the bonds, and the subsequent decision of the state court had been against their validity, the court might perhaps have applied one or the other of the exceptions discussed in the two preceding sections.

And so, in *Moores v. Citizens' Nat. Bank*, 104 U. S. 625, 26 L. ed. 870, a decision of the circuit court based upon a construction of the statute of limitations by the inferior state court was reversed because of a decision by the state supreme court pending the appeal.

And in *American Sugar Ref. Co. v. New Orleans*, 55 C. C. A. 328, 119 Fed. 691, a decision of the lower Federal court was reversed upon the strength of a decision of the state supreme court overruling the prior state court decisions, which had been followed by the lower Federal court.

And in *Tefft v. Stern*, 21 C. C. A. 73, 43 U. S. App. 442, 74 Fed. 755, reaffirming 21 C. C. A. 67, 43 U. S. App. 148, 73 Fed. 591, an order allowing extra costs was reversed because of a decision of the state court after the order was made.

So, a decision of the Federal court on 40 L.R.A. (N.S.)

demurrer adverse to the constitutionality of a state taxing statute, will be reversed where before final hearing the statute is held constitutional by the state court. *Western U. Teleg. Co. v. Poe*, 64 Fed. 9.

In *Messinger v. Anderson*, 96 C. C. A. 445, 171 Fed. 785, the circuit court of appeals followed its own decision on a prior appeal construing a will, notwithstanding that in the meantime a contrary construction had been placed on the same will by a decision of the state supreme court, upon the ground, *inter alia*, that the decision on the prior appeal in the Federal court was the "law of the case," from which the court was not at liberty to depart even if it wished to do so. The decision on the last appeal was reversed by the Federal Supreme Court (225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 739.) The latter court said in effect that the phrase, "law of the case," as applied to the effect of previous orders in the same case, merely expresses the practice of the courts generally not to reopen what has already been decided, not a limit to their power; that in any event the Supreme Court was free when the case came before it. The court added that in its opinion, even apart from the state judgment as an adjudication, it should have been followed, if for no other reason, because, at least against the decision of the court of appeals, it was right.

⁶⁶ *Currie v. Lewiston*, 21 Blatchf. 236, 15 Fed. 377.

⁶⁷ *Brooks v. Memphis*, Fed. Cas. No. 1,954.

⁶⁸ See, for illustration, *Frankfort v. Deposit Bank*, 59 C. C. A. 639, 124 Fed. 18.

considerations, but rather upon the nature of the question involved, or at least upon the grounds of the state court's decision. Thus, in a number of cases the Federal courts have refused to abide by decisions of the state courts, although the question involved, or at least was involved in, the state constitution or statutes upon the ground that they were as to the effect, rather than the construction, of the Constitution or statute; and did not rest upon nor involve the particular language employed, but proceeded upon general principles. This exception is well illustrated by the cases subsequently cited,⁶⁹ where the Federal courts have declined to follow state decisions so far as they held that the failure to comply with statutory requirements in the issuance of county or municipal bonds rendered them unenforceable in the hands of purchasers without notice, upon the ground that to that extent the state decisions did not rest upon the statute, but upon general principles. Thus, the Federal Supreme Court, in declining to follow decisions of the state court that municipal bonds were unenforceable even in the hands of bona fide purchasers, where they were delivered directly to an improvement company for whose benefit they were issued, or were not authorized by the requisite number of voters, said that the state cases made no attempt at interpretation of the statute, but asserted general principles, and therefore presented no such case of the construction of a state statute as to make them binding upon the Federal court.⁷⁰ So, the fact that the state decisions holding a statute unconstitutional did not turn upon constitutional principles peculiar to the state has been alluded to as a reason why they should not be allowed by the Federal courts.⁷¹ And it has been held that the question whether railroad aid is

a public purpose for which the power of taxation may be exercised is not a local question of constitutional or statutory construction, but a general question, as to which the Federal courts were not bound though the question arose under the state Constitution.⁷² And in another case Judge Lurton, now of the United States Supreme Court, as a reason for declining to follow a decision of the Ohio supreme court against the constitutionality of a mechanics' lien statute, mentions the fact that it was not placed upon any merely local or peculiar provision of the Ohio Constitution, but upon the general ground that it was an unreasonable and oppressive restraint upon the owner's right of contract.⁷³ So, in declining to follow a decision of the state court that certain defects rendered a judgment void, and not merely erroneous, the Federal court remarked that the state decision was based mainly, if not entirely, on a consideration of the principles of the common law as they had been stated and applied by the courts of other states, and did not place or attempt to place a definite construction upon any statute of the state.⁷⁴ Again the question whether a provision of contract prescribing a shorter period of limitation than is prescribed by the state statute of limitations has been held to be one of general public policy, as to which the Federal courts are not bound to follow the state court decisions not based upon any peculiar feature of the statute of limitations of the particular state.⁷⁵ And the same has been held as to the question when a cause of action for fraud is deemed to accrue for the purposes of the statute of limitations.⁷⁶

In another case⁷⁷ the court, while conceding that the Federal courts would be bound by the decisions of the state court

⁶⁹ See *infra*, IV. a, 3, note 35.

⁷⁰ *Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583. And see other cases *infra*. IV. a, 3, note 35.

⁷¹ *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, reversed on another ground in 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690. The fact that the rights of the parties in this case accrued before the decisions of the state court furnished another reason for declining to follow them. But see *Zeiger v. Pennsylvania R. Co.* 86 C. C. A. 69, 158 Fed. 809, *infra*, IV. p. 3.

⁷² *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382. There was another ground for the decision in this case, however, in that there had been a change in the state decisions after the contract in question. But see IV. a, and IV. v.

⁷³ *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 40 L.R.A. (N.S.)

397, 86 Fed. 370, reversed on another ground in 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690. In this case there was another ground in that the point had not been decided by the state court when the rights of the parties accrued.

⁷⁴ *Ryan v. Staples*, 23 C. C. A. 541, 40 U. S. App. 427, 76 Fed. 721, affirming 62 Fed. 635. And see also *Phoenix Bridge Co. v. Castleberry*, 65 C. C. A. 481, 131 Fed. 175, *infra*, IV. n, note 6.

⁷⁵ *Spinks v. Mutual Reserve Fund Life Assn.* 137 Fed. 169.

⁷⁶ *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 62, 92 Fed. 868. The court expressly stated as the ground of the decision on this point, that the state decisions do not attempt to construe state statutes, but were based entirely on the supposed rules of the common law.

⁷⁷ *Western U. Teleg. Co. v. Sklar*, 61 C. C. A. 281, 126 Fed. 295.

construing a state statute as conferring a right to recover at least nominal damages for unreasonable delay in the delivery of a telegram, although no such damages are averred, nevertheless held that the Federal courts would not be bound by the further position of the state court that such right to nominal damages was a sufficient predicate for the right to recover for injury to the feelings, since the question, after conceding the premise based on the construction of the statute, was one of general law, and not of the construction of a statute.

It will be perceived that the exception suggested and exemplified by the foregoing cases opens an almost unlimited field for conjecture and speculation as to the view which the Federal courts may take of questions which, though settled by the state court as questions of statutory construction, did not turn upon language peculiar to the statute, and in the solution of which the state court applied general reasoning and invoked the aid of general principles. A concrete illustration of the practical difficulty of forecasting the view of the Federal court is afforded by contrasting the cases just referred to, with the decision of the United States Supreme Court holding that the Federal courts were bound to follow the decision of the state court that one traveling on Sunday in violation of the state statute could not recover for injuries received through the negligence of a carrier, although the statute did not purport to deal with the question of liability.⁷⁸

Some further instances of the application

of the exceptions or variations of the same exception now under discussion are disclosed in subsequent parts of the note.⁷⁹ It is to be said, however, that the possibility of applying these exceptions has been apparently overlooked or ignored in numerous cases which presented at least as good an opportunity for invoking them as those in which they have been applied.⁸⁰

Another element of uncertainty is involved in the statement of Judge Lurton that the opinion of the state court as to construction of a statute is authoritative to the extent of the precise question decided, and no further.^{80a}

f. Application of general rule of construction to particular facts.

A slightly different exception or variation from those considered in the last subdivision is made by the position that, though the construction or interpretation of a state statute by the state court is binding upon the Federal court, yet when it becomes necessary to apply the statute as thus construed by the local courts, to a particular contract, and determine, upon a consideration of all its provisions, whether it is violative of the statute, a Federal court is entitled to express an independent judgment.⁸¹ So the question as to what constitutes an indebtedness within a constitutional limitation of municipal indebtedness, or at least the question whether a particular contract or enterprise creates such an indebtedness, has been held to be one for the independent judgment of the Federal courts.⁸² And in

⁷⁸ *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974. The court said that the decisions on this subject by the Massachusetts court are numerous enough and sufficiently longstanding to establish the rule so far as they can establish it; we think that, taken in connection with the relation which they bear to the statute itself, though giving an effect to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts on that subject. (Field and Harlan, JJ., dissenting without opinion). See *contra*, *Sawyer v. Oakman*, 1 Low. Dec. 134, Fed. Cas. No. 12,404.

⁷⁹ See, for example, *Spinks v. Mutual Reserve Fund Life Assn.* 137 Fed. 169, *infra*, IV. a, 4, note 43; and cases cited *infra*, IV. f, notes 68-70; IV. j, note 12; IV. kk, note 68, 69; IV. m, note 90 et seq.; IV. q, 2 (b) IV. q, 3, notes 63, 64.

⁸⁰ See, for example, *Yarrington v. Delaware & H. Co.* 143 Fed. 565, *infra*, IV. a, 5, note 64. So it would seem that this exception might have been invoked as to some of the questions as to which the decisions of the state courts were held controlling in *infra*, IV. d; IV. dd; IV. e; IV. f; IV. h, note 1; IV. j; IV. k; IV. m (especially 40 L.R.A. (N.S.)

note 70); IV. q, 2 (b), notes 50, 55; IV. q, 3, note 58; IV. s, notes 68, 82, 83. And see other subdivisions dealing with the specific question.

^{80a} *Southern R. Co. v. Simpson*, 65 C. C. A. 563, 131 Fed. 705.

⁸¹ *Casserleigh v. Wood*, 56 C. C. A. 212, 119 Fed. 308, holding that a state court decision that, under the local statutes, bad faith was necessary to render a contract champertous, was binding, but that the decision of the state court as to the applicability of the statute so construed, to a contract precisely like that before the Federal court, was not binding upon the latter.

⁸² *Ottumwa v. City Water Supply Co.* 59 L.R.A. 604, 56 C. C. A. 219, 119 Fed. 315. In this case the Federal court held, contrary to the decision of the state court, that the contract in question created such an indebtedness. In *Columbia Ave. Sav. Fund S. D. Title & T. Co. v. Dawson*, 130 Fed. 152, in an opinion of the master in chancery, approved by the circuit court, it was said that whether the decision of the state court be regarded as in construction of the state Constitution, or as relating to a question of general commercial law in defining the meaning of the word "debt," it was not

one case the court, while conceding the construction by the state court of a state statute in relation to champerty to be binding upon the Federal court, yet held that when it becomes necessary to apply the statute as thus construed by the state court, to a particular contract, and determine, upon a consideration of all its provisions, whether it is violative of the state statute, the Federal court is entitled to express an independent judgment.⁸³

g. Statutes declaratory of common law; codification.

Another exception or special application of the exceptions already discussed, which is destined to be of increasing importance with the growth of the codification of the common law, is suggested by the refusal of a Federal court to follow decisions of the state courts as to the construction of state statutes,⁸⁴ upon the ground that they are merely declaratory of the common law. In another case, the court, while not deeming an expression of an opinion on the point necessary, remarked that an interesting point was presented by the question as to how far the Federal courts would be bound by decisions of a state court construing a statute occupying the peculiar position of the negotiable instrument act, that is to say, attempting to codify and make uniform the rules that govern an important topic of general commercial law.⁸⁵ So, Judge Taft, while conceding that if the rule established by the state court decisions as to the effect of contributory negligence grew out of the peculiar liability imposed by

statute, as distinguished from that imposed for negligence at common law, it was binding on the Federal court, remarked that if the statute were held to be merely declaratory of the common law, the question as to the effect of contributory negligences would be a question of general common law, as to which the Federal court might exercise its own independent judgment.^{86, 87}

h. Passage or repeal of statute; conclusiveness of enrolled bill.

The decisions of the highest state court are binding upon the Federal courts upon the question as to the manner and legality of the passage of a statute;⁸⁸ as to whether an enrolled or engrossed bill may be impeached by resort to the legislative journals;⁸⁹ as to the repeal of a statute, assuming that there is no question as to violation of the Federal Constitution.⁹⁰

IV. Particular subjects.

a. Personal contracts.

1. In general.

As to contracts other than commercial paper and those in relation to specific real or personal property not affected by statute, it is frequently difficult to forecast with certainty whether the Federal court will feel bound to follow the decisions of the highest state court, or will treat the question as one of general law, as to which those decisions are not controlling. Sometimes, this uncertainty is reflected in a single case

binding upon the Federal court unless in harmony with the plain language of the Constitution or the settled judicial construction existing at the time the contract was entered into or the bonds issued and sold.

⁸³ *Casserleigh v. Wood*, 56 C. C. A. 212, 119 Fed. 308. The court declined to follow the decision of the state court, although the contract before it was precisely like the one before the state court.

⁸⁴ *Mutual L. Ins. Co. v. Lane*, 151 Fed. 276. But see *infra*, IV. q. 2, note 51.

⁸⁵ *Forrest v. Safety Bkg. & T. Co.* 174 Fed. 345.

^{86, 87} *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605. In this case, however, the question is held to be peculiar to the statute, so that the decisions of the state court with reference to it must be followed.

⁸⁸ *Peters v. Broward* (*Peters v. Gilchrist*) 222 U. S. 483, 56 L. ed. 278, 32 Sup. Ct. Rep. 122; *Wilkes County v. Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 579; *Nielsen* 40 L.R.A. (N.S.)

v. Chicago, B. & Q. R. Co. 109 C. C. A. 225, 187 Fed. 393.

⁸⁹ *Re Duncan*, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *United States v. Andem*, 158 Fed. 996; *Ames v. Union P. R. Co.* 64 Fed. 165 (implied); *Portland Gold Min. Co. v. Duke*, 90 C. C. A. 166, 164 Fed. 180; *Chicago, B. & Q. R. Co. v. Smyth*, 103 Fed. 376.

⁹⁰ *Kibbe v. Ditto*, 93 U. S. 674, 23 L. ed. 1005; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Southern R. Co. v. North Carolina Corp. Commission*, 99 Fed. 162; *Love v. Busch*, 73 C. C. A. 545, 142 Fed. 429; *Wicomico County v. Bancroft*, 203 U. S. 112, 51 L. ed. 112, 27 Sup. Ct. Rep. 21; *Black v. Elkhorn Min. Co.* 47 Fed. 600; *Allen v. Francisco Sugar Co.* 193 Fed. 825.

It is only where the provision of the earlier act is irrepealable, thus constituting a contract, that it becomes the duty of the Federal court to decide for itself whether the subsequent act did or did not impair the obligation of the contract. *Wicomico County v. Bancroft*, 203 U. S. 112, 51 L. ed. 112, 27 Sup. Ct. Rep. 21.

as it passes through the different Federal courts.⁹¹

The tendency of the Federal courts seems to be to regard questions concerning contracts not in relation to specific real or personal property, and not dependent upon local statute or any peculiar local usage, to be questions of general jurisprudence, as to which the decisions of the highest state court are not controlling. It has been so held as to the liability of the lessor of a railroad company for negligence of a lessee,⁹² whether a bill of sale in restraint of trade may be collaterally assailed on that ground;⁹³ the validity of a contract payable in Confederate money;⁹⁴ whether a contract by a lunatic is void or voidable;⁹⁵ whether an absolute refusal to perform a contract gives the other party an immediate right to maintain an action for his entire damages, although the contract period has not expired;⁹⁶ whether an implied contract arises upon the owner's waiver of his remedy in tort for the conversion of goods;⁹⁷

whether under the terms of a contract one party was primarily and individually liable for the salary of another;⁹⁸ the construction and effect of contracts of guaranty;⁹⁹ the rights of laborers and materialmen to recover upon a contractor's bond, as affected by the invalidity of the contract as between the contractor and the municipality.¹⁰⁰

But the United States Supreme Court has declared generally that questions of public policy as affecting the liability for acts done or upon contracts made and to be performed within one of the states of the Union, when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of commercial or mercantile law, or of general jurisprudence, of national or universal application, are governed by the law of the state as expressed by its own Constitution and statutes, or declared by its highest court.¹ And the decisions of the highest state court have been held to be binding on the question whether a third person may sue on a con-

⁹¹ See, for illustration, the case of Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. supra, note 14.

⁹² Curtis v. Cleveland, C. C. & St. L. R. Co. 140 Fed. 777.

⁹³ Gilbert v. American Surety Co. 61 L.R.A. 253, 57 C. C. A. 619, 121 Fed. 499 (certiorari denied in 190 U. S. 560, 47 L. ed. 1184, 23 Sup. Ct. Rep. 855).

⁹⁴ Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661, 20 L. ed. 757. The court said: "This is not the class of questions in which we are bound to follow the state courts. It is not based on a statute of the state, or on a construction of such a statute, nor on any rule of law affecting title to lands, nor any principle which has become a settled rule of property, but on those principles of public policy designed for the protection of the state or the public, of which we must judge for ourselves, as they do when the question is fairly presented."

⁹⁵ Edwards v. Davenport, 4 McCrary, 34, 20 Fed. 756.

⁹⁶ H. T. Smith Co. v. Minetto-Meriden Co. 168 Fed. 777.

⁹⁷ Reynolds v. New York Trust Co. 39 L.R.A. (N.S.) 391, 110 C. C. A. 409, 188 Fed. 611.

⁹⁸ Bancroft v. Hambly, 36 C. C. A. 595, 94 Fed. 975, reversing 83 Fed. 444. The court said: "As a precedent, the opinion of the supreme court of the state in the case cited is entitled, as are all of its opinions, to great respect. The present case, however, involves the interpretation of a contract not in any way dependent upon the construction of any state law, and that being so, we are not at liberty to follow the decision of that court construing the contract, if such construction does not meet with our approval, but are bound to exercise our independent judgment."

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⁹⁹ Johnson v. Charles D. Norton Co. 86 C. C. A. 361, 159 Fed. 361. In this case, which involved the specific question whether the liability of the guarantor was conditional upon the prosecution of the principal to insolvency, Lurton, J., said: "With respect of such a question of general law, involving as this does the construction and effect of commercial obligations so much used in commercial transactions, the courts of the United States, while inclined to agreement with the decisions of the court of the state of the solution of the contract, are not compelled to follow such decisions when they do not profess to be based upon a local statute nor any local usage having the force of local law." But see Re Merrill & Baker, 108 C. C. A. 390, 186 Fed. 312, a bankruptcy case, holding that a contract of guaranty is to be construed in the light of New York decisions that, when the meaning of the words used has been ascertained, the guarantor's liability is *strictissimi juris*, and not to be extended beyond its precise import.

¹⁰⁰ Kansas City Hydraulic Press Brick Co. v. National Surety Co. 149 Fed. 507. See also 93 C. C. A. 132, 167 Fed. 496 for later decision in this case. The court said that it was bound by the state decision as to the validity of the bond as between the contractor and the municipality, since that decision involved the construction of a state statute, but that the Federal court was not bound by the decision in so far as it held that no recovery can be had by laborers or materialmen, for the reason that that question was one of general jurisprudence, upon which the Federal court is bound to exercise its independent judgment.

¹ Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33 (validity of stipula-

tract made for his benefit;² as to the effect upon contracts of a statute prohibiting labor on Sunday;³ as to what constitutes a breach of a contract for services;⁴ as to the right of the lowest bidder to the award of a contract for a public improvement.⁵ And the validity, under the state Constitution, and the construction, of statutes in relation to the payment of wages of employees, are, of course, matters as to which the decisions of the highest state courts are binding upon the Federal courts.⁶

2. Commercial paper.

As has been seen, the doctrine that the Federal courts are not bound to follow the decision of the state court on questions of

tion in lease exempting railroad company from liability for negligence in setting fire to a storage warehouse on the right of way). But see *supra*, note 14, for a history of this case.

"But in special contracts not governed by the rules of commercial law, but provided for by special legislation of a state, conferring special rights and vested interests enforceable alone under such state legislation, we must, under the ruling in *Whitfield v. Aetna L. Ins. Co.* 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. Rep. 578, be governed by the law of that state touching the application of this doctrine of public policy, for, under such circumstances, the state has a right to adopt the view entertained by the supreme court or to reject it. In other words, the state, by its own legislation and the decisions of its own courts, can establish its own public policy, 'provided it does not, in doing so, come into conflict with the Constitution of the state or the Constitution of the United States,' although such policy, so established, may be, in the opinion of the Federal courts, 'inconsistent with public policy or sound morality.'" So in *McCue v. Northwestern Mut. L. Ins. Co.* 93 C. C. A. 71, 167 Fed. 435, it was said: The judgment in the *McCue* Case was reversed by the United States Supreme Court (223 U. S. 234, 56 L. ed. 419, 38 L.R.A.(N.S.) 57, 32 Sup. Ct. Rep. 220), but that court held that the contract in question was governed by the law of Virginia, the decisions of whose courts on the point in question did not differ from those of the Federal courts, rather than by the law of Wisconsin, as held by the lower court. The Supreme Court said that it was not called upon to decide whether it would have had to yield to the public policy of Virginia if it were the same as it was contended that the policy of Wisconsin was on the point involved in the case. See also *Spinks v. Mutual Reserve Fund Life Asso.* 137 Fed. 160, *supra*, III. e, note 75.

But in *Sheppey v. Stevens*, 177 Fed. 484 (involving a contract attacked as contrary to public policy as in restraint of marriage), it is declared generally that the

general law, but may exercise their own independent judgment, in the absence of statutory provision on the point in question, was first declared with reference to the general principles of commercial law, and specifically with reference to the question whether one who takes negotiable paper in payment of, or as collateral security for, an existing indebtedness, is entitled to protection as a bona fide holder. The right of the Federal court in the absence of statute on the subject, to decide this question for itself, irrespective of the decisions of the court of the state in which the action arose, has been held in a number of cases since the original decision to that effect in *Swift v. Tyson*.⁷ And this right of the Federal courts, in the absence of a local statute, to

question whether a contract is contrary to public policy is one of general law, and not dependent upon any local statute or usage, and in determining such question the Federal courts will exercise their own judgment. The court, however, apparently fails to take account of the possible difference in this respect between commercial or mercantile contracts, and contracts not of that character.

There is an obvious distinction bearing on the subject of this note, between the question whether a contract is invalid because contrary to public policy, and the question referred to *infra*, IV. b, whether it is contrary to the public policy of one state to entertain an action upon a particular contract or transaction having its situs in another.

² *Sonstiby v. Keeley*, 2 *McCrary*, 103, 7 Fed. 447, also reported in 11 Fed. 578; *Bethlehem Iron Co. v. Hoadley*, 152 Fed. 735. In the first case the court gave as a reason for following the state decisions on the point that otherwise a party might be subjected to a double liability.

³ *Hill v. Hite*, 79 Fed. 826.

⁴ *Ely v. Van Kannel Revolving Door Co.* 184 Fed. 459.

⁵ *United States Wood Preserving Co. v. Sundmaker*, 110 C. C. A. 224, 186 Fed. 678.

⁶ *Crowther v. Fidelity Ins. Trust & S. D. Co.* 29 C. C. A. 1, 42 U. S. App. 701, 85 Fed. 41. The case of *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, following the construction placed by the state court on such a statute, is not strictly within the scope of the note, as the case came up on writ of error to the state court.

⁷ To that effect are *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865 (original case); *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *Riley v. Anderson*, 2 *McLean*, 589, Fed. Cas. No. 11,835; *Re Hopper-Morgan Co.* 154 Fed. 249; *H. Scherer & Co. v. Everest*, 94 C. C. A. 346, 168 Fed. 822; *Melton v. Pensacola Bank & T. Co.* 111 C. C. A. 166, 190 Fed. 126. And other Federal cases have

determine the questions of general commercial law in accordance with their own independent judgment, and upon general principles of commercial law, without reference to the decisions of the state court, clearly attaches to all questions relating to commercial paper, and has been specifically declared and applied to the questions concerning the character and negotiability of paper;⁸ whether one who places his name on the back of a note before delivery is a maker or indorser;⁹ the liability of accommodation parties;¹⁰ whether the transfer of a note having valid inception, from indorser to indorsee at an excessive rate of interest, is usurious;¹¹ the right of the holder to maintain an action against the drawer as soon as the drawee refuses to accept, without awaiting the maturity of the bill;¹² the rate of interest *ex more* for default in paying a bill of exchange;¹³ whether a contract created by indorsement and delivery

may be varied by parol;¹⁴ whether a particular defense is available against a bona fide purchaser before maturity;¹⁵ and the doctrine has been applied to common-law questions of burden of proof and presumption in relation to commercial paper.¹⁶ It has been held, however, that a Federal court will follow the decisions of the state court as to the relative priority of notes secured by a mortgage, upon the ground that they established a rule of property.¹⁷

Thus far questions referred to in this section have been dealt with upon the assumption that there was no local statute affecting them. It has been held that even an explicit state statute cannot affect the right or duty of the Federal court to decide a question of commercial law upon general principles, when it affects the jurisdiction of that court, and the statute, if binding upon it, would diminish its jurisdiction.¹⁸ And

assumed that the Federal rule on this subject was to be followed by the Federal court irrespective of the views of the state court. See note in 31 L.R.A.(N.S.) 289, *et seq.*

⁸ *Austen v. Miller*, 5 McLean, 153, Fed. Cas. No. 661 (certificate of deposit); *Farmers' Nat. Bank v. Sutton Mfg. Co.* 17 L.R.A. 595, 3 C. C. A. 1, 6 U. S. App. 312, 52 Fed. 191 (as affected by provision for attorneys' fee); *Bradley v. Lill*, 4 Biss. 473, Fed. Cas. No. 1,783; *Bank of Saginaw v. Title & T. Co.* 105 Fed. 491 (certificate of deposit); *State Nat. Bank v. Cudahy Packing Co.* 126 Fed. 543, affirmed in 67 C. C. A. 662, 134 Fed. 538; *The Avalon*, 169 Fed. 696 (as affected by provision for attorneys' fee); *Forrest v. Safety Bkg. & T. Co.* 174 Fed. 345; *Security Trust Co. v. Des Moines County*, 198 Fed. 331 (payable in New York or Chicago exchange). And see *Windsor Sav. Bank v. McMahon*, 3 L.R.A. 192, 38 Fed. 286. And see also *infra*, IV. a, 3, note 37. In *Farmers' Nat. Bank v. Sutton Mfg. Co.* *supra*, Judge Taft remarked that where the question is a new one with the Federal court, it is their rule, as it is their duty, to give weight to the decisions of the state whose law they are administering. But see *infra*, note 18.

⁹ *First Nat. Bank v. Lock-Stitch Fence Co.* 24 Fed. 221; *Phipps v. Harding (Hudson Furniture Co. v. Harding)* 30 L.R.A. 513, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468.

¹⁰ *Jewett v. Hone*, 1 Woods, 530, Fed. Cas. No. 7,311; *H. Scherer & Co. v. Everest*, 94 C. C. A. 346, 168 Fed. 822.

¹¹ *Nichols v. Fearson*, 7 Pet. 103, 8 L. ed. 623 (this case, however, arose in the District of Columbia).

¹² *Watson v. Tarpley*, 18 How. 517, 15 L. ed. 509.

¹³ *Ex parte Heidelberg*, 2 Low. Dec. 526, Fed. Cas. No. 6,322.

¹⁴ *Van Vleet v. Sledge*, 45 Fed. 743; 40 L.R.A.(N.S.)

Northern Nat. Bank v. Hoopes, 98 Fed. 935.

¹⁵ *Citizens' Sav. Bank v. Newburyport*, 95 C. C. A. 232, 169 Fed. 766, *certiorari* denied in 215 U. S. 598, 54 L. ed. 342, 30 Sup. Ct. Rep. 399, holding that the fact that notes of a municipality constituted an overissue was no defense as against a bona fide holder. The court said: "It has long been held by the Supreme Court that special local laws do not apply to all phases of commercial paper in the hands of innocent bona fide holders; and the reason for this is plain. Commercial paper is governed by the law merchant, and the law merchant is a part of the private international law; and, commercial paper being intended to circulate into the hands of citizens of different states and nonresidents, it is not always possible to apply peculiar local law with justice." See also *infra*, IV. a, 3, note 35.

¹⁶ *First Nat. Bank v. Liewer*, 109 C. C. A. 70, 187 Fed. 16 (burden of proof as to alteration); *Young v. Lowry*, 113 C. C. A. 149, 192 Fed. 825 (presumption and burden of proof as to bona fides of holder).

¹⁷ *New York Secur. & T. Co. Lombard Invest. Co.* 65 Fed. 271.

¹⁸ Thus, in *Windsor Sav. Bank v. McMahon*, 3 L.R.A. 192, 38 Fed. 283, it was held that the negotiability of a note as affecting the right of an assignee to maintain an action thereon in the Federal court under the act of 1875, which in effect, with the exception of "promissory notes negotiable by the law merchant and bills of exchange," precludes an action in that court by an assignee unless the assignor could have maintained an action there, is to be determined by the law merchant, and is not affected by a state statute. And in *Watson v. Tarpley*, *supra*, it was held that a state statute providing that no action shall be commenced on a bill of exchange until maturity thereof could not restrict the

there are *obiter* expressions in some of the cases, lending some color to the view that so far as Federal courts are concerned it is beyond the power of the state legislature to change the general commercial law, even so far as questions of purely substantive law are concerned.¹⁹ That view, however, in respect of questions of substantive law, has not been sanctioned by the adjudicated cases; and is opposed to the tacit assumption of most of them, and has been expressly repudiated in at least one case decided by the circuit court of appeals.²⁰ And it has been expressly held by the Federal Supreme Court that a state statute of frauds, even as applied to commercial paper, is such a law of the state as has been declared by Congress to be a rule of decision in courts of the United States.²¹ There seems, therefore, to be no serious doubt that an explicit state statute on a particular point in relation to commercial paper must prevail in the Federal courts so far as the substantive rights of the parties are concerned, though it may be opposed to the general principles of commercial law which the Federal court would apply in the absence of such statute.²² And doubtless the

decisions of the highest state court as to the construction or effect of such a statute will in general be regarded as conclusive upon the Federal court.²³ The question arises, however, whether the Federal courts will feel bound by the decisions of the state courts construing the uniform negotiable instrument act as adopted in the respective states. Doubtless many of the questions of the law merchant as to which there was formerly a conflict of authority in the several states have been definitely settled by the explicit terms of such act, leaving no room for construction or interpretation. But upon some points there is the same opportunity for difference of opinion that there was before the adoption of the act, or at least the courts of some states which have adopted the act have so held. For example, the very question involved in the case in which the Federal Supreme Court first authoritatively declared its independence of the state decisions, *viz.*, whether one who takes paper as collateral security for a pre-existing indebtedness is a bona fide holder, has been held by some of the lower courts in New York to be unaffected by the act.²⁴ And if the court of appeals of that

right of the holder of such a bill (assuring diversity of citizenship) to bring an action thereon against the drawee in the Federal court immediately upon the drawee's refusal to accept it and before its maturity.

¹⁹ See opinion of Justice Story in *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865, and of Justice Daniel in *Watson v. Tarpley*, 18 How. 517, 15 L. ed. 509. In *Bank of Sherman v. Apperson*, 4 Fed. 25, the court, while conceding that it was not clear why, if the state has power to enlarge the commercial law, it does not have power to restrict it, yet said that the result of the authorities seems to be that, while state statutes which restrict or impair the rights and remedies secured to citizens of the several states under the general commercial law, or which devalue Federal courts of the cognizance of those rights and remedies are not binding those statutes which enlarge and extend the general commercial law will be enforced.

²⁰ *Phipps v. Harding* (Hudson Furniture Co. v. Harding) 30 L.R.A. 513, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468. The court characterized the language employed in *Swift v. Tyson*, 16 Pet. 1, 18, 10 L. ed. 865, 871, and *Watson v. Tarpley*, 18 How. 517, 15 L. ed. 509, on this point as *obiter*; and remarked that, while it was desirable that there should be uniformity of laws with respect to commercial paper, it was not within the province of the court to bring about that result.

²¹ *Moses v. National Bank*, 149 U. S. 298, 37 L. ed. 743, 13 Sup. Ct. Rep. 900.

²² Thus, in *Phipps v. Harding*, *supra*, it is held that the Federal court is bound by 40 L.R.A. (N.S.)

a state statute which entitles one who signs a note on the back thereof before delivery to notice of dishonor as a surety.

²³ *Bank of United States v. Daniel*, 12 Pet. 32, 9 L. ed. 989 (following state decisions as to applicability to bill payable in another state, of a statute subjecting drawer of bill to 10 per cent damages); *Davie v. Hatcher*, 1 Woods, 456, Fed. Cas. No. 3,610 (following state decisions as to applicability of statute requiring pursuit of principal as condition of holding indorser); *Bank of Sherman v. Apperson*, 4 Fed. 25 (following state decisions as to construction of statute enlarging negotiability of bills and notes).

So, in *Farmers' Nat. Bank v. Sutton Mfg. Co.* 17 L.R.A. 595, 3 C. C. A. 1, 6 U. S. App. 312, 52 Fed. 191, Judge Taft, while declaring in effect that Federal courts were not bound by the state decisions on general question of commercial law, "except so far as the rights of the parties are affected by statute," said a decision of the state court as to construction of a statute in relation to agreements for attorneys' fees in bills of exchange was "conclusive." And in *H. Scherer & Co. v. Everest*, 94 C. C. A. 346, 168 Fed. 822, the court, after asserting the right of the Federal courts to determine questions of general commercial law on general principles, remarked that so far as its conclusions rested upon a construction of a state statute limiting recovery by the holder of commercial paper procured by fraud, to the amount paid therefor, it was not inconsistent with the decisions of the state court.

²⁴ See note in 31 L.R.A. (N.S.) 287, 293.

state should adopt that view, a Federal court in a case arising there would be called upon to determine whether its right to follow the Federal rule rather than the New York rule on that point had been lost, because the New York decisions no longer rest solely upon the law merchant, but involve the construction of a statute. In view of their apparent reluctance to yield their right to decide commercial questions for themselves, it seems probable that the Federal courts would hold that the New York court doctrine still rests affirmatively upon their view of the principles of the law merchant, and only negatively upon the construction of the statute, which if not necessarily subversive of the New York doctrine, as is held in some states where that doctrine formerly prevailed, certainly lends no affirmative support thereto.²⁵

The general question as to whether the Federal courts are bound to follow the decisions of the state courts on questions under statutes codifying the common law has been touched upon in a previous subdivision.²⁶

²⁵ In *Re Hopper-Morgan Co.* 154 Fed. 249, the court held that the uniform negotiable instrument law as adopted in New York had not changed the New York rule as laid down by cases in that state holding that, in the absence of a diversion of the paper from the purposes intended, even one who took merely as collateral security for a pre-existing indebtedness may enforce the same against an accommodation party. There is, however, no conflict between the New York rule and the Federal rule in such a situation. The conflict, so far as concerns the right of such a holder as against an accommodation party, is in relation to cases where the paper had been diverted. See note in 31 L.R.A. (N.S.) 287, 296. In *Trust Co. v. Markee*, 179 Fed. 764, and *Melton v. Pensacola Bank & T. Co.* 111 C. C. A. 166, 190 Fed. 126, it was assumed that the Federal rule had been put in force by the adoption of the negotiable instrument law, even if it had not formerly prevailed in the particular state; and as there were apparently no decisions of the state court to the contrary, the situation suggested in the text was not presented.

²⁶ *Supra*, III. g.

²⁷ *Amey v. Allegheny City*, 24 How. 364, 16 L. ed. 614; *Lee County v. Rogers*, 7 Wall. 181, 19 L. ed. 160; *Chambers County v. Clewa*, 21 Wall. 317, 22 L. ed. 517; *Florida v. Anderson*, 91 U. S. 667, 23 L. ed. 290; *Rummel v. Butler County*, 93 Fed. 304; *Leavenworth County v. Barnes*, 94 U. S. 70, 24 L. ed. 63; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. ed. 394; *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416; *Morgan County v. Allen*, 103 U. S. 498, 26 L. ed. 498; *Walnut v. Wade*, 103 U. S. 683, 26 L. ed. 526; *Wade v. Walnut*, 105 U. S. 1, 26 L. ed. 1027; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 363; *First Nat. Bank v. Bennington*, 16 Blatchf. 53, Fed. Cas. No. 4,807; *First Nat. Bank v. Arlington*, 16 Blatchf. 57, Fed. Cas. No. 4,806; *King v. Wilson*, 1 Dill. 555, Fed. Cas. No. 7,810; *McCoy v. Washington County*, 3 Phila. 290, Fed. Cas. No. 8,731; *Smith v. Tallapoosa County*, 2 Woods, 574, Fed. Cas. No. 13,113; *Thomas v. Scotland County*, 3 Dill. 7, Fed. Cas. No. 13,909; *Estill County v. Embry*, 50 C. C. A. 573, 112 Fed. 882, affirmed in 75 C. C. A. 654, 144 Fed. 913; *Rees v. Olmsted*, 68 C. C. A. 50, 135 Fed. 296.

3. Municipal and county bonds.

Upon no other questions relating to the validity and construction of state statutes have there been so many departures by the Federal courts from the rule of following the decisions of the highest state court, as upon the questions relating to the constitutionality, construction, and effect of statutes under which commercial bonds have been issued by municipalities, or counties, or other public bodies. The Federal courts nearly always follow the decisions of the highest state court upon these questions, when those decisions sustain the validity of the bonds.²⁷

In some cases, the decisions of the highest state court have been followed notwithstanding they were such as to render the bonds in question invalid. But it generally appears in such cases that the state decisions relied on were rendered before the issuance of the bonds in question, or that, even as an independent proposition, the Federal court would have reached the same conclusion as the state court.²⁸

In the last case, the court said that the question must be determined by the construction placed upon the Constitution at the time the statute under which the bonds were issued was passed. It does not appear, however, that there had been any change of decision. See also *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715, *infra*, note 33.

But see *Quaker City Nat. Bank v. Nolan County*, 59 Fed. 660, where the Federal court refused to follow a decision of the state court upholding the validity of the bonds issued without compliance with a constitutional requirement, the point not having been called to the attention of the state court.

²⁸ In *Pleasant Twp. v. Aetna L. Ins. Co.* 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215, the Federal court, while agreeing with the decisions of the state courts rendered after the rights of the parties had accrued, against the validity of the bonds, expressly declared that the state decisions were not conclusive.

In the following cases, in which the de-

But when the latest decisions of the highest state court as to the validity or construction of a statute under which such bonds were issued are such, if followed, as to render the bonds invalid, the Federal court, at least unless, as an independent proposition, they would reach the same conclusion as the state court, generally finds some way of upholding the bonds notwithstanding the state court decisions. The precise ground of exception to the general rule, is apt to be dictated by the exigencies of the particular case. The exception most frequently applied is that the Federal courts, in case of a change of judicial decision by the state courts, will follow the earlier decisions in favor of the validity of the bonds in force at the time they were

issued, or when the right of the parties accrued, rather than the later decisions unfavorable to their validity;²⁹ thus, applying specifically the exception discussed in subdivision III. b. supra.

In other cases, where there were prior Federal decisions favorable to the bonds, the Federal courts have refused to follow later state decisions unfavorable thereto, rendered after the accrual of the rights in question.³⁰ In one case, the Federal Supreme Court declined to reverse a decision of the Federal circuit court favorable to the bonds, in consequence of a contrary decision rendered by the state court after the decision in the circuit court.³¹ The same court, however, upon another occasion, changed its prior decision unfavorable to the validity

cisions of the state court were followed, although they were unfavorable to the validity of the bonds, it appeared that they were rendered before the issuance of the bonds in question, or at least before the rights in question had accrued: *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154 (the principle was decided before the bonds were issued, though the decisions as to the specific question were later); *Post v. Kendall County*, 105 U. S. 667, 26 L. ed. 1204 (the principle was decided before the bonds were issued, though the decisions as to the specific question were later); *German Sav. Bank v. Franklin County*, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. Rep. 159 (the court expressly states that the state decisions were rendered before the bonds were issued); *Rich v. Mentz*, 134 U. S. 632, 33 L. ed. 1074, 10 Sup. Ct. Rep. 610; *Raymond v. Terrebonne*, 28 Fed. 773, affirmed in 132 U. S. 192, 33 L. ed. 309, 10 Sup. Ct. Rep. 67 (expressly states that plaintiff took title to bonds after the state court decision was made public). While the state decision which was followed in *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121, was apparently rendered after the issuance of the bonds, they seem to have been issued during the pendency of the appeal in which the decision was made.

In *East Oakland v. Skinner*, 94 U. S. 255, 24 L. ed. 125; *Liebman v. San Francisco*, 11 Sawy. 158, 24 Fed. 705, and *Katzenberger v. Aberdeen*, 16 Fed. 745, affirmed in 121 U. S. 172, 30 L. ed. 911, 7 Sup. Ct. Rep. 947, following state court decisions unfavorable to the validity of bonds, although apparently rendered after the bonds in question were issued, the Federal courts were of the same opinion as the state courts, on the merits of the question. And see *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489.

In *Willis v. Wyandotte County*, 30 C. C. A. 445, 58 U. S. App. 665, 86 Fed. 872, holding that a state decision declaring a statute under which road certificates were is-

sued by a county unconstitutional would be adopted by the Federal court, it does not appear whether the certificates were issued before or after the state decision. As a matter of fact, however, the plaintiff was allowed to recover in this case on the ground of estoppel, so that no practical consequences followed from the adoption of the state decision.

In *Lytle v. Lansing*, 147 U. S. 59, 37 L. ed. 78, 13 Sup. Ct. Rep. 254, the state decision against the validity of the bond was perhaps *res judicata*, though that is not clear. However, it does not appear but that the Federal court would have reached the same conclusion as an independent proposition.

²⁹ *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. ed. 38; *Thomas v. Lee County*, 3 Wall. 327, 18 L. ed. 177; *Mitchell v. Burlington*, 4 Wall. 270, 18 L. ed. 350; *Kenosha v. Lamson*, 9 Wall. 477, 19 L. ed. 725; *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. ed. 1008; *New Buffalo Twp. v. Cambria Iron Co.* 105 U. S. 73, 26 L. ed. 1024; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382; *Re Copenhaver*, 54 Fed. 660; *Coler v. Stanly County*, 89 Fed. 257; *Franklin County v. Gardiner Sav. Inst.* 55 C. C. A. 614, 119 Fed. 36; *Henderson County v. Travelers' Ins. Co.* 63 C. C. A. 467, 128 Fed. 817. In *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520, there was a vigorous dissenting opinion by Miller, J.

³⁰ *Westermann v. Cape Girardeau County*, 5 Dill. 112, Fed. Cas. No. 17,432; *Foote v. Johnson County*, 5 Dill. 281, Fed. Cas. No. 4,912; *McCall v. Hancock*, 20 Blatchf. 344, 10 Fed. 8; *Pickens Twp. v. Post*, 41 C. C. A. 1, 99 Fed. 659. But see *contra*, *Leslie v. Urbana*, 8 Biss. 435, Fed. Cas. No. 8,276.

³¹ *Roberts v. Bolles*, 101 U. S. 119, 25 L. ed. 880.

of the bonds, in consequence of a decision of the state court upholding their validity.³²

While, as just shown, the Federal courts ordinarily decline to follow later state court decisions unfavorable to the validity of the bonds, overruling earlier decisions in force when the bonds were issued and the rights of the parties accrued, the converse of that proposition is not true. Thus, the United States Supreme Court has followed the latest state court decisions favorable to the validity of the bonds in preference to earlier state court decisions unfavorable thereto.³³

Another and broader exception than either of those already referred to, has been frequently invoked to enable the Federal courts to avoid following decisions of the highest state court unfavorable to the bonds in question, when the Federal courts would hold otherwise as an independent proposition, *viz.*, that the Federal courts are not bound to follow a decision of the state court as to the validity or construction of a statute under which bonds were issued, rendered after the issuance of the bonds and after the rights of the party had accrued.³⁴ It is doubtless essential to the application

³² *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544. As a matter of fact, the decision of the state court was prior in point of time to the first decision of the Federal court, but was not then brought to the attention of that court.

³³ *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715, reversing 26 C. C. A. 589, 52 U. S. App. 395, 81 Fed. 742. The court said: "If there be any inconsistency in the opinions of these courts, the general rule is that we follow the latest judicial adjudication in preference to the earlier one." The earlier state decisions, however, were subsequent to the issuance of the bonds, and so the court would perhaps have reached the same result even though there had been no state court decisions favorable to the bonds, by applying the exception next discussed in the text.

³⁴ *Pine Grove Twp. v. Talcott*, 19 Wall. 666, 22 L. ed. 227; *Bourbon County v. Block*, 99 U. S. 686, 25 L. ed. 491; *Johnson County v. Thayer*, 94 U. S. 631, 24 L. ed. 133; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *Barnum v. Okolona*, 148 U. S. 393, 37 L. ed. 495, 13 Sup. Ct. Rep. 638; *Folsom v. Township 96*, 159 U. S. 611, 40 L. ed. 278, affirming 51 C. C. A. 379, 113 Fed. 705, 16 Sup. Ct. Rep. 174; *Stanly County v. Coler*, 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811; *Speer v. Kearney County*, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 762; *Union Bank v. Oxford*, 90 Fed. 7; *Rondot v. Rogers Twp.* 39 C. C. A. 462, 99 Fed. 202; *Northwestern Sav. Bank v. Centreville Station*, 74 C. C. A. 275, 143 Fed. 81; *Onslow County v. Tollman*, 76 C. C. A. 317, 145 Fed. 753; *Hertford County v. Tome*, 82 C. C. A. 215, 153 Fed. 81.

In *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539, where the state decision was rendered upon the very bonds in suit in the Federal case, though the state action was between different parties and the judgment was not *res judicata*, the Federal court said: The state decision is not a judgment construing the Constitution and laws of the state which, without regard to its opinion, the Federal court is bound to adopt and apply, it not being a rule previously established so as to become recognized as settled law, 40 L.R.A. (N.S.)

knowledge of which would be imputed to the party.

A number of the foregoing cases cite *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10, which, as shown in another section, recognizes a case where there were no state decisions prior to the contract in question, as well as a case where there was a change of judicial position by the state court after the contract, as an exception to the general rule that the Federal courts will follow the decisions of the highest state court. And so, upon the authority of that case, the court in *Anderson v. Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413, after holding that the rights of the parties upon municipal bonds representing negotiable securities were to be determined according to the law as declared by the state court at the time the securities were issued, further expressly said that, assuming that, at the time the bonds were issued, the state court had not passed upon the validity of the statute, the Federal courts could adopt their own interpretation of the law applicable to the case, although a different interpretation may have been adopted by the state court after such rights accrued.

In *Elmwood Twp. v. Marcy*, 92 U. S. 289, 23 L. ed. 710, however, following state decisions holding bonds void and as in violation of the state Constitution, and a curative act unconstitutional, the court said: "We have always followed the highest court of the state in its construction of its own Constitution and laws. It is only where they have been construed differently at different times that, in cases like this, we have adopted as a rule of action the first decision and rejected the last." Although the state decisions upon the specific question as to the validity of bonds issued under the circumstances involved in the Federal case were subsequent to the issuance of the bonds in question, they were apparently in harmony with earlier state decisions preceding the bonds. It seems probable, therefore, that the court did not have in mind a case where there had been no state decision on the subject at all prior to the issuance of the bonds in question. At all events, any implication that it is only when there has been a change of decision by the state courts that the Federal courts may

of this broader exception that, at the time of the issuance of the bonds, there shall have been no intimations from an authoritative source, legislative or judicial, casting any serious doubt upon their validity, and that the holders, upon the facts then existing, shall have been justified in assuming that the bonds were valid; but it is not essential that they should have acted upon affirmative decisions of the state tribunals to that effect. This is a specific application of the exception discussed in subdivision III. c.

In some cases, the Federal courts have decided in favor of the holder of the bonds, notwithstanding state decisions to the effect that they were invalid even in the hands of bona fide holders, upon the ground that the

right of bona fide holders of such instruments is a general question of commercial law, as to which the Federal courts are not bound by the decisions of the state court.³⁵ This position is apparently not dependent upon the time of the state decisions relatively to the issuance of the bonds. The theory underlying these cases appears to be that, while the decisions of the state courts may be regarded as decisions upon a question of local, constitutional, or statutory law so far as they hold in general that the bonds are invalid, yet they are but decisions on a question of commercial law so far as they hold that the defects in the bonds are available as against bona fide holders, at least when they are mere deductions from the general holding as to the in-

refuse to follow the state decision is against the weight of authority of the later cases.

In this connection, however, attention is called to the case of *Zane v. Hamilton County*, 189 U. S. 370, 47 L. ed. 858, 23 Sup. Ct. Rep. 538, affirming a decision of the circuit court of appeals (43 C. C. A. 416, 104 Fed. 63), which, upon the authority of state decisions apparently rendered after the issuance of the bonds in question, held that the bonds were void. The point made in the Supreme Court was that the holder of the bonds had no contract right protected by the Federal Constitution, because the purchase was made on the faith of prior decisions of the state courts that municipal subscriptions to railroad stock were so far germane to railroad incorporation as not to require specific mention in the title of an act providing for the incorporation of a railroad. There is no suggestion in the opinion of the Supreme Court that the Federal court was not bound to follow the decision of the state court holding that the statute under which the bonds were issued was unconstitutional; and, as stated, the decision in the lower court against the validity of the bonds was expressly based on the decisions of the state court, although it would seem that they were rendered after the issuance of the bonds in question. It may be, however, that the Federal court, even as an independent question, would have come to the same conclusion as the state court.

³⁵ *Marshall County v. Schenck*, 5 Wall. 772, 18 L. ed. 556; *Pine Grove Twp. v. Talcott*, 19 Wall. 666, 22 L. ed. 227; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704; *Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583; *Pleasant Twp. v. Ætna L. Ins. Co.* 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215 (there was no conflict between the decisions of the state court and the opinion of the Federal court, both being of the opinion that the act was constitutional); *Presidio County v. Noel-Young Bond & Stock Co.* 212 U. S. 58, 53 L. ed. 402, 29 Sup. Ct. Rep. 237; *Schenck v. Marshall County*, 1 Biss. 533, Fed. Cas. No. 12,449; *Clapp v. Otoe County*, 45 C. 40 L.R.A. (N.S.)

C. A. 579, 104 Fed. 477; *Independent School Dist. v. Rew*, 55 L.R.A. 364, 49 C. C. A. 198, 111 Fed. 1; *Citizens' Sav. Bank v. Newburyport*, 95 C. C. A. 232, 169 Fed. 766, certiorari denied in 215 U. S. 598, 54 L. ed. 342, 30 Sup. Ct. Rep. 399.

In *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704, the court said that it might be required to yield, against its own judgment, to the proposition that, under the charter of the railway company, the election in this case was irregular and void; but that it was not bound to accept the inference drawn by the state court that, in consequence of such irregularity, the bonds were void in the hands of a bona fide holder.

In *Presidio County v. Noel-Young Bond & Stock Co.* the court said that since the decision in *Swift v. Tyson*, it has been the accepted doctrine that, in respect of questions of commercial law and general jurisprudence, the courts of the United States will exercise their own independent judgment, and in respect to such questions will not be controlled by decisions based upon local statutes or local usage, although, if the question is balanced with doubt, the courts of the United States, for the sake of harmony, will lean toward an agreement of views with the state court.

In *Independent School Dist. v. Rew*, 55 L.R.A. 364, 49 C. C. A. 198, 111 Fed. 1, the court said that the question under consideration was not one of the construction of the Constitution or of the statute of the state of Iowa, but simply involved the construction and effect of recitals in negotiable instruments, and was a question of commercial law, as to which the decisions of the state court were not controlling on the Federal court.

In *Citizens' Sav. Bank v. Newburyport*, 95 C. C. A. 232, 169 Fed. 766, involving the right of an innocent purchaser to recover on city notes representing an overissue, a fact which was not known to him and which did not appear on the face of the notes, the court said that if the whole question was one merely of authority on the part of the city treasurer, and if all the

validity of the bonds, and do not turn upon any statutory language on this point as to rights of bona fide holders. This, it will be observed, is a specific application of the exception considered in subdivision III. e.

So a decision of the state court that a statute authorizing issuance of railroad aid bonds was unconstitutional has been held not to be binding upon a Federal court, because the question determinative of the decision whether railroad aid is a public purpose for which taxation may be authorized is a general one, as to which the decisions of the state court are not controlling.³⁶ The question as to the negotiability of county bonds has been held a question of general commercial or mercantile law, as to which the decisions of the state courts are not binding.³⁷ But the right to interest on overdue interest coupons of railroad aid bonds has been held a question of local law, as to which state decisions are controlling.³⁸

4. Insurance contracts.

At the same term of court at which *Swift v. Tyson* was decided, Justice Story in another case³⁹ extended the doctrine announced in the former case, to contracts of insurance, remarking, in this connection: "The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract

of insurance, which is by no means local in its character or regulated by any local policy or customs. Whatever respect, therefore, the decisions of state tribunals may have on such a subject, they are certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment." Under this doctrine, it has been specifically held or declared that the Federal courts may decide with reference to general principles, and without regard to the decisions of the particular state court, the questions as to the mortgagor's interest in a policy taken out in his name and assigned to the mortgagee, and whether such insurance falls within the clause of another policy upon the mortgagor's interest, requiring notice of other insurance;⁴⁰ whether a policy procured by misrepresentation amounts to other insurance within such a provision;⁴¹ the necessity of an insurable interest as a condition of a valid assignment of a policy of life insurance;⁴² the validity of a stipulation prescribing a shorter period of limitation than that fixed by the statute of limitations;⁴³ whether an insurance

facts concerning the same were known to the purchaser of the notes when the title was acquired, the question might be a local one in the ordinary sense of the expression, but that the facts not being exhibited on the face of the notes, and not being known to the holder at the time the title was acquired, the question was not one as to which it was necessary to examine the local decisions.

In *German Sav. Bank v. Franklin County*, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. Rep. 159, however, state decisions rendered before the bonds in question were issued, which rendered them invalid whether in the hands of a bona fide holder or not, unless certain conditions were complied with, were followed by the Federal court.

So, in *Scipio v. Wright*, 101 U. S. 665, 25 L. ed. 1037, the state court decisions to the effect that purchasers of railroad aid bonds, with notice that they had been directly issued to a railroad company in exchange for stock, could not recover thereon, were followed and to the same effect is *Thompson v. Perrine*, 103 U. S. 806, 26 L. ed. 612.

³⁶ *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382. This was given an independent ground for refusal to follow the state decision, although there was another ground in that the bonds when issued were valid under the state Constitution and laws 40 L.R.A. (N.S.)

as expounded when they were issued. But see *Sutherland-Innes Co. v. Ewart*, 30 C. C. A. 305, 58 U. S. App. 335, 86 Fed. 597, *infra* IV. a, note 77.

³⁷ *Mercer County v. Hackett*, 1 Wall. 83, 17 L. ed. 548. The court, however, said that if the decision of the state court had been founded upon the construction of the Constitution or statute law of the state, the Supreme Court would have felt bound to follow it.

³⁸ *Bolles v. Amboy*, 45 Fed. 168.

³⁹ *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Gordon v. Ware Nat. Bank*, 67 L.R.A. 550, 65 C. C. A. 580, 132 Fed. 444; *Mutual L. Ins. Co. v. Lane*, 151 Fed. 276; *Russell v. Grigsby*, 94 C. C. A. 61, 168 Fed. 577. The last case was reversed by the United States Supreme Court, in 222 U. S. 140, 56 L. ed. 133, 36 L.R.A. (N.S.) 642, 32 Sup. Ct. Rep. 58; but that court also seems to have assumed that the question was a general one for the independent judgment of the Federal court although it expressed its gratification that the conclusion reached by it was sustained by a decision of the state court.

⁴³ *Spinks v. Mutual Reserve Fund Life Asso.* 137 Fed. 169. The court remarked that the decision of the state court cited

broker is the agent of the insurer or of the insured; ⁴⁴ whether an action for the cancellation of a life policy may be maintained after the death of the insured; ⁴⁵ what amounts to double insurance requiring contribution between insurers; ⁴⁶ the validity of an agreement for arbitration.⁴⁷ And the doctrine has been applied in numerous cases involving policies of marine insurance.⁴⁸

But the decisions of the highest state court construing statutes in relation to insurance are in general binding upon the Federal courts. It has been specifically so held or declared with reference to the construction of a state statute penalizing life insurance companies for failure to pay losses; ⁴⁹ as to statutes relating to suicide as a defense; ⁵⁰ excluding applications from evidence when a copy is not attached to the policy; ⁵¹ the applicability to policies issued by a foreign company, of a state statute making policies nonforfeitable for default

in payment of premium.⁵² So, the construction of the charter of an insurance company, although obtained under a general law, pertains to the state court, just as if it were granted by a special act of the legislature.⁵³ And it has been held by the circuit court of appeals that the decisions of the state court are controlling on the question whether the public policy of the state precludes recovery under a policy issued by a mutual insurance company created by a special act of the legislature, where the insured was executed for crime.⁵⁴ But it has been held that when a state statute is merely declaratory of a general principle in relation to insurance, is clear and unambiguous in its terms, and the state court, by apparent construction, writes into the statute a fundamental change in such general law, its decisions will not be regarded as binding upon the Federal courts.⁵⁴

by counsel was not based upon any peculiar feature of the statutes of limitation differentiating them from similar statutes in other jurisdictions; and that the reasoning upon which it was based was equally applicable to any jurisdiction. It is otherwise, of course, if there is an express statutory provision on the point. *Small v. Westchester F. Ins. Co.* 51 Fed. 789.

⁴⁴ *Travelers' Ins. Co. v. Thorne*, 38 L.R.A. (N.S.) 626, 103 C. C. A. 436, 180 Fed. 82, certiorari denied in 220 U. S. 614, 55 L. ed. 610, 31 Sup. Ct. Rep. 719.

⁴⁵ *Union L. Ins. Co. v. Riggs*, 123 Fed. 312.

⁴⁶ *Meigs v. London Assur. Co.* 126 Fed. 781, affirmed in 68 C. C. A. 249, 134 Fed. 1021.

⁴⁷ *Jefferson F. Ins. Co. v. Bierce*, 183 Fed. 588.

⁴⁸ *Washburn & M. Mfg. Co. v. Reliance M. Ins. Co.* 179 U. S. 1, 45 L. ed. 49, 27 Sup. Ct. Rep. 1, affirming 27 C. C. A. 134, 50 U. S. App. 231, 82 Fed. 296; *Robinson v. Commonwealth Ins. Co.* 3 Sumn. 220, Fed. Cas. No. 11,949 (total loss; abandonment; calculating half value); *Gloucester Ins. Co. v. Younger*, 2 Curt. C. C. 322, Fed. Cas. No. 5,487 (abandonment; acceptance by underwriter); *Williams v. Suffolk Ins. Co.* 3 Sumn. 270, Fed. Cas. No. 17,738 (liability for loss remotely caused by negligence of master or crew); *Mutual Safety Ins. Co. v. The George, Olcott*, 89, Fed. Cas. No. 9,981 (general average; voluntary stranding to save cargo).

⁴⁹ *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126.

⁵⁰ *Knights Templars' & M. Life Indemnity Co. v. Jarman*, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. Rep. 108.

⁵¹ *Manhattan L. Ins. Co. v. Albro*, 62 C. C. A. 213, 127 Fed. 281 (admissibility of oral statements afterwards included in application).

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⁵² *McClain v. Provident Sav. Life Assur. Soc.* 49 C. C. A. 31, 110 Fed. 80, certiorari denied in 184 U. S. 699, 46 L. ed. 765, 22 Sup. Ct. Rep. 938. The case of *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962, holding state court interpretation on that point conclusive, is not in point, as the case arose on error to the state court.

⁵³ *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404.

⁵⁴ *McCue v. Northwestern Mut. L. Ins. Co.* 93 C. C. A. 71, 167 Fed. 435. The circuit court of appeals was of the opinion that the contract in question was governed by the law of Wisconsin, where the company was incorporated, and, in conformity with the text, held that the decisions of the supreme court of Wisconsin were conclusive as to the public policy of the state. This decision was reversed by the Supreme Court in 223 U. S. 234, 56 L. ed. 419, 38 L.R.A. (N.S.) 57, 32 Sup. Ct. Rep. 220. The latter court, however, was of the opinion that the policy was governed, not by the law of Wisconsin, but by the law of Virginia, and as there was no conflict between the Virginia decisions and the Federal decisions on the point, the court said in effect that it was not called upon to decide whether it would have had to yield to the Virginia decisions if they had been contrary to the Federal decisions.

⁵⁴ *Mutual L. Ins. Co. v. Lane*, 151 Fed. 276, refusing to follow the decisions of the Georgia supreme court that a valid assignment of a policy of life insurance may be made to one having no insurable interest in the life of insured, although they purported to rest upon and be a construction of the Code provisions of the state on the subject. See further, as to the exception applied in this case, supra, III. g.

5. Carriers' contracts.

In the absence of local statutes, questions affecting the contracts of carriers and their liability *ex contractu* or *ex delicto* are regarded as questions of general law, as to which the decisions of the state court are not binding upon the Federal court. Thus, the Federal courts will exercise their own independent judgment upon the question what constitutes a contract of carriage;⁵⁵ as to the character of a passenger's legal rights and the carrier's liability;^{55a} and specifically whether the mistake of a ticket agent excuses the act of a conductor in ejecting a passenger;⁵⁶ as to the liability of the carrier for punitive or exemplary damages for the wanton misconduct of a conductor toward a passenger;⁵⁷ the duty which the carrier owes to the shipper in respect of the condition of cars;⁵⁸ the validity of a stipulation against liability for negligence.⁵⁹ It has been said, however, that upon considerations of comity and in the orderly administration of law, the decisions of the highest state court in an action between the same parties and upon the same facts, though not controlling, will be followed by the Federal court, even though it may not be wholly in accord upon the question of negligence presented.⁶⁰

The duty of the Federal courts to abide by the decisions of the highest state court construing statutes in relation to carriers

has been declared in a number of cases in the United States Supreme Court, which are not in point in this note, because the cases came up on error to the state court, and upon a question under the Federal Constitution.⁶¹ However, in actions in which the jurisdiction of the Federal courts rested upon diversity of citizenship, it has been held that they are bound by decisions of the highest state court as to validity, under the state Constitution, of a statute imposing an absolute liability upon carriers for injuries to passengers;⁶² whether a stipulation limiting liability to a fixed valuation violates a provision of the state Code declaring that a common carrier shall not exempt itself from liability for gross negligence by any contract made in anticipation thereof.⁶³ And so, while recognizing that the question whether a railway mail clerk is to be regarded as a passenger is, in the absence of statute, a general question, as to which the decisions of the state court are not controlling upon the Federal court, it has been held that a decision of the state court on that point, under a statute providing in effect that when one not an employee is injured while lawfully employed in or about any train or car, the right to recover shall be such only as would exist if such person were an employee, but that the provision shall not apply to passengers, is binding upon the Federal court.⁶⁴

⁵⁵ *Myrick v. Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425.

^{55a} *Baltimore & O. R. Co. v. Thornton*, 110 C. C. A. 502, 188 Fed. 868.

⁵⁶ *Ibid.*

⁵⁷ *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. -97, 13 Sup. Ct. Rep. 261.

⁵⁸ *Pennsylvania R. Co. v. Hummel*, 92 C. C. A. 541, 167 Fed. 89.

⁵⁹ *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 367, 21 L. ed. 627, 636; *Liverpool & G. W. Steam Co. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289 (*obiter*); *Eells v. St. Louis, K. & N. W. R. Co.* 52 Fed. 903. But see *contra*, *Blackwell v. Southern P. Co.* 184 Fed. 489, citing *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, in support of its proposition that where Congress has not legislated on the subject, the Federal courts will follow the declared policy of the state, as found either in its statutes or judicial decisions. The *Hughes* Case arose on writ of error to the state court, and for that reason is not in point.

⁶⁰ *Mearns v. Central R. Co.* 71 C. C. A. 331, 139 Fed. 543. In this instance, however, there was no variance between the views of the state and of the Federal court. 40 L.R.A. (N.S.)

⁶¹ See, for example, *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; *Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101; *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95.

⁶² *Clark v. Russell*, 38 C. C. A. 541, 97 Fed. 900.

⁶³ *Blackwell v. Southern P. Co.* 184 Fed. 489 (Cal. Code provision).

⁶⁴ *Yarrington v. Delaware & H. Co.* 143 Fed. 565, affirmed in 81 C. C. A. 522, 152 Fed. 396. The decision of the state court was followed notwithstanding that in the opinion of the Federal court it was erroneous. The Federal court said that if the state court had merely decided that a railway mail clerk was not a passenger, that being a question of general law, the

6. Telegraphs.

The liability of a telegraph company for failure promptly to deliver a message,⁶⁵ and the validity of a contract exempting the company from liability beyond the amount paid,⁶⁶ are questions of general law, as to which, in the absence of a local statute, the decisions of the state court are not controlling. And the same is true of the right to recover for mental anguish on account of the breach of duty of a telegraph company.⁶⁷

And it has even been held that the Federal court does not lose its right to decide, as an independent question, whether damages for mental anguish may be recovered by reason of state decisions upholding such right under a statute which does not deal with that particular question, but declares generally that a telegraph company shall be liable in case of unreasonable delay in delivering a telegram.⁶⁸

b. Contracts in relation to property.

1. Deeds, mortgages, and leases of real property.

As has been seen, the tendency is to regard questions concerning real property as local questions, as to which the decisions of the state court are controlling. Questions concerning the construction or effect of deeds and mortgages of real property have, however, in some instances, been regarded as general questions, as to which the Federal courts may exercise their own independent judgment, and are not concluded by the decisions of the state court. Thus, in a case⁶⁹ decided shortly after *Swift v. Tyson*, the United States Supreme Court declared that the decisions of the state court upon the construction of a deed as

to matters and language belonging to the common law, and not to any local statute, although entitled to high respect, are not conclusive upon the Supreme Court. And in another early case⁷⁰ the question whether an instrument which purports on its face to be an absolute conveyance may be shown by extrinsic evidence to be a mortgage was declared to be one depending upon general principles of equity jurisprudence, concerning which the court would be governed by its own view of those principles, and would not hold itself bound by the decision of the state court.

Upon the other hand, it has been declared to be well settled that the Federal court will adopt the local law of real property as sustained by the decisions of the state court, whether those decisions are grounded upon the construction of state statutes or form a part of the unwritten law, and therefore, where it appears that, by a course of decision in the courts of the state, certain language found in a deed, will, or other muniment of title, is there held to grant a certain estate or to confer certain rights, the Federal courts will give the same effect to the language.⁷¹ So it has been held that the decisions of the highest state court are binding upon the question whether a deed reserving a vendors' lien vests title in the grantee;⁷² whether an eviction was by virtue of the act of a holder of a paramount title, so as to come within the operation of a covenant in a deed;⁷³ whether the granting clause will prevail in case of a conflict with the other parts of the deed.⁷⁴

So it has been declared generally that the settled law of a state on the subject of mortgages is regarded as a rule of property, and the Federal courts are governed by the statute and decision of the court

Federal court would not be bound by it, but that the decision of the state court was that a railway mail clerk was not a passenger within the meaning of the statute whereby the company's responsibility is defined, and the decision therefore interpreted the statute, and could not be disregarded.

⁶⁵ *Western U. Telegr. Co. v. Wood*, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471.

⁶⁶ *Western U. Telegr. Co. v. Cook*, 9 C. C. A. 680, 15 U. S. App. 445, 61 Fed. 624.

⁶⁷ *Western U. Telegr. Co. v. Sklar*, 61 C. C. A. 281, 126 Fed. 295; *Western U. Telegr. Co. v. Burris*, 102 C. C. A. 386, 179 Fed. 92.

⁶⁸ *Western U. Telegr. Co. v. Sklar*, *supra*. See, further, as to the exception here applied to the general rule that decisions under state statutes must be followed, *supra*, III. e.

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⁶⁹ *Foxcroft v. Mallett*, 4 How. 353, 11 L. ed. 1008. In *Thomas v. Hatch*, 3 Sumn. 170, Fed. Cas. No. 13,899, Judge Story, referring to the construction of a deed relatively to amount conveyed, said that if the question were one of purely local law, the Federal court should not hesitate to follow the decision, but that the interpretation of the deed on the point in question was in no just sense a part of the local law.

⁷⁰ *Russell v. Southard*, 12 How. 139, 13 L. ed. 927. See, further, as to question of equity jurisprudence, *infra*, IV. w.

⁷¹ *Buford v. Kerr*, 33 C. C. A. 166, 62 U. S. App. 270, 90 Fed. 513, affirming 86 Fed. 97.

⁷² *Oliver v. Clarke*, 45 C. C. A. 360, 106 Fed. 402.

⁷³ *Pabst Brewing Co. v. Thorley*, 76 C. C. A. 87, 145 Fed. 117.

⁷⁴ *Dickson v. Wildman*, 105 C. C. A. 618, 183 Fed. 398.

of last resort of the state where the mortgaged property is situated.⁷⁵ And the rule has been applied to the nature and extent of the mortgagee's rights;⁷⁶ and specifically to his right to possession;⁷⁷ to the validity of a stipulation for attorneys' fees in case of foreclosure;⁷⁸ and the rights of the assignee of a bond and mortgage as against defenses available between the original parties.⁷⁹ So the Federal courts will follow the decisions of the state court upon question peculiar to mining leases;^{79a} as to interest recoverable on arrears of ground rent.^{79b} So the question whether a written contract amounts to an option or a sale of a vein of coal underlying land is one as to which decisions of the state court establishing a local rule are controlling upon the Federal court.^{79c} And, *a fortiori*, the Federal courts are ordinarily bound to follow the decisions of the highest state courts as to the construction and effect

of statutes in relation to deeds or mortgages of real property; and this rule has been specifically applied to decisions under statutes as to the effect of a transaction as a mortgage;⁸⁰ acknowledgment;⁸¹ amount secured;⁸² the legality of foreclosure proceedings;⁸³ the right of mortgagee to rents and profits pending foreclosure;⁸⁴ whether fees vests in mortgagee upon the default of the mortgagor;⁸⁵ redemption from foreclosure sale;⁸⁶ the order in which parcels sold subsequently to the mortgage shall be subjected to the satisfaction thereof;⁸⁷ the character and extent of title acquired under foreclosure in the state court.⁸⁸ While the Federal courts will doubtless in most cases continue to follow the decisions of the state court upon questions as to contracts in relation to real property, whether they depend upon statutes or the common law, it would seem that under the majority opinion of the

⁷⁵ Haggart v. Wilczinski, 74 C. C. A. 176, 143 Fed. 22.

⁷⁶ Omaha v. Omaha Water Co. 112 C. C. A. 504, 192 Fed. 246.

⁷⁷ Semple v. Bank of British Columbia, 5 Sawy. 88, Fed. Cas. No. 12,659.

⁷⁸ Bendey v. Townsend, 109 U. S. 665, 27 L. ed. 1065, 3 Sup. Ct. Rep. 482; Dodge v. Tulleys, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 28; Gray v. Havemeyer, 3 C. C. A. 497, 10 U. S. App. 456, 53 Fed. 174. State decisions, however, will not prevent Federal court from making reasonable allowance for counsel fees. Dodge v. Tulleys, *supra*.

⁷⁹ McFarlane v. Griffith, 4 Wash. C. C. 585, Fed. Cas. No. 8,790.

^{79a} Foster v. Elk Fork Oil & Gas Co. 32 C. C. A. 560, 61 U. S. App. 576, 90 Fed. 178.

^{79b} Newman v. Keffer, Brunner, Colo. Cas. 502, Fed. Cas. No. 10,177.

^{79c} Frette v. Shriver, 181 Fed. 279. The court, however, said that the Federal court would not be bound to follow a single decision of the state court of last resort, especially when such state decision was rendered since the institution of the suit in the Federal court.

⁸⁰ Pioneer Gold Min. Co. v. Baker, 10 Sawy. 539, 23 Fed. 258.

⁸¹ M'Keen v. Delancy, 5 Cranch, 22, 3 L. ed. 25; Berry v. Northwestern & P. Hypotheek Bank, 35 C. C. A. 185, 93 Fed. 44; Gillespie v. Pocahontas Coal & Coke Co. 91 C. C. A. 494, 163 Fed. 992.

So, in Lewis v. Herrera, 208 U. S. 309, 52 L. ed. 506, 28 Sup. Ct. Rep. 412, it was held that the construction of a territorial statute on this subject by the local courts was of great, if not controlling, weight.

⁸² Whitney v. Whitney Elevator & Warehouse Co. 180 Fed. 187.

⁸³ Bacon v. Northwestern Mut. L. Ins. Co. 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787. The court remarked that it 40 L.R.A.(N.S.)

would follow the ruling of the state supreme court on this point, even though it might have some doubts upon it as an original proposition. Sullivan v. Portland, 4 Cliff. 212, Fed. Cas. No. 13,596.

⁸⁴ Union Mut. L. Ins. Co. v. Union Mills Plaster Co. 3 L.R.A. 90, 37 Fed. 286.

⁸⁵ Russell v. Ely, 2 Black, 575, 17 L. ed. 258.

⁸⁶ Metropolitan Nat. Bank v. Connecticut Mut. L. Ins. Co. 131 U. S. CLXII. and 24 L. ed. 1011; Jackson & S. Co. v. Burlington & L. R. Co. 29 Fed. 474; Traer v. Fowler, 75 C. C. A. 540, 144 Fed. 810.

In the following cases, the decision on this point is simply to the effect that the state statutes relating to redemption are binding upon the Federal courts in suits to foreclose, there apparently being no question as to the effect of state decisions under those statutes: Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Swift v. Smith, 102 U. S. 442, 26 L. ed. 193; Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236; Parker v. Dacres, 130 U. S. 43, 32 L. ed. 848, 9 Sup. Ct. Rep. 433.

But the Federal courts, in giving substantial effect to the right of redemption secured by a state statute, may adhere to their own mode of procedure. Allis v. Northwestern Mut. L. Ins. Co. 97 U. S. 144, 24 L. ed. 1008. As stated at the beginning of the note, it does not purport to deal with the question whether a particular statute is binding upon the Federal courts; but presupposes that a statute explicit in terms would be binding. Otherwise, of course, the distinctive question presented in this note could not arise.

⁸⁷ Orvis v. Powell, 98 U. S. 176, 25 L. ed. 238.

⁸⁸ Hearfield v. Bridges, 21 C. C. A. 212, 44 U. S. App. 574, 75 Fed. 47, affirming 67 Fed. 333.

But in Julian v. Central Trust Co. 193

Supreme Court in the Kuhn Case,⁸⁹ they are at liberty to decline to do so as to decisions of the state court that had not become rules of property at the time the rights in question accrued; and this notwithstanding that there has been no change in decisions in the state court.

2. Chattel mortgages; conditional sales.

Questions relating to chattel mortgages are, in general, regarded as local questions, as to which the decisions of the state court are controlling upon the Federal courts, assuming that the particular question is not affected by the Federal law. It has been so held as to the question whether taking possession under an unrecorded chattel mortgage amounts to a fraudulent preference;⁹⁰ the validity of a chattel mortgage covering after-acquired property,⁹¹ or property consumable in the use;⁹² its validity as affected by a provision giving the

mortgagor the right to retain possession and make sales,⁹³ or by the reservation of the mortgagor's exemption.⁹⁴

So, the question as to the validity and effect of a chattel mortgage which is not filed as provided by statute is a local question, as to which the decisions of the state court are controlling, assuming that the statute itself is binding upon the Federal courts.⁹⁵

The Federal courts will also follow the decision of the highest state court as to the construction of statutes in relation to conditional sales, and the effect of the failure to file the contract.⁹⁶

So, the question whether a contract in relation to personal property is one for a conditional sale or a lease,⁹⁷ or a bailment or sale,⁹⁸ has been held a question of local state law. It is to be understood that this subdivision, in conformity to the scope of the note as outlined at the beginning, deals only with cases that proceed upon the as-

U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399, holding that the determination by a state court that the property covered by a mortgage of all property and franchises of a railroad company remains liable after a sale under a Federal court decree of foreclosure, for the debts thereafter accruing against the mortgagor, because of the purchaser's failure to organize a domestic corporation, is not conclusive on the Federal Supreme Court in determining the rights secured by the purchaser under such a decree, the court said: "This decision of the highest court of the state was made after the rights of the Southern Railway Company, whatever they may be, had accrued in the property and franchise of the Western North Carolina Railroad Company, and, while entitled to the highest respect and consideration, is not conclusive upon this court in determining the rights secured to the purchaser under the decree of foreclosure in a Federal court."

⁸⁹ Kuhn v. Fairmont Coal Co. 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140. And see Fretts v. Shriver, ante, note 79, c. See also, as to what is necessary to a rule of property binding upon the Federal courts, supra II. b.

⁹⁰ Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567.

⁹¹ Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; American Surety Co. v. Worcester Cycle Mfg. Co. 100 Fed. 40.

In *Re Hurley*, 185 Fed. 851, the court expressly states that had the chattel mortgagee taken possession of after-acquired property before the commencement of bankruptcy proceedings, her right to hold it as against the trustee would have been a question of Massachusetts law, and not a question depending upon the bankruptcy act. Apparently the decision that she could not hold as against the trustee was referred 40 L.R.A. (N.S.)

to the provision of the bankruptcy act, § 78, by which the title of the trustee relates back to the date of the adjudication.

⁹² Swager v. Smith, 194 Fed. 762.

⁹³ Morse v. Riblet, 22 Fed. 501; *Re Antigo Screen Door Co.* 59 C. C. A. 248, 123 Fed. 249; *Dugan v. Beckett*, 63 C. C. A. 498, 129 Fed. 56; *Dodge v. Norlin*, 66 C. C. A. 425, 133 Fed. 363; *Re First Nat. Bank*, 67 C. C. A. 536, 135 Fed. 62; *Johansen Bros. Shoe Co. v. Alles*, 197 Fed. 274; *Etheridge v. Sperry*, 139 U. S. 267, 35 L. ed. 171, 11 Sup. Ct. Rep. 565. But see *contra*, *Re Hull*, 115 Fed. 858.

⁹⁴ Wilson v. Perrin, 11 C. C. A. 66, 22 U. S. App. 514, 62 Fed. 629.

⁹⁵ Cutler v. Huston, 158 U. S. 423, 39 L. ed. 1040, 15 Sup. Ct. Rep. 868; *Re Oliver*, Fed. Cas. No. 10,492; *Re Wade*, 195 Fed. 667; *Re Shirley*, 50 C. C. A. 252, 112 Fed. 301; *Re H. G. Andrae Co.* 117 Fed. 561; *Re Beede*, 138 Fed. 441; *Re Huxoll*, 113 C. C. A. 637, 193 Fed. 851; *Walter A. Wood Co. v. Eubanks*, 95 C. C. A. 273, 169 Fed. 929.

⁹⁶ Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; *Re Burke*, 168 Fed. 994; *Hamilton v. David C. Beggs Co.* 179 Fed. 949. In the *Hamilton Case* and the *York Mfg. Co. Case*, the position of the state court on this point was deduced from its position with respect of chattel mortgages under a similar statute.

⁹⁷ *Re Sheets Printing & Mfg. Co.* 136 Fed. 989, affirmed in 74 C. C. A. 453, 143 Fed. 315.

⁹⁸ *Re Heckathorn*, 144 Fed. 499.

The decision referred to in *Henderson v. Phillips*, 178 Fed. 374, as strongly persuasive, but not controlling, on the question whether an instrument was a contract for the sale of a corporate stock, or an option,

sumption that an explicit state statute on the point in question would have been binding upon the Federal as well as the state court, and merely inquire whether the Federal court is bound to follow the decisions of the highest state court when the point is not explicitly covered by such a statute. It has no concern with the question whether the provision of the Federal bankruptcy act displaces the state law on a particular question.

c. Title and incidents of real property, generally; water rights.

Most questions relating to real property, though depending upon common-law principles, are regarded as local questions, as to which the decisions of the highest state court are binding upon the Federal court, at least if they have become rules of property, and assuming, of course, that the question is one as to which an explicit state statute would concededly govern to the exclusion of any Federal statute.

was not a decision of the supreme court of the state, but of an intermediate appellate court.

⁹⁹ *Hinde v. Vattier*, 5 Pet. 398, 8 L. ed. 168.

To the same effect, as to the effect of the state decisions in respect of titles to real property, are: *Taylor v. Brown*, 5 Cranch, 234, 3 L. ed. 88; *Waring v. Jackson*, 1 Pet. 570, 7 L. ed. 266; *Davis v. Mason*, 1 Pet. 503, 7 L. ed. 239; *Henderson v. Griffin*, 5 Pet. 151, 8 L. ed. 79; *Bodley v. Taylor*, 5 Cranch, 191, 3 L. ed. 75; *Beauregard v. New Orleans*, 18 How. 497, 15 L. ed. 469; *White v. Burnley*, 20 How. 235, 15 L. ed. 886; *League v. Egerer*, 24 How. 264, 16 L. ed. 655; *Smith v. McCann*, 24 How. 398, 16 L. ed. 714; *Suydam v. Williamson*, 24 How. 427, 16 L. ed. 742; *Williamson v. Suydam*, 6 Wall. 723, 18 L. ed. 967; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Clement v. Packer*, 125 U. S. 309, 31 L. ed. 721, 8 Sup. Ct. Rep. 907; *Halsted v. Buster*, 140 U. S. 273, 35 L. ed. 484, 11 Sup. Ct. Rep. 782; *Lowndes v. Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758; *Re Zug*, 25 Pittsb. L. J. 29, Fed. Cas. No. 18,222; *Seefeld v. Duffer*, 103 C. C. A. 32, 179 Fed. 214, certiorari denied in 220 U. S. 616, 55 L. ed. 611, 31 Sup. Ct. Rep. 720. This general rule was conceded in *Marlatt v. Silk*, 36 U. S. 1, 9 L. ed. 609, but held not to apply where the question arises and is to be decided by a compact between two states.

¹⁰⁰ *Smith v. McCann*, 24 How. 398, 16 L. ed. 714.

¹ *Preston v. Bowmar*, 6 Wheat. 581, 5 L. ed. 336 (question whether course shall yield to distance, or *vice versa*); *United States v. Roselius*, 15 How. 31, 14 L. ed. 587 (boundary of grant).
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It was said in an early case: "There is no principle better established and more uniformly adhered to in this court, than that the circuit courts, in deciding on titles to real property in the different states, are bound to decide precisely as the state courts ought to do. . . . The rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of a state, furnish the guides and rules of decision in those of the Union in all cases to which they apply, where the Constitution, treaties, or statutes of the United States do not otherwise provide."⁹⁹

The rule has been specifically applied to the sufficiency of an equitable title to support ejectment; ¹⁰⁰ questions of boundary; ¹ and specifically the question whether the title of an abutting owner extends to the middle of the street, and his rights therein; ^{1a} priority of state grants; ² and generally as to questions and rights incident to the title of real property, as, for example, what constitutes a water course; ³ the rights of riparian owners; ⁴ including

But in *Davis v. Commonwealth Land & Lumber Co.* 141 Fed. 711, it was held that the decision of the state court on a question of boundary, though entitled to the highest consideration, was not binding upon the Federal court, where the state action was not seriously contested, and was apparently brought with a view to its effect on pending Federal actions, and the decision gave the tract only about one half the area given it by a prior decision in the Federal court.

^{1a} *SNARE & T. Co. v. FRIEDMAN*.

² *North Carolina Min. Co. v. Westfeldt*, 151 Fed. 290, reversed on another point in 92 C. C. A. 378, 166 Fed. 706. And see *Best v. Polk*, 18 Wall. 112, 21 L. ed. 805, holding that decisions of the highest court of Mississippi, that the Indian reserve, under the treaty with the Chickasaw Nation, was entitled to a preference over subsequent patentees from the United States, were rules of property, and that to disturb them would unsettle titles bona fide acquired.

³ *Chicago, B. & Q. R. Co. v. Appamoose County*, 31 L.R.A. (N.S.) 1117, 104 C. C. A. 573, 182 Fed. 291.

⁴ *Rundle v. Delaware & R. Canal Co.* 14 How. 80, 14 L. ed. 335; *St. Louis v. Rutz*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337.

Cases like *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157, also holding that the decisions of the highest state court are conclusive as to the riparian rights, are not in point, as they were actions originating in the state courts.

the question as to the extent of the title of a riparian or littoral proprietor on navigable waters, to the extent that an explicit state statute on the subject would be binding;⁵ rights and liabilities respecting surface water;⁶ questions as to fixtures.⁷

In one case, however, it was held that the question as to dedication of real property did not depend upon a local statute or local state law, but upon general principles of common law, as to which the decisions of the state court are not controlling.⁸

Occasionally, the courts, in declaring the controlling effect of the decisions of the state courts on questions as to real property, have by their form of statement implied that something like a settled rule in the state court was necessary.⁹ Until the recent decision of the United States Supreme Court in the *Kuhn v. Fairmont Coal Co. Case*,¹⁰ however, there seems

to have been no express authority for refusing to follow the decision of the highest state court as to a question affecting real property, upon the ground that the state decision in question was rendered after the right of the parties to the Federal suit had accrued; although as previously shown, such an exception has been frequently applied in case of state decisions based on statute. The exception was applied in the *Kuhn Case* by holding that the Federal court was not bound by a decision of the highest court of the state as to the duty of subjacent support, where an estate in mineral is severed from an estate in the surface.

In construing local statutes respecting real property, the Federal courts are governed by state decisions.¹¹ Thus, the Federal court will follow the decision of the state court construing state statutes with reference to the public lands of the state,¹² and

⁵ *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *Western P. R. Co. v. Southern P. Co.* 80 C. C. A. 606, 151 Fed. 376; *Iowa v. Carr*, 112 C. C. A. 477, 191 Fed. 257; *The Golden Rod*, 197 Fed. 830. In the former case, Field, J., said that the courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grant; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of grants or the use and enjoyment of the property by the grantee.

The right of riparian owners on navigable streams, and the question of navigability as affecting such right, have been held (*Cairo, V. & C. R. Co. v. Brevoort*, 25 L.R.A. 527, 62 Fed. 129; *Chisolm v. Caines*, 87 Fed. 285) not local questions, but questions depending upon general principles, as to which the decisions of the state court are not controlling. It would seem, however, that such questions are really Federal questions, and not questions of state law at all.

⁶ *Walker v. New Mexico & S. P. R. Co.* 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421.

⁷ *New York L. Ins. Co. v. Allison*, 46 C. C. A. 229, 107 Fed. 179.

⁸ *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984.

⁹ In *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984, Miller, J., remarked generally: "The law which governs the case is the common law, on which this court has never acknowledged the right of the state courts to control our decisions, except, perhaps, in a class of cases where the state courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the state."

So, the statement in *Williamson v. Suy-* 40 L.R.A.(N.S.)

dam, 6 Wall. 723, 18 L. ed. 967, is: "Where any principle of law establishing a rule of real property is settled in the state court, the same rule will be applied by this court in the same or analogous cases."

And in *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974, the statement is: "It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state,—by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto,—they are to be treated as laws of that state by the Federal courts."

The statement in *Phelps v. Harris*, 101 U. S. 370, 25 L. ed. 855, that the opinion expressed by the state courts in a case growing out of the same transaction as that involved in the Federal case, though entitled to great weight, was not absolutely controlling, was apparently prompted by the assumption that the point was not necessarily involved in the state case.

¹⁰ 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140. For the history of that case see *supra*, I. note 14.

¹¹ In *Polk v. Wendal*, 9 Cranch, 87, 3 L. ed. 665, Chief Justice Marshall said: "In cases depending on the statutes of a state, and more especially in those respecting titles to land, this court adopts the construction of the state where that construction is settled and can be ascertained." The question involved, i. e., right to impeach a grant for a cause anterior to its issuance, not having been passed upon by the state court, it was decided as an independent question.

¹² *Shipp v. Miller*, 2 Wheat. 316, 4 L. ed. 248; *Herron v. Dater*, 120 U. S. 464, 30 L. ed. 748, 7 Sup. Ct. Rep. 620; *Fisher v. Haldeman*, 20 How. 186, 15 L. ed. 879; *Christy v. Pidgeon*, 4 Wall. 196, 18 L. ed. 322; *Murphy v. Packer*, 152 U. S. 398, 38

specifically with reference to swamp land and the reclamation thereof;^{12a} statutes relating to settlement of disputes concerning title to land;¹³ statutes relating to unimproved and uninclosed land;¹⁴ occupying claimant acts;¹⁵ and statutes in relation to allowance in partition for improvements;¹⁶ statutes of entail;¹⁷ statutes in relation to the erection of dams;¹⁸ fence laws;¹⁹ irrigation statutes;²⁰ and statutes relating to the erection of wharves, so long as they do not conflict with any provision of the Federal Constitution or statute;²¹ statutes relating to laying a railroad track in street;²² and statutes in relation to natural resources.²³

The rule, of course, does not apply where

any question under the Federal Constitution or statutes is presented, even though the construction of a state statute may be incidentally involved.²⁴ And the rule is subject to the exceptions previously pointed out, that attach to the general rule that the decisions of the state courts are to be followed upon questions as to the validity and construction of local statutes.²⁵ Thus, Federal courts have refused to follow decisions of the highest state court, with which they did not agree, construing state statutes in relation to real property, because of contrary decisions of the state court in force when the rights of the parties accrued;²⁶ or upon the broader ground that the state decisions were rendered after

L. ed. 489, 14 Sup. Ct. Rep. 636; Lockard v. Asher Lumber Co. 65 C. C. A. 517, 131 Fed. 689; Kinney v. Clark, 2 How. 76, 11 L. ed. 185. Walker v. State Harbor (Walker v. Marks) 17 Wall. 648, 21 L. ed. 744. But see Robinson v. Campbell, 3 Wheat. 222, 4 L. ed. 375, as to applicability of a Tennessee statute construed by the courts of that state to render an elder grant founded on a junior entry void, the titles deriving their validity from the law of Virginia and confirmed by compact between the two states.

American Emigrant Co. v. Adams County, 100 U. S. 61, 25 L. ed. 563; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; Reclamation Dist. No. 108 v. Hagar, 6 Sawy. 567, 4 Fed. 366, affirmed in 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

^{12a} The decision in Southern Pine Co. v. Hall, 44 C. C. A. 363, 105 Fed. 84, certiorari denied in 180 U. S. 639, 45 L. ed. 711, 21 Sup. Ct. Rep. 921, refusing to follow the construction placed by the state court upon the statute relating to the disposition of swamp land, was upon the ground that the rights in question were acquired before the statute had received the construction by the state court.

¹³ Barker v. Jackson, 1 Paine, 559, Fed. Cas. No. 989.

¹⁴ Forshaw v. Layman, 104 C. C. A. 559, 182 Fed. 193.

¹⁵ Leighton v. Young, 18 L.R.A. 266, 3 C. C. 176, 10 U. S. App. 298, 52 Fed. 439.

¹⁶ McClaskey v. Barr, 62 Fed. 209.

¹⁷ Van Rensselaer v. Kearney, 11 How. 297, 13 L. ed. 703; Buford v. Kerr, 33 C. C. A. 166, 62 U. S. App. 270, 90 Fed. 513.

¹⁸ Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

¹⁹ New York C. & H. R. Co. v. Price, 16 L.R.A. (N.S.) 1103, 86 C. C. A. 502, 159 Fed. 330.

²⁰ Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56. The court, however, points out in this case that the decisions of the state court, though to be treated with very great re-

spect by the Federal courts, are not absolutely binding on it as to whether the statute in question meets the requirement of due process of law.

²¹ Griffing v. Gibb, McAll 212, Fed. Cas. No. 5,819.

²² Van Bokelen v. Brooklyn City R. Co. 5 Blatchf. 379, Fed. Cas. No. 16,830.

²³ Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337.

²⁴ Thus, in United States v. Bellingham Bay Boom Co. 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343, the court, while conceding that if there had been no Federal law in existence the question whether a log boom conformed to the provisions of a state statute would have been a question as to which the decisions of the state court would have been controlling, yet held that, as the question was whether the boom came within the decisions of the state statute so as to exempt it from prohibition under the Federal river and harbor act, the question must be decided by the Federal court in a suit for an injunction against the boom as an obstruction to navigation prohibited by the Federal court. As stated at the beginning of the note, however, the question whether the Federal court will follow the decision of the state court on questions of statutory construction which arise in connection with a question of Federal law are not within the scope of the present annotation.

²⁵ See supra, III. b; III. c; III. d; III. e; III. f; III. g.

²⁶ Wilson v. Ward Lumber Co. 67 Fed. 674 (statute affecting title to large tracks of land; earlier construction had remained unchallenged for over twenty years, and had been recognized by a decision of the United States Supreme Court). In Forest Products Co. v. Russell, 161 Fed. 1004, the Circuit Court declined to follow the latest decision of the supreme court of the state as to the effect under the state statute of a lease of school lands for ninety nine years, because of a contrary position assumed by that court before the rights of the parties accrued; but that case was reversed in 97 C. C. A. 666, 173 Fed. 1019,—

the rights of the parties accrued.²⁷ The question whether a decision of the state court depending upon the meaning and construction of a patent granted by the Crown, under which certain rights were claimed by the state on the one hand, and by private individuals on the other, falls within the rule in relation to the decisions of the state court when expounding their own Constitution and laws, was mooted, but not decided, by Chief Justice Taney.²⁸

d. Recording laws.

The Federal courts are bound to follow the decisions of the state courts in the construction of their local recording acts, if there has been a uniform course of decision respecting them; ²⁹ and such decisions have been followed as to the validity of an unregistered mortgage as between the parties; ³⁰ or as against creditors; ³¹ as to the sufficiency of the record to impart constructive notice; ³² the necessity of truly describing the debt intended to be secured; ³³ the necessity of re-recording; ³⁴ the effect of knowledge of unrecorded mortgage, or mortgage not properly acknowledged; ³⁵ the necessity of recording vendor's privilege.³⁶

dd. Fraudulent transfers of property.

Questions in relation to conveyances or transfers of property in fraud of creditors are generally regarded as local questions, as to which the decisions of the state court

are controlling; ³⁷ and this is true even in bankruptcy cases, in so far as the bankruptcy act does not undertake itself to avoid transfers, but relegates the matter to the state law. Thus, it has been held that the policy of the state law not to permit the owner of personal property to sell it and still continue in possession, so as to exempt it from seizure or attachment by the creditors of the vendor, will be followed by the Federal court.^{37a} And the same is true of the general question as to the validity of a conveyance made with intent to hinder, delay, or defraud creditors; ³⁸ and specifically whether a deed of trust is void for that reason; ³⁹ the validity of an assignment in trust, vesting the assignee with discretion as to disposal of the property; ⁴⁰ the validity and effect of a voluntary settlement or conveyance between husband and wife as against the former creditors; ⁴¹ as to the acquisition of a lien from the date of filing a bill to set aside a fraudulent transfer; ⁴² the right of a simple contract creditor to attack a conveyance as fraudulent.^{42a}

Though the state court decisions which were thus followed purported to be rendered under state statutes, the statutory provisions involved were for the most part of the type common to most of the states, being taken from the original statute in relation to fraudulent conveyances. The query occurs whether, if the exception referred to in subdivision III. e, is sound, it could not have been invoked as to some of

on the authority of *Simpson County v. Wisner-Cox Lumber & Mfg. Co.* 95 C. C. A. 227, 170 Fed. 52, and the court in the latter case took the view that there had been no change of opinion by the state court.

²⁷ *Southern Pine Co. v. Hall*, supra.

²⁸ *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997.

²⁹ *Townsend v. Todd*, 91 U. S. 452, 23 L. ed. 413, and cases cited in subsequent notes to this subd. See also supra, IV. a, 2 note 95, as to chattel mortgages and conditional sales.

³⁰ See supra, IV. b, 2, note 95.

³¹ *Sturdivant Bank v. Schade*, 195 Fed. 188.

³² *Coleman v. Peshtigo Lumber Co.* 30 Fed. 317; *Tygart Valley Brewing Co. v. Vilter Mfg. Co.* 107 C. C. A. 169, 184 Fed. 845.

³³ *Townsend v. Todd*, 91 U. S. 452, 23 L. ed. 413.

³⁴ *Bondurant v. Watson*, 103 U. S. 281, 26 L. ed. 447.

³⁵ *Ridings v. Johnson*, 128 U. S. 212, 32 L. ed. 401, 9 Sup. Ct. Rep. 72; *Cumberland Bldg. & L. Asso. v. Sparks*, 49 C. C. A. 510, 111 Fed. 647; *Levy v. Mentz*, 23 La. Ann. 261.

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³⁶ *Ridings v. Johnson*, supra.

³⁷ See, in addition to the cases cited in this subdivision, those with reference to chattel mortgages, cited supra, IV. b, 2.

^{37a} *Allen v. Massey*, 17 Wall. 351, 21 L. ed. 542; *Dooley v. Pease*, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 329.

³⁸ *Moulton v. Chafce*, 22 Fed. 26.

³⁹ *Re Elletson Co.* 174 Fed. 859, affirmed in 106 C. C. A. 153, 183 Fed. 715.

⁴⁰ *Sumner v. Hicks*, 2 Black, 532, 17 L. ed. 355.

⁴¹ *Lloyd v. Fulton*, 91 U. S. 479, 23 L. ed. 363 (question whether voluntary settlement by husband upon wife is conclusively or only presumptively fraudulent as against creditors). In *Schreyer v. Scott*, 134 U. S. 405, 33 L. ed. 955, 10 Sup. Ct. Rep. 579, the court said that, in determining whether a voluntary conveyance by a husband to wife is void as to subsequent creditors, reference should be had not only to the decisions of the United States Supreme Court, but also to those of New York. There was, however, no conflict between the decisions.

⁴² *Johnston v. Straus*, 26 Fed. 57.

^{42a} *Buford v. Holley*, 28 Fed. 680.

the questions considered in the present subdivision.

e. Statute of frauds.

In an early case, Justice Story, considering the question as to the admissibility of parol evidence to supply the defect, in the written instrument as to the consideration, remarked that what might be his own view of the question, unaffected by any local decision, it was not necessary to suggest, because the point had been settled by the decisions of the state court and they were controlling.⁴³

And the Federal courts have consistently followed the decisions of the highest state court in the construction of the statute of frauds, even as to questions which are common to all such statutes. This doctrine has been applied specifically to the question whether one who did not sign a contract or memorandum for the sale of land may enforce the same against a party who did sign;⁴⁴ as to the necessity of naming or designating the party who does not sign an agreement for sale of land;⁴⁵ whether a contract not in writing, as required by the statute, is so absolutely void as to enable the vendee to recover the purchase price paid, when the vendor is willing to perform;⁴⁶ the sufficiency of the writing to satisfy the requirements of the statute of frauds in relation to contracts not to be performed within a year;⁴⁷ the right to hold an undisclosed principal upon a contract required to be in writing, when signed by his agent in his own name.⁴⁸

Here again, the query presents itself whether it would not have been possible to invoke the exception considered in *supra*, III. e, to the general rule that the de-

cisions of the state court upon statutory questions are controlling.

f. Statute of limitations.

1. Actions at law.

This section, being concerned only with the question whether the Federal courts will follow state decisions as to the effect and construction of state statutes of limitations, which if explicit on the point would concededly have governed, does not purport to deal with the question as to when state statutes are applicable, nor with cases in which the refusal to follow the state decisions is upon the ground that the statutes themselves are not controlling.

As a predicate for the decision of the questions within the scope of this subdivision, however, it is proper to point out that even before the conformity act, so called,⁴⁹ statutes of limitations, even in personal actions, were regarded as "laws of the several states" which, except where the Constitution, treaties, or statutes of the United States otherwise required, must, under the judiciary act,⁵⁰ "be regarded as rules of decisions in trials at common law in the courts of the United States in cases where they apply."⁵¹ Nor is the applicability of state statutes of limitations confined to actions arising under the state law, but extends to actions arising under Federal statutes, if there is no Federal statute of limitations applicable.⁵²

In general, though there are occasionally exceptions, the Federal courts will follow the decisions of the highest state court as to the construction and effect of state statutes of limitations, in actions at law in which the statutes themselves are controlling.⁵³ And this applies to stat-

⁴³ *D'Wolf v. Rabaud*, 1 Pet. 476, 7 L. ed. 227.

⁴⁴ *Beckwith v. Clark*, 110 C. C. A. 207, 188 Fed. 171.

⁴⁵ *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366.

⁴⁶ *York v. Washburn*, 64 C. C. A. 132, 129 Fed. 564, affirming 118 Fed. 316.

⁴⁷ *Ballantine v. Yung Wing*, 146 Fed. 621.

⁴⁸ *Walker v. Hafer*, 24 L.R.A.(N.S.) 315, 95 C. C. A. 311, 170 Fed. 37.

⁴⁹ Act of Congress, June 1, 1872, chap. 255, § 5 (Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684) requiring the practice, pleadings, and forms and modes of proceedings in actions at law in the circuit and district courts of the United States to conform as near as may be to those of courts of record of the state.

⁵⁰ Act of September 24, 1789, chap. 20, § 34.

⁵¹ *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 32 L. ed. 1080, 9 Sup. Ct. Rep. 690. 40 L.R.A.(N.S.)

⁵² See, for illustration *Campbell v. Haverhill*, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217; *Atlanta v. Chattanooga Foundry & Pipe Co.* 101 Fed. 900; *Thompson v. German Ins. Co.* 76 Fed. 802. The state statute is, of course, inapplicable in actions arising under a Federal statute, if there is a Federal statute of limitations applicable. *Campbell v. Haverhill*, *supra*; *Arnson v. Murphy*, 109 U. S. 238, 27 L. ed. 920, 3 Sup. Ct. Rep. 184; *Atlanta v. Chattanooga Foundry & Pipeworks*, 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23; *United States use of Gibson Lumber Co. v. Boomer*, 106 C. C. A. 164, 183 Fed. 726. The cases cited are by no means exhaustive, since, as stated in the text, the point is not within the scope of the note.

⁵³ Justice Story, in *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174, remarked that if, upon examination, the doctrines of the Kentucky court upon a question affecting limitation are irreconcilable with those deduced

utes of nonclaim.⁵⁴ The rule has been applied to a wide variety of questions including the questions what are statutes of limitation;⁵⁵ the right of a foreign corporation to avail itself of the statute;⁵⁶ what period of limitations applies to a particular claim or cause of action;⁵⁷ applicability of the statute to judgments rendered before its passage;⁵⁸ the effect of the statute on a right of set-

off;⁵⁹ meaning of term "beyond seas" as affecting running of statute;⁶⁰ and, generally, as to construction and effect of provisions suspending running of statute in case of absence or nonresidence, including the meaning of the words "residence," "departure" from state, and the like;⁶¹ when the statute commences to run;⁶² when action is deemed commenced for purposes of the statute;⁶³ sufficiency of an

from the statute of James, the Federal court would, in conformity with its general practice, follow the local law and administer the same justice which the state court would administer between the same parties.

The rule is thus formulated in *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261: "The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the judiciary act of 1789."

In *Moore v. Citizens' Nat. Bank*, 104 U. S. 625, 26 L. ed. 870, the Supreme Court, speaking by Mr. Justice Gray, declared that the construction given by the supreme court of a state to a statute of limitations will be followed by the Federal Supreme Court, even in a case decided the other way in the Federal circuit court, in harmony with a decision of a lower state court before the decision of the state supreme court. See other cases subsequently cited supporting text.

⁵⁴ *Security Trust Co. v. Dent*, 187 U. S. 237, 47 L. ed. 158, 23 Sup. Ct. Rep. 61; *Pulliam v. Pulliam*, 10 Fed. 53. But see *Johnston v. Roe*, 1 McCrary, 162, 1 Fed. 692, refusing to follow the state decision because the statute as thus construed conflicts with rules of equity administered in Federal courts.

⁵⁵ *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554, following state decisions that Illinois burnt records act was, in effect, a statute of limitations.

⁵⁶ *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 22 L. ed. 331; *Taylor v. Union P. R. Co.* 123 Fed. 155.

⁵⁷ *Moore v. Citizens' Nat. Bank*, 104 U. S. 625, 26 L. ed. 870; *Andrews v. Bacon*, 38 Fed. 777 (stockholder's liability); *Brunswick Terminal Co. v. National Bank*, 48 L.R.A. 625, 40 C. C. A. 22, 99 Fed. 635, certiorari denied in 178 U. S. 611, 44 L. ed. 1215, 20 Sup. Ct. Rep. 1029 (stockholder's liability); *St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 256, 4 U. S. App. 160, 49 Fed. 315.

⁵⁸ *Murray v. Gibson*, 15 How. 421, 14 L. ed. 755.

⁵⁹ *Wilson v. Smith*, 117 Fed. 707, affirmed in 61 C. C. A. 446, 126 Fed. 916.

⁶⁰ *Davie v. Briggs*, 97 U. S. 637, 24 L. ed. 1086.

In *Shelby v. Guy*, 11 Wheat. 361, 6 L. ed. 495, it being necessary to send the 40 L.R.A. (N.S.)

cause back on other grounds, the court waived a positive decision as to the meaning of the term "beyond seas," trusting that the state court would in due time furnish proof to settle the question.

⁶¹ *Penfield v. Chesapeake, O. & S. W. R. Co.* 134 U. S. 351, 33 L. ed. 940, 10 Sup. Ct. Rep. 566; *Bauserman v. Blunt*, 147 U. S. 647, 657, 37 L. ed. 316, 320, 13 Sup. Ct. Rep. 466; *Boyle v. Arledge, Hempst.* 620, Fed. Cas. No. 1,758; *Tomes v. Barney*, 35 Fed. 112 (notwithstanding that following those decisions, the court was compelled to reverse its former ruling); *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 817.

⁶² *Amy v. Dubuque*, 98 U. S. 470, 25 L. ed. 228 (question whether statute begins to run against coupons from their maturity, although not severed from the bond); *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294 (question when statute commences to run against administrator); *Paine v. Central Vermont R. Co.* 118 U. S. 152, 30 L. ed. 193, 6 Sup. Ct. Rep. 1019 (as to when statute commences to run against a demand note).

Great Western U. Teleg. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810, holding that the question when the statute commenced to run against an action upon a subscription to corporate stock was a local question, as to which the judgment of the state supreme court could not be reviewed, is not in point, as the case came up on error to the state court, and not from a lower Federal court.

In *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737, the court followed its own views in holding that a statute of limitation commences to run when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided; but the court remarked that in the present case it was not bound by any decisive construction of the state court. In *Brigham-Hopkins Co. v. Gross*, 107 Fed. 769, the Federal circuit court, having held that a decision of the circuit court of appeals that an action might be maintained against the surviving partners on a firm debt, without making the administrator of the partnership estate a party, was controlling, notwithstanding an intervening decision of the state court to the contrary, further held that the decision of the state court did not operate to suspend the running of limitation against such an action in the Federal court.

⁶³ *Fearing v. Glenn*, 19 C. C. A. 388, 38 U. S. App. 424, 73 Fed. 116.

acknowledgment or new promise to take a debt out of the statute; ⁶⁴ effect of minority upon the running of the statute; ⁶⁵ the right to recommence an action after limitation period, where original action failed for reasons not affecting the merits; ⁶⁶ the right to raise defense by demurrer.⁶⁷

It has been held, however, that the Federal courts are not bound by decisions of the state court based on general reasoning, and not on particular terms of the statute, as to the effect of the concealment of the cause of action upon the running of the statute; ⁶⁸ or as to the maturity of the debt for the purposes of the running of the statute.⁶⁹

So, the United States Supreme Court has refused to follow decisions of the state court based on general principles, and not upon any provisions of the local statute, holding that the Civil War did not have the effect to suspend the statute.⁷⁰

It will be observed that the cases just cited refusing to follow the decisions of the state court apply the exception discussed in subdivision III. e. It may perhaps be

doubted whether there was not equal opportunity to invoke that exception as to some of the questions previously referred to in the present subdivision, as to which the decisions of the state court were held controlling, if that exception is to be admitted at all.

2. In equity.

As stated at the beginning of the note, the question as to when a state statute explicit in terms is binding upon the Federal courts is not within its scope, nor does it purport to cover cases in which it is held or assumed, whether correctly or incorrectly, that such a statute would not have been binding, although the actual decision was that the state court decisions were not binding. As a predicate for the discussion in this subdivision, however, it is proper to point out that state statutes of limitations, if applied at all in Federal suits in equity, are in general applied upon principles of analogy; ⁷¹ though it has been held otherwise where the statute, by its ex-

But it is otherwise as to admiralty suits. *Laidlaw v. Oregon R. & Nav. Co.* 26 C. C. A. 665, 48 U. S. App. 430, 81 Fed. 876, reversing 73 Fed. 846. It will be observed that the decision is upon the ground that the statute itself does not apply, and not upon the ground that decisions of the state court are not binding as to the construction of a statute which would itself be applicable if construction or interpretation were unnecessary.

⁶⁴ *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174; *Bullion & E. Bank v. Hegler*, 93 Fed. 890.

⁶⁵ *Cheatham v. Evans*, 87 C. C. A. 576, 160 Fed. 802.

⁶⁶ *Harrison v. Pennington Paper Co.* 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314, certiorari denied in 199 U. S. 607, 50 L. ed. 331, 26 Sup. Ct. Rep. 747.

⁶⁷ *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. ed. 806.

⁶⁸ *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 62, 92 Fed. 871. And see, as to the question in equity, *infra*, IV. f, 2, note 79.

⁶⁹ *Keene Five Cent. Sav. Bank v. Reid*, 59 C. C. A. 225, 123 Fed. 221, certiorari denied in 191 U. S. 567, 48 L. ed. 305, 25 Sup. Ct. Rep. 841. The court said that the decisions of the state courts are claimed to be controlling did not deal in any respect with the construction of local statute, but exclusively with the meaning, scope, and effect of a provision found in a private contract; that the statute on the subject (*i. e.*, the statute of limitations) was plain and its application obvious, when the time that the indebtedness became due or accrued was ascertained. In answer to an argument based 40 L.R.A.(N.S.)

on the stipulation in the principal note, that the rights of parties should be determined according to the laws of the state of Kansas, the court said that in the first place the stipulation related to the note, and not to the mortgage, and that in the second place the phrase, "the laws of the state of Kansas," meant the statutes of the state lawfully enacted, and there was no local statute declaring what effect should be given to such a provision in the mortgage or other agreement. The dissent of Caldwell, J., was based on the stipulation in the note referring it to the law of Kansas.

⁷⁰ *Levy v. Stewart*, 11 Wall. 244, 20 L. ed. 86. See also *Hanger v. Abbott*, 6 Wall. 532, 18 L. ed. 939, where this question was discussed as a general question, for the independent judgment of the Federal court.

⁷¹ *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430; *Hall v. Russell*, 3 Sawy. 506, Fed. Cas. No. 5,943; *Bisbee v. Evans*, 17 Fed. 474; *St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 256, 4 U. S. App. 160, 49 Fed. 315; *Hayden v. Thompson*, 17 C. C. A. 592, 36 U. S. App. 361, 71 Fed. 60; *Stevens v. Grand Cent. Min. Co.* 67 C. C. A. 284, 133 Fed. 28; *Kessler v. Ensley Land Co.* 123 Fed. 546. The list is, of course, merely illustrative, and not exhaustive, as the note does not purport to deal with the question whether the Federal courts are bound by state statutes upon a particular subject.

In *Kirby v. Lake Shore & M. S. R. Co.* *supra*, Harlan, J., said: "It is undoubtedly true, as announced in adjudged cases, that courts of equity feel themselves bound in cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances, and that

press terms, applies to suits in equity as well as actions at law;⁷² or where the jurisdiction of law and equity is concurrent.⁷³ Doubtless these exceptions are themselves subject to the necessity of preserving the equitable jurisdiction of the Federal courts unimpaired.⁷⁴ It follows, possibly with exceptions noted, that the decisions of the state courts respecting statutes of limitations are not absolutely binding upon the Federal courts in suits in equity, so far at least as they pertain to the remedy merely, and not to the substantive rights of the parties. But though sitting in equity, the Federal court may follow the rule of decision in the state court on the question of laches and limitations.⁷⁵ And upon this principle, the Federal courts have followed the state decisions as to the applicability of the statute to claims against trustees;⁷⁶ and upon the point that the filing of a petition within a statutory

period is sufficient, although process is not issued until after the period has expired.⁷⁷

The Federal courts, however, when sitting in equity, will not, even by analogy, apply a state statute where unusual conditions or extraordinary circumstances render it inequitable to do so.⁷⁸ Nor may the established rule in equity as administered in the Federal court,—that where relief is asked on the ground of actual fraud, the time will not run in favor of defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered,—be obviated by reason of a contrary construction of the state statute of limitation by the state courts.⁷⁹ But it seems that when the local law, whether statutory or otherwise, though in form pertaining to the remedy really affects the substantive rights of the parties, the Federal courts not only will, but must, follow it, even in a suit in equity.⁸⁰

sometimes they act upon the analogy of the like limitation at law. But these general rules must be taken subject to the qualification that the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit."

⁷² *Norris v. Haggin*, 28 Fed. 275; *St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 256, 4 U. S. App. 160, 49 Fed. 315. But see *Norris v. Haggin*, 136 U. S. 386, 34 L. ed. 424, 10 Sup. Ct. Rep. 942.

⁷³ In *Miles v. Vivian*, 25 C. C. A. 208, 51 U. S. App. 194, 79 Fed. 848, the court declares that the Federal courts will adjudge, in cases over which there is a concurrent jurisdiction by courts of law and equity, that lapse of time to be a bar in equity which would have constituted a bar if the action had been at law. And see cases cited in the opinion. And so in *Higgins Oil & Fuel Co. v. Snow*, 51 C. C. A. 267, 113 Fed. 433, it is said that in cases of concurrent jurisdiction equity follows law, and a court of equity will consider itself bound by the same rules that would apply in a court of law. And in *Hayden v. Thompson*, 17 C. C. A. 592, 36 U. S. App. 361, 71 Fed. 60, it was said that national courts sitting in equity act or refuse to act in analogy to the statute of limitations of the state in which they are sitting, and if the analogous action at law against the defendant would be barred under the local state statute, the suit must be dismissed.

And in *Frishmuth v. Farmers' Loan & T. Co.* 95 Fed. 5, it is said that the Federal courts, like all courts of equity, feel themselves bound in all cases of concurrent jurisdiction, by the statute of limitations that govern courts of law in such circumstances, and that whether they act in analogy or in obedience to those statutes is not of practical moment.

⁷⁴ *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. 40 L.R.A.(N.S.)

Rep. 430; *St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 256, 4 U. S. App. 160, 49 Fed. 315; *Tice v. School Dist. No. 18*, 17 Fed. 283.

⁷⁵ *Higgins Oil & Fuel Co. v. Snow*, 51 C. C. A. 267, 113 Fed. 433; *Naddo v. Bardon*, 47 Fed. 782, affirmed in 2 C. C. A. 335, 4 U. S. App. 642, 51 Fed. 493; *Wheeling Bridge & Terminal R. Co. v. Reymann Brewing Co.* 32 C. C. A. 571, 61 U. S. App. 531, 90 Fed. 189; *Kentucky Coal & Timber Development Co. v. Kentucky Union Co.* 110 C. C. A. 93, 187 Fed. 945.

In *St. Paul, S. & T. F. R. Co. v. Sage*, 1 C. C. A. 256, 4 U. S. App. 160, 49 Fed. 315, seems to hold that the Federal court was bound by the decisions of the state court on the question whether the cause of action came within the provision of the state statute providing that, in actions for relief on the ground of fraud, the cause of action shall not be deemed to have accrued until discovery of the facts constituting the fraud, or the provision making the six years, statute applicable to actions to enforce trusts or to compel an accounting where the trusts have been repudiated.

⁷⁶ *Amory v. Lawrence*, 3 Cliff. 523, Fed. Cas. No. 336; *Naddo v. Bardon*, supra, note 75.

⁷⁷ *Armstrong Cork Co. v. Merchants' Refrigerating Co.* 107 C. C. A. 93, 184 Fed. 199. In *United States v. Miller*, 164 Fed. 444, however, it was held that the question when a suit in equity is begun is wholly within equity practice and procedure, and is not governed by a local statute. If this is true, it is clear, of course, that the decisions of the state court would not be binding upon the point.

⁷⁸ *Stevens v. Grand Cent. Min. Co.* 67 C. C. A. 284, 133 Fed. 28.

⁷⁹ *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430. *Tice v. School Dist. No. 18*, 17 Fed. 283.

⁸⁰ *Dupre v. Mansur*, 214 U. S. 161, 53 L.

ff. Adverse possession.

The decisions of the state court have been generally held controlling upon the Federal court on questions relating to adverse possession; including the general questions what constitutes adverse possession;⁸¹ the question who may avail himself of the statute;⁸² color of title;⁸³ necessity of connecting possession with grant in order to make statute applicable;⁸⁴ even though there had been a prior decision of the Federal Supreme Court to the contrary;⁸⁵ effect of tax deed to create constructive possession of unoccupied land;⁸⁶ when the bar of the statute of prescription begins to be operative.⁸⁷

ed. 950, 29 Sup. Ct. Rep. 548, holding that a Federal court of equity in a suit to quiet title against the purchaser of notes secured by a vendor's lien will apply the rule of local law, that when a debt is barred by the statute, an action to foreclose a lien or mortgage showing the same is also barred. Justice Holmes said: "We hardly see how a court of law could disregard an express reservation of security, or how a lien so reserved can be called a purely equitable right. But equitable or not, it is a creation not of the United States, but of the local law of Texas. If that law should declare the words in Bailey's deed purporting to reserve a lien unavailing, it would not be for the courts of the United States to say otherwise when sitting in equity, any more than when sitting at law. It appears to us equally their duty, when the local law decides that the words create a right, to take the measure of that right from the same source. The notes are barred as well in equity as at law. . . . This is not a matter of procedure or jurisdiction, but of substantive rights concerning land. It seems to us it should be governed by the decisions of the state where the land lies." But see *contra*, *Butler v. Douglass*, 1 McCrary, 630, 3 Fed. 612.

⁸¹ *Elder v. McClaskey*, 17 C. C. A. 251, 37 U. S. App. 1, 199, 70 Fed. 529; *Scott v. Mineral Development Co.* 64 C. C. A. 659, 130 Fed. 497, certiorari denied in 196 U. S. 640, 49 L. ed. 631, 25 Sup. Ct. Rep. 796.

⁸² *Harending v. Reformed Dutch Church*, 16 Pet. 455, 10 L. ed. 1029 (right of religious corporation to acquire title by adverse possession).

⁸³ *Santee River Cypress Lumber Co. v. James*, 50 Fed. 360; *Hoge v. Magnes*, 29 C. C. A. 564, 56 U. S. App. 500, 85 Fed. 355; *United States v. One Lot of Land*, 178 Fed. 334.

⁸⁴ *Patton v. Easton*, 1 Wheat. 476, 4 L. ed. 139; *Powell v. Harmon*, 2 Pet. 241, 7 L. ed. 411, following state decisions holding that under the state statute possession was a bar only when held under a grant, or under a deed founded on a grant.

⁸⁵ *In Green v. Neal*, 6 Pet. 291, 8 L. ed. 40 L.R.A. (N.S.)

g. Liens.

State decisions establishing the rule that a vendor's lien does not pass under an assignment of the debt secured must be followed as a rule of property.⁸⁸ So Federal courts are in general bound to follow the decisions of the state courts as to the validity and construction of lien statutes.⁸⁹ This general rule, however, is subject to the exception pointed out in subdivision III. c, with respect to decisions rendered after the rights of the parties have accrued;⁹⁰ and it has been intimated that in any event the Federal court would not be bound to follow decisions of the state court as to the constitutionality of

402, the supreme court followed the later decisions of the state court overruling its own earlier decisions on the point.

⁸⁸ *Bardon v. Land & River Improv. Co.* 157 U. S. 327, 39 L. ed. 719, 15 Sup. Ct. Rep. 650.

⁸⁷ *Balkan v. Woodstock Iron Co.* 154 U. S. 177, 38 L. ed. 953, 14 Sup. Ct. Rep. 1010.

⁸⁶ *Ober v. Gallagher*, 93 U. S. 199, 23 L. ed. 829. In this case, however, the court was of the opinion that the rule was not an established one at the time the notes in question were assigned.

⁸⁹ *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 42 Fed. 372; *Re Grissler*, 69 C. C. A. 406, 136 Fed. 754; *The Winnebago*, 73 C. C. A. 295, 141 Fed. 945, certiorari denied in 200 U. S. 616, 50 L. ed. 621, 26 Sup. Ct. Rep. 752 (in relation to contracts not maritime); *Morgan v. First Nat. Bank*, 76 C. C. A. 236, 145 Fed. 466; *George A. Shaw & Co. v. Cleveland, C. C. & St. L. R. Co.* 97 C. C. A. 520, 173 Fed. 746.

So the first direct ruling of the highest court of a state construing a state statute will be followed by a Federal court without further inquiry, notwithstanding a prior decision of the Federal court to the contrary. *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166, rehearing denied in 36 L.R.A. 153, 23 C. C. A. 454, 46 U. S. App. 619, 77 Fed. 774, certiorari denied in 166 U. S. 721, 41 L. ed. 1188, 17 Sup. Ct. Rep. 996. It would appear, however, that the prior Federal decision referred to was rendered after the rights of the parties had accrued.

As to mortgages, see *supra*, IV. b, 1.

⁹⁰ *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576, affirming 54 C. C. A. 165, 116 Fed. 793; *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, reversed on another point in 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; *Westinghouse Air Brake Co. v. Kansas City Southern R. Co.* 71 C. C. A. 1, 137 Fed. 26. But see *Andrews National Foundry & Pipe Works*, *supra*, note 89.

such statute, where they do not turn upon any constitutional provision peculiar to the state.⁹¹

h. Conflict of laws.

If the ultimate question in a case is regarded by the Federal courts as one of general law, which they are to determine for themselves, and as to which the decisions of the state court are not controlling, it is obvious that no practical necessity arises for determining which of two or more states in which different elements of the transaction had their situs should furnish the governing law,—although it would be necessary for a state court to determine that question.⁹² In some cases, however, the Federal courts have the same occasion as the state courts to determine that question, for the reason that some of the elements of the transaction may have their situs in a foreign country; or, if in a state, the ultimate question may be governed by statute or other local rule. In general, when it is necessary for the Federal courts to determine questions relating to conflict of laws at all, those questions, as distinguished from the ultimate question as to the rule prescribed by the law of the state whose law is held to govern, usually seem to be regarded as questions of general jurisprudence, as to which the Federal court, when in the exercise of the jurisdiction resting upon diversity of citizenship, are not bound to follow the decisions of the state court,—i. e., the decisions of

the courts of the state in which the Federal action originates,—as to which of two or more possible jurisdictions should furnish the governing law,—unless those decisions purport to rest upon a construction of a local statute in respect of its applicability to cases presenting interstate or international features, in which event, it would seem that the case must fall within the operation of the general rule that decisions of the highest state court are controlling as to the construction of state statutes, unless it could be taken out of that general rule by virtue of the exception discussed in subdivision III. e.

Of the many Federal cases which discuss one or another of the phases of conflict of laws, comparatively few of them allude to the point whether the Federal court, as to such questions,—as distinguished from the ultimate question in the case after the governing law is ascertained,—is bound by the decisions of the highest court of the state in which the action originates. Most of them seem tacitly to assume that the preliminary question which states should furnish the governing law is to be decided according to the Federal court's own view of the principles applicable to that subject.^{92a} And these cases by their cumulative effect furnish strong support for that view, which is also sustained by express decisions. Thus, it has been held that the Federal courts are not bound to follow the decisions of the state courts as to the governing law with respect to usury;⁹³ the capacity of a married woman to con-

⁹¹ *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, reversed on another point in 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690. See, further, as to this possible exception, *supra*, III. e.

⁹² According to the views occasionally expressed, even a state court might determine such a question according to its own precedents without reference to the precedents of the other state, whose law, if statutory, would concededly govern; but this is opposed to the weight of authority and general practice so far as state courts are concerned. See notes in 6 L.R.A.(N.S.) 212, and 18 L.R.A.(N.S.) 880.

^{92a} Thus, while the circuit court of appeals in *McCue v. Northwestern Mut. L. Ins. Co.* 93 C. C. A. 71, 167 Fed. 435, was of the opinion that the insurance contract in question was a Wisconsin contract and governed by its law, and the United States Supreme Court in the same case (223 U. S. 234, 56 L. ed. 419, 38 L.R.A.(N.S.) 57, 32 Sup. Ct. Rep. 220) was of the opinion that the contract was a Virginia contract and governed by its law, both courts apparently assumed that such preliminary question as to conflict of laws was a gen-

eral question, which the Federal courts were to determine for themselves, and without especial reference to the decisions of the courts of Virginia, where the action originated; although the circuit court of appeals was of the opinion that the decisions of the Wisconsin court were controlling on the ultimate question in the case, *viz.*, whether there could be a recovery under the policy, the insured having been executed for a crime; and the Supreme Court queried whether it would have been bound by the decisions of the Virginia court on that point, if they had been opposed to the Federal decisions.

⁹³ *McIlwaine v. Ellington*, 55 L.R.A. 933, 49 C. C. A. 446, 111 Fed. 578, overruling *McIlwaine v. Isely*, 96 Fed. 62; *Dybert v. Vermont Loan & T. Co.* 37 C. C. A. 389, 94 Fed. 913. Many other Federal cases involving the question of the governing law with respect to usury, in which it was apparently assumed that the question was one of general law, as to which the decisions of the state court are not conclusive upon the Federal courts, will be found in notes to *McIlwaine v. Ellington*, 55 L.R.A. 933, and *United States Sav. & L. Co. v. Beckley*, 62 L.R.A. 33.

tract;⁹⁴ the manner and sufficiency of notice of the dishonor of commercial paper;⁹⁵ the character of a statute, or of the liability created thereby, as affecting the transitory character of an action to enforce it;⁹⁶ the effect of a general assignment for creditors made in another state, to defeat an attachment of property by a citizen.⁹⁷

So, it has been held that the Federal courts will decide for themselves, without being bound by the decisions of the courts of the states in which the action originates, whether it is contrary to the public policy of the forum for a Federal court sitting in one state to entertain a cause of action arising under a statute of another state;⁹⁸ or whether a law of another country giving

a civil right to recover for personal injuries will be enforced in a Federal court.⁹⁹

But on the other hand, it has been held that the question whether a general assignment to the receiver of a foreign corporation was voluntary, so as to sustain his right as against a subsequent attachment of property in the state where the action in the Federal court originated, is one as to which the decisions of the state court, at least a decision as to the same assignment, is controlling.¹⁰⁰ So, the question whether one adopted in another state may take under the local statutes of descents has been held a question of statutory construction, as to which the decisions of the state court are conclusive, even if against the weight of authority.¹ And in one case it is declared generally that the Federal courts will fol-

⁹⁴ First Nat. Bank v. Mitchell, 34 C. C. A. 542, 92 Fed. 565. The court was of the opinion that, upon principles in relation to conflict of laws, the question as to the capacity of a married woman was to be determined by the law of Illinois, and accordingly reversed the decision of the circuit court (92 Fed. 90), which followed a decision of the Connecticut supreme court, with reference to the same transaction, and held that the contract was invalid under the Connecticut statute, because of her lack of capacity. The decision of the circuit court of appeals in this case was reversed by the Supreme Court (180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. Rep. 418), but the reversal was upon the ground that the decision of the Connecticut court was *res judicata*.

⁹⁵ GUERNSEY v. IMPERIAL BANK.

⁹⁶ Converse v. Mears, 162 Fed. 767 (whether liability imposed upon stockholders by statute of another state is wholly statutory or partially contractual); Leyner Engineering Works v. Kempner, 163 Fed. 605 (whether statute of another state is penal, and therefore unenforceable outside the state of its enactment).

⁹⁷ Stowe v. Belfast Sav. Bank, 92 Fed. 90. This decision is, however, perhaps to be regarded as resting upon the ground that, there being but a single decision on the point in the state court, there was no fixed local usage or custom on the point, rather than upon the ground that the question from its nature was one as to which the Federal courts were not bound by the decisions of the state court. This decision was affirmed by the circuit court of appeals in 34 C. C. A. 229, 63 U. S. App. 14, 92 Fed. 100; but that court held that the state decision which it was asked to follow was in violation of a principle of constitutional law as declared by the United States Supreme Court in another case. That court was therefore not called upon to decide whether the question of conflict of laws was one as to which it would be bound to follow the state decisions or not.

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⁹⁸ Dexter v. Edmonds, 89 Fed. 467 (stockholder's liability); Missouri Pac. R. Co. v. Larussi, 88 C. C. A. 230, 161 Fed. 66 (action for death).

The general statement in Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558, that whether a state court should permit an action to be maintained therein on principles of comity between the states in a question exclusively for the courts of that state to decide,—does not militate against the text, after it has reference to actions in the state courts, and the case came up on error to the state court.

⁹⁹ Evey v. Mexican C. R. Co. 38 L.R.A. 387, 26 C. C. A. 407, 52 U. S. App. 118, 81 Fed. 294, certiorari denied in 167 U. S. 746, 42 L. ed. 1210, 17 Sup. Ct. Rep. 996. But in Gallagher v. Florida East Coast R. Co. 196 Fed. 1000, the court said that the decisions of the New York courts that it was contrary to public policy of that state to entertain an action under the death statute of Florida were probably binding, and in any event persuasive, upon the Federal court.

¹⁰⁰ Zacher v. Fidelity Trust & S. V. Co. 45 C. C. A. 480, 106 Fed. 593. The state decision in this case was rendered in a case growing out of the same assignment, though the decision was not *res judicata*. Lurton, J., said: "It would be a scandal upon the administration of justice if two co-ordinate courts administering the same law should reach a different conclusion upon the same facts; and more especially would this be so in respect of a matter in which the highest court of the state whose comity and policy was involved had led the way by a decision between the same parties in respect to another fund embraced in the same assignment.

¹ Hood v. McGehee, 189 Fed. 205. It may perhaps be questioned whether the question should not be regarded as falling within the exception referred to in subd. III. e, as to decisions that turn upon considerations that are common to the question as arising in other states.

low the rule laid down by the highest court of a state, in determining whether the *lex loci contractus* of the *lex fori* shall govern.³

It has been declared⁴ that where a contract expressly stipulates that a certain state shall be regarded as the place of the contract, it will be construed according to that law, even though in the absence of such a term in the contract the construction and interpretation would be a question of general, and not local, law.

4. Measure of damages.

State decisions have been held controlling upon the measure of damages for evicting a lessee;⁵ for breach of a covenant of quiet enjoyment in a lease.⁶ It will be observed that both points present a question as to the law of real estate, and it was upon this ground that the state decisions were held controlling. So, the decisions of the state court will ordinarily be followed upon the measure of damages for breach of a personal contract, if based upon a local statute.⁶

In the absence of statute, however, the measure of damages recoverable in an action for tort, at least a personal tort, is one of general jurisprudence, as to which the Fed-

eral courts are not bound by the state decision.⁷ And that is also held to be true of the liability of a carrier for exemplary damages to a passenger;⁸ and of the right to recover for mental anguish.⁹

5. Interest and usury.

Interest being a matter of local regulation, the decisions of the courts of last resort of the state are binding upon the Federal courts;¹⁰ and this doctrine has been specifically applied to the question whether the statutory or contractual rate applies after maturity.¹¹

The rule also applies to questions of usury. Thus, it was said by the United States Supreme Court: "The local law [as to usury], consisting of the applicable statutes as construed by the supreme court of the state, furnishes the rule of decision."¹² And decisions of the state supreme court construing the state statute so as to abrogate the rule making tender of the principal sum with lawful interest a condition of the right to maintain a bill in equity to cancel a usurious note are binding upon the Federal courts.¹³ And it has been held that the Federal courts are bound by the de-

³ Parker v. Moore, 53 C. C. A. 369, 115 Fed. 799. The question was whether it was contrary to public policy to enforce a cause of action in connection with margin transactions in another state.

⁴ Russell v. Grigsby, 94 C. C. A. 61, 168 Fed. 577 (opinion by Lurton, J.). (But see supra, IV. f, 1, note 69.) The question in the case, however, related to an assignment of the policy, and that was held to be another contract, and not within the stipulation as to the law of Pennsylvania. The reversal of this case (222 U. S. 149, 56 L. ed. 133, 36 L.R.A.(N.S.) 642, 32 Sup. Ct. Rep. 58) was on the merits of the question in relation to the assignment.

⁴ American Ice Co. v. Pocono Spring Water Ice Co. 179 Fed. 868, modified on another point in 105 C. C. A. 625, 183 Fed. 193.

⁵ Thorley v. Pabst Brewing Co. 102 C. C. A. 522, 179 Fed. 338. The court said that it must follow the New York decision, even if the rule as laid down by them is opposed to the weight of authority elsewhere, and contrary to the founded principle, or even if it were to be assumed that the court of appeals might modify in favor of the plaintiff the rule now established. "The plaintiff has brought his suit affecting land in this court, and we must follow settled rules, not change them. Our own duty is to take the law as we find it, and as we find it, apply it."

⁶ New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444, holding that state decisions under a local statute, as to the right to interest on damages sustained by carrier's

breach of contract, are binding upon the Federal court.

⁷ Woldson v. Larson, 90 C. C. A. 422, 164 Fed. 548; Power v. Augusta, 191 Fed. 647 (measure of damages for personal injury).

⁸ Norfolk & P. Traction Co. v. Miller, 98 C. C. A. 453, 174 Fed. 607.

⁹ See supra, IV, a, 6, note 67.

¹⁰ Bond v. John v. Farwell Co. 96 C. C. A. 546, 172 Fed. 58. In this case, however, there was no decision of the state court upon the question, so that the Federal court was obliged to adopt its own construction of the statute. As to conflict of laws with respect to interest and usury, see supra, IV. 1.

¹¹ Ohio v. Frank, 103 U. S. 697, 26 L. ed. 531. Query whether the exception discussed in supra, III. e, might not be invoked on such a point.

¹² Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179.

But in New England Mortg. Secur. Co. v. Gay, 33 Fed. 636, writ of error dismissed in 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815, the Federal court refused to follow the state decision as to whether commission charged by the lender's agent for services in making a loan rendered the transaction usurious, for the reason, as the court said, that no question of construction was involved, and the decision of the state court was not produced, nor the opinion delivered or filed.

¹³ Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179. It was argued in this case (and of that opinion was Circuit Court

cisions of the state court as to the effect of the intention of the parties on the question of usury; ¹⁴ and the effect of a provision in a contract for interest at an unlawful rate after maturity.¹⁵ In one case, however, the court declined to follow the decision of the state court as to the law governing a contract with respect to usury, the decision having been rendered after the contract in question was made.¹⁶

In one instance, the exception discussed in *supra*, III. e, was invoked to take a question as to usury out of the general rule.¹⁷ And it would seem that that exception, if sound, might have been invoked as to some other questions referred to in this subdivision.

Judge Sanborn in the same case, 23 C. C. A. 1, 40 U. S. App. 620, 77 Fed. 32) that, as Federal courts in the exercise of their equity jurisdiction do not receive any modification from the legislation of the states or the practice of their courts, and no state statute can deprive the Federal courts sitting in equity of the power or relieve them of the duty to enforce the established principle of equity jurisprudence, that he who seeks equity must do equity, and to require the complainants to pay what they justly owe for principal and lawful interest as a condition of maintaining their bill for affirmative relief. The supreme court, however, said: "We think it a satisfactory reply to such a proposition that the complainants in the present case were not seeking equity, but to avail themselves of a substantive right under the statutory law of the state. It seems to be conceded, or, if not conceded, it is plainly evident, that if the cause had remained in the state court, where it was originally brought, the complainant would have been entitled, under the public policy of the state of Minnesota, manifested by its statutes as construed by its courts, to have this usurious contract canceled and surrendered without tendering payment of the whole or any part of the original indebtedness. The defendant company could not, by removing the case to the Federal court, on the ground that it was a citizen of another state, deprive the complainants of such a substantive right."

¹⁴ *Brown v. Grundy*, 111 Fed. 15. Here, again, is a question that suggests the possibility of invoking the exception in III. e.

¹⁵ *Union Mortg. Bkg. & T. Co. v. Hagood*, 97 Fed. 360.

¹⁶ *Vermont Loan & T. Co. v. Dygert*, 89 Fed. 123.

¹⁷ *New England Mortg. Secur. Co. v. Gay*, *supra*, note 12.

¹⁸ *Gardner v. Collins*, 2 Pet. 58, 7 L. ed. 347 (it was admitted in this case, however, that there was no state decision on the particular point in question); *Levy v. McCarlee*, 6 Pet. 102, 8 L. ed. 334; *Middleton v. McGrew*, 23 How. 45, 16 L. ed. 403; *McPherson v. Mississippi Valley Trust Co.* 40 L.R.A.(N.S.)

11. Decedents' estates generally.

Decisions of the highest court of the state are controlling upon the Federal courts as to the construction of the local statute of descents; ¹⁸ and statute of distributions.¹⁹ So the decisions of the highest state court based upon statute, will be followed upon the question whether the estate has been fully settled and administered; ²⁰ as to the effect of proceedings in probate court; ²¹ as to claims against the estate and the enforcement thereof; ²² as to the sale and conveyance of real property in the course of administration; ²³ as to the obligation of a devisee to give a bond for the payment of debts of the estate; ²⁴ whether a statutory power conferred upon the owner of property

58 C. C. A. 455, 122 Fed. 367; *Yocum v. Parker*, 67 C. C. A. 227, 134 Fed. 205; *Hood v. McGehee*, 189 Fed. 205.

In *Saunders v. Gould*, 4 Pet. 392, 7 L. ed. 897, Chief Justice Marshall said that, had the court been satisfied that there had been a settled construction of the statute of descents by the state supreme court, that settled construction would undoubtedly have been respected.

In *Gardner v. Collins*, *supra*, the court said that if the statute had been an ancient one, and a uniform course of professional opinion and practice had long prevailed in the interpretation of it, that would be respected as of almost equal authority with a judicial interpretation.

In *Hanrick v. Patrick*, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147, involving the right of alien heirs, the court said that great weight, if not conclusive effect, was to be given to the decisions of the state court upon the question of the construction of the statutes of the state as affecting titles to real property within its territory, though in this case the Federal Supreme Court was of the same opinion as the state court on the question at issue.

¹⁹ *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906.

²⁰ *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 47 L. ed. 147, 23 Sup. Ct. Rep. 52.

²¹ *Witters v. Sowles*, 32 Fed. 130.

²² *Williams v. Benedict*, 8 How. 107, 12 L. ed. 1007; *Dodd v. Ghiselin*, 27 Fed. 405.

²³ *Maxwell v. Moore*, 22 How. 185, 16 L. ed. 251; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Dubois v. McLean*, 4 McLean, 486, Fed. Cas. No. 4,107; *Patapasco Guano Co. v. Morrison*, 2 Woods, 395, Fed. Cas. No. 10,792. So, a decision of the supreme court of the state is controlling as to the effect of the failure to give an additional bond as required by the statute upon the validity of a sale of a minor's real property. *Arrowsmith v. Gleason*, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237.

²⁴ *Aspden v. Nixon*, 4 How. 467, 11 L. ed. 1059.

may be exercised by his executor;²⁵ as to dower rights of widow.²⁶

333. Wills.

There is no such duty devolving upon the Federal courts to follow the state courts in the construction of a particular will as there is in the construction of a statute, assuming, of course, that the state court's decision is not binding upon the principle of *res judicata*.²⁷

When, however, the state court decisions have established a rule of real property applicable to the will in question, the Federal court is in general bound to follow those decisions.²⁸ On this principle the decisions of the state courts have been accepted by the Federal courts on the question whether the word "heirs" is a word of limitation or

purchase;²⁹ applicability of rule in Shelly's Case;³⁰ whether a will creates an executory devise;³¹ whether a devise of real estate carries the fee;³² questions relating to charitable bequests and uses;³³ whether a claim barred by the statute of limitations may be set off against a legacy.^{33a}

It is obvious that, so far as rules of construction as distinguished from rules of property are concerned, the decisions of the state court merely serve as guides to the Federal courts in applying the general rule that the intention of the testator is to be given effect, and are not absolutely controlling.³⁴

Decisions of the highest state court as to the construction or effect of local statutes in relation to wills must in general be followed by the Federal courts.³⁵ And it

²⁵ *McCutchen v. Marshall*, 8 Pet. 220, 8 L. ed. 923.

²⁶ *Black v. Elkhorn Min. Co.* 47 Fed. 600.

Of course, it may be necessary where dower is claimed in same interest derived from the Federal government, *e. g.*, a mining claim, to consider the effect of the Federal statutes or decisions. See *Black v. Elkhorn Min. Co.* 3 C. C. A. 312, 7 U. S. App. 393, 52 Fed. 859, affirmed in 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101.

²⁷ *Lane v. Vick*, 3 How. 464, 11 L. ed. 681 (question whether certain property covered by a devise); *Barber v. Pittsburgh, Ft. W. & C. R. Co.* 166 U. S. 83, 41 L. ed. 925, 17 Sup. Ct. Rep. 488 (character of estate devised); *Messinger v. Anderson*, 96 C. C. A. 445, 171 Fed. 785 (question whether one took title to real property under terms of will). The Federal court in the last case adhered to its own previous construction of the will, notwithstanding that in the interval the state court had placed a different construction upon the same will. The court gave as an additional reason why it was not bound by the state court's decision construing the will, even if it had power to retract its own opinion and adopt the subsequent view of the state court, that at the time of the earlier decisions in the Federal court there was no settled line of decisions in the state court applicable to the devise in question. This decision was reversed by the Supreme Court (225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 739), but the latter court was of the opinion that the decision of the state court was right, "at least as against the decision of the circuit court of appeals," and there was no disapproval, at least no expressed disapproval, of the general position taken by the Circuit Courts of Appeals as to a state court decision with respect to a particular will.

²⁸ *Jackson ex dem. St. John v. Chew*, 12 Wheat. 167, 6 L. ed. 588; *Lane v. Vick*, 3 How. 464, 11 L. ed. 681; *Barber v. Pittsburgh, Ft. W. & C. R. Co.* 166 U. S. 83, 41 L. ed. 925, 17 Sup. Ct. Rep. 488; *Northrop v. Columbian Lumber Co.* 108 C. C. A. 40 L.R.A. (N.S.)

640, 186 Fed. 770 (declining, however, to follow a change of decision made by commencement of action in Federal court); *Barker v. Eastman*, 192 Fed. 659.

After stating the rule of the text, the court, in *Jackson ex dem. St. John v. Chew*, 12 Wheat. 167, 6 L. ed. 588, remarked: "This is a principle so obviously just and indispensably necessary under our system of government, that it cannot be lost sight of."

²⁹ *Daly v. James*, 8 Wheat. 495, 5 L. ed. 670; *Myrick v. Heard*, 31 Fed. 241.

³⁰ *Hubbird v. Goin*, 70 C. C. A. 320, 137 Fed. 822.

³¹ *Buford v. Kerr*, 33 C. C. A. 166, 62 U. S. App. 270, 90 Fed. 513.

³² *Smith v. Shriver*, 3 Wall. Jr. 219, Fed. Cas. No. 13,108.

³³ *Loring v. Marsh*, 6 Wall. 337, 18 L. ed. 802; *Meade v. Beal, Taney*, 339, Fed. Cas. No. 9,371.

This is implied in *Vidal v. Philadelphia*, 2 How. 127, 197, 11 L. ed. 205, 233, where the court refers to the Pennsylvania decisions to the effect that the provisions of 43 Eliz. chap. 4, have been enforced in Pennsylvania by common usage and constitutional recognition, and not only these but the more extensive range of charitable uses which chancery supported before that statute and beyond it.

^{33a} *Wilson v. Smith*, 117 Fed. 707, affirmed in 61 C. C. A. 446, 126 Fed. 916.

³⁴ Thus, in *Russell v. United States Trust Co.* 127 Fed. 445, affirmed in 69 C. C. A. 410, 136 Fed. 758, it was said that while the Federal courts adopt the local law of real property as ascertained by decisions of the state court, whether grounded on the construction of statutes or the unwritten law, yet upon the question whether the expression of a testator of a wish or recommendation will create a trust, the decision of the state court merely affords a guide in applying the general rule that the intention of the testator is to be effectuated.

³⁵ The decision in *Carroll v. Carroll*, 16 How. 275, 14 L. ed. 936, refusing to follow the construction of a state statute by

has been so held with respect to the decisions under a statute relating to the extent and character of the estate passing under a devise; ³⁶ the construction and effect of statutes abolishing entails; ³⁷ the meaning of the statutory phrase, "any person interested," in a statute in relation to contests; ³⁸ the effect of the omission to provide for a child; ³⁹ as to the right of the Federal government under a local statute to take by devise; ⁴⁰ as to the effect of adverse possession of land upon the operation of a devise thereof; ⁴¹ republication of will. ⁴²

But in one case the Federal court declined to follow a decision of the state court rendered during the pendency of the action in the Federal court, overruling earlier state court decisions to the effect that probate in the state was not essential to enable a devisee in a foreign will to maintain actions in relation to land within the state. ⁴³

k. Domestic relations; married women.

Decisions of the highest state court have been held binding upon the Federal court as to the construction and effect of statutes in relation to marriage; ⁴⁴ and generally as to the capacity of married women to

contract and their liability on their contracts; ⁴⁵ and specifically her right under married women's acts, to mortgage her separate property to secure her husband's debts; ⁴⁶ the requisites of conveyances, ⁴⁷ and acknowledgment, ⁴⁸ by a married woman; the effect of conveyances to husband and wife; ⁴⁹ the nature of the wife's right or title in property; ⁵⁰ her right to sue in her own name, and as to the running of the statute of limitations against her; ⁵¹ the common-law right of husband and wife respectively to custody of a child. ⁵²

kk. Assignments for creditors; insolvency proceedings; receivership.

This subdivision is not concerned with the effect of the bankruptcy act or other Federal statutes upon state insolvency or assignment statutes. ⁵³ On the other hand, it presupposes that the particular question involved is a state question, in the sense that it would be controlled by the state statutes if the same were explicit on the point and stood in no need of construction, and deals simply with the question whether the state decisions as to the validity, construction, and effect of the statutes are binding upon the Federal courts. The construction and effect of state

the state court, was upon the ground that what was said by the state court on this point was *obiter*. But see *Williamson v. Berry*, 8 How. 495, 12 L. ed. 1170, as to private act passed to remove obstacles in way of executing certain trusts under a will.

³⁶ *Roberts v. Lewis*, 153 U. S. 367, 38 L. ed. 747, 14 Sup. Ct. Rep. 945 (following state decision notwithstanding a previous decision of the Federal Supreme Court construing the same will); *Yocum v. Parker*, 67 C. C. A. 227, 134 Fed. 205 (following a later state decision notwithstanding a conflicting earlier decision in force at the time the will in question was executed).

³⁷ *Yocum v. Parker*, 67 C. C. A. 227, 134 Fed. 205.

³⁸ *Selden v. Illinois Trust & Sav. Bank*, 107 C. C. A. 196, 184 Fed. 872.

³⁹ *Loring v. Marsh*, 2 Cliff. 469, Fed. Cas. No. 8,515.

⁴⁰ *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192.

⁴¹ *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99, 7 L. ed. 617.

⁴² *Dike v. Kuhns*, Fed. Cas. No. 3,907.

⁴³ *Northrop v. Columbian Lumber Co.* 108 C. C. A. 640, 186 Fed. 770. The court said in effect that this was true, even though the later decision announced the correct rule.

⁴⁴ *Meister v. Moore*, 96 U. S. 76, 24 L. ed. 826.

⁴⁵ *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67; *Ankeney v. Han- non*, 147 U. S. 118, 37 L. ed. 105, 13 Sup. 40 L.R.A. (N.S.)

Ct. Rep. 206; *Lippincott v. Mitchell*, 94 U. S. 767, 24 L. ed. 315. And see IV. h, note 94.

⁴⁶ *Mitchell v. Lippincott*, 2 Woods, 467, Fed. Cas. No. 9,665.

⁴⁷ *Schley v. Pullman's Palace Car Co.* 120 U. S. 575, 30 L. ed. 789, 7 Sup. Ct. Rep. 730; *Gillespie v. Pocahontas Coal & Coke Co.* 91 C. C. A. 494, 163 Fed. 992.

⁴⁸ *Berry v. Northwestern & P. Hypotheek Bank*, 35 C. C. A. 185, 93 Fed. 44.

⁴⁹ *Myers v. Reed*, 9 Sawy. 132, 17 Fed. 401.

⁵⁰ *Slaughter v. Glenn*, 98 U. S. 242, 25 L. ed. 122.

⁵¹ *Kibbe v. Ditto*, 93 U. S. 674, 23 L. ed. 1005.

⁵² *Re Barry*, 42 Fed. 113, writ of error dismissed in 5 How. 103, 12 L. ed. 70.

⁵³ For example, the decision in *Johnson v. Crawford & Yothers*, 154 Fed. 761, to the effect that a state insolvency statute is superseded by the Federal bankruptcy law, is not within the scope of this note, since the question was not as to how the state law on the subject is to be ascertained,—whether as an independent question for the Federal court or by following state decisions,—but as to the effect of the Federal bankruptcy act. And so the note excludes cases like *Perry Mfg. Co. v. Brown*, 2 Woodb. & M. 449, Fed. Cas. No. 11,015, which, though holding that the state law prevails on a particular question, does not consider the question whether the decisions of the state court are controlling in ascertaining the state law.

insolvency statute or statutes regulating assignments for the benefit of creditors are questions as to which the decisions of the highest court of the state, establishing a rule of property, are of controlling authority in the courts of the United States, assuming that the statutes themselves are binding on those courts.⁵⁴ The rule has been specifically applied to the question whether such a statute should be strictly or liberally construed;⁵⁵ whether a general assignment act of the state is repealed by a later insolvent debtor act of the same state;⁵⁶ whether a statute in relation to assignments is an insolvency law;⁵⁷ what amounts to an assignment for creditors under the statute;⁵⁸ the validity of assignments with preference;⁵⁹ and, generally, as to the right of an insolvent debtor to prefer creditors by conveyances or transfers of property;⁶⁰ the effect of discrimination against creditors who fail to release their claims;⁶¹ the effect of transfer or convey-

ances to individual creditors contemporaneously with the general assignment;⁶² the effect of vesting assignee with discretion as to the sale of the assigned property;⁶³ the effect of the assignee's failure to file inventory and bonds before taking possession of the property;⁶⁴ the question who are employees within the provision of the statute for preference to the employees of an insolvent corporation;⁶⁵ landlord's right to preference;⁶⁶ the applicability of a state statute to receivers in Federal courts.⁶⁷

But it has been held that the right of a trust fund to preferential payment out of the assets of an insolvent, depending upon general principles of law and equity, presents a question for the independent judgment of the Federal courts, as to which they are not concluded by the decisions of the state court;⁶⁸ and the same is true of the general question whether a creditor holding a collateral security is entitled to a dividend on his entire claim.⁶⁹

✓ ⁵⁴ *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. ed. 1136, 12 Sup. Ct. Rep. 318; and other cases subsequently cited in this section.

In *Randolph v. Quidnick Co.* (Jencks v. Quidnick Co.) 135 U. S. 457, 34 L. ed. 200, 10 Sup. Ct. Rep. 655, the court said: When the highest court of a state affirms that a conveyance made by a debtor to a trustee for the benefit of creditors is valid under statutes of that state, this court will follow that ruling, unless upon clear conviction that it was wrong, even though that statute was common to other states in which a different ruling was obtained.

⁵⁵ *White v. Cotzhausen*, 129 U. S. 329, 32 L. ed. 677, 9 Sup. Ct. Rep. 309.

⁵⁶ *Springer v. Foster*, 1 Story, 601, Fed. Cas. No. 13,265; *Springer v. Foster*, 2 Story, 383, Fed. Cas. No. 13,266.

⁵⁷ *Re Curtis*, 91 Fed. 737, affirmed in 36 C. C. A. 430, 94 Fed. 630. This case is not strictly in point, since the question was subsidiary to the ultimate question as to the effect of the Federal bankruptcy act on the statute in question. Whether in view of that fact the decision is correct is not within the scope of the note, but the case is of course, *a fortiori*, authority on the point apart from its bearing on the Federal question.

⁵⁸ *Brown v. Grand Rapids Parlor Furniture Co.* 22 L.R.A. 817, 7 C. C. A. 225, 16 U. S. App. 221, 58 Fed. 286; *Marbury v. Kentucky Union Land Co.* 10 C. C. A. 393, 22 U. S. App. 267, 62 Fed. 335 (state decision followed as real property, although it was filed after decree of Federal circuit court was entered); *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 235, 34 L. ed. 341, 345, 10 Sup. Ct. Rep. 1013; *May v. Tenney*, 148 U. S. 60, 37 L. ed. 368, 13 Sup. Ct. Rep. 491; *Clapp v. Dittman*, 21 Fed. 15; *Rainwater & Boogher Hat Co. v. Malcolm*, 2 C. C. A. 476, 10 U. 40 L.R.A. (N.S.).

S. App. 249, 51 Fed. 734; *Appolos v. Brady*, 1 C. C. A. 299, 4 U. S. App. 209, 49 Fed. 401.

⁵⁹ *Parker v. Phetteplace*, 2 Cliff. 70, Fed. Cas. No. 10,746.

⁶⁰ *Bamberger v. Schoolfield*, 160 U. S. 149, 40 L. ed. 374, 16 Sup. Ct. Rep. 225; *Rothschild v. Hasbrouck*, 72 Fed. 813; *Coolidge v. Curtis*, 1 Bond, 222, Fed. Cas. No. 3,184. And see *infra*, IV. m, note 83.

⁶¹ *Brashear v. West*, 7 Pet. 608, 8 L. ed. 801; *Robinson v. Belt*, 187 U. S. 41, 47 L. ed. 65, 23 Sup. Ct. Rep. 16; *Heydock v. Stanhope*, 1 Curt. C. C. 471, Fed. Cas. No. 6,445. The general question as to the validity of provisions in state insolvency for discharge of claims is, of course, not within the scope of the note, as it presents a question under the Federal Constitution.

⁶² *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. ed. 1136, 12 Sup. Ct. Rep. 318; *Freund v. Yaegerman*, 27 Fed. 248.

⁶³ *Jaffray v. McGehee*, 107 U. S. 361, 27 L. ed. 495, 2 Sup. Ct. Rep. 307.

⁶⁴ *Rice v. Frayser*, 24 Fed. 460; *Sanger v. Flow*, 1 C. C. A. 56, 4 U. S. App. 32, 48 Fed. 152.

⁶⁵ *Gay v. Hudson River Electric Power Co.* 178 Fed. 499. The court said that where, as here, there is a conflict of opinion in the highest court of the state, it is respected all the same, and where two decisions conflict, the latest must control.

⁶⁶ *Re Chaudron*, 180 Fed. 841.

⁶⁷ *Guaranty Trust Co. v. Galveston City R. Co.* 46 C. C. A. 305, 107 Fed. 311.

⁶⁸ *John Deere Plow Co. v. McDavid*, 70 C. C. A. 422, 137 Fed. 802; *Beard v. Independent Dist.* 31 C. C. A. 562, 60 U. S. App. 372, 88 Fed. 375, reversing 83 Fed. 5, which held that the state court decisions were binding.

⁶⁹ *Tod v. Kentucky Union Land Co.* 57 Fed. 47.

l. Agency; partnership.

There are but few cases on specific questions in relation to agency or partnership. It would seem, however, in the absence of local statutes, most of the questions that arise in connection with these subjects are of a general nature, as to which the decisions of the state court would not be controlling; and it has been expressly so held as to the question whether a broker to whom goods are delivered to sell has implied power to pledge them.⁷⁰ And in one case, the Federal circuit court followed the decisions of the Federal circuit court of appeals, construing a state statute in relation to the right to sue the surviving member of a firm without joining the administrator of the partnership estate, notwithstanding an intervening decision to the contrary by the highest court of the state.⁷¹

m. Corporations.

The Federal courts, in the absence of any question arising under the Federal Con-

stitution or statutes, in general, follow the decisions of the highest state courts as to the constitutionality, construction, and effect of statutes in relation to corporations; and this rule has been applied specifically to statutory questions in relation to the origination and regulation of banking associations;⁷² as to the corporate existence of a company or association;⁷³ what constitutes a state corporation;⁷⁴ corporate names;⁷⁵ the constitutionality of special acts creating corporations;⁷⁶ the construction of the corporate charters;⁷⁷ and, generally, as to the powers and liabilities of the corporation;⁷⁸ whether act of a corporation in contracting a debt in excess of the statutory limit is void or voidable;⁷⁹ whether to give validity to *ultra vires* contracts made and to be performed within the states would be contrary to its public policy;⁸⁰ as to right of creditor or person connecting himself with title to assail an unauthorized encumbrance on corporate property;⁸¹ as to dissolution of a corporation;⁸² the validity of conveyances or mortgages made after insolvency;⁸³ whether corporate stock is

⁷⁰ *Bragg v. Meyer*, McAll. 408, Fed. Cas. No. 1,801.

⁷¹ *Brigham-Hopkins Co. v. Gross*, 107 Fed. 769.

⁷² *Nessmith v. Sheldon*, 4 McLean, 375, Fed. Cas. No. 10,125.

⁷³ *Secombe v. Milwaukee & St. P. R. Co.* 23 Wall. 108, 23 L. ed. 67; *Nesmith v. Sheldon*, 7 How. 812, 12 L. ed. 925; *Hancock v. Louisville & N. R. Co.* 145 U. S. 409, 36 L. ed. 755, 12 Sup. Ct. Rep. 969.

⁷⁴ *Mooney v. Humphrey*, 4 McCrary, 112, 12 Fed. 612; *Fitzgerald v. Missouri P. R. Co.* 45 Fed. 812.

⁷⁵ *Lehigh Valley Coal Co. v. Hamblen*, 23 Fed. 225.

⁷⁶ *Indianapolis & St. L. R. Co. v. Vance*, 96 U. S. 450, 24 L. ed. 752.

⁷⁷ *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404; *Cleveland, P. & A. R. Co. v. Franklin Canal Co.* Fed. Cas. No. 2,890; *New Orleans Waterworks Co. v. Southern Brewing Co.* 36 Fed. 833, affirmed by divided court in 145 U. S. 649, 36 L. ed. 850, 12 Sup. Ct. Rep. 986.

⁷⁸ *Smith v. Kernochen*, 7 How. 198, 12 L. ed. 666; *Florida C. R. Co. v. Schutte*, 103 U. S. 118, 26 L. ed. 327; *Stone v. Southern Illinois & M. Bridge Co.* 206 U. S. 267, 51 L. ed. 1057, 27 Sup. Ct. Rep. 615; *Hazard v. Vermont & C. R. Co.* 17 Fed. 753; *Venner v. Atchison, T. & S. F. R. Co.* 28 Fed. 581 (if not controlling at least very persuasive); *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *San Diego Flume Co. v. Souther*, 32 C. C. A. 548, 61 U. S. App. 134, 90 Fed. 164, affirmed in 44 C. C. A. 143, 104 Fed. 706; *Schofield v. Goodrich Bros. Bkg. Co.* 39 C. C. A. 76, 98 Fed. 271; *Anglo-American Land Mortg. & Agency Co. v. Lombard*, 68 C. C. A. 89, 132 Fed. 721; certiorari denied in 196 U. S. 638, 49 L. ed. 630, 25 Sup. Ct. Rep. 793.

Consumers' Gas Trust Co. v. Quinby, 70 C. C. A. 220, 137 Fed. 882, certiorari denied in 198 U. S. 585, 49 L. ed. 1174, 25 Sup. Ct. Rep. 803. But see *contra*, *Roberts v. Northern P. R. Co.* 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756, as to rights of corporation created by law of United States for national purposes and interstate commerce.

⁷⁹ *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341. It was contended by counsel in this case that the Federal court was not bound to follow the decisions of the state court, because those decisions rested upon the principle of estoppel, and thus presented a question of general, and not local, law, but the court said that the assumption was not well founded, and it was therefore unnecessary to decide whether the state decisions, if founded on estoppel, would have been controlling.

And see *Illins v. New York & N. H. R. Co.* Fed. Cas. No. 7,010, following state decisions as to liability of corporation on spurious certificates of stock issued by president and in hands of bona fide holder.

⁸⁰ *Alabama Consol. Coal & I. Co. v. Baltimore Trust Co.* 197 Fed. 347.

⁸¹ *Williams v. Gaylord*, 186 U. S. 157, 46 L. ed. 1102, 22 Sup. Ct. Rep. 798; *Williams v. Gold Hill Min. Co.* 96 Fed. 454.

⁸² *Re Munger Vehicle Tire Co.* 87 C. C. A. 81, 159 Fed. 901.

⁸³ *George T. Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 237, 34 L. ed. 346, 10 Sup. Ct. Rep. 1017.

personal property;⁸⁴ right of corporation to a lien on its stock;⁸⁵ the statutory liability of stockholders;⁸⁶ and of corporate officers,⁸⁷ though it is otherwise as to the common-law liability of stockholders on their unpaid subscriptions.⁸⁸ Generally, and in the absence of any interference with the Federal Constitution or statutes, the Federal courts follow the decisions of the state courts with respect to the validity, under the state Constitution, construction, and effect of statutes in relation to foreign corporations.⁸⁹ It is to be observed, however, that if a contract made by a foreign corporation in violation of such a statute is not for that reason invalid, the Federal court may entertain an action thereon, even though the state court would refuse to do so.^{89a}

Some of the exceptions previously discussed to the general rule that the state court decisions must be followed on statu-

tory questions have, however, occasionally been extended to questions in relation to corporations.⁹⁰ Thus, the question whether the right of action given by the statute against stockholders is in the nature of a specialty has been held to be a general question, as to which the Federal courts are not bound by the decisions of the state court.⁹¹

So it has been declared that the relations between a building and loan association and its stockholders, as such, are governed by the general law, unless modified by the local statute on the subject, and that in those respects the decisions of the highest state court do not control, though the questions which arise when the members become borrowers must be determined by the local law.⁹² And the exception with respect to decisions of the state court rendered after the rights of the parties had accrued has been invoked to re-

⁸⁴ *Jellenik v. Huron Copper Min. Co.* 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559.

⁸⁵ *George H. Hammond & Co. v. Hastings*, 134 U. S. 401, 33 L. ed. 960, 10 Sup. Ct. Rep. 727.

⁸⁶ *United States v. Stanford*, 69 Fed. 25 (question whether Constitution furnishes rule by which to fix the amount of liability. See, however, affirmation in 17 C. C. A. 143, 44 U. S. App. 68, 70 Fed. 346, and 161 U. S. 412, 40 L. ed. 751, 16 Sup. Ct. Rep. 576); *National Bank v. Whitman*, 76 Fed. 697 (following *dictum* of supreme court of state as to transitory character of action); *Whitman v. Atkinson*, 65 C. C. A. 185, 130 Fed. 759 (when liability accrues); *Ramsden v. Knowles*, 151 Fed. 718 (when liability accrues); *Republic Iron & Steel Co. v. Carlton*, 189 Fed. 126 (nature of liability).

In *Flash v. Conn.* 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263, the court said that the decision of the New York court of appeals on the question whether the statute of that state imposing liability on stockholder was penal or not was entitled to great, if not conclusive, weight. And in *Evans v. Nellis*, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74, it seems to have been assumed that the decisions of the state court were conclusive on the question whether the statutory liability could be enforced by a receiver. But see *infra*, note 91.

⁸⁷ *Proctor-Gamble Co. v. Warren Cotton Oil Co.* 180 Fed. 543. But see *infra*, note 96.

In *National Park Bank v. Remsen*, 158 U. S. 337, 39 L. ed. 1008, 15 Sup. Ct. Rep. 891, the court said that the rulings of the highest state court as to such a liability ought to be regarded in every court as at least most persuasive.

⁸⁸ *Clark v. Bever*, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468. Nor does this 40 L.R.A. (N.S.)

become a statutory question as to which the decisions of the state court are binding, merely because the liability is recognized by a statute which provides a new remedy for its enforcement.

⁸⁹ *Noble v. Mitchell*, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; *Chattanooga Nat. Bldg. & L. Assn. v. Denson*, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630; *Stone v. Southern Illinois & M. Bridge Co.* 206 U. S. 267, 51 L. ed. 1057, 27 Sup. Ct. Rep. 615; *Morenci Copper Co. v. Freer*, 127 Fed. 129; *Tennis Bros. Co. v. Wetzel & T. R. Co.* 140 Fed. 193; *Pittsburgh Constr. Co. v. West End Belt R. Co.* 11 L.R.A. (N.S.) 1145, 83 C. C. A. 501, 154 Fed. 929; *Western U. Teleg. Co. v. Julian*, 169 Fed. 166; *Buffalo Refrigerating Mach. Co. v. Penn Heat & P. Co.* 102 C. C. A. 196, 178 Fed. 697; *Re Monongahela Distillery Co.* 186 Fed. 220. *Eastern Bldg. L. Assn. v. Bedford*, 88 Fed. 7, and *Thomas v. Birmingham R. Light & P. Co.* 195 Fed. 340 (validity of contracts). But see *infra*, note 95.

^{89a} See note 26 L.R.A. (N.S.) 999.

⁹⁰ *Supra*, III. b; III. e; III. h.

⁹¹ *Brunswick Terminal Co. v. National Bank*, 88 Fed. 607. The point arose in connection with the question whether the liability created by the Georgia statute was barred by the statute of Maryland, the action being brought in a Federal court sitting in that state. The judgment was reversed in *Brunswick Terminal Co. v. National Bank*, 48 L.R.A. 625, 40 C. C. A. 22, 99 Fed. 635 (certiorari denied in 178 U. S. 611, 44 L. ed. 1215, 20 Sup. Ct. Rep. 1029), upon the ground that the limitation prescribed by the Georgia statute applied.

⁹² *Coltrane v. Blake*, 51 C. C. A. 457, 113 Fed. 785. In this case it was held that, the loan being regarded as usurious by the local law, the borrowing member was entitled to be credited on his loan with all sums as premium and interest; but it was

lieve the Federal court of the duty of following the decisions of the state court, under statutes in relation to corporations.⁹³ And the fact that the state decisions were not based entirely upon the statute, but involved extraneous conditions, has also been held sufficient to relieve the Federal court of the duty of following the state court decisions.⁹⁴ So, while conceding that it is the duty of the Federal courts to follow the construction of state statutes by the state courts, it has been held that the Federal courts are not bound to go beyond the point actually decided and accept the results that might be reached by implication;⁹⁵ and that state decisions rendered under statutes more or less similar, but not under the particular statute involved, while entitled to high respect as authorities, are not controlling upon the Federal courts.⁹⁶ Whether it is contrary to public policy for a Federal court sitting in one state, to enforce the liability of stockholders under the statute of another state, is a question of comity, as to which the Federal court is not bound by the decisions of the state court.⁹⁷

n. Judgments.

The question whether, and to what extent, state laws apply to judgments rendered by the Federal court, is, of course, not within the scope of this section, which presupposes that the state law governs, and merely inquires whether, in ascertaining that law, the decisions of the state court are to be followed by the Federal court. In other words, this subdivision is concerned only with questions in relation to judgments as to which the Federal courts would concededly be bound by an explicit state statute, if there were one.⁹⁸ The United States Supreme Court has declared generally that the question what effect a judgment of a state court shall have as *res judicata* in a subsequent action in the Federal court is a question of state or local law.⁹⁹ And it has been held that the decisions of the highest state court are binding as to the nature and priority of judgments rendered in the state court;¹⁰⁰ as to whether a cause of action is merged in the judgment;¹ the effect and conclusiveness of a judgment in

assumed that so far as payments on his stock were concerned, he must be placed on an equality with the nonborrowing members, and that this would be true whatever the local rule on the subject would be, although, as a matter of fact, the local rule on this subject seems to have been the same as the Federal rule.

⁹³ *Caesar v. Capell*, 83 Fed. 403; *Adelbert College v. Wabash R. Co.* 96 C. C. A. 465, 171 Fed. 805, 17 Ann. Cas. 1204; *Brunswick Terminal Co. v. National Bank*, 192 U. S. 386, 48 L. ed. 491, 24 Sup. Ct. Rep. 314 (liability of stockholders. The fact that the state decision was rendered by a divided court, and was subsequently doubted by the court which rendered it, was also mentioned); *Meador Furniture Co. v. Commercial Nat. Safe Deposit Co.* 192 Fed. 616 (validity of contract by foreign corporation which had not complied with conditions of doing business).

⁹⁴ *Adelbert College v. Wabash R. Co.* 96 C. C. A. 465, 171 Fed. 805, 17 Ann. Cas. 1204, involving a question as to a lien upon the property of a consolidated corporation. The extraneous condition referred to was found in the fact that the state court did not rely wholly upon the statute as creating the lien, but partly upon the terms of the consolidation agreement.

⁹⁵ *Caesar v. Capell*, 83 Fed. 403, declining to follow implications in decisions of the state court that certain transactions amounted to "doing business within the state," within penal and prohibitory provisions of a statute.

⁹⁶ *Lyman v. Hilliard*, 83 C. C. A. 117, 154 Fed. 339 (liability of corporate director).

⁹⁷ *Dexter v. Edmonds*, 89 Fed. 467. And see also *supra*, IV. h, note 96. 40 L.R.A. (N.S.)

⁹⁸ Cases like *Clements v. Berry*, 11 How. 398, 13 L. ed. 745, and *Armistead v. Smith*, 16 Pet. 303, 10 L. ed. 973, which turn upon the question as to the applicability of the state law to Federal judgments, rather than upon the question whether the decisions of the state court are controlling, assuming that an explicit state statute would be, are not in point. For the same reason, cases like *Gunter v. Atlantic Coast Line R. Co.* 200 U. S. 273, 55 L. ed. 477, 26 Sup. Ct. Rep. 252, holding that the principles of *res judicata* as settled by the United States Supreme Court will be followed in determining the effect of an earlier Federal judgment, irrespective of the doctrine announced by the court of the state in which the Federal court is sitting, especially where it involves rights protected by the Federal Constitution, are excluded.

⁹⁹ *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604.

¹⁰⁰ *Pence v. Cochran*, 6 Fed. 269.

¹ *Packer v. Whittier*, 81 Fed. 335. The circuit court having determined that according to the state decisions, the judgment merged the cause of action, further held that a discharge in bankruptcy would apply to the judgment, although the original cause of action would not have been affected. The decision was reversed by the circuit court of appeals (33 C. C. A. 658, 63 U. S. App. 37, 91 Fed. 511) upon the ground that the circuit court was mistaken as to the effect of the judgment to merge the cause of action. The opinion in the latter court does not expressly pass upon the point whether the question was one as to which the decision of the state court must be followed, but cites both Federal and state decisions in support of its ruling.

ejectment; ³ the lien of a judgment; ⁴ right to relief from a judgment on the ground of fraud, mistake, or irregularity.⁴ But the rule that state decisions with reference to judgments are to be followed by the Federal courts has been held subject, even in case of a decision under statutes, to an exception, where they were rendered after the right of the parties had accrued; ⁵ or where the state decision was not deduced from the language of the statute, and does not place definite construction thereon, but rests upon general principles of law.⁶ And it has been held that the question of presumptions attending a judgment, except so far as it may be affected by state statutes or decisions thereunder, is one of general law, as to which the decisions of the state court, though entitled to respect, are not binding.⁷

³ *Miles v. Caldwell*, 2 Wall. 35, 17 L. ed. 755; *Blanchard v. Brown*, 3 Wall. 245, 18 L. ed. 69; *Britton v. Thornton*, 112 U. S. 526, 28 L. ed. 816, 5 Sup. Ct. Rep. 291; *Bryar v. Bryar*, 78 Fed. 657. See also *Equator Min. & Smelting Co. v. Hall*, 106 U. S. 86, 27 L. ed. 114, 1 Sup. Ct. Rep. 128, holding that the state statute on that point is binding upon the Federal court.

⁴ *United States v. Morrison*, 4 Pet. 124, 7 L. ed. 804; *Massingill v. Downs*, 7 How. 760, 12 L. ed. 903; *Taylor v. Thomson*, 5 Pet. 358, 8 L. ed. 154; *Bank of United States v. Longworth*, 1 McLean, 35, Fed. Cas. No. 923; *United States v. Eisenbeis*, 88 Fed. 4.

The following cases, holding that a decree of a Federal court is a lien in all cases where it is so by the law of the state, do not appear to have involved any consideration of the state decisions construing the local statutes in this respect; but the implication is that the Federal courts would adopt the decisions of the state court construing the state statutes on that subject as well as the statutes themselves: *Ward v. Chamberlain*, 2 Black, 430, 17 L. ed. 319; *Brown v. Pierce*, 7 Wall. 205, 19 L. ed. 134; *Baker v. Morton*, 12 Wall. 150, 20 L. ed. 262.

⁵ *Garrison v. New York*, 21 Wall. 196, 22 L. ed. 612.

⁶ *Ryan v. Staples*, 23 C. C. A. 541, 40 U. S. App. 427, 76 Fed. 721 (there was another ground, see next note).

⁷ *Ryan v. Staples*, 23 C. C. A. 541, 40 U. S. App. 427, 76 Fed. 721 (involving question whether judgment was void or merely erroneous. There was, however, another ground, see last note).

Phoenix Bridge Co. v. Castleberry, 65 C. C. A. 481, 131 Fed. 175 (involving the right to attack a judgment collaterally for want of jurisdiction). The court in the last case conceded that if the decisions of the state supreme court that the first grant of letters of administration by a domestic pro-40 L.R.A. (N.S.)

c. Attachment; execution; judicial sales.

The decisions of the highest state court as to the construction and effect of the attachment laws are in general binding upon the Federal courts; ⁸ and the rule has been specifically applied to decisions under statutory provisions in relation to attachment bonds,⁹ including the question of measure of damages in action on such a bond; ¹⁰ as to the right of intervention in attachment proceedings; ¹¹ the applicability of a statute with reference to allowances to a garnishee.¹² And the Federal courts are bound to follow the decisions of the highest state court as to the right to permit an amendment of an execution by affixing a seal after a sale therein, and as to the validity of a sale without a seal; ¹³ as to the right of redemption from the sale; ¹⁴

bate court, even when made without jurisdiction of the particular state in question, cannot be attacked collaterally, could be considered as construing the statute law of the state, the Federal courts would be bound by them. It was held, however, that the state decisions in question were not so intended.

⁷ *Galpin v. Page*, 3 Sawy. 93, Fed. Cas. No. 5,206.

⁸ In the early case of *Beach v. Viles*, 2 Pet. 675, 7 L. ed. 559, the court states that the construction of such a statute by the state courts is entitled to great respect, and ought, in conformity to the uniform practice of this court, to govern its decisions.

⁹ *Feitas v. Cockrem*, 101 U. S. 301, 25 L. ed. 954; *L. Bucki & Son Lumber Co. v. Fidelity & D. Co.* 48 C. C. A. 436, 109 Fed. 393, affirmed in 189 U. S. 135, 47 L. ed. 744, 23 Sup. Ct. Rep. 582; *Lehman v. Berdin*, 5 Dill. 340, Fed. Cas. No. 8,215.

¹⁰ *L. Bucki & Son Lumber Co. v. Fidelity & D. Co.* supra, note 9.

¹¹ *Rice v. Adler-Goldman Commission Co.* 18 C. C. A. 15, 36 U. S. App. 266, 71 Fed. 151.

¹² *Tefft v. Stern*, 21 C. C. A. 73, 43 U. S. App. 442, 74 Fed. 755, reaffirming 21 C. C. A. 67, 43 U. S. App. 148, 73 Fed. 591. In this case it was held that the state court decision would be followed by the circuit court of appeals, although it necessitated the reversal of an order of the Federal circuit court rendered before the state court decision and while the question was an open one.

¹³ *McGoon v. Scales*, 9 Wall. 23, 19 L. ed. 545.

¹⁴ *Burham v. Fritz*, 4 McCrary, 410, 13 Fed. 368.

But in *Lauriat v. Stratton*, 6 Sawy. 339, 11 Fed. 107, the court refused to follow a state decision as to the effect of a sale under a decree, to extinguish a lienor's right of redemption, for the reason that there

as to the title or interest passing under the sale.¹⁵

p. Debtors' exemptions.

In cases where the state statutes relating to debtors' exemptions are themselves binding upon the Federal court,—and the present note is concerned only with cases in which that is assumed,—the Federal courts uniformly follow the decisions of the highest state court construing such statutes. The provision of the Federal bankruptcy act allowing the exemptions prescribed by the state laws has furnished the occasion for many of these decisions. The rule that the decisions of the state court will be followed has been applied specifically to the question whether the statute embraces trust of real estate;¹⁶ the character of property which may be the subject of a homestead exemption;¹⁷ the right to a reasonable time to convert unimproved land into improved land subject to the homestead exemption;¹⁸ the effect of knowledge of insolvency and contemplation of bankruptcy on homestead exemption;¹⁹ whether growing crops are within the exemption extended by homestead act;²⁰ the effect of a conveyance to

wife upon a homestead exemption;²¹ the right of a married woman who holds the title to the property, to the exemption as against her own creditors, under the homestead statute;²² forfeiture of the exemption on the ground of fraud in concealing the property from creditors;²³ partner's right to individual exemption out of partnership assets;²⁴ the character of proceedings against which the exemption is available;²⁵ and the question whether the mortgaging or conveying exempt property to a creditor is against the public policy of the state.²⁶

q. Torts.

1. Negligence and contributory negligence generally.

As shown more in detail in the next subdivision, questions relating to negligence causing personal injuries are, in the absence of statute, usually regarded as questions of general law, as to which the Federal courts are not concluded by the decisions of the state courts. This rule would seem clearly applicable to a general question like that whether the negligence of a parent is imputable to a child, though the decisions disclose a conflict on the point.²⁷ The rule

was but a single decision, and that appeared to have been made under a misapprehension of the provisions of the statute.

¹⁵ *Henry v. Pittsburgh Clay Mfg. Co.* 25 C. C. A. 581, 39 U. S. App. 605, 80 Fed. 485, certiorari denied in 170 U. S. 704, 42 L. ed. 1217, 18 Sup. Ct. Rep. 943.

But see *Waples v. United States*, 110 U. S. 630, 28 L. ed. 272, 4 Sup. Ct. Rep. 225, holding that the title to property sold under judicial process is not warranted by the party obtaining the judgment, and that any different rule prevailing on that subject in a state by statute cannot change the position of the United States courts with respect to judicial sales in proceedings instituted by them.

¹⁶ *Nichol v. Levy*, 5 Wall. 433, 18 L. ed. 596.

¹⁷ *Re Stone*, 116 Fed. 35, affirmed in 57 C. C. A. 147, 120 Fed. 733.

¹⁸ *Re Baker*, 104 C. C. A. 602, 182 Fed. 392.

¹⁹ *Re Stone*, *supra*, note 17; *Re Wood*, 147 Fed. 877.

²⁰ *Re Sullivan*, 78 C. C. A. 505, 148 Fed. 815.

²¹ *First Nat. Bank v. Glass*, 25 C. C. A. 151, 49 U. S. App. 228, 79 Fed. 706; *Thompson v. McConnell*, 46 C. C. A. 124, 107 Fed. 33.

²² *Richardson v. Woodward*, 44 C. C. A. 235, 104 Fed. 873. The duty to follow the decision of the state court on this question, if there had been any, was expressly recognized. But in the absence of any decision by the state court on the specific point, the Federal court solved the question by applying L.R.A. (N.S.)

ing the general established rule of construction.

²³ *Re Cochran*, 185 Fed. 913.

²⁴ *Re Stevenson*, 93 Fed. 789; *Re Camp*, 91 Fed. 745, appeal dismissed in 38 C. C. A. 689, 97 Fed. 981; *Re McCrary Bros.* 169 Fed. 485; *Re Beauchamp*, 101 Fed. 106 (if there are any state decisions in point).

²⁵ *Lanahan v. Sears*, 102 U. S. 318, 26 L. ed. 180.

²⁶ *Re National Grocer Co.* 30 L.R.A. (N.S.) 982, 104 C. C. A. 47, 181 Fed. 33.

²⁷ In *Berry v. Lake Erie & W. R. Co.* 70 Fed. 679, it was held that, under the doctrine of imputed negligence, this was clearly a general question, to be decided by the Federal court for itself.

But the contrary position was taken by *Shiras, J.*, in *Kowalski v. Chicago G. W. R. Co.* 84 Fed. 586. He said: "The great desirability of securing uniformity in the rulings of courts acting within the same territorial limit is self-apparent, and therefore in matters which are purely domestic, and which are not affected by any provision of the Constitution or laws of the United States, or which do not pertain to the general commercial law of the country, or other matters within the legislative control of Congress, the rule adopted by the supreme court of the state wherein the cause of action arises should be followed by the Federal court, acting within the state." This position seems to be clearly against the *Baugh Case* and other cases cited in the next subdivision. And it will be observed that the language quoted places a much narrower restriction upon the right

has been applied to the doctrine of the "Turntable Cases," though with an intimation that a settled line of decisions by the state court on the point might be controlling;²⁸ to the liability of an abutting owner who lets work on the street to a contractor;²⁹ and the liability of the lessor railroad company for negligence of the lessee.³⁰ So the doctrine of the Federal courts that contributory negligence is an affirmative defense which must be established by a preponderance of the evidence is not affected by a different common-law rule in the state where the action arises.³¹

The decisions of the state court construing a statute to prevent contributory negligence from being a complete bar to an action under the statute are binding upon the Federal courts, if they grow out of the language of the statute, but it is otherwise if the statute is held to be declaratory merely of the common law, both in its requirements and in the liability imposed for failure to observe it.³² And it has been held that the opinion of a state court as to the construction of a statute in relation to the duty of railroads to maintain a look-

out is authoritative only to the extent of the precise question decided, and no farther.³³

The attitude of the Federal courts towards the decisions of the state courts on other questions of negligence is shown in the succeeding subdivisions.

2. Master and servant.

(a) At common law.

The relations of master and servant and their relative rights and duties are, in the absence of statute, regarded as questions of general law, as to which the Federal courts will follow their own independent judgment, irrespective of the decision of the state court. This has been specifically applied to the duty of the master to furnish proper appliances;³⁴ the question whether the doctrine of *res ipsa loquitur* applies as between master and servant;³⁵ as to negligence toward, and the contributory negligence of, minor employee;³⁶ delegation of duty;³⁷ the duty to employ competent fellow servants;³⁸ and the entire subject of fellow servants, including the question who

of the Federal courts to determine questions of general law for themselves, than is now sustained by the cases as a whole.

The decision in the Kowalski Case was affirmed by the circuit court of appeals (34 C. C. A. 1, 92 Fed. 310), but the latter court seems to have disposed of the question of imputed negligence as an independent question, merely mentioning the decision of the court of the state in which the case arose in connection with decisions from other jurisdictions on the question.

²⁸ *SNARE & T. Co. v. FRIEDMAN*, certiorari denied in 214 U. S. 518, 53 L. ed. 1065, 29 Sup. Ct. Rep. 700. The state court had repudiated the turntable doctrine in a case growing out of the same state of facts as that involved in the Federal case (*Friedman v. Snare & T. Co.* 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 Ann. Cas. 497), though the judgment of the state court was not *res judicata*.

²⁹ *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298.

³⁰ *Yeates v. Illinois C. R. Co.* 137 Fed. 943.

³¹ *Chicago G. W. R. Co. v. Price*, 38 C. C. A. 239, 97 Fed. 423; *Hemingway v. Illinois C. R. Co.* 52 C. C. A. 477, 114 Fed. 843. Nor does the fact that the question arises in a statutory action for death change the rule in this regard. *Ibid*.

³² *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605. This was an action based upon the failure of a railroad company to observe the statutory precautions in operating trains, and the court, speaking by Taft, J., being of the opinion that the

decisions of the state court that contributory negligence is not a complete defense to an action were based upon the Tennessee statute, and grew out of the language of the statute, they were held binding upon the Federal court.

So, in *Rogers v. Cincinnati, N. O. & T. P. R. Co.* 69 C. C. A. 321, 136 Fed. 573, state decisions construing the Tennessee statute to give damages notwithstanding contributory negligence were followed by the Federal court. See *infra* IV. q. 2 (b) notes 53, 54.

³³ *Southern R. Co. v. Simpson*, 65 C. C. A. 563, 131 Fed. 705, holding that a decision of a Tennessee court against a railroad company, upon the ground that by running its engine backward at night without a headlight it disabled itself from complying with a part of the statute requiring an effective lookout, could not be regarded as an authoritative decision that the statute is violated when an engine is run backwards, irrespective of whether the company is thereby disabled from maintaining an effective lookout, although there were general expressions in the opinion to that effect.

³⁴ *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140.

³⁵ *Patton v. Illinois C. R. Co.* 179 Fed. 530; *Montbriand v. Chicago, St. P. M. & O. R. Co.* 191 Fed. 988.

³⁶ *Force v. Standard Silk Co.* 160 Fed. 992, affirmed in 95 C. C. A. 286, 170 Fed. 184.

³⁷ *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612, 618.

³⁸ *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932.

are fellow servants; ³⁹ to what acts the rule applies; ⁴⁰ and the applicability of the rule as affected by continued carelessness upon the part of the fellow servant.⁴¹

(b) Under statutes in relation to master and servant.

Ordinarily, as shown in the last subdivision, common-law questions as to the relation of master and servant, and the liability of the former for injuries sustained by the latter in the course of the employment, are regarded as questions of general law, as to which the decisions of the state courts are not controlling upon the Federal courts. When, however, the subject is regulated by a state statute, the decisions of the highest court of the state on questions arising under the statute are controlling upon the Federal courts. At least this is true of decisions that may be fairly regarded as construing the statute.

Thus, the decisions of the highest state court are binding on the Federal court as to questions concerning notice, under a state employer's liability act; ⁴² the validity, un-

der the state Constitution, of a statute precluding the acceptance of benefits from a relief department as a defense to an action for damages; ⁴³ or a statute modifying the fellow servant rule.⁴⁴ So decisions of the state court will be followed as to the construction of a statutory provision respecting the liability of a master for injuries due to the negligence of a person intrusted with superintendence; ⁴⁵ whether the liability in such case is based upon statute and is independent of contract; ⁴⁶ the effect of violation of a statute by the person injured.⁴⁷

As shown in the previous subdivision, the Federal courts, in the absence of a statute on the subject, reserve the right to determine for themselves the questions arising in connection with the common-law rule as to fellow servants, but when that rule has become the subject of constitutional or statutory provisions, those courts generally follow the decisions of the state court as to the construction and effect of such provisions.⁴⁸ This rule has been specifically applied to the question what classes of employers are within the operation of a stat-

³⁹ *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322 (implied); *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184 (implied); *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Beutler v. Grand Trunk Junction R. Co.* 224 U. S. 85, 56 L. ed. 679, 32 Sup. Ct. Rep. 402; *Northern P. R. Co. v. Peterson*, 2 C. C. A. 157, 4 U. S. App. 574, 51 Fed. 182 reversed on another ground in 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Newport News & M. Valley Co. v. Howe*, 3 C. C. A. 121, 6 U. S. App. 172, 52 Fed. 362; *Wright v. Southern R. Co.* 80 Fed. 260; *Felton v. Bullard*, 37 C. C. A. 1, 94 Fed. 784; *Hunt v. Hurd*, 39 C. C. A. 226, 98 Fed. 683; *Elliot v. Felton*, 56 C. C. A. 74, 119 Fed. 270; *Pennsylvania Co. v. Fishack*, 59 C. C. A. 269, 123 Fed. 465; *Jones v. Southern P. Co.* 75 C. C. A. 602, 144 Fed. 973, 7 Ann. Cas. 256, certiorari denied in 202 U. S. 620, 50 L. ed. 1174, 26 Sup. Ct. Rep. 766; *Kinnear Mfg. Co. v. Carlisle*, 82 C. C. A. 81, 152 Fed. 933; *Salmons v. Norfolk & W. R. Co.* 162 Fed. 722; *Snipes v. Southern R. Co.* 91 C. C. A. 593, 166 Fed. 1.

And this is recognized in the following state cases: *Spring Valley Coal Co. v. Patting*, 112 Ill. App. 4; *Chandler v. St. Louis & S. F. R. Co.* 127 Mo. App. 34, 106 S. W. 553; *Farrar v. St. Louis & S. F. R. Co.* 149 Mo. App. 188, 130 S. W. 373. And see *infra*, IV. q. 3, note 63, where question arises in an action under a death statute. But see *infra*, IV. q. 2, b, as to questions arising under statute dealing specifically with relation of master and servant. But see *contra*. *Easton v. Houston & T. C. R.* 40 L.R.A. (N.S.)

Co. 32 Fed. 893, and *Kerlin v. Chicago, P. & St. L. R. Co.* 50 Fed. 185.

⁴⁰ *New York, N. H. & H. R. Co. v. O'Leary*, 35 C. C. A. 562, 93 Fed. 737; *Illinois C. R. Co. v. Hart*, — L.R.A. (N.S.) —, 100 C. C. A. 49, 176 Fed. 245.

⁴¹ *McPeck v. Central Vermont R. Co.* 25 C. C. A. 110, 50 U. S. App. 27, 79 Fed. 590.

⁴² *Crosby v. Lehigh Valley R. Co.* 128 Fed. 193; *Pennsylvania Steel Co. v. Lakkonen*, 104 C. C. A. 513, 181 Fed. 325; *Spinello v. New York, N. H. & H. R. Co.* 106 C. C. A. 189, 183 Fed. 762; *United States Gypsum Co. v. Sliwienka*, 106 C. C. A. 38, 183 Fed. 688.

⁴³ *Atlantic Coast Line R. Co. v. Dunning*, 94 C. C. A. 128, 166 Fed. 850.

⁴⁴ *Oakes v. Mase*, 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 345; *Kane v. Erie R. Co.* 68 L.R.A. 788, 67 C. C. A. 653, 133 Fed. 681 (the Federal court, however, was obliged to determine the question of constitutionality, as the state courts had not passed upon it).

⁴⁵ *Proctor & G. Co. v. Williams*, 106 C. C. A. 45, 183 Fed. 695.

⁴⁶ *Dormidy v. Sharon Boiler Works*, 127 Fed. 485.

⁴⁷ *Malloy v. American Hide & Leather Co.* 107 C. C. A. 646, 185 Fed. 776.

⁴⁸ As stated at the beginning of the note, the question as to the duty of the Federal court to follow the decisions of the state court when involved in a question arising under the Federal Constitution is not in general within the scope of this note. In this connection, however, mention is made of the case of *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, declaring that the interpreta-

ute modifying or abolishing the fellow servant rule;⁴⁹ its applicability to employees of a receiver operating a railroad under direction of a court of equity.⁵⁰ So it has even been held that the decisions of the state court are binding as to who are fellow servants, within a statute declaring that the employer is not bound to indemnify his employee for loss suffered in consequence of the negligence of another person employed by the same employer in the general business, unless he has neglected to use ordinary care in the selection of the culpable employee.⁵¹ As such a statute is merely declaratory of the common law, and does not profess to deal with the question who are fellow servants, it may be doubted whether state decisions under it should not be regarded as falling within exceptions discussed in other subdivisions.⁵² The same

doubt arises as to decisions of the state court as to whether the defense of assumed risk is impliedly excluded by statutes which impose certain duties upon the master, but do not deal expressly with such defense. In many of the Federal cases in which this question has arisen, the court has disposed of it as though it were a question for the independent judgment of the Federal court, without, however, expressly passing on that point.⁵³ It has, however, been expressly held that Federal courts are bound by the decision of the highest state court on this subject.⁵⁴

The question whether the Federal courts are bound by the decisions of the state courts on common-law questions in relation to master and servant, when they arise in a statutory action for death, is discussed in the next subdivision.

tion of a state statute as affixed to it by the state court of last resort will not be disregarded by the United States Supreme Court, and a different construction given to the statute, which will make it repugnant to the Federal Constitution.

⁴⁹ *Kibbe v. Stevenson Iron Min. Co.* 69 C. C. A. 145, 136 Fed. 147; *United States Leather Co. v. Howell*, 80 C. C. A. 674, 151 Fed. 444; *Atlantic Coast Line R. Co. v. Farmer*, 100 C. C. A. 244, 176 Fed. 692.

⁵⁰ *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 69 Fed. 353. It was argued in this case that the decision of the state court was not a construction of the statute, but was an application of the common law to the statute, and that, being such, it was merely advisory to a Federal court, and should not control it. The court, however, quoted from the opinion of the state court, to show that its decision was based upon a construction of the statute.

⁵¹ *Northern P. R. Co. v. Hogan*, 11 C. C. A. 51, 27 U. S. App. 184, 63 Fed. 102. Thayer, D. J., writing for the court, said: "Indeed, it would lead to intolerable results, which will be readily apprehended, if the Federal courts should either deny the authority of such statutes, or refuse to enforce them according to the interpretation placed thereon by the courts of the state, particularly by its court of last resort. . . . It is the statute, however, and not the common law, which is now in force in the state of North Dakota; and it is the statute, as construed by the highest court of that state, which must determine the rights of the parties, and control the decision in the case at bar."

And in *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, involving a similar statute, the court seems to have assumed that the decision of a state court on the question as to who were fellow servants within the statute would be controlling, though as a matter of fact the decision involved was rendered by the supreme court of the territory, and the court said: "While this construc-

tion given by the supreme court of a territory is not obligatory upon this court, it is certainly entitled to respectful consideration, and in a doubtful case might well be accepted as turning the scale in favor of the doctrine there announced. . . . We may safely assume that the construction thus given to this statute will not be overruled by the courts of the two states which have succeeded the supreme court of the territory, without most cogent reasons for their action."

⁵² *Supra*, III. g; III. e.

⁵³ See *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A.(N.S.) 981, and cases cited in the opinion and in the note to that case; cases cited in notes to *Johnson v. Mammoth Vein Coal Co.* 19 L.R.A.(N.S.) 646, and *Poli v. Nuna Block Coal Co.* 33 L.R.A.(N.S.) 646.

⁵⁴ *Inland Steel Co. v. Kachwinski*, 80 C. C. A. 571, 151 Fed. 219; *Welsh v. Barber Asphalt Paving Co.* 93 C. C. A. 101, 167 Fed. 465. And in *E. S. Higgins Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900, and *Chicago-Coulterville Coal Co. v. Fidelity & C. Co.* 130 Fed. 957, the courts, without expressly declaring that the Federal courts were bound by the construction placed upon the statute by the highest court of the state, allude to such construction as though it were conclusive.

In *Welsh v. Barber Asphalt Paving Co.* 93 C. C. A. 101, 167 Fed. 465, the court expressly said that the question was one of the construction of a state statute, and its effect upon the common-law rule, and expressed its dissent to the assumption in *St. Louis Cordage Co. v. Miller*, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, that the question was one of general law, to be determined upon general principles. The Oregon statute in question in the *Welsh Case* having been adopted from Washington, the construction placed upon it by the supreme court of the latter state was held binding by the Federal court.

In *Federal Lead Co. v. Swyers*, 88 C. C. A. 547, 161 Fed. 689, refusing to follow a

3. Statutory action for death.

The decisions of the highest state court upon questions distinctive of a statute giving a right of action for a negligent homicide are binding upon the Federal courts;⁵⁵ and the doctrine has been specifically declared with respect to the question whether the statute creates a new cause of action, or transmits an existing cause of action;⁵⁶ whether the provision of the statute in relation to notice creates a condition precedent or subsequent;⁵⁷ whether a nonresident alien is within the benefit of the statute;⁵⁸ the question of damages;^{58a} including the right to exemplary damages;⁵⁹ and the right to compensation for pain and suffering;⁶⁰ the question whether a husband is the "next of kin" of the wife, within the provision defining the beneficiaries.⁶¹ The character of the statute, however, as penal or otherwise, so far as it affects the jurisdiction of the Federal court, is to be

determined by that court for itself, unaffected by the decisions of the state court.⁶² Of course, even when a question distinctive of the statute is involved, the Federal court must determine the question for itself, if it has not been settled by the decisions of the highest state court.⁶³

State court decisions are not conclusive upon the Federal courts as to questions which, though arising in a statutory action for death, are not distinctive or peculiar to that character of actions, but pertain equally to the common-law action for negligent injury. Thus, it has been held that the question as to who are fellow servants, though arising in a statutory action for the death of an employee, is a general question, to be determined by the Federal court for itself, whether the state statute be regarded as creating a new right of action, or as simply abrogating the common-law rule by which actions for personal injuries are extinguished by death.^{63a} And it has

decision of a state intermediate appellate court, it seems to have been assumed that a decision of the highest court of the state on the subject would have been binding.

⁵⁵ See cases cited in subsequent notes to this action. The case of *Walsh v. New York, N. H. & H. R. Co.* 173 Fed. 494, holding that recourse cannot be had to a state statute to determine whether or not a cause of action given by a Federal statute survives, is, of course, not opposed to the text on this subject, and is not within the scope of the note.

⁵⁶ *Matz v. Chicago & A. R. Co.* 85 Fed. 180. In this case, however, it appeared that the precise point had not been decided in the state court, and it was declared that mere *dicta* concerning the construction are not binding on the Federal court.

⁵⁷ *Spinello v. New York, N. H. & H. R. Co.* 106 C. C. A. 189, 183 Fed. 762.

⁵⁸ *Zeiger v. Pennsylvania R. Co.* 86 C. C. A. 69, 158 Fed. 809; *Fulco v. Schuylkill Stone Co.* 94 C. C. A. 498, 169 Fed. 98; *Saveljich v. Lytle*, 97 C. C. A. 443, 173 Fed. 277; *Debitulia v. Lehigh & W. Coal Co.* 174 Fed. 886. In the former case the court said that the theory that the state decisions did not construe a statute, but enunciated a supposed policy of law, was ingenious, but unsound, and that whether the limitation of the statute was or was not founded on considerations of public policy was unimportant, as in any event the decisions were interpreting, and put a construction upon, the statute. (But see *supra*, III. e.) Cases like *Maiorano v. Baltimore & O. R. Co.* 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424, holding the same on writ of error to the state court, are, for reason stated in the scope note, not in point.

^{58a} *Quinette v. Bisso*, 5 L.R.A.(N.S.) 303, 69 C. C. A. 503, 136 Fed. 825, certiorari denied in 199 U. S. 600, 50 L. ed. 330, 26 Sup. Ct. Rep. 746.
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⁵⁹ *Louisville & N. R. Co. v. Lansford*, 42 C. C. A. 160, 102 Fed. 62.

⁶⁰ *Jacobs v. Glucose Sugar Ref. Co.* 140 Fed. 766.

⁶¹ *Joplin & P. R. Co. v. Payne*, 194 Fed. 387.

⁶² *Perkins v. Boston & A. R. Co.* 90 Fed. 321; *Malloy v. American Hide & Leather Co.* 148 Fed. 482, reversed on another ground in 107 C. C. A. 646, 185 Fed. 776. The Federal court, however, ought to lean toward the decisions of the state court on this point. *Perkins v. Boston & A. R. Co.* *supra*. And see *Lyman v. Boston & A. R. Co.* 70 Fed. 409.

⁶³ Thus, the United States Supreme Court in *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439, in passing upon the question whether an administrator appointed in New Jersey could maintain the action under the New Jersey statute, said: "The right to recover for an injury to the person resulting in death is of very recent origin, and depends wholly upon statutes of the different states. The questions growing out of these statutes are new, and many of them unsettled. Each state court will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decision, this court must decide for itself the question now for the first time presented to it, and, with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator in cases like this to maintain the action." And see *Matz v. Chicago & A. R. Co.* 85 Fed. 180. *supra*, note 56.

^{63a} *Elliott v. Felton*, 56 C. C. A. 74, 119 Fed. 270, *Lurton, J.*, speaking for the court, said that the state court not having made the statute the basis of any decision as to the liability of an employer for an injury to one servant by the negligence of another,

been held that the Federal rule which places the burden of proof of contributory negligence upon the defendant applies to an action for death under a state statute, irrespective of the decisions of the state court on that point.⁶⁴

r. License; intoxicating liquor.

In the absence of any conflict with the Federal Constitution or statutes, it has been held that a decision of the highest state court will be followed as to the validity, under the state laws, of a license ordinance adopted by a board of county supervisors,⁶⁵ or ordinances respecting the traffic in intoxicating liquors.⁶⁶ Cases involving the question whether state statutes or ordinances on these subjects are in violation of the Federal Constitution or statutes are, of course, not in point.

s. Public bodies; municipal corporations.

The character and extent of the powers and liabilities of the political bodies or municipal corporations of a state are in general questions of local law, as to which the decisions of the supreme court of the state which creates those bodies are authoritative in the Federal courts.⁶⁷ In a case involving the validity of a statute providing for the organization of irrigation districts, the United States Supreme Court,

while declaring it to be the duty of the Federal courts to decide for themselves whether the statute was in violation of the Federal Constitution, said that it would not be justified in holding the act to be in violation of the state Constitution in face of fair and repeated decisions of the highest court of the state to the contrary, under the pretext that it was deciding principles of general constitutional law.⁶⁸ So, in an early case it was remarked that if the state of Georgia had practically settled the limits of a certain county, such settlement ought to have been conclusive upon the circuit court.⁶⁹ So, it has been held that state decisions will be followed as to the authority of a public board;⁷⁰ and as to the contracts of counties or school districts.⁷¹ And the Federal courts uniformly follow the decision of the state courts construing constitutional or statutory provisions in relation to municipal corporations; and this rule has been applied to questions concerning the dissolution of municipalities;⁷² municipal boundaries;⁷³ the construction and effect of statutes providing for the destruction of property to prevent fire;⁷⁴ the authority of a city under its charter to order the destruction of liquor, and its liability for the liquor destroyed thereunder;⁷⁵ the validity of an ordinance prohibiting erection of bill boards;⁷⁶ power to encourage the establishment of private manufacturing establishments;⁷⁷ and gen-

there was no basis for the suggestion that the legislature, when enacting the survival statute, intended to adopt the law as declared by the existing decisions of the state court, as a statutory rule of liability where death resulted from the wrongful act.

⁶⁴ *Hemingway v. Illinois* C. R. Co. 52 C. C. A. 477, 114 Fed. 843.

⁶⁵ *Flanigan v. Sierra County*, 196 U. S. 553, 49 L. ed. 597, 25 Sup. Ct. Rep. 314; *Wheeler v. Plumas County*, 196 U. S. 562, 49 L. ed. 599, 25 Sup. Ct. Rep. 316. See also *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214, holding on error to the state court, that a state decision will be followed as to the construction of a statute prescribing a state license tax.

⁶⁶ *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Miller v. Ammon*, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721.

⁶⁷ *Johnson v. St. Louis*, 96 C. C. A. 617, 172 Fed. 31, 18 Ann. Cas. 949; *Goodrich v. Chicago*, 4 Biss. 18, Fed. Cas. No. 5,542.

⁶⁸ *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

⁶⁹ *Patterson v. Jenks*, 2 Pet. 216, 7 L. ed. 402.

⁷⁰ *Hoyt v. Gleason*, 65 Fed. 685.

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⁷¹ *Thompson v. Searcy County*, 6 C. C. A. 674, 12 U. S. App. 618, 57 Fed. 1030. See supra, IV. a, 3, as to county bonds.

In *Capital Bank v. School Dist. No. 26*, 11 C. C. A. 514, 27 U. S. App. 479, 63 Fed. 938, state decisions with reference to the power of the school district to issue warrants for a school building were followed as a reasonable construction of the statute, but whether the decision of the state court, construing the law of a territory out of which the state had been carved, should be given the same force and effect as a decision of that court construing an act of the legislature of the state, was not decided.

⁷² *Ringling v. Hempstead*, 113 C. C. A. 464, 193 Fed. 596.

⁷³ *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665, reversing 18 C. C. A. 175, 34 U. S. App. 552, 71 Fed. 443.

⁷⁴ *Bowditch v. Boston*, 101 U. S. 16, 25 L. ed. 980.

⁷⁵ *Richmond v. Smith*, 15 Wall. 429, 21 L. ed. 200.

⁷⁶ *Whitmier & F. Co. v. Buffalo*, 118 Fed. 773.

⁷⁷ *Sutherland-Immes Co. v. Evart*, 30 C. C. A. 305, 58 U. S. App. 335, 86 Fed. 597. But see *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382, supra, III. a, note 72.

erally as to the power to incur indebtedness and make contracts.⁷⁸ But it has been held that while a Federal court is bound by the construction placed by the highest state court upon a constitutional provision limiting municipal indebtedness, it is not bound by a decision of that court as to whether a particular proposed contract and issue of bonds will violate the provisions of the Constitution thus construed;⁷⁹ and that state decisions upon the validity of contracts that rest upon general principles or upon evidential value of certain facts, and not upon the construction of a local statute, are not binding upon the Federal court.⁸⁰ And it has been declared that a decision of the state court, whether regarded as construction of the state Constitution or as relating to a question of general law, defining the word "debt," is not binding upon the Federal court, unless in plain harmony with the language of the Constitution or the settled judicial construction thereof existing at the time the contract was entered into. This, however, was perhaps intended to be limited to cases involving a question under the Federal Constitution, in which event, for reasons previ-

ously explained, it is not within the scope of the note.⁸¹ It has also been held that the decision of the highest state court, that the remedy by mandamus to enforce a warrant issued by a municipality is exclusive of an action, does not prevent an action in the Federal courts.^{81a}

The questions of municipal liability for defects or obstructions in the street,⁸² and liability for the torts of officers or employees,⁸³ though not involving any specific statute, and turning upon the distinction between governmental and private functions, have been regarded as local questions, as to which the decisions of the state courts are controlling. And this, of course, is true, *a fortiori*, if the decisions of the state court rest upon a statute.⁸⁴

t. Public service corporations.

Assuming that there is no question under the Federal Constitution or statutes, the decisions of the highest state court are in general binding upon the Federal court as to the validity, under the state Constitution, of statutes in relation to public service corporations;⁸⁵ and as to the construction of

⁷⁸ German Ins. Co. v. Manning, 95 Fed. 597; Sioux Falls v. Farmers' Loan & T. Co. 69 C. C. A. 373, 136 Fed. 721. See supra, IV. a, 3, as to municipal bonds.

⁷⁹ Ottumwa v. City Water Supply Co. 59 L.R.A. 604, 56 C. C. A. 219, 119 Fed. 315. And this decision of the circuit court of appeals was held binding upon the Federal circuit court in a subsequent suit between the same parties involving different contract, but made pursuant to same ordinance. City Water Supply Co. v. Ottumwa, 120 Fed. 309. See, further, as to this exception supra, III. f.

⁸⁰ Mankato v. Barber Asphalt Paving Co. 73 C. C. A. 439, 142 Fed. 329. The court said: "In so far as it [the decision of the state court] construes a local law, the charter of the city of Mankato, under certain condition of facts, it is [finding]. This is settled by abundant authority, but in so far as it expresses the opinion of the state court on general principles of the law of contract, or on the evidential value of facts, it clearly is not. As to such question, it is not only the privilege, but the duty, of this court, which it owes to suitors entitled to invoke its jurisdiction, to exercise its independent judgment." Another reason for holding that the state decision, even if it were to be regarded as a construction of a local law, was not of controlling authority, was found in the fact that the decision in question was rendered upon the

very contract in question, and after the rights of the parties had accrued.

⁸¹ Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson, 130 Fed. 152. The court cites a number of cases to the effect that, in passing upon the question of impairing the obligation of a contract, the Federal court is not bound by the decisions of the state court as to the nature of the contract, or whether it has been impaired.

^{81a} First Nat. Bank v. Port Townsend, 106 C. C. A. 554, 184 Fed. 574. And see infra, IV. x, note 69.

⁸² Detroit v. Osborne, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012; Blaylock v. Muskogee, 54 C. C. A. 639, 117 Fed. 125. —

⁸³ Denver v. Porter, 61 C. C. A. 168, 126 Fed. 288 (liability for negligence of employee charged with duty of preventing spread of fire); Edgerton v. New York, 27 Fed. 230; Clark v. Atlantic City, 180 Fed. 598 (false arrest).

⁸⁴ Merrill v. Portland, 4 Cliff. 138, Fed. Cas. No. 9,470.

⁸⁵ Chicago, B. & Q. R. Co. v. Smyth, 103 Fed. 376; Underground R. Co. v. New York, 116 Fed. 952.

In San Jose-Los Gatos Interurban R. Co. v. San Jose R. Co. 84 C. C. A. 265, 156 Fed. 455, 13 Ann. Cas. 571, however, the Federal court declined to follow a state decision as to the construction of a contract with reference to the right

such statutes.⁸⁶ The rule, however, is subject to the exception with reference to decisions rendered after the rights of parties have accrued.⁸⁷

u. Monopolies.

A Federal court, though not bound by a decision of an intermediate state appellate court as to the construction and effect of a state statute with respect to monopolies in restraint of trade, is bound to follow the decision of the highest state court, if it does not come in conflict with the Federal Constitution or statute.⁸⁸

uu. Eminent domain.

Many of the judicial declarations as to the duty of the Federal court to abide by the decisions of the state courts on questions in relation to eminent domain are to be found in cases that came before the Federal Supreme Court on writ of error to the state court, and the cases therefore presented either a question under the Federal Constitution, or a question of state law, not open to review by the Federal court at all, and for the reasons explained in the scope of

of different lines of street railway to use the same street, which depended upon the opinion of one judge not concurred in by a majority.

⁸⁶ *Hawes v. Contra Costa Water Co.* 5 Sawy. 287, Fed. Cas. No. 6,235 (question whether under statute water company was bound to furnish water for certain purposes); *Westerly Waterworks Co. v. Westerly*, 75 Fed. 181 (statute authorizing the laying of water pipes to supply inhabitants of city with water); *Sunset Teleph. & Teleg. Co. v. Pomona*, 97 C. C. A. 251, 172 Fed. 829 (whether statute permitting telegraph company to construct lines in highway includes telephone corporations).

The duty to follow the decisions of the state court when applicable to the question under consideration was also recognized in *Wiemer v. Louisville Water Co.* 130 Fed. 251, but it was held that the decision relied on was not applicable to the question before the Federal court.

And in *Seccomb v. Wursters*, 83 Fed. 856, the court, in determining a motion for a preliminary injunction, followed a decision of an intermediate state appellate court construing a statute limiting the period for which a street franchise may be granted, though the question had not been settled by the state court of last resort.

There are many other Federal cases which have declared the duty of the Federal courts to follow the state decisions on such points, which are not within the scope of the note, because they came up on writ of error to the state court, or at all events involved a question arising under the Federal Constitution.

⁸⁷ *Central Trust Co. v. Citizens' Street R.* 40 L.R.A. (N.S.)

the note, are not in point on the subject of this annotation.⁸⁹

But it has been held, in cases originating in the lower Federal courts, and presenting no question under the Federal Constitution or statutes, that the decisions of the highest state court are to be followed as to the liability of a municipality for damage to lateral support by a public improvement; ⁹⁰ as to character or extent of interest acquired in condemnation proceedings; ⁹¹ whether benefits may be considered in assessing damages; ⁹² what constitutes damage within a state Constitution declaring that private property shall not be taken or damaged for public use without compensation.^{93a}

v. Taxes.

The United States has declared, generally, that the determination of all questions arising under the tax laws is a matter primarily belonging to the state courts, and the national tribunals universally follow their ruling, except in cases where it is claimed that some right protected by the Federal Constitution has been invaded.⁹³

Co. 82 Fed. 1, appeal dismissed in 27 C. C. A. 580, 53 U. S. App. 658, 83 Fed. 529. *Bartholomew v. Austin*, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359.

⁸⁸ *Continental Securities Co. v. Interborough Rapid Transit Co.* 165 Fed. 945.

In *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379, it is held that the construction given by the state courts to a state statute, as removing the discriminatory features of a prior anti-trust law, is conclusive upon the Federal Supreme Court in determining, on writ of error to the state court, whether such statute denies the equal protection of the law. This case, however, is not within the scope of the note.

⁸⁹ See, for illustration, *Baltimore Traction Co. v. Baltimore Belt R. Co.* 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Backus Jr. & Sons v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

⁹⁰ *Johnson v. St. Louis*, 96 C. C. A. 617, 172 Fed. 31, 18 Ann. Cas. 949.

⁹¹ *Kennedy v. Indianapolis*, 11 Biss. 13, Fed. Cas. No. 7,703.

⁹² *Ibid.*

^{93a} *Idaho & W. N. R. Co. v. Nagle*, 106 C. C. A. 578, 184 Fed. 598.

⁹³ *Lewis v. Monson*, 151 U. S. 545, 38 L. ed. 265, 14 Sup. Ct. Rep. 424, and see other cases cited in this subdivision. But see *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382.

In an early case, the United States Supreme Court said: "There can be no class of laws more strictly local in their charac-

This rule has been applied to a question as general in its nature as that whether railroad aid is a "corporate purpose" for which taxes may be raised;^{93a} but, on the other hand, it has been held that the question what is a public use for which taxes may be raised is a question as to which the Federal courts are not bound by the decisions of the highest state courts.⁹⁴

The rule that the decisions of the state court are controlling has been applied to

the validity, under the state Constitution, of a statute imposing certain charges upon foreign insurance company for the benefit of municipalities;^{95a} to the question what property is within the jurisdiction for purposes of taxation, assuming that there is no question under the Federal Constitution;⁹⁵ and generally as to questions under state Constitution or statutes in relation to taxation of foreign corporations;⁹⁶ whether a taxing statute

ter, and which more directly concern real property, than these [tax laws]. They not only constitute a rule of property, but their construction by the courts of the state should be followed by the courts of the United States with equal, if not with greater, strictness than the construction of any other class of laws." *Games v. Stiles*, 14 Pet. 322, 10 L. ed. 476.

Nor does the fact that the decision of the state supreme court sustaining the constitutionality of a state statute was contained in a prepared case, which did not involve a genuine controversy, prevent the Federal court from following it. *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305.

And the decision of the state court holding that the statute is not in violation of the state Constitution, rendered before final judgment in the action in the Federal court, should be followed by that court notwithstanding that the Federal court had previously held otherwise upon a demurrer. *Western U. Tele. Co. v. Poe*, 64 Fed. 9 (opinion by Taft, J.); *Sandford v. Poe*, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546 (opinion by Lurton, J.). In *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, affirming the last two decisions, it was also held that the decision of the state court was binding, though the Supreme Court did not allude to the previous holding of the Federal court on demurrer. But it has been held that a decree of the Federal court will not be reversed on a bill of review because of a subsequent decision of the state courts at variance with the decision of the Federal court as to the constitutionality of a taxing statute, where the point had not been decided by the state court at the time of the Federal decision. *King v. Dundee Mortg. & Trust Invest. Co.* 28 Fed. 33.

In *Central R. & Bkg. Co. v. Wright*, 164 U. S. 327, 41 L. ed. 454, 17 Sup. Ct. Rep. 80, the United States Supreme Court refused to accept as controlling the headnote of a Georgia case construing a taxing statute, upon the ground that it was not borne out by an examination of the case, and was not concurred in by a majority of the judges, although they agreed in the result.

There are many cases in the Federal Supreme Court declaring that the state court decisions with reference to taxation are to be followed or are conclusive, that are not within the scope of this note, for the reason 40 L.R.A. (N.S.)

that they came up on error to the state court, and the point was really that the question was concluded by the decision of the state court in the same case, and was not before the Federal court at all, rather than that such decisions would be binding as to a question to be passed upon by the Federal court in the exercise of their concurrent jurisdiction with the state courts, though the latter would doubtless have been true of most of the questions involved. See, as illustrations of this class of cases, though they are by no means complete, *Adams v. Nashville*, 95 U. S. 19, 24 L. ed. 369; *Lane County v. Oregon*, 7 Wall. 71, 19 L. ed. 101; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. ed. 573, 16 Sup. Ct. Rep. 412; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 45 L. ed. 1227, 21 Sup. Ct. Rep. 863; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578, affirming 125 Ky. 402, 101 S. W. 321.

Cases whether originating in the Federal courts, or brought to the Federal Supreme Court on writ of error to the state court, holding that the state court decisions are, of course, not controlling, are not included, if the ground of the Federal court's decision on the point is that the question involved, either because of its own nature or because of its association, presented a question under the Federal Constitution.

^{93a} *Weightman v. Clark*, 103 U. S. 256, 26 L. ed. 392. The court said in this case that the construction which the highest court of a state has given to a state statute will be treated as part of the statute itself, except when, by giving such construction a retroactive effect, it will invalidate the contract lawfully made. But see next case.

⁹⁴ *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382. See *supra*, III. e.

^{95a} *Liverpool & L. & G. Ins. Co. v. Clunie*, 88 Fed. 160.

⁹⁵ *Dundee Mortg. Trust Invest. Co. v. School Dist. No. 1*, 10 Sawy. 52, 19 Fed. 359; *Oliver v. Omaha*, 3 Dill. 368, Fed. Cas. No. 10,499.

⁹⁶ *Singer Mfg. Co. v. Adams*, 91 C. C. A. 461, 165 Fed. 877, appeal dismissed in 216 U. S. 617, 54 L. ed. 639, 30 Sup. Ct. Rep. 577.

violates the requirement of the state Constitution as to uniformity and equality;⁹⁷ questions as to double taxation;⁹⁸ as to compliance with formal requirements of state Constitution as to manner of passage and the terms of taxing statute;⁹⁹ whether an exaction by the state constitutes a tax, apart from any question arising under the Federal laws;¹⁰⁰ whether a particular tax is a tax on the privileges and franchises of a corporation, or a tax on the property;¹ whether a state statute applied to assessments for the year during which it was enacted;² what property is embraced within the taxing statute;³ the liability to

municipal taxation of land brought within its limits by an extension of municipal boundaries.⁴ And so, in the absence of interference with vested rights acquired before the decisions, or of any question under the Federal Constitution, the decisions of the state court are binding as to questions in relation to exemptions;⁵ as the question whether an exemption statute is constitutional;^{5a} whether a repealable exemption has been in fact repealed by a subsequent state statute;⁶ whether shares of capital stock of a savings bank are exempt;⁷ who is a manufacturer within exemption statute.⁸ So the decisions of

⁹⁷ *Gilman v. Sheboygan*, 2 Black, 510, 17 L. ed. 305 (statute requiring tax for railroad purposes to be levied exclusively upon real estate within a city); *Taylor v. Secor*, 92 U. S. 575, 23 L. ed. 663 (statute prescribing a different rule of taxation for railroad companies than for individuals); *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, affirming *Sandford v. Poe*, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546, and *Western U. Teleg. Co. v. Poe*, 64 Fed. 9 (Ohio statute, "the Nichols law," creating a state board of appraisers and assessors of the property in Ohio, of telegraph, telephone, and express companies, and prescribing the rule and method of assessment); *Dundee Mortg. Trust Invest. Co. v. Parrish*, 11 Sawy. 92, 24 Fed. 197 (mortgage tax); *People's Nat. Bank v. Marye*, 107 Fed. 570, modified in 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. Rep. 68, on another point.

⁹⁸ *Dundee Mortg. Trust Invest. Co. v. Parrish*, supra.

⁹⁹ *Dundee Mortg. Trust Invest. Co. v. Parrish*, supra; *People's Nat. Banks v. Marye*, supra.

¹⁰⁰ *New Jersey v. Anderson*, 203 U. S. 483, 51 L. ed. 284, 27 Sup. Ct. Rep. 137 (implied). The decisions of the state court on that point, however, are not conclusive on the Federal courts so far as they affect the rights to a preference under the bankruptcy act. *Ibid.* But see *Re Ott*, 95 Fed. 274.

¹ *Provident Inst. v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907.

² *Hager v. American Nat. Bank*, 86 C. C. A. 334, 159 Fed. 396. It was so held, although the effect of the state court decision was to eliminate a discrimination against national banks. *Lurton, J.*, said that a statute which thus prevents a discriminating method of assessment does not give rise to any such independent right of construction of a local statute as is exercised by United States courts when contracts have been made under a state statute before interpretation by the highest court of the state of the contract.

³ *Carroll v. Safford*, 3 How. 441, 11 L. ed. 671. (The court said that the Federal 40 L.R.A. (N.S.)

court would adopt as a rule of decision the established construction of local laws, and it was immaterial whether such construction had been established by long usage or a judicial decision.) *Paine v. Wright*, 2 McLean, 395, Fed. Cas. No. 10,676.

⁴ *Kountze v. Omaha*, 5 Dill. 443, Fed. Cas. No. 7,928.

⁵ See subsequent notes. But the Federal court is not bound by decisions of the state court adverse to the right of exemption, rendered after rights had accrued. *Louisville & N. R. Co. v. Gaines*, 2 Flipp. 621, 3 Fed. 266.

In *Keokuk & W. R. Co. v. County Ct.* 41 Fed. 305, affirmed in 152 U. S. 317, 38 L. ed. 457, 14 Sup. Ct. Rep. 605, however, the court assumed that it was entitled to express an independent opinion upon the question whether a consolidated corporation acquired the right of exemption enjoyed by the constituent corporations, although it agreed with a later decision of the state court denying the exemption, and refuse to be bound by earlier state decisions favoring the exemption.

^{5a} *American Sugar Ref. Co. v. New Orleans*, 55 C. C. A. 328, 119 Fed. 691.

⁶ *Wicomico County v. Bancroft*, 203 U. S. 112, 51 L. ed. 112, 27 Sup. Ct. Rep. 21. Of course, the question whether the exemption is in fact repealable may present a question under the Federal Constitution, as to which the decisions of the state court are not controlling,—a point not within the scope of the note. But see, for illustration, *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558.

⁷ *Davenport Nat. Bank v. Mittelbuscher*, 4 McCrary, 361, 15 Fed. 225. (The question never having been decided by the state court, but being then before that court, the Federal court decided to await the decision of the state court, and said it would abide by the construction placed by it upon the statute in question.)

⁸ *American Sugar Ref. Co. v. New Orleans*, supra. The circuit court of appeals expressly said that, even it did not agree with the conclusion, it would be bound to follow the latest state decision, which was in favor of the exemption, though it required the reversal of the decision of the

the state court control upon the question whether notice to the taxpayer is a condition of the right of the board of equalization to increase the assessment;⁹ whether the method and basis of assessment are in conformity with the state Constitution or statutes;¹⁰ the sufficiency of the description of land in an assessment roll;¹¹ the duty to levy a special tax to satisfy a judgment;¹² whether defects in proceedings for sale of land for nonpayment of taxes rendered them void;¹³ the requisites of a judgment for taxes;¹⁴ whether a judgment by default in a tax sale proceeding may be impeached collaterally by the taxpayer;¹⁵ the validity of tax sale when part of the tax was illegal;¹⁶ or the omission to pay was due to an excusable mistake;¹⁷ the necessity of showing full compliance with the tax statutes in order to sustain a tax title;¹⁸ or as a condition of the admission of a tax deed in evidence;¹⁹ the validity of tax deeds where the description was insufficient;²⁰ and generally as to questions

under state Constitution or statute in relation to limitation as affecting tax titles;²¹ and the necessity of reimbursing the holder of the tax title as a condition of recovering the land.²²

So, in general, and in the absence of any Federal question, the decisions of the state court are controlling as to assessments for local improvements;²³ though this, of course, subject to the general exception elsewhere pointed out, as to a change of decision in the state courts after the rights have accrued.²⁴

vv. Courts.

The decisions of the highest court of a state as to the validity, under the state Constitution, and the construction and effect of statutes in relation to the state courts, are binding upon the Federal courts.²⁵ But the Federal courts are not bound by decisions of the highest state court so far as they affect the jurisdiction

Federal court rendered in reliance upon earlier state court decisions. The last state decision, though rendered between the parties to the Federal action, does not seem to have been regarded as *res judicata*.

⁹ Taylor v. Secor, 92 U. S. 575, 23 L. ed. 663.

¹⁰ Bailey v. Maguire, 22 Wall. 215, 22 L. ed. 850; Taylor v. Secor, 92 U. S. 575, 23 L. ed. 663; Paine v. Germantown Trust Co. 69 C. C. A. 303, 136 Fed. 527.

¹¹ Paine v. Willson, 77 C. C. A. 44, 146 Fed. 488.

¹² Carroll County v. United States, 18 Wall. 71, 21 L. ed. 771. In Stryker v. Grand County, 23 C. C. A. 286, 40 U. S. App. 583, 77 Fed. 567, however, the court declined to follow the decision of a state court on this point, because it was by an intermediate appellate court, and for the further reason that it was not promulgated until nearly a year after the Federal court had had occasion to place a definite construction upon the statute.

¹³ Thatcher v. Powell, 6 Wheat. 119, 5 L. ed. 221; Haley Live-Stock Co. v. Routt County, 36 C. C. A. 350, 94 Fed. 297.

¹⁴ Woods v. Freeman, 1 Wall. 398, 17 L. ed. 543.

¹⁵ Gage v. Pumpelly, 115 U. S. 454, 29 L. ed. 449, 6 Sup. Ct. Rep. 136.

¹⁶ Ibid.

¹⁷ Lewis v. Monson, 151 U. S. 545, 38 L. ed. 265, 14 Sup. Ct. Rep. 424.

¹⁸ Hodgdon v. Burleigh, 4 Fed. 111.

¹⁹ Games v. Stiles, 14 Pet. 322, 10 L. ed. 476.

²⁰ Raymond v. Longworth, 14 How. 76, 14 L. ed. 333.

²¹ Leffingwell v. Warren, 2 Black. 599, 17 L. ed. 261; Saranac Land & Timber Co. v. Comptroller (Saranac Land & Timber Co. v. Roberts) 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642; Parks v. Watson, 20 40 L.R.A. (N.S.)

Fed. 764; Williams v. Kirtland, 13 Wall. 306, 20 L. ed. 683.

²² Rice v. Jerome, 38 C. C. A. 388, 97 Fed. 719.

²³ O'Brien v. Wheelock, 37 C. C. A. 309, 95 Fed. 883, affirmed in 184 U. S. 450, 46 L. ed. 636, 22 Sup. Ct. Rep. 354; Treat v. Chicago, 64 C. C. A. 645, 130 Fed. 443. In the O'Brien Case, the court followed the decisions of the state court holding unconstitutional a statute under which the assessments were made, notwithstanding that they were rendered after the rights of the parties had accrued, it appearing that the principle applied by the state courts had been established in earlier decisions, though the latter were not with reference to the same statute.

²⁴ Thus, in Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174, the Supreme Court refused to follow decisions of the state court, rendered after the assessments had been made and the rights had accrued, holding the statute under which the improvements were made unconstitutional, such decisions being contrary to the earlier state decisions. This was also the position taken in the circuit court in this case (91 Fed. 37). But see O'Brien v. Wheelock, supra, note 23.

²⁵ Williams v. Stearns, 126 Fed. 211; United States v. Andersen, 169 Fed. 201.

So, it is the duty to follow a decision of the state appellate court as to its own jurisdiction, when not plainly in conflict with the decisions of the supreme court of the state. Re Gilligan, 81 C. C. A. 595, 152 Fed. 605, certiorari denied in 206 U. S. 563, 51 L. ed. 1190, 27 Sup. Ct. Rep. 796.

So, it is declared in Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493, that the question as to what functions the circuit court of a state may have is a matter of state law,

of the Federal courts,²⁶ though even in such case they will "lean" towards the decisions of the state court.²⁷

w. Equity.

The provisions of the judiciary act,²⁷ which declared that the laws of the several states should be regarded as rules of decision, were expressly limited to trials at common law. And since the equity jurisdiction of the Federal courts is the same as that which the high court of chancery in England possesses, and is subject to neither limitation nor restraint by state legislation,²⁸ there are comparatively few cases involving equity jurisprudence or practice, at least with the exception of questions of evidence, that present the distinctive question under consideration, as to when the Federal courts are bound to follow the decisions of the state court, since, as stated at the beginning of the note, that question

presupposes that an exclusive state statute in relation to the point under investigation would be controlling upon the Federal courts as well as the state courts, and is concerned only with the inquiry whether the decisions of the state court are binding upon the Federal courts in determining the law of the state on a point concededly within its province, but which does not happen to be covered by the explicit terms of a state statute.²⁹ But while the equity jurisdiction of the Federal court cannot be impaired by state statutes or decisions, a Federal court may enforce new rights created or remedies provided by state statutes.³⁰ And in such cases the question may arise whether the Federal court is bound to follow the decisions of the state court construing or interpreting such a statute. Doubtless, if the particular equitable question presented is one to which the Federal court would, under the principle just stated, apply an

on which the decisions of the state courts will be followed by the Federal court. This, however, was a case which came up on error to the state court, and is therefore not strictly in point.

²⁶ *Mohr v. Manierre*, 101 U. S. 417, 25 L. ed. 1052; *United States v. Tully*, 140 Fed. 299. But see *supra*, IV. q. 3, note 62.

²⁷ *Perkins v. Boston & A. R. Co.* 90 Fed. 321 (question whether a state statute giving cause of action for death is penal as affecting jurisdiction of Federal court).

Act September 24, 1789, U. S. Rev. Stat. § 721, U. S. Comp. Stat. 1901, p. 581.

²⁸ See, for illustration, *United States v. Howland*, 4 Wheat. 108, 115, 4 L. ed. 526, 528; *Robinson v. Campbell*, 3 Wheat. 227, 4 L. ed. 376; *Boyle v. Zacharie*, 6 Pet. 658, 8 L. ed. 536; *Livingston v. Story*, 9 Pet. 656, 9 L. ed. 264; *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75; *Stearns v. Page*, 7 How. 819, 12 L. ed. 928; *Russell v. Southard*, 12 How. 147, 13 L. ed. 930; *Neves v. Scott*, 13 How. 272, 14 L. ed. 142; *Barber v. Barber*, 21 How. 592, 16 L. ed. 229; *Green v. Creighton (Kendall v. Creighton)* 23 How. 105, 16 L. ed. 423; *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430. But see for limitation of this rule, *Missouri, K. & T. Trust Co. v. Krumseig*, 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179, *supra*, IV. j, note 13.

In *Neves v. Scott*, 13 How. 268, 14 L. ed. 140, the court, speaking with reference to the decision of questions arising in the exercise of the equitable jurisdiction of the court, said: "The Constitution provides that the judicial power of the United States shall extend to all cases in equity arising between citizens of different states.

Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, 40 L.R.A., (N.S.)

and for this court in the last resort, to decide what those principles are, and to apply such of them to each particular case, as they may find justly applicable thereto. These principles may make part of the law of a state, or they may have been modified by its legislation or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several states. But in all the states the equity law recognized by the Constitution and by acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court."

But where the constitutional laws of a state, which govern the descent, alienation, and transfer of real property and constituting rules of property, conflict with the practice of a national court in equity, the former prevails; and where there is no conflict, both are in force. *Childs v. Ferguson*, 104 C. C. A. 305, 181 Fed. 795.

²⁹ In *Loewe v. California State Federation of Labor*, 189 Fed. 714, the court said that, in applying general principles of equity, the Federal courts determine for themselves what those principles are, untrammelled by the decisions of the state tribunals.

³⁰ *Rich v. Braxton*, 158 U. S. 375, 39 L. ed. 1022, 15 Sup. Ct. Rep. 1006; *Cowley v. Northern P. R. Co.* 159 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. Rep. 127; *Darraugh v. H. Wetter Mfg. Co.* 23 C. C. A. 609, 49 U. S. App. 1, 78 Fed. 7; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *New Jersey Land & Lumber Co. v. Gardener Lacy Lumber Co.* 190 Fed. 861; *United States Min. Co. v. Lawson*, 115 Fed. 1005; *American Asso. v. Williams*, 93 C. C. A. 1, 166 Fed. 17. The list is not exhaustive, as the point is not within the scope of the note.

explicit provision of the state statute, it will follow the decisions of the highest state court construing or interpreting a statute that is not explicit, but is susceptible of construction, subject to such exceptions as attach to the general rule of following state decisions upon statutory questions.⁸¹ And so it has been held that the decisions of the highest court of the state, that under its statute a bill to remove a cloud on title may be maintained by one out of possession who relies solely on his legal title, are controlling upon the Federal courts, the statute itself being an enlargement of an equitable right which the Federal courts are competent to administer.⁸² But it has also been held that decisions of the state court on this point are not controlling where they were not based on a local statute, but represent a mere variation of a general principle of equity.⁸³ It has also been held that the enforceability in equity of a lien, for the enforcement of which there is no special statutory provision, is a matter as to which the Federal courts will recognize the practice of the state court as expressive of the local law.⁸⁴

vv. Evidence; witnesses.

The provision of 34th section of the judi-

ciary act,⁸⁵ that the laws of the several states, with the exception there stated, shall be regarded as rules of decisions at common law in the courts of the United States, included rules of evidence prescribed by the laws of the states, in cases where the Constitution, treaties, or statutes of the United States did not otherwise provide.⁸⁶ And by a later statute it was prescribed that, with certain exceptions, the laws of the state in which the court is held shall be rules of decision as to competency of witnesses in equity and admiralty causes as well as in trials at common law.⁸⁷

Since, as stated at the beginning of the note, the subject under annotation is merely the duty of the Federal courts to follow the decisions of the highest state court on questions within the province of the state, and as to which an explicit state statute would concededly bind the Federal as well as the state courts, there are many cases holding that certain state statutes in relation to matters of evidence and competency of witnesses are binding upon the Federal courts,⁸⁸ as well as cases holding that other state statutes are not binding, because the point in question is the subject of congressional legislation,⁸⁹ or because the provision does not apply to criminal ac-

⁸¹ See *Beebe v. Louisville, N. O. & T. R. Co.* 39 Fed. 481; *Harrison v. Remington Paper Co.* 3 L.R.A. (N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314, certiorari denied in 199 U. S. 607, 50 L. ed. 331, 26 Sup. Ct. Rep. 747.

⁸² *Harding v. Guice*, 25 C. C. A. 352, 42 U. S. App. 411, 80 Fed. 162. To the same effect, see *Goldsmith v. Gilliland*, 10 Sawy. 606, 22 Fed. 865. But see next note.

Cases like *Dick v. Foraker*, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124, and *Greeley v. Lowe*, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24, also holding that Federal courts sitting in equity will entertain a suit to remove a cloud on title whether the complainant be in or out of possession, if such a remedy is provided by the state statute, are not in point, for the reason that the question was merely as to giving effect to the state statute, and not as to following decisions of the state court. The same reason excludes many other decisions in which the Federal courts sitting in equity have enforced or administered remedies created by the state statute.

⁸³ *Peck v. Ayers & L. Tie Co.* 53 C. C. A. 551, 116 Fed. 273.

⁸⁴ *Knapp, S. & Co. v. McCaffrey*, 178 Ill. 107, 69 Am. St. Rep. 290, 52 N. E. 898, affirmed in 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824.

⁸⁵ Section 721 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 581.

⁸⁶ *M'Niel v. Holbrook*, 12 Pet. 84, 9 L. ed. 1009; *Vance v. Campbell*, 1 Black, 427, 40 L.R.A. (N.S.)

17 L. ed. 168; *Potter v. Third Nat. Bank*, 102 U. S. 163, 26 L. ed. 111.

⁸⁷ Act of July 2, 1864, U. S. Rev. Stat. § 858, U. S. Comp. Stat. 1901, p. 659.

⁸⁸ See, for example, *Wright v. Bales*, 2 Black, 535, 17 L. ed. 264 (commercial question); *Lucas v. Brooks*, 18 Wall. 436, 21 L. ed. 779 (competency of husband); *Northwestern Union Packet Co. v. Clough*, 20 Wall. 528, 22 L. ed. 406 (competency of wife); *Camden & Suburban R. Co. v. Stetson*, 177 U. S. 172, 44 L. ed. 721, 20 Sup. Ct. Rep. 617 (surgical examination); *Rowland v. Biesecker*, 181 Fed. 128; *Butler v. Fayerweather*, 33 C. C. A. 625, 63 U. S. App. 120, 91 Fed. 458 (privileged communications to attorney); *Re Jefferson*, 98 Fed. 826 (competency of wife of bankrupt); *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119 (competency of physician); *Fowler v. Hecker*, 4 Blatchf. 425, Fed. Cas. No. 5,001; *United States v. Dunham*, Brunner, Col. Cas. 653, Fed. Cas. No. 15,006; *Nelson v. First Nat. Bank*, 16 C. C. A. 425, 32 U. S. App. 554, 69 Fed. 798 (admissibility of certificate of protest by notary); *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513, 10 Sup. Ct. Rep. 216 (judicial notice of statute).

⁸⁹ *Potter v. Third Nat. Bank*, 102 U. S. 163, 26 L. ed. 111 (competency of party as a witness); *Whitford v. Clark County*, 119 U. S. 522, 30 L. ed. 500, 7 Sup. Ct. Rep. 306 (depositions); *King v. Worthington*, 104 U. S. 44, 26 L. ed. 652; *Travis v.*

tions,⁴⁰ that are not within the scope of the note. And even when the decision of the Federal court is in the form of a refusal to follow the decisions of the state court, it is of no value on the distinctive subject under annotation if it really rests upon the ground that the point in question is governed by a Federal statute, or for other reasons is beyond the province of the state law so far as the Federal courts are concerned, so that even an explicit state statute would not be binding upon them.⁴¹

Assuming then that an explicit state statute on a particular question of evidence or competency of witnesses would be controlling upon the Federal court, it would seem, speaking generally, that decisions of the highest state court construing such

statute must be equally conclusive and binding. It has been so held in respect of decisions of state courts construing statutes in relation to the admission of real property records;⁴² statutes in relation to proof of foreign law;⁴³ statutes in relation to the competency of witnesses;⁴⁴ and statutes excluding application for insurance when a copy is not attached to the policy.⁴⁵

The weight of authority upon the specific point seems to be that in civil actions at law the Federal courts will follow the decisions of the highest state court as to the rules of evidence, whether they are based upon the statute or upon the rules of the common law.⁴⁶ And so the decisions of the highest court of the state have been followed by the Federal courts as to the admissibility

Nederland L. Ins. Co. 43 C. C. A. 653, 104 Fed. 486 (competency to testify to transaction with deceased); *White v. Wansey*, 53 C. C. A. 634, 116 Fed. 345 (competency of party as a witness); *Morris v. Norton*, 21 C. C. A. 553, 43 U. S. App. 739, 75 Fed. 912 (competency of party to testify to transaction with deceased).

⁴⁰ See, for example, *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Hanley v. United States*, 123 Fed. 849, overruled on rehearing on another ground in 62 C. C. A. 561, 127 Fed. 929; *Lang v. United States*, 66 C. C. A. 255, 133 Fed. 201; *United States v. Hall*, 53 Fed. 352.

⁴¹ Such a case is *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251. The court there refused to follow state decisions as to admissibility of confidential communications made to professional advisers, and remarked that an examination of the state statute rendered it doubtful whether the law was in accordance with the contention that such evidence was admissible; but that in any event the lower court did right to exclude the testimony for the reason that the laws of the state are to be regarded as rules of decision in the Federal court only where the Constitution, treaties, or statutes of the United States have not otherwise provided, and that the point in question was covered by the act of Congress in relation to the competency of parties as witnesses. It is obvious that so far as the decision rests on the latter ground, it would be no authority on a question not covered by a Federal statute and concededly within the province of the state law even as applied to Federal courts.

⁴² *Olcott v. Bynum*, 17 Wall. 44, 21 L. ed. 570; *Wright v. Taylor*, 2 Dill. 23, Fed. Cas. No. 18,096; *Union P. R. Co. v. Reed*, 25 C. C. A. 389, 49 U. S. App. 233, 80 Fed. 234.

⁴³ *Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co.* 189 U. S. 221, 47 L. ed. 782, 23 Sup. Ct. Rep. 517 (implied).

⁴⁴ *Connecticut Mut. L. Ins. Co. v. Union* 40 L.R.A. (N.S.)

Trust Co. 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119 (implied).

⁴⁵ *Manhattan L. Ins. Co. v. Albro*, 62 C. C. A. 213, 127 Fed. 281.

⁴⁶ Thus, in actions at law the courts of the United States administer the rules of evidence as they find them administered in the state courts. *Thompson v. Central Ohio R. Co.* 6 Wall. 134, 18 L. ed. 765.

And in *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724, it is said: "It has often been decided in this court that, in actions at law in the courts of the United States, the rules of evidence and the law of evidence generally of the states prevail in those courts." The rule was not applied in that case, however, as the state statute and the decisions thereunder were in conflict with a Federal statute on the same subject. This was quoted with apparent approval in *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974.

So, the court in *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554, declares generally that decisions of the state court will be in regard to rules of evidence in actions at law.

And in *Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co.* 189 U. S. 222, 47 L. ed. 783, 23 Sup. Ct. Rep. 517, the court declared generally that the "laws of the several states" with respect to evidence, within the meaning of U. S. Rev. Stat. § 721, U. S. Comp. Stat. 1901, p. 581, apply not only to the statutes, but to the decisions of their highest courts. The state decisions involved in this case, however, were in construction of a statute.

In *Hinds v. Keith*, 6 C. C. A. 231, 13 U. S. App. 222, 57 Fed. 10, it is said: "In actions at law in the courts of the United States, the rules of evidence and the law of evidence generally of the state within which such courts are held will prevail." And see *Stewart v. Morris*, 32 C. C. A. 203, 60 U. S. App. 557, 89 Fed. 290, declaring generally that a Federal court will follow the decisions of the highest court of the state concerning rules of evidence.

So, prior to the act of July 2, 1864 (U.

of secondary evidence to prove a contract, when the subscribing witnesses are not subject to process;⁴⁷ as to the measure of proof in a civil action grounded on an act constituting a crime;⁴⁸ as to the admissibility of a declaration of a person since deceased touching the location of disputed boundary;⁴⁹ as to the right of one to testify as to his own motive or intent;⁵⁰ as to admissibility of memorandum used by witness to refresh his recollection.⁵¹

But while conceding that Federal courts must enforce the provisions of a local statute of the state in which the action arises, prescribing rules of evidence, unless the local statute is in conflict with some law of the United States regulating the same subject, it has been held that decisions of the state court construing common-law rules of evidence are not obligatory upon the Federal courts, but are merely persuasive authority, and that while the Federal courts will follow them when the question at issue is balanced with doubt, yet they will not be governed by such decisions when they appear to be at variance with the great weight of authority.⁵² So, it has been held that the question whether a court at common law has power to compel plaintiff in an action for personal injuries, to submit to a surgical examination, is one upon which the decisions of the state court, not depending upon any consideration peculiar to the state, are not controlling upon the Federal courts.⁵³ And it has been recently declared that the whole matter of presumption and burden of proof belongs to the laws of evidence, as to which the decisions

of the state court are not controlling upon the Federal court, even when it is administering the law of the state.⁵⁴ This seems to be merely an application to common-law questions of evidence, of the same exception that is applied to general substantive questions of common law. Nor is it apparent why the word "laws" as employed in § 721 or § 858 of the Revised Statutes, U. S. Comp. Stat. 1901, pp. 581, 659, should be deemed to include decisions of the state courts as to common-law questions in relation to evidence or witnesses, and not such decisions on substantive questions. At all events it seems clear that the Federal courts are not bound to follow the decisions of the state court on a question which, though in form one of evidence, is in reality a substantive question of common law.⁵⁵

x. Practice and pleading generally.

Prior to the conformity act of 1872, remedies in the Federal court, both at common law and in equity, were according to the essential character of the case, uncontrolled in that particular by the practice of the state court.⁵⁶ But, even before that act, if the state legislature created a right, and at the same time prescribed the remedy to enforce it, that remedy would be pursued in the Federal courts in the same form as in the state courts, if substantially consistent with the ordinary modes of procedure in the former courts.⁵⁷ The conformity act, however, prescribes that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity

S. Rev. Stat. § 858, U. S. Comp. Stat. 1901, p. 659), which provided, *inter alia*, that in the courts of the United States no witness should be excluded because he is a party to or interested in the issue tried, it was held that the competency of a party as a witness in his own behalf was a question as to which the state court decisions were controlling. *Vance v. Campbell*, 1 Black, 427, 17 L. ed. 168, and *Haussknecht v. Claypool*, 1 Black, 431, 17 L. ed. 172.

⁴⁷ *Wilcox v. Hunt*, 13 Pet. 378, 10 L. ed. 209.

⁴⁸ *Pooler v. United States*, 62 C. C. A. 317, 127 Fed. 519.

⁴⁹ *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. ed. 113; *Belding v. Hebard*, 43 C. C. A. 296, 103 Fed. 532 (opinion by Lurton, J.).

⁵⁰ *Hinds v. Keith*, 6 C. C. A. 231, 13 U. S. App. 222, 314, 57 Fed. 10.

⁵¹ *Stewart v. Morris*, 32 C. C. A. 203, 60 U. S. App. 557, 89 Fed. 290.

⁵² *Union P. R. Co. v. Yates*, 40 L.R.A. 553, 25 C. C. A. 103, 49 U. S. App. 241, 79 Fed. 584. Referring to this case, the circuit court of appeals in *Stewart v. Morris*, supra, states that the cases which were re-40 L.R.A.(N.S.)

lied on were not in point because the questions decided were questions of ultimate right, and not rules of evidence by which the right might be established.

⁵³ *Chicago & N. W. R. Co. v. Kendall*, 93 C. C. A. 422, 167 Fed. 62, 16 Ann. Cas. 560.

⁵⁴ *Young v. Lowry*, 113 C. C. A. 149, 102 Fed. 825. This as a matter of fact was a bankruptcy case, the point being whether the burden of proof rested upon the holder of negotiable paper to negative notice of a defense. And see *First Nat. Bank v. Liewer*, 109 C. C. A. 70, 187 Fed. 16, infra, note IV. a, 2, note 16; and *Chicago G. W. R. Co. v. Price*, 38 C. C. A. 239, 97 Fed. 423; *Hemingway v. Illinois C. R. Co.* 52 C. C. A. 477, 114 Fed. 843, supra IV. q, 1, note 31.

⁵⁵ And see supra, IV. a, 2, note 14.

⁵⁶ *New Orleans v. Louisiana Constr. Co.* 129 U. S. 45, 32 L. ed. 607, 9 Sup. Ct. Rep. 223; *Campbell v. Claudius*, Pet. C. C. 484, Fed. Cas. No. 2356; *Hankin v. Squires*, 5 Biss. 186, Fed. Cas. No. 6,025; *Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123.

⁵⁷ *Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123.

and admiralty causes, in the circuit and district courts, shall conform as near as may be to the same things existing at the time in like cases in the courts of record of the state within which the Federal court is held.⁵⁵ This subdivision does not deal with the question what matters fall within the operation of that act,⁵⁶ but simply with the question whether the decisions of the highest state court are controlling upon the Federal courts as to matters within that act, and as to which an explicit state statute would therefore concededly be binding upon the Federal as well as the state courts.

Assuming, however, that the subject-matter of a state statute relates to practice, pleading, or forms of procedure, and that the statute itself would be binding, the decisions of the highest state court with reference to it are in general controlling.⁵⁷ And it has been held specifically that the Federal courts are bound by the decisions of the state courts upon statutory ques-

tions as to the effect of an order directing a garnishee to pay a judgment creditor;⁶¹ the sufficiency of an appeal in special proceeding;⁶² the construction of pleadings in actions for personal injuries;⁶³ the sufficiency and effect of a general denial;⁶⁴ destruction of property as an excuse for failure to redeliver in replevin;⁶⁵ sufficiency of the right of entry without actual seisin to sustain partition;⁶⁶ in taxation of costs in partition suits;⁶⁷ dismissal of actions.⁶⁸

There seems to be some doubt whether decisions of the state court on questions of common-law practice and procedure are binding upon the Federal courts. In one case Judge Brown (later Mr. Justice Brown) declared in effect that the rule that the Federal court is not bound by the decisions of the state court upon general questions of common law applies to questions of practice, pleading, form, and modes of procedure, as well as to questions of general commercial law.⁶⁹

⁵⁵ Act of June 1, 1872, Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684.

"The general doctrine that remedies whose foundations are statutes of the state are binding upon the courts of the United States within its limits is undoubted. This well-known rule of the Federal courts, founded on the act of 1789, 1 Stat. at L. 92, chap. 20, Rev. Stat. § 721, U. S. Comp. Stat. 1901, p. 581, that the laws of the several states, except when the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, was enlarged in 1872 by the provision found in § 914 of the Revision, U. S. Comp. Stat. 1901, p. 684. This enacts that 'the practice, pleadings, and forms and modes of proceeding in civil cases, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, anything in the rules of courts to the contrary notwithstanding.' Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.

⁵⁶ See, however, for illustrations of matters that do not fall within the act, and as to which even the explicit terms of a state statute are not controlling, Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859.

⁵⁷ Atlantic & P. R. Co. v. Hopkins, 94 U. S. 11, 24 L. ed. 48.

O'Connell v. Reed, 5 C. C. A. 586, 12 U. S. App. 369, 56 Fed. 531, refusing to follow the decisions of the state supreme 40 L.R.A.(N.S.)

court construing a state statute in relation to joinder of causes of action, was decided upon the ground that even an express statutory provision would not be binding upon the Federal court if, in the judgment of the latter, it would unwisely encumber the administration of law and tend to defeat the ends of justice.

⁶¹ Atlantic & P. R. Co. v. Hopkins, *supra*.

⁶² New York, N. H. & H. R. Co. v. Cockcroft, 49 Fed. 3.

⁶³ Bryson v. Gallo, 103 C. C. A. 424, 180 Fed. 70.

⁶⁴ Halferty v. Wilmering, 112 U. S. 713, 28 L. ed. 858, 5 Sup. Ct. Rep. 364.

⁶⁵ Three States Lumber Co. v. Blanks, 69 L.R.A. 283, 66 C. C. A. 353, 133 Fed. 479.

⁶⁶ McClaskey v. Barr, 42 Fed. 609.

⁶⁷ Willard v. Serpell, 62 Fed. 625.

⁶⁸ Lapp v. Ritter, 88 Fed. 108.

⁶⁹ Sanford v. Portsmouth, 2 Flipp. 105, Fed. Cas. No. 12,315 (holding specifically that a decision of the state supreme court that mandamus is the only proper remedy upon municipal bonds is not binding upon the Federal courts). The position there taken seems to be approved in Wall v. Chesapeake & O. R. Co. 37 C. C. A. 129, 95 Fed. 398, although there was another ground for the decision in that case; and it was said in the recent case of Knight v. Illinois C. R. Co. 103 C. C. A. 514, 180 Fed. 368, that the question was not free from difficulty, though the case was disposed of on another ground. And see First Nat. Bank v. Port Townsend, *supra*, IV, a, note 81a.

But the decisions of the state court have been held controlling on the question whether an abutting owner's remedy in case of the construction of a railroad in front of his premises is an action at law for dam-

xx. Set-off.

As defendants in the Federal courts may avail themselves of laws which prevail in the state concerning the right of set-off,⁷⁰ provided the distinction between law and equity is not lost sight of,⁷¹ the Federal courts will doubtless follow the decision of the highest state court construing and interpreting such statutes.⁷²

y. Process.

In cases which concern the jurisdiction of the Federal court, notwithstanding the provision of the so-called conformity act,⁷³ neither the statutes of the state nor the decisions of its court as to form⁷⁴ or service of process, are conclusive upon the Federal courts.⁷⁵

Assuming, however, that the service of

ages or an injunction (*Lobenstein v. Union Elev. R. Co.* 25 C. C. A. 304, 53 U. S. App. 1, 80 Fed. 9); the question as to the proper form of action in a given case. (*Taylor v. Brigham*, 3 Woods, 377, Fed. Cas. No. 13,781); and the question whether an attorney has a lien for services on money recovered for his client. (*Cain v. Hocken-smith Wheel & Car Co.* 157 Fed. 992).

⁷⁰ *Partridge v. Phoenix Mut. L. Ins. Co.* 15 Wall. 573, 21 L. ed. 229; *Frick v. Clements*, 31 Fed. 542. But it is otherwise in a suit by United States against an individual (*United States v. Eckford* [*United States v. Tillow*] 6 Wall. 484, 18 L. ed. 920); and as to questions arising exclusively under the laws of the United States.

Watkins v. United States, 9 Wall. 750, 19 L. ed. 820, *contra*, was decided before the act of 1872, providing that the practice, pleading, and form and mode of proceeding in civil process, other than equity and admiralty causes, shall conform as near as may be to the practice, pleading, form, and mode of proceeding in like causes in the courts of record of the state.

⁷¹ *Arkwright Mills v. Aultman & T. Machinery Co.* 128 Fed. 195.

⁷² *Charnley v. Sibley*, 20 C. C. A. 157, 34 U. S. App. 705, 73 Fed. 980.

In *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696, the court cites the Pennsylvania cases to show their interpretation of a statute in relation to the right of set-off, and follows those decisions, apparently assuming that they would be binding upon the Federal court, although it is not expressly so declared.

Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 54 L. ed. 179, 30 Sup. Ct. Rep. 78, holding that the decision of the highest court of the state upon the question whether the state statute requires claim for damages for poor quality of goods to be set up in an action on the note, in order that the matter may be concluded by the judgment, is binding on the Federal courts, was an action originating in 40 L.R.A. (N.S.)

process is sufficient to meet the requirements of due process of law, its sufficiency to uphold a judgment of the state court collaterally attacked in the Federal courts is to be determined in accordance with the decisions of the state court, at least, if they rest upon a construction of the state statute.⁷⁶

But it has been held that the question whether the failure to give the notice prescribed by statute in proceedings to sell the real property of a lunatic will defeat the jurisdiction of the state court is one as to which the Federal courts are not concluded by the decisions of the state court.⁷⁷

It would seem, however, that a general question not dependent upon the construction of a statute, for example, the question whether presumptions will be indulged in aid of substituted service, will be de-

the state court, and brought to the Supreme Court on error, and therefore is not strictly in point.

⁷³ U. S. Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684.

⁷⁴ *Hills & Co. v. Hoover*, 220 U. S. 329, 55 L. ed. 485, 31 Sup. Ct. Rep. 402.

⁷⁵ *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125. To the same effect are *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.* 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720, and *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; *West v. Cincinnati, N. O. & T. P. R. Co.* 170 Fed. 319. The earlier cases (*Amy v. Watertown*, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; *Eaton v. St. Louis Shakspear Min. & Smelting Co.* 2 McCrary, 362, 7 Fed. 139; *Chamberlain v. Mensing*, 47 Fed. 435, and *Joseph v. New Albany Steam Forge & Rolling Mill Co.* 53 Fed. 180), which followed decisions of the state court construing statutes relating to the service of process, notwithstanding that the jurisdiction of the Federal courts was involved, were rendered upon the assumption that the state statute was binding upon the Federal court by virtue of the conformity act, and therefore seem to be overruled by the cases above cited. In the *Joseph Case*, it appeared that the circuit court had by rule adopted the statute of the state in regard to the service of process, and therefore the statute, as interpreted by its highest tribunal, was held controlling.

⁷⁶ *Swarts v. Christie Grain & Stock Co.* 166 Fed. 338.

In *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354, the Federal court followed the state decisions as to sufficiency of the service of process on a foreign corporation, though it does not expressly state that such decision would be absolutely controlling.

⁷⁷ *Mohr v. Manierre*, 7 Biss. 419, Fed. Cas. No. 9,695.

terminated by the Federal court as an independent question, as to which the decisions of the state court are not controlling.⁷⁸ It has been held, however, that the Federal courts are, even in the absence of statute, bound by the decisions of the state court on the question as to the effect of a special appearance as waiver of defects in the service of process upon which a judgment of the state court was rendered.⁷⁹ The sufficiency of a criminal complaint or warrant for the violation of a state law is a question upon which the decisions of the state court are controlling.⁸⁰

G. H. P.

⁷⁸ King v. Davis, 137 Fed. 198. As a matter of fact, this case involved the jurisdiction of the Federal court, and it would seem that the result might have been referred to the rule stated at the beginning of the subdivision, that the decision, however, as indicated in text, is put upon the general ground that the question was a general one; and the court remarked that the state's decision to which it was cited was not a decision construing a statute.

⁷⁹ China v. Foster-Milbourn Co. 195 Fed. 158.

⁸⁰ O'Halloran v. McGuirk, 93 C. C. A. 129, 167 Fed. 493.

SOUTH CAROLINA SUPREME COURT.

CITIZENS' TRUST & SAVINGS BANK,
Respt.,
v.

JAMES STACKHOUSE et al., Appts.

(— S. G. —, 74 S. E. 977.)

Bills and notes — purchase — bona fides — prior suits.

The fact that a bank which has purchased notes from a horse dealer has had more than twenty suits to collect the notes, the defenses usually being that the horses were not satisfactory, is not sufficient to defeat the bona fides of its purchase of another note, so as to let in the defense of fraud in favor of the maker.

(Gary, Ch. J., and Fraser, J., dissent.)

(May 23, 1912.)

APPEAL by defendants from a judgment of the Common Pleas Circuit Court for Marion County in plaintiff's favor in an action on a promissory note. Affirmed.

The facts are stated in the opinion.

Mr. W. F. Stackhouse for appellants.

Note.— The general question as to the circumstances sufficient to put a purchaser of negotiable paper on inquiry is considered in the note to Mee v. Carlson, 29 L.R.A. (N.S.) 351.
40 L.R.A. (N.S.)

Mr. James W. Johnson, for respondent:

A mere suspicion that there may be a defect of title in the holder of negotiable paper, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of one who buys the paper before it is due, but such result will follow only where there has been bad faith on the part of the purchaser.

Goodman v. Harvey, 4 Ad. & El. 870, 6 L. J. K. B. N. S. 260, 6 Nev. & M. 372; Goodman v. Simonds, 20 How. 343, 15 L. ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. ed. 857; Cromwell v. Sac County, 96 U. S. 51, 24 L. ed. 681; Witte v. Williams, 8 S. C. 301, 28 Am. Rep. 294; Walker v. State, 12 S. C. 272; First Nat. Bank v. Anderson, 28 S. C. 148, 5 S. E. 343; Stouffer v. Erwin, 81 S. C. 541, 62 S. E. 843; Park v. Funderburk, 87 S. C. 76, 68 S. E. 963.

Hydrick, J., delivered the opinion of the court:

Plaintiff brought this action on one of three promissory notes given by defendants to McLaughlin Brothers of Columbus, Ohio, in payment for a stallion, alleging that it bought the note for value before maturity. The defendants set up the defenses of failure of consideration, breach of warranty, fraud and misrepresentation in the sale of the horse, and allege that plaintiff is not the bona fide owner of the note sued on, but that it is acting in collusion with the payees thereof to defeat their defenses, under the pretense of being the bona fide purchaser for value without notice. The note was for \$1,399, bears date December 21, 1906, and was due thirteen months after date. Plaintiff proved by its vice president and cashier that it bought the note (with eleven others) from McLaughlin Brothers on December 6, 1907, and paid them for it \$1,383.11; that the money was paid by a cashier's check, and it was not deposited to the credit of McLaughlin Brothers in the plaintiff bank, although they were depositors of that bank, and had been since 1890, and for the past several years their deposit account ran from \$5,000 to \$15,000. He said that neither he nor the plaintiff bank had notice of any defense to the note; that he knew the business of McLaughlin Brothers and that they dealt in horses and imported French coach stallions, and he supposed the note sued on was one of a series of notes given in payment for a horse, as the McLaughlin Brothers usually took their notes in that way; that he had discounted many such notes for them during the past seventeen years; that formerly, when they

were not so strong financially as they are now, he made inquiry as to the solvency of the makers of such notes, but for the past ten years he had made no such inquiry, because he considered McLaughlin Brothers financially able to protect their indorsements; that the bank had had litigation in the collection of some twenty, or probably forty, of the notes discounted for McLaughlin Brothers; the usual defense being that the horse was not satisfactory; that McLaughlin Brothers had always protected the bank, and, when it had had litigation and had paid attorneys' fees in the collection of notes indorsed to the bank by them they reimbursed the bank, and plaintiff would look to them for like protection in this case; however, the plaintiff had no claim upon them except as indorsers of the note. This testimony was brought out in the examination, direct and cross, of plaintiff's witness.

The defendants offered in evidence a copy of the Marion Star, issued September 4, 1907, in which was published a notice warning people not to trade for the notes given by defendants to McLaughlin Brothers, giving the ground of defense. They also offered a letter, dated June 26, 1907, from McLaughlin Brothers to the cashier of a bank at Mullins, in Marion county, in which they offered to sell the defendants' notes aggregating \$4,400 for \$3,700. They also offered to prove that they had notified all the banks in Marion of the fraud in the inception of these notes, and asked the banks to extend the notice to all persons who might inquire about them. They also offered to prove the defenses set up in their answer; to wit, failure of consideration, breach of warranty, and fraud and misrepresentation in the sale of the horse. The court excluded the testimony so offered because there was no evidence that plaintiff had notice of any of the facts or defenses sought to be proved when it purchased the note, and on the ground that there was no evidence tending to show bad faith on the part of the plaintiff in the transaction, and thereupon the court directed a verdict for the plaintiff for the amount sued for.

It is to be regretted that the defendants cannot be permitted to prove their defenses, for, according to the allegations of their answer, the note which they are now called upon to pay was obtained from them by fraud and misrepresentation. But it is of vastly more importance to the commerce of the country that the integrity and unassailability of negotiable paper, in the hands of bona fide holders for value, shall be maintained by the courts, than that persons who carelessly put their names to

such paper shall be relieved of liability thereon.

In *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865, the Supreme Court of the United States, by Mr. Justice Story, said: "There is no doubt that a bona fide holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there that the holder of any negotiable paper, before it is due, is not bound to prove that he is a bona fide holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defense satisfactory proofs of the contrary, and thus to overcome the prima facie title of the plaintiff."

In *Murray v. Lardner*, 2 Wall. 110, 17 L. ed. 857, Mr. Justice Swayne, speaking for the court, said: "The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty; for guilty knowledge and wilful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud, there can be no question. The circumstances mentioned, and others of a kindred character, while inconclusive in themselves, are admissible in evidence, and fraud established, whether by direct or circumstantial evidence, is fatal to the title of

the holder. The rule laid down in the class of cases of which *Gill v. Cubitt*, 3 Barn. & C. 466, 5 Dowl. & R. 324, 3 L. J. K. B. 48, is the antitype, is hard to comprehend and difficult to apply. One innocent holder may be more or less suspicious under similar circumstances at one time than at another, and the same remark applies to prudent men. One prudent man may also suspect where another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs. The rule established by the other line of decisions has the advantage of greater clearness and directness. A careful judge may readily so submit a case under it to the jury that they can hardly fail to reach the right conclusion. We are well aware of the importance of the principle involved in this inquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep-rooted and wide-branching. It ramifies in every direction, and its fruits enter daily into the affairs of persons in all conditions of life. While courts should be careful not so to shape or apply the rule as to invite aggression or give an easy triumph to fraud, they should not forget the considerations of equal importance which lie in the other direction."

This court has announced in numerous cases that, to defeat the rights of a bona fide holder for value of commercial paper, something more is required than proof of facts and circumstances which merely give rise to suspicion, or which may be sufficient to put a prudent person on inquiry. There must be proof of actual notice or knowledge of the defect in title, or bad faith on the part of the holder at the time he purchased the paper.

Of course, actual notice and bad faith may be shown by circumstantial as well as by direct evidence. *McCaskill v. Ballard*, 8 Rich. L. 470; *Witte v. Williams*, 8 S. C. 290, 28 Am. Rep. 294; *Bond Debt Cases*, 12 S. C. 272; *Walker v. Kee*, 14 S. C. 142; *Hand v. Savannah & C. R. Co.* 17 S. C. 256; *First Nat. Bank v. Anderson*, 28 S. C. 149, 5 S. E. 343; *Ehrlich v. Jennings*, 78 S. C. 273, 125 Am. St. Rep. 795, 58 S. E. 922, 13 Ann. Cas. 1166; *Fretwell v. Carter*, 78 S. C. 531, 59 S. E. 639.

No point was made either here or on circuit as to where lies the burden of proof in a case like this, where it is shown by defendants that the note had its inception in fraud. The defendants seem to have voluntarily assumed the burden of proof.

While the authorities elsewhere are not entirely in accord, our own cases and the greater weight of authority in other jurisdictions agree that when the defendant shows fraud or illegality in the inception of the paper, or that it was lost by or stolen from the owner, the presumption which is raised by its mere possession is overcome, and the burden then shifts to the holder to show that he acquired it in good faith, for value, before maturity, in the usual course of business, and under circumstances creating no presumption that he knew of the fraud or other defect in title. *Schaub v. Clark*, 1 Strobb. L. 301, 47 Am. Dec. 554; *Witte v. Williams*, 8 S. C. 290, 28 Am. Rep. 294; *First Nat. Bank v. Anderson*, 28 S. C. 149, 5 S. E. 343; see note in 11 Am. St. Rep. p. 324; *Canajoharie Nat. Bank v. Diefendorf*, 10 L.R.A. 676, and note (123 N. Y. 191, 25 N. E. 402); *Commercial Bank v. Burgwyn*, 17 L.R.A. 326, and note (110 N. C. 267, 14 S. E. 623).

The application of this rule can make no difference, however, in the decision of this case, but it might be of some consequence in a case where the evidence is very close, or evenly balanced, or in a case where there is no evidence of good faith except that of the holder himself, and the question arises whether his evidence shall be received as true. In such a case, if there is anything, either in the facts and circumstances, appearing in evidence, or any direct evidence tending to impeach the witness, the court would submit the issue to the jury; but if there is no evidence, direct or circumstantial, tending to impeach the witness, the court would do as it did in this case, direct the verdict, instead of inviting a verdict based upon caprice or prejudice by submitting an issue to the jury when there really is none in the evidence. Courts are organized to do justice, and they should not even impliedly sanction a verdict which is not supported by evidence by submitting an issue to a jury when only one reasonable inference can be drawn from the evidence. Therefore the defendants' attorney very properly concedes that, if there was nothing in the evidence from which a reasonable inference could have been drawn of bad faith on the part of plaintiff in the purchase of the note, the verdict was rightly directed. He zealously contends, however, that the circumstances brought out in the testimony of plaintiff's witness do warrant such an inference. All the facts and circumstances relied on by counsel, as susceptible of such a conclusion, were set out in the statement at the beginning of this opinion.

We have carefully considered them, but

we find nothing in them, either singly or collectively, which tends to show bad faith on the part of the plaintiff. The fact most strongly relied upon is that the plaintiff has had some twenty, probably forty, suits in collecting notes discounted for McLaughlin Brothers; the usual defense being that the horse was not satisfactory. It does not appear, however, what was the result in those cases. It may be that plaintiff won each of them, and that the defenses were wholly without merit. Moreover, it does not appear why the horses were not satisfactory. The dissatisfaction may have been caused by something which would not have suggested to the mind of anyone that there had been fraud or misrepresentation in the sale of the horses. Now, if it had appeared that in each case, or in a good number of them, the charge of misrepresentation and fraud was made and proved, then it might, with some show of reason, be contended that plaintiff should have suspected that there may have been fraud and misrepresentation in the sale of the horse to defendants. But we have seen that proof of facts and circumstances which merely create suspicion, or which should put a prudent person on inquiry, is not sufficient. To be sure, the holder of negotiable paper must not be allowed to wilfully shut his eyes to the truth, for, as said by Mr. Justice Swayne in *Murray v. Lardner*, supra, wilful ignorance is as bad as guilty knowledge, and both involve the result of bad faith.

But certainly the mere fact that plaintiff had litigation in collecting some twenty, or probably forty, of the many notes which it had discounted in the run of seventeen years' business with the McLaughlin Brothers as its depositors does not tend to show bad faith in discounting the note here sued on.

Judgment affirmed.

Woods and Watts, JJ., concur.

Gary, Ch. J., dissenting:

I will not delay the filing of the opinion by discussing at length the question whether the plaintiff was a bona fide holder of the note. The mere recital in the opinion of the fact, "that the bank had had litigation in the collection of some twenty, or probably forty, of the notes discounted for McLaughlin Brothers, the usual defense being that the horse was not satisfactory," was in itself sufficient, at least, to put the plaintiff on notice that there was a good defense to the note, but which was heretofore not considered on the merits, on the ground that the plaintiff was a bona fide holder.

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Furthermore, the fact that the purchase of the note was made just before it was due, and long after its execution, thus enabling the payee to avoid valid defenses; the fact that sale was made by men who habitually kept large deposits with the purchaser, and who did not appear to have been forced to sell for any legitimate purpose; the fact that the purchase money of the note was immediately taken out of the reach of the purchaser although the seller habitually deposited with the buyer,—are circumstances, taken together, that amount to more than a suspicion, and should have carried the case to the jury, as there was testimony tending to show that the transaction originated in fraud.

Fraser, J., concurs.

Petition for rehearing denied May 30, 1912.

WISCONSIN SUPREME COURT.

FRED W. GERRETSON, Admr., etc., of
Wilhelmina Gerretson, Deceased, Appt.,
v.

RAMBLER GARAGE COMPANY, Resp't.

(— Wis. —, 136 N. W. 186.)

Master and servant — chauffeur — negligent operation of leased car — liability.

1. A chauffeur sent by the owner of a garage to operate an automobile leased for a pleasure ride, and who obeys the directions of the lessee merely as to routes, is the servant of the owner of the garage, and the latter will be liable for injury inflicted upon occupants of the car through his negligence.

Sunday — leasing automobile — liability for negligence.

2. The owner of an automobile leased for hire cannot escape liability for injury to an occupant of the car through the negligence of the chauffeur because the leasing was on Sunday.

(May 14, 1912.)

Note. — Who is responsible for negligence of chauffeur operating a leased or demonstrating car.

As to responsibility of owner for injuries caused by automobile while being driven by a servant or third person for his own business or pleasure, see note to *Riley v. Roach*, 37 L.R.A. (N.S.) 834, and notes there referred to.

And as to the liability of owner for negligence of borrower or hirer of automobile, see also note to *Hartley v. Miller*, 33 L.R.A. (N.S.) 81.

As to the liability of automobile owner

A PPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in defendant's favor dismissing the complaint in an action brought to recover damages for personal injuries to plaintiff's testate resulting in death, alleged to have been caused by defendant's negligence. Reversed.

Statement by Kerwin, J.:

This action was brought by the plaintiff as administrator with the will annexed of the estate of Wilhelmina Gerretson, deceased, to recover upon two causes of action,—one in favor of the estate of deceased, and the other in favor of the beneficiaries of said deceased under the death statute for the benefit of her children on account of

the negligence of the defendant. Damages are claimed in the sum of \$5,000 under the first cause of action, and in the sum of \$3,500 under the second cause of action. The answer admits that Wilhelmina Gerretson died testate on the 16th day of December, 1909, and the representative capacity of the plaintiff; that deceased was injured at the time and place alleged in the complaint, and that she was a widow; also admits the corporate existence of the defendant; and denies generally upon information and belief the other allegations of the complaint. The court granted a nonsuit as to the second cause of action, and, after the evidence was all in, directed a verdict for the defendant. Judgment was entered in favor of the

for negligence of chauffeur furnished by a third person, see note to *Neff v. Brandeis*, 39 L.R.A. (N.S.) 933.

The general question as to who is responsible for acts of driver furnished with a hired vehicle is treated in the notes to *Frerker v. Nicholson*, 13 L.R.A. (N.S.) 1122, and supplemental note accompanying *Morris v. Tredo*, 25 L.R.A. (N.S.) 33, the present note being concerned with that question only so far as it applies to automobiles.

Liability where car is leased.

The chauffeur furnished with a leased automobile is generally held to be the servant of the owner of the machine, where the lessee has authority only to give directions as to where the car shall be driven.

Thus, this rule was applied in *Shepard v. Jacobs*, 204 Mass. 110, 26 L.R.A. (N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392, where it was held that the owner of an automobile who leased it with a licensed chauffeur in charge, at a certain sum per day, was liable to strangers for the negligent act of the chauffeur which resulted in a collision and damage, where the lessee had no control over him except as to when and where the car should be driven.

And where an express company hires an electric van with a chauffeur by the month or day, and the chauffeur has nothing to do with the putting of the parcels into the vehicle or delivering them, a servant of the express company performing these duties, it is not liable for an injury resulting from the operation of the van, where it appears that at the time all of the packages had been delivered and the machine had returned to the express company's office, where the employee of that company had been left, and the chauffeur was, at the time of the accident, either on his way to lunch or to have the vehicle repaired, since the chauffeur was not *ad hoc* the hirer's servant. *Bohan v. Metropolitan Exp. Co.* 122 App. Div. 590, 107 N. Y. Supp. 530. The court said: "In the present case, if the accident had actually occurred while the express packages were being delivered, it might be 40 L.R.A. (N.S.)

that the defendant would be liable under the rule laid down in the last two cases [cases involving liability for injuries occurring while goods were being delivered by hired van], but even then it might be doubtful, inasmuch as the chauffeur had nothing whatever to do with the handling of the goods of the defendant or making collections. All he did was to obey the directions as to where he should take the vehicle. (*Lewis v. Long Island R. Co.* 162 N. Y. 52, 56 N. E. 548, *Johnson v. Netherlands American Steam Nav. Co.* 132 N. Y. 576, 30 N. E. 505.) But, as we have already seen, at the time of the accident he had delivered all the packages for the defendant, and was not then engaged in doing any work for it; he was then either taking the vehicle to the transportation company's office to have it repaired, or else was engaged in his personal business, and in neither case can it be said that he was acting as the servant of the defendant or engaged in its business. The defendant did not own the vehicle; had no right to inspect it, or give directions as to repairs. Under such circumstances I know of no rule of law under which defendant can be held liable. When the chauffeur left the defendant's office for the purpose of going back to the transportation company's office to have the vehicle repaired, or to get his lunch, he ceased to be the servant of the express company, because he was not then engaged in doing its business, and for his negligence in operating the vehicle while thus engaged the express company is not liable."

And in *Routledge v. Rambler Automobile Co.* — Tex. Civ. App. —, 95 S. W. 749, it was held that a guest of one hiring a motor car, who was injured by the negligent operation of the car by the chauffeur furnished therewith, might recover damages of the owner, notwithstanding the car was running at a high rate of speed at the solicitation of the host, it not appearing that the plaintiff had acquiesced therein.

However, one who delivers an automobile to another under an agreement that the latter is to use it for hire, and pay the purchase price to the first party out of the receipts, is not liable for an injury resulting

defendant dismissing the complaint, from which this appeal was taken.

The evidence tends to show that during the afternoon of Sunday, November 7, 1909, William F. Gerretson, a son of deceased, called defendant's garage by telephone, and ordered a seven-passenger automobile to come to his home on Garfield avenue in the city of Milwaukee, for a drive about the city, carrying himself, members of his family, and friends. In response to the call, one of defendant's seven-passenger 45-horse power automobiles, driven by defendant's servant, L. D. Cook, went to the home of W. F. Gerretson under instructions from defendant's foreman to drive the machine where directed, and Mr. and Mrs. W. F. Gerretson and Mr. and Mrs. James Dono-

van there entered the car, Mr. Gerretson directing the chauffeur to drive to 1820 Grand avenue, the home of R. W. Gerretson, another son of deceased. There deceased and her granddaughter entered the car, and the chauffeur was directed to drive to the Gerretson store, 107 Wisconsin street, thence to several places on Milwaukee street, thence to a point on Van Buren street between Knapp street and Juneau avenue. The day was misty and rainy, and the sides, top, and glass wind shield of the automobile were up to protect the occupants. The pavement was wet and slippery, and there were tire chains in the car, furnished by defendant to meet the very conditions then presented by wet and slippery pavements. The chauffeur negli-

while it is being used by the purchaser, there being no relation of master and servant between the parties. *Braverman v. Hart*, 105 N. Y. Supp. 107.

Where there is a conflict upon the question of whether the operator of an automobile has hired it of the owner for his own use, or whether he is acting as an employee of the owner, it is a question of fact for the jury and their findings are conclusive. *Ottomeier v. Hornburg*, 50 Wash. 316, 97 Pac. 235.

Liability where car is being demonstrated.

Where a chauffeur is furnished to operate a demonstrating car he is generally held to be the servant of the owner of the car, so that the latter is liable for any damage resulting from his negligence.

Thus, in *McGuire v. Autocar Sales Co.* 134 N. Y. Supp. 702, it was held that a company engaged in the business of selling trucks was liable for an injury resulting from the operation of one of its trucks which was being operated by one of its drivers in delivering articles to customers of a company which was considering the purchasing of a car, since the driver was acting as a servant of the automobile company in demonstrating its truck. The court said: "It is quite true that the operator of the auto truck was engaged in the work of participating in the delivery of various packages of Greenhut & Company at the time of the accident. While in one sense he was doing this work for Greenhut & Company, yet the doing of this work was but incidental to a larger work which he was doing for the defendant appellant, and which was the main purpose of his operating the machine; that is to say, he was demonstrating by actual experience, on behalf of the defendant appellant, the effectiveness of its auto truck, for the purpose of inducing, for the benefit of his general employer, the purchase either of that truck or other trucks by Greenhut & Company from his general employer. It seems to me unquestionable that during every part of this performance he was primarily and par-

ticularly the servant and agent of his general employer. To hold otherwise, it would follow that every time one takes passage in a motor car when it is under demonstration for the purpose of inducing a sale and purchase, he shall become liable for the negligent operation of the car by the driver furnished by the intending vendor. This would be going entirely too far."

And a company whose business it is to sell automobiles is liable for the negligence of a demonstrator sent by it to demonstrate a car to a prospective customer, where the demonstrator, in answer to the prospective customer's question as to whether he could crank the car, stated that anybody could crank the car, and told him to push in and turn the crank around, and the prospective customer's arm was broken by the kick of the engine, since in such a case the customer was not a mere licensee, but an invitee, who acted at the implied invitation of the defendant's demonstrator, who had knowledge of the person's inexperience with automobiles. *Martin v. Maxwell-Briscoe Motor Vehicle Co.* 158 Mo. App. 188, 138 S. W. 65.

So, where the owner of an automobile sent his chauffeur with the car to demonstrate it, and the chauffeur permitted an employee of a prospective purchaser to drive it, and an injury resulted while the car was being driven by such person, the owner of the car is liable for the injury, since the act of permitting the employee of the prospective buyer to drive the car was one performed in the furtherance of his servant's employment. *Wooding v. Thom*, 148 App. Div. 21, 132 N. Y. Supp. 50. The court said: "If the owner himself had undertaken to demonstrate the car, and as a part of such demonstration had permitted Eglit to drive it, no one would have any doubt as to such owner's liability. The case here is no different. Simmons was authorized to demonstrate the car; that was his employment; in the course of that employment, as a part of the demonstration he permitted Eglit to drive; this, I think, fastens upon Simmons's employer liability for the negligence which resulted in plaintiff's injuries."

gently failed to put them on because he "did not want to get his hands and clothes soiled." After leaving the Peacock home, on Van Buren street, on the return trip to the home of R. W. Gerretson, on Grand avenue, the chauffeur selected his own route and drove north on Van Buren street to Knapp street, west on Knapp street to Milwaukee street, and south on Milwaukee street in a straight line five blocks to its intersection with Mason street. Going south on Milwaukee street, the automobile was driven at a speed of 18 to 20 miles an hour, in violation of the ordinance of the city limiting the speed to 12 miles per hour. When the street car, running west on Mason street came into view, the speed with which the automobile was driven made a collision between it and the car inevitable, and to minimize its effect the chauffeur turned sharply the corner at Mason and Milwaukee streets going west. The street car and automobile reached the west line of Milwaukee street at the same time, and, the speed of the automobile being so great, its rear wheels skidded on the pavement, and the rear end of the automobile collided with the street car at its forward truck, just behind the front platform. The force of the impact was so great as to throw deceased with such violence against the left side of the automobile as to completely fracture five ribs and severely bruise her hip and back. The automobile was held fast to the street car for a few minutes, then freed, and ran down the hill on the north side of Mason street about 60 feet. After the release from the street car, W. F. Gerretson and James Donovan administered to the two injured ladies, and the wrecked machine was then driven by the chauffeur to the garage, about a block from the place

of the accident, and the deceased and Mrs. Donovan were lifted into another automobile and driven by the chauffeur, Cook, to the home of W. F. Gerretson, into which they were carried. From this time until her death deceased suffered great pain, and during that period was confined almost continuously to her bed, being moved with difficulty and never without assistance. From the injuries sustained and the pain and suffering undergone death ensued December 16, 1909. It further appears that during the entire period of hiring, Cook, as driver of the automobile, was acting wholly within the scope of his employment, and in compliance with the directions of the defendant.

Mr. Paul D. Durant, for appellant:

When a garage keeper or owner of an automobile hires it to another person and furnishes a driver, such driver is the agent of the owner of the automobile or garage keeper.

Shepard v. Jacobs, 204 Mass. 110, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392; Little v. Hackett, 116 U. S. 366, 375, 379, 380, 29 L. ed. 652, 655-657, 6 Sup. Ct. Rep. 391; Morris v. Trudo, 83 Vt. 44, 25 L.R.A.(N.S.) 33, 74 Atl. 387; Hiroux v. Baum, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; Frerker v. Nicholson, 13 L.R.A.(N.S.) 1122 and note, 41 Colo. 12, 92 Pac. 224, 14 Ann. Cas. 730; Murray v. Dwight, 161 N. Y. 301, 48 L.R.A. 673, 55 N. E. 901; Alaimo v. E. & J. Marzin Co. 121 N. Y. Supp. 563; Quarman v. Burnett, 6 Mees. & W. 499, 9 L. J. Exch. N. S. 308, 4 Jur. 969; Samuel v. Wright, 5 Esp. 263; 1 Thomp. Neg. § 582; Story, Agency, 9th ed. § 4530; 20 Am. & Eng. Enc. Law, 178; Corliss v. Keown, 207 Mass. 149,

In *Burnham v. Central Automobile Exch.* — R. I. —, 67 Atl. 429, where the purchaser of a motor car claimed to have received an injury while riding in it, by reason of the reckless driving of a chauffeur furnished by the seller to teach the former how to operate the car, the court refused to disturb a verdict against the seller, although the latter claimed the accident was caused by a break in the machinery due to the purchaser's previous reckless operation of the car, and not to the negligence of the chauffeur, as, under the circumstances, the question of liability was held to be properly submitted to the jury.

Where a prospective purchaser of an automobile sends his employee to look at a car at a garage, with instructions to examine the engine and report its condition, remarking that if the report is satisfactory he will arrange about a demonstration, the employer is not liable for an injury resulting from his employee's negligence in operating the car, which had been taken out at the suggestion of the selling agent after the em-

ployee had made his examination of the engine, since he was acting entirely outside the scope of his employment with reference to the car. *Wooding v. Thom*, supra.

In *Hiroux v. Baum*, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533, it was held that a son might be found to have been acting as the agent of his father in operating the latter's automobile, where it was purchased mainly at his solicitation, with the understanding that he was to learn to run it for the benefit of the family, and it appeared that at the time in question he was operating the car under the instruction of the vendor.

And in this case it was held that the automobile, which had been purchased with the understanding that the son of the purchaser should be taught to operate it, might be found to be in possession of the son as agent of the purchaser while the instructions were being given, and not in that of the vendor as an independent contractor. *Ibid.*

J. T. W.

93 N. E. 143; Hussey v. Franey, 205 Mass. 413, 137 Am. St. Rep. 460, 91 N. E. 391.

Whether the requirements of the master call for peculiar knowledge, training, or skill, or an entire absence thereof, has no bearing whatever upon the liability of the master for the acts of the servant, if done while in the master's employ and in the scope of the agency or employment.

Fraker v. Chicago & N. W. R. Co. 36 Wis. 669, 17 Am. Rep. 504; Bass v. Chicago, & N. W. R. Co. 39 Wis. 636, 42 Wis. 654, 24 Am. Rep. 437; Schaefer v. Osterbrink, 67 Wis. 495, 58 Am. St. Rep. 875, 30 N. W. 922; Bryan v. Adler, 97 Wis. 127, 41 L.R.A. 658, 65 Am. St. Rep. 99, 72 N. W. 368; Rogahn v. Moore Mfg. Co. & Foundry Co. 79 Wis. 575, 48 N. W. 669; Bergman v. Hendrickson, 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304; Johnston v. Chicago, St. P. M. & O. R. Co. 130 Wis. 492, 110 N. W. 424; Daley v. Chicago & N. W. R. Co. 145 Wis. 249, 32 L.R.A.(N.S.) 1164, 129 N. W. 1062; Hiroux v. Baum, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 227; Healy v. Johnson, 127 Iowa, 221, 103 N. W. 92; Fleischner v. Durgin, 207 Mass. 435, 33 L.R.A.(N.S.) 79, 93 N. E. 801, 20 Ann. Cas. 1291; Connolly v. Des Moines Invest. Co. 130 Iowa, 633, 105 N. W. 400; Johnson v. Coey, 237 Ill. 88, 21 L.R.A.(N.S.) 81, 86 N. E. 678, affirming 142 Ill. App. 147; Routledge v. Rambler Automobile Co. — Tex. Civ. App. —, 95 S. W. 749.

Messrs. Lines, Spooner, Ellis, & Quarles, for defendant:

Plaintiff cannot recover because the alleged tort is based upon a Sunday contract.

Sentinel Co. v. A. D. Meiselbach Motor Wagon Co. 144 Wis. 224, 32 L.R.A.(N.S.) 436, 140 Am. St. Rep. 1007, 128 N. W. 861; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 227; Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534; Way v. Foster, 1 Allen, 408; Parker v. Latner, 60 Me. 528, 11 Am. Rep. 210; Whelden v. Chappel, 8 R. I. 230; Chenette v. Teehan, 63 N. H. 149; Berrill v. Gibbs, 1 Clark (Pa.) 313; Woodman v. Hubbard, 25 N. H. 67, 57 Am. Dec. 310; Jeffers v. Green Bay & W. R. Co. 148 Wis. 315, 134 N. W. 900.

There is nothing in the record showing that Rambler Garage Company failed to exercise ordinary care in the premises.

Trout v. Watkins Livery & Undertaking Co. 148 Mo. App. 621, 130 S. W. 136; 19 Am. & Eng. Enc. Law, 434; McGregor v. Gill, 114 Tenn. 521, 108 Am. St. Rep. 919, 86 S. W. 318; Payne v. Halstead, 44 Ill. App. 97; Benner Livery & Undertaking Co. v. Busson, 58 Ill. App. 17; Ohlweiler v. Lehmann, 88 Wis. 75, 59 N. W. 678. 40 L.R.A.(N.S.)

Kerwin, J., delivered the opinion of the court:

There is ample evidence to entitle the jury to find that the chauffeur so negligently operated the car as to cause the injury in question. But it is insisted by respondent that the directed verdict for defendant and judgment dismissing the complaint should be upheld for the following reasons: (1) That the chauffeur was the servant of F. W. Gerretson, the hirer of the car; (2) that, even though the chauffeur was the agent of defendant, still no negligence was shown because the negligence of the chauffeur was not chargeable to defendant; and (3) that the contract between Gerretson and defendant was void because made on Sunday; therefore no recovery could be had upon it.

1. There is no evidence in the case tending to show that the chauffeur was the servant of deceased or of F. W. Gerretson. The defendant furnished the car with the chauffeur to operate it, and the chauffeur had charge and management of the car. The deceased or F. W. Gerretson exercised no control as to the operation and management of it. The chauffeur, therefore, was the servant of the defendant. Shepard v. Jacobs, 204 Mass. 110, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392; Little v. Hackett, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; Morris v. Trudo, 83 Vt. 44, 25 L.R.A.(N.S.) 33, 74 Atl. 387; Hiroux v. Baum, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; Frerker v. Nicholson, 41 Colo. 12, 13 L.R.A.(N.S.) 1122, 92 Pac. 224, 14 Ann. Cas. 730; Murray v. Dwight, 161 N. Y. 301, 48 L.R.A. 673, 55 N. E. 901; Quarman v. Burnett, 6 Mees. & W. 499, 9 L. J. Exch. N. S. 308, 4 Jur. 969.

2. The respondent, in support of the judgment below, strenuously insists that the plaintiff cannot recover because the right to recover must be traced through a Sunday contract, and relies mainly upon Sentinel Co. v. A. D. Mieselbach Motor Wagon Co. 144 Wis. 224, 32 L.R.A.(N.S.) 436, 140 Am. St. Rep. 1007, 128 N. W. 861. In that case the action was brought to recover upon *quantum meruit* for services performed on Sunday, and it was held that no recovery could be had because of our statute (Stat. 1898, § 4595) which prohibits labor, business, or work, except only works of necessity or charity, on Sunday. It will be seen that in that case the contract upon which the suit was based was in direct violation of the statute, being for Sunday publications, and came clearly within the terms of the statute as "labor, business, or work," and not work of necessity or charity. The right of action in the instant case is not based upon the contract of hiring between F. W. Gerretson and the respondent, even if it should be held that such contract was in violation of the Sunday

law, a point we do not decide. It has been held under statutes quite similar to ours that it is not illegal to walk, drive, or exercise on Sunday (*Barker v. Worcester*, 139 Mass. 74, 29 N. E. 474; *Sullivan v. Maine C. R. Co.* 82 Me. 196, 8 L.R.A. 427, 19 Atl. 169), nor to carry home a visitor (*Buck v. Biddeford*, 82 Me. 433, 19 Atl. 912). See also *Crosman v. Lynn*, 121 Mass. 301.

But whether the contract of hiring was void or not is not material here, since the plaintiff's right of recovery is based upon the tort of the defendant's servant while acting within the scope of his duty in operating the car. Many cases are cited by both parties from foreign jurisdictions, but the question has been settled by this court in favor of the appellant. *Gabbert v. Hackett*, 135 Wis. 86, 14 L.R.A.(N.S.) 1070, 115 N. W. 345; *Sutton v. Wauwatosa*, 29 Wis. 31, 9 Am. Rep. 534; *McArthur v. Green Bay & M. Canal Co.* 34 Wis. 150; *Knowlton v. Milwaukee City R. Co.* 59 Wis. 278, 18 N. W. 17.

It is argued, however, by respondent that, if the contract of hiring were void, no duty rested upon the defendant, and that the case should be distinguished from those of common carriers, where the law imposes a duty independent of contract. We think the contention is not only against the decisions of this court, but against the great weight of authority elsewhere. The duty of a common carrier, while in some degree imposed by law, is a duty growing out of contract, and this court held in *Gabbert v. Hackett*, 135 Wis. 86, 14 L.R.A.(N.S.) 1070, 115 N. W. 345, that whether the contract was valid or invalid was immaterial, because it had no causal relation with the injury. In the case at bar the defendant undertook for hire to carry the deceased and others, and in the performance of that duty through negligence caused the injury to deceased. The contract of hiring had no causal relation with the injury. The cause of action is based upon the tort or negligence of the defendant. In *McArthur v. Green Bay & M. Canal Co.* 34 Wis. 150, the court said: "The same state of facts which would entitle the plaintiff to recover had the injury happened on any day other than Sunday will entitle him to recover in this action, notwithstanding the injury was received on Sunday, and when he was unlawfully navigating the canal with his boats." See also *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Kansas City v. Orr*, 62 Kan. 61, 50 L.R.A. 783, 61 Pac. 397; *Gross v. Miller*, 93 Iowa, 72, 26 L.R.A. 605, 61 N. W. 385; *Philadelphia, W. & B. R. Co. v. Philadelphia, H. de G. Steam Towboat Co.* 23 How. 209, 16 L. ed. 433, 40 L.R.A.(N.S.)

3. The evidence being sufficient to warrant the jury in finding that the agent or servant of the defendant was acting within the scope of his duty, and that he was guilty of a want of ordinary care, which caused the injury, his negligence was the negligence of the defendant. This doctrine is well settled by the decisions of this court. *Shaefer v. Osterbrink*, 87 Wis. 495, 58 Am. St. Rep. 875, 30 N. W. 922; *Bryan v. Adler*, 97 Wis. 127, 41 L.R.A. 658, 65 Am. St. Rep. 99, 72 N. W. 368; *Rogahn v. Moore Mfg. & Foundry Co.* 79 Wis. 575, 48 N. W. 669; *Bergman v. Hendrickson*, 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304; *Johnston v. Chicago, St. P. M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424; *Hiroux v. Baum*, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; *Steffen v. McNaughton*, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227; *Daley v. Chicago & N. W. R. Co.* 145 Wis. 249, 32 L.R.A.(N.S.) 1164, 129 N. W. 1062. The principles of the foregoing cases apply to the instant case. In *Rogahn v. Moore Mfg. & Foundry Co.* 79 Wis. 575, 48 N. W. 669, this court said: "There has been much discussion in the courts as to how far the master is liable for the torts of his servant, and many nice distinctions have been made; but it is generally agreed that for the negligent or wrongful acts of the servant in the line of his duty, for which the master would be liable if the act were done by himself, the master is responsible." The doctrine is peculiarly applicable to the operation of an automobile. In *Shepard v. Jacobs*, 204 Mass. 110, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392, where the court had under consideration the question, it is said: "The management of an automobile properly can be trusted only to a skilled expert. The law will not permit such a vehicle to be run in the streets except by a licensed chauffeur of approved competency. The danger of great loss of property by the owner as well as of injury to the chauffeur, his servant, is such as to make it of the highest importance that care should be exercised in his interest, and that the control and management of the machine should not be given up to the hirer." See also *Johnson v. Coey*, 237 Ill. 88, 21 L.R.A.(N.S.) 81, 86 N. E. 678; *Trout v. Watkins Livery & Undertaking Co.* 148 Mo. App. 621, 130 S. W. 136; *Routledge v. Rambler Automobile Co.* — Tex. Civ. App. —, 95 S. W. 749; *Morris v. Trudo*, 83 Vt. 44, 25 L.R.A.(N.S.) 33, 74 Atl. 387; *Frerker v. Nicholson*, 41 Colo. 12, 13 L.R.A.(N.S.) 1122, 92 Pac. 224, 14 Ann. Cas. 730.

It follows that the judgment of the court below must be reversed.

UNITED STATES CIRCUIT COURT
OF APPEALS, SEVENTH CIRCUIT.

POPE AUTOMATIC MERCHANDISING
COMPANY et al., Appts.,
v.

McCURUM-HOWELL COMPANY.

(112 C. C. A. 391, 191 Fed. 979.)

Unfair competition — making identical article — right to injunction.

One who manufactures an unpatented article for the market, arranging the parts to the best advantage, and giving it a form which is most effective and economical to manufacture, and using an unpainted material which is best adapted to the purpose, cannot enjoin the use by a subsequent manufacturer of the identical combination of mechanical devices, form, and material, if he uses a different name plate so as to distinguish the origin of manufacture.

(July 27, 1911.)

APPEAL by defendants from an order of the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois granting a preliminary injunction to restrain defendants from making and selling suction cleaners in unfair competition with plaintiff. Reversed.

The facts are stated in the opinion.

Argued before Grosscup and Baker, Circuit Judges, and Sanborn, District Judge.

Mr. Frederick A. Brown for appellants.

Mr. Hillary C. Messimer for appellee.

Baker, Circuit Judge, delivered the opinion of the court:

By a preliminary injunctive order appellants are restrained from making and selling suction cleaners of a certain type. No patent for mechanism or process or product or design is involved. Nor is infringement of trademarks or tradenames alleged. Unfair competition in trade is the sole basis of the case.

Appellee, prior to the bringing of this suit, was marketing a suction cleaner that bore a plate carrying the tradename "Richmond" and the name and address of appellee as maker. At the same time appellants were putting out a cleaner of identi-

cal mechanical principles and arrangement of parts, of identical form, and of identical color. To appellants' cleaner was affixed a name plate much larger than appellee's, as large as could well be attached, displaying conspicuously a red cross and the words in large capitals, "The Pope Electric Cleaner, Made by the Pope Co., Chicago, U. S. A."

Appellee was senior in the field; and the affidavits may warrant a conclusion that appellants deliberately copied the mechanism, form, and color of appellee's cleaner, with a view of sharing in the trade built up by appellee's pushing of the "Richmond." As appellants' trademark, tradename, and name and address of maker, were unmistakably distinguished from appellee's, infringement must rest upon appellee's exclusive right to the mechanics and the form and the color of its cleaner, or one or more of them.

Mechanically the cleaner is this: At the bottom is a mouthpiece, to rest upon the carpet or other material to be cleaned. Next above the mouthpiece is a rotary fan, inclosed in the necessary casing. Just above the fan, and on the same perpendicular axis, is an electric motor in a ventilated casing. To the top of the motor casing a detachable handle is affixed at an angle of about 45 degrees from the perpendicular. In the fan casing is an opening around which one end of a cloth bag to receive the dust is fastened, the other end being attached to the handle; these parts, with the switch, socket, and cord for supplying current to the motor, making up a combination that has many advantages and that probably is the best mechanical arrangement for a vacuum cleaner that is to be carried about as a single tool. But in the absence of a patent this particular combination must be viewed as the culmination of a mechanical evolution, to the equal benefits of which all society is entitled. Indeed, appellee does not deny appellants' right to use the exact combination if they had given the fan and motor casings and other exterior parts different form and color.

In form the mouthpiece is common and old, antedating appellee. To be efficient, the inner surface of the fan casing has to be cylindrical. If the casing is to be cut

Note. — The cases are in harmony with the doctrine of the above case that the manufacturer of an article is not entitled, upon the ground of unfair competition or upon any other ground, to be protected against the manufacture and sale by a competitor of an article similar in design, where the similarity complained of is with reference to necessary functional characteristics of the article. Notes in 37 L.R.A. 40 L.R.A. (N.S.)

(N.S.) 259, and 19 L.R.A. (N.S.) 269, as to the right to protection against the use by a rival of a similar design, shell, or pattern not protected by patent. See also note in 17 L.R.A. (N.S.) 448, upon the question of unfair competition in the sale or manufacture of an article not protected by patent identical with that originated by a competitor.

from metal of even thickness, as it comes in sheets, the outer surface, too, cannot be other than cylindrical. As the motor is of less diameter than the fan (from proper mechanical relations of power), the motor casing naturally (from motives of economy in materials and labor) is a smaller cylinder. The ventilating opening in the motor case, the dust opening in the fan case, the handle, the bag, the electric connections, are all either in their inevitable or best possible mechanical locations. In short, appellee uses the most efficient and most economically manufactured form into which the mechanical combination can probably be embodied. Not a line nor a curve, not a mark, not a bit of superfluous material, for embellishment or distinction. Nothing but the name plate. If appellants should be required to give a square or hexagonal or other than cylindrical form to the outer surface of the casings, considerations of costs of the superfluous material and labor might prevent them from competing with appellee in the manufacture and sale of a mechanism that was equally open to both. In the Singer Case, 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002, the Supreme Court held that at the expiration of a machine patent the utilitarian form in which the patentee had embodied his mechanical combination also became public property. No difference in principle is perceived between a machine that after a period of seventeen years becomes free for common use, and one that has been such all the time.

Aluminum is the metal used. Its advantages in strength, in durability, in lightness of weight, and in freedom from tarnish, have led to its adoption for various utensils and tools. Appellee can have no monopoly of its use for this tool. In both cleaners the metal is unpainted. If appellants should be compelled to paint their cleaner a distinctive color, they would increase their manufacturing cost and would also lose one of the main advantages of a metal that was as open to them as to appellee, and that was as obviously the best as a material as the cylinder was as a form.

Development in a useful art is ordinarily toward effectiveness of operation and simplicity of form. Carriages, bicycles, automobiles, and many other things from diversity have approached uniformity through the utilitarian impulse. If one manufacturer should make an advance in effectiveness of operation, or in simplicity of form, or in utility of color; and if that advance did not entitle him to a monopoly by means of a machine or a process or a product or a design patent; and if by 40 L.R.A.(N.S.)

means of unfair trade suits he could shut out other manufacturers who plainly intended to share in the benefits of the unpatented utilities and in the trade that had been built up thereon, but who used on their products conspicuous name plates containing unmistakably distinct trade-names, trademarks, and names and addresses of makers, and in relation to whose products no instance of deception had occurred,—he would be given gratuitously a monopoly more effective than that of the unobtainable patent in the ratio of eternity to seventeen years.

Order reversed, and cause remanded for further proceedings not inconsistent with this opinion.

ALABAMA SUPREME COURT.

SOUTHERN STEEL COMPANY, Appt.,

v.

WILEY HOPKINS, Admr., etc., of Sam Birchfield, Deceased, et al.

(— Ala. —, 57 So. 11.)

Equity — multiplicity of suits — separate actions by employees.

Equity has no jurisdiction, in order to prevent a multiplicity of suits, to enjoin the prosecution of a large number of actions by different persons under an employer's liability act, against a common employer, to recover damages for wrongful deaths caused by the same accident in the employer's plant, and determine the question of liability itself.

(January 29, 1911.)

A PPEAL by complainant from a decree of the Chancery Court for Jefferson County sustaining a demurrer to a bill

Note. — Power of equity to take jurisdiction because of multiplicity of actions at law for personal injuries growing out of a single tort.

The above is the subject of notes in 20 L.R.A.(N.S.) 848, and 35 L.R.A.(N.S.) 491, to which this note is supplementary.

Other aspects of the general subject of avoidance of multiplicity of suits as a ground of equity jurisdiction are treated in notes in 14 L.R.A.(N.S.) 239, in relation to suits for possession of separate parcels of land held by different defendants claiming under a common source; in 28 L.R.A.(N.S.) 743, in relation to the liability of different members of a club or corporation; and in 32 L.R.A.(N.S.) 941, and 34 L.R.A.(N.S.) 897, in relation to adjustment of losses between concurrent insurance policies on the same property.

filed to enjoin prosecution of numerous actions at law. Affirmed.

The facts are stated in the opinion.

Mr. J. T. Stokely for appellant.

Messrs. Stallings & Drennen for appellees.

Mayfield, J., delivered the opinion of the court:

This is a suit in equity to enjoin the prosecution of 110 separate actions at law. The sole ground of equity jurisdiction upon which the suit is based is to prevent a multiplicity of suits. The separate actions at law were brought by the administrators of 110 unfortunate workmen who lost their lives by an explosion in a coal mine. Each of these 110 actions was brought, under the employer's liability act, to recover damages for the wrongful death of the respective intestate; was brought against the same defendant, the complainant in this suit; and sought to recover on account of negligence in causing or allowing the explosion which killed the unfortunate workmen.

The prayer for relief is as follows: "Your orator further prays that your Honor will grant unto your orator a preliminary writ of injunction, enjoining and restraining each and all of said parties defendant and their attorneys and successors from all further proceedings in said actions at law, or prosecuting the same in any manner, until the further orders of this court, and that your Honor will proceed to hear

and determine the question of the liability *vel non* of said Alabama Steel & Wire Company, in the premises; and, if there should prove to be any such liability, that your Honor will further determine the extent thereof, and the manner and mode in which the same shall be prorated or paid."

This appeal, for the second time, brings up for our decision the equity of this bill, a full statement of the facts of which, and a discussion of the law involved, may be found in the reports of the case in 167 Ala. 175, 20 L.R.A.(N.S.) 848, 131 Am. St. Rep. 20, 47 So. 274, 16 Ann. Cas. 690.

The question of law involved in this suit is this: Has a court of equity jurisdiction to enjoin numerous tort actions, brought by different plaintiffs against the same defendant, when there is merely a community of interest in the questions of law and of fact involved, and no common title, no community of interest or of right, in the subject-matter? This question was decided in the affirmative by this court on the former appeal. After the cause was remanded, the complainant amended the bill, and other defendants demurred, and again raised the equity of the bill as last amended. The chancellor again sustained the demurrer, and from that decree the complainant again appeals to this court.

We regret the necessity of overruling our former decision, and recognize and appreciate the wisdom in the maxim, that "it is as important that the law be certain

This is the second appearance of the case of *SOUTHERN STEEL CO. v. HOPKINS*, before the supreme court of Alabama. The former decision of that court is reported in 20 L.R.A.(N.S.) 848.

In a later decision by the supreme court of Alabama (*Roanoke Guano Co. v. Saunders*, — Ala. —, 35 L.R.A.(N.S.) 491, 56 So. 198), they refer with approval to the note in 20 L.R.A.(N.S.) 848, and overrule their first decision in the *Hopkins Case*, for the reasons suggested in the criticism of that decision in the note appended to the *Hopkins Case*, 20 L.R.A.(N.S.) 991, and cited with approval in the *Saunders Case*. In the *Saunders Case* the court gives this question very able consideration, and points out that "the writer of the opinion in the *Hopkins Case* failed to distinguish between cases in which the sole ground of equity jurisdiction depended upon the question of preventing a multiplicity of suits, and those cases which rest upon some other independent equity." And it is said that failure to observe this distinction is the cause of the many conflicting decisions upon the question as to sufficiency of a bill to prevent a multiplicity of suits; and the doctrine is asserted that in order to support a bill in equity upon the sole ground of preventing a multiplicity of suits, a bill must show some community or mutuality

of interest in the subject-matter of the controversy in which the various litigants are interested. A mere community of interest in the questions of law and fact involved is not sufficient.

Another late case in which this question has been considered and which also refers with approval to the note in 20 L.R.A.(N.S.) 848, is *Cumberland Teleph. & Teleg. Co. v. Williamson*, — Miss. —, 57 So. 559, which in effect overrules an earlier decision by that court (*Whitlock v. Yazoo & M. Valley R. Co.* 91 Miss. 779, 45 So. 861), in which the court had reached the same conclusion as did the Alabama court in the first decision in the *Hopkins Case*. In the later Mississippi case referred to, the court reaffirms the doctrine of *Tribbette v. Illinois C. R. Co.* 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32, and asserts the doctrine that in order for equity to take jurisdiction on the ground of a multiplicity of suits, there must be some recognized ground of equitable interference, or some community of interest in the subject-matter, or a common right or title involved, to warrant joinder of all in one suit; or there must be some common purpose, the pursuit of a common adversary, where each may resort to equity in order to be joined in one suit.

A. G. S.

as that it be right;" yet it is not only our prerogative, but our duty, to overrule a former decision, when we are convinced that it is fundamentally wrong, both in theory and in practice.

There is a sharp and distinct conflict in the decisions of the various courts upon this question; but, after a careful examination and review of many of them, and of the text-books upon the subject, we are constrained to recede from the holding on the former appeal, and to follow that line of decisions and those text-books which deny equity jurisdiction to prevent a multiplicity of suits at law, in the absence of a common title, or of some community of right or interest, in the subject-matter among the several parties. To state the proposition differently, we now hold that a community of interest among the several parties in the questions of law and of fact involved is not sufficient to confer jurisdiction upon a court of equity to enjoin the several tort actions at law, though brought against the same defendant, and though each may depend upon the same state of facts.

Our statute (§ 5965 of the Code) provides as follows: "The supreme court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion at that time, is law, without any regard to such former ruling on the law by it; but the right of third persons, acquired on the faith of the former ruling, shall not be defeated or interfered with by or on account of any subsequent ruling."

The importance of this question of law and practice involved is such that we deem it proper to state, as briefly as we may, the reasons which have impelled us to overrule the former decision.

We have reached the conclusion that the law has been correctly settled, both in England and America, differently from that declared by this court in the former decision of this case. We think there is little doubt that the courts have been led astray upon this subject by following what Mr. Pomeroy stated in his valuable work on Equity Jurisprudence, 2d ed. § 269. We recognize both the ability and the authority of Mr. Pomeroy as a writer upon equity jurisprudence; in fact, we concede, as we have often stated in our opinions, that he is probably the leading and the best authority upon this subject; but he is human, and must therefore sometimes err. Prior to this text of Mr. Pomeroy, there were, we are certain, few, if any, adjudicated cases which supported the text, or which would sustain the equity of a bill which rested solely upon

the jurisdiction of equity to prevent a multiplicity of suits, when there was no common title, no community of interest or of right, in the subject-matter among the several individuals whose actions at law were sought to be enjoined.

It must be conceded, however, that there are a number of decisions, since the text, which support it; some of them extending the doctrine further, probably, than it was ever intended or supposed by Mr. Pomeroy. Chief among these is the decision of our own court in this case on the former appeal. Another is that of *Whitlock v. Yazoo & M. Valley R. Co.* 91 Miss. 779, 45 So. 861. These two cases have certainly extended the Pomeroy doctrine further than have any others, before or since their rendition.

Chief Justice McClellan, in the *Turner Case*, 135 Ala. 73, 33 So. 132, after devoting several pages of the opinion to the fallacy of the Pomeroy doctrine, which was followed and given effect to by this court on the former appeal, concluded as follows, which is quoted with approval from the *Tribette Case*, 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32: "But we affirm, after careful examination and full consideration, that Pomeroy is not sustained in his 'conclusions,' stated in § 269 of his most valuable treatise; and the cases he cited do not maintain the proposition that mere community of interest 'in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body,' is ground for the interposition of chancery to settle, in one suit, the several controversies. There is no such doctrine in the books, and the zeal of the learned and unusually accurate writer mentioned, to maintain a theory, has betrayed him into error on this subject. It has so blinded him as to cause the confounding of distinct things in his view of this subject, to wit, joinder of parties, and avoidance of multiplicity of suits."

On the other hand, the opinion of Chief Justice Tyson, on the former appeal, referring to the same doctrine, quotes approvingly from another Mississippi case, as follows: "We think the doctrine announced by Pomeroy is sound, and clearly established by the best-considered modern cases." Chief Justice Tyson also states in his opinion that *Tribette's Case* was directly opposed to his views of the law, and to the other Mississippi cases quoted from by him, but that the *Turner Case* was not so opposed, except as to certain *dicta* therein.

In this last statement as to the *Turner Case*, we think the opinion in the former

case is in error. It is certain that the Turner Case followed the Tribette Case, and gave sanction to every doctrine announced therein. Chief Justice McClellan, in Turner's Case, referring to the doctrine that, in order for a court of equity to enjoin a multiplicity of actions at law, there must be a common title to, or common interest in, the subject-matter involved, and that a mere common interest in a question of law is not sufficient, states that "this position is nowhere better or more fully stated than by Campbell, Ch. J., in Tribette's Case; and as the opinion treats fully of Mr. Pomeroy's position, and demonstrates its fallacy, we quote it in part," etc., and then proceeds to quote several pages from the opinion in Tribette's Case.

The opinion in the Turner Case thus shows on its face that Chief Justice McClellan therein quoted more than half of Chief Justice Campbell's opinion in the Tribette Case. This, we think, makes it certain that if the decision in the Tribette Case was in conflict with Chief Justice Tyson's opinion it was unquestionably in conflict with the decision in Turner's Case which not only followed the decision in Tribette's Case, but literally quoted pages of it, and thus expressly adopted it.

Chief Justice McClellan, in the Turner Case, says: "This court has never undertaken to define the jurisdiction of equity to prevent a multiplicity of suits, nor to lay down general principles from which the several categories of cases in which that jurisdiction may be invoked is possible of statement. All that has been decided or said by this court bearing upon the subject evidences an inclination toward the confinement of this jurisdiction to a narrow field, and a purpose to conserve in its full integrity the right of trial at law and by juries,"—citing many authorities. Further on in that opinion he says that "nothing . . . has ever been said or decided in this court giving any countenance to the proposition that a common interest in the questions at issue only will give to numerous parties so interested a standing in equity for the prevention of a multiplicity of suits. The intolerable consequences to which the recognition of such a doctrine would logically lead are sufficiently indicated in the cases to which we have referred. . . . It would seem to be an elementary and fundamental proposition that a party who seeks to come into equity must himself have an equity, . . . or he cannot maintain a bill. . . . The wholly fortuitous, accidental, and collateral fact that numerous other persons have like, but entirely independent and disconnected, legal rights, estates, or defenses 40 L.R.A. (N.S.)

cannot, upon any conceivable principle, invest him with any right, legal or equitable, and his rights, whatever they may be, are precisely the same as if no other person had similar rights. . . . Jurisdiction in equity is not entertained on any notion that the court has an equity; that it will take jurisdiction to prevent a multiplicity of suits, in order to lessen its own labors or those of other courts. The equity upon which the invocation is made must reside in the party making it. When numerous parties have each the same equity, they may in a proper case unite in one bill for its declaration and effectuation; each having the separate right to come into equity upon an identical ground, they will be allowed to come in together, on the theory of preventing a multiplicity of suits. So, where one party is subjected to or threatened with numerous and vexatious actions at law, or is the victim of numerous, repeated and continuing wrongs, so that a multitude of suits would be necessary for his redress at law, he may come into chancery, because the necessity for numerous suits or defenses . . . is in itself such a wrong and vexation . . . as vests him with an equity." But the mere fact that a defendant has committed a tort, by which he injured one or a hundred parties, cannot give him an equity to prevent each and every one of the parties so injured from maintaining an action against him to recover damages. If there had been a combination or conspiracy between such numerous parties to vex and harass the complainant by numerous suits, then he would have an equity to enjoin their prosecution. But the mere fact that his tort has injured a hundred persons, and that it will save him and the court time and lessen the expenses of the litigation, does not give him any equity to go into a court of chancery to enjoin or prevent a multiplicity of suits.

It was pointed out by Chief Justice Campbell, in the Tribette Case, and by Chief Justice McClellan, in the Turner Case, that the authorities cited by Mr. Pomeroy do not support the text upon which the former decision of this case was based. We will now proceed to show that the authorities cited by Chief Justice Tyson, in his opinion in the former decision of this case, do not support the text of Mr. Pomeroy, nor the former decision in this case.

We think we have shown that the Turner Case, cited in favor of it, not only fails to support the opinion to which it is cited, but is diametrically opposed to it, and is based solely upon the Tribette Case, which Chief Justice Tyson concedes is opposed to this opinion and decision. The case of

Crawford v. Mobile, J. & K. C. R. Co. 83 Miss. 708, 102 Am. St. Rep. 476, 36 So. 82, cited, does not support the conclusion, because it rested upon an independent equity, which sought to compel the surrender and cancelation of forty odd written instruments, upon the ground that they were obtained by the same fraud. The case of Sheffield Waterworks v. Yeomans, L. R. 2 Ch. 8, 15 L. T. N. S. 342, 15 Week. Rep. 76, which is so strongly relied on by Chief Justice Tyson, was also based upon an independent equity, to wit, the delivery and cancelation of more than 7,000 instruments, upon the ground that they were fraudulently issued, and that they were used as the foundation for the prosecution of the suits based thereon. That case did not seek to enjoin actions of tort, brought by the persons injured by the bursting of a water pipe, as might be inferred from the reference made to it in the opinion. While more than 7,000 persons were injured by the bursting of the pipe, certificates were issued in compromise and settlement of their claims against the company, and the bill in that case was filed by the company to compel the surrender and cancelation of such certificates and claims, on the ground that they were secured by fraud. It was only a question of multifariousness involved in each of the two cases referred to, and not the question of the jurisdiction to prevent a multiplicity of suits. The case of York v. Pilkington, 1 Atk. 282, 9 Mod. 273, was a bill of peace, by one in possession of land, to settle a disputed right of fishery against several persons who were claiming it, which, of course, is not an authority in point. The other cases cited are reviewed in the note to that case, as reported in 20 L.R.A.(N.S.) 849. Each of the cases cited has been examined, and none of them supports the conclusion reached in that case. The Whitlock Case, however, does support the Hopkins Case, but it is in direct conflict with the Tribette Case, which it does not cite or mention, though it does cite the case of Illinois C. R. Co. v. Garrison, 81 Miss. 264, 95 Am. St. Rep. 469, 32 So. 996, which quotes approvingly from the Tribette Case. We concede, however, that later Mississippi cases have in effect departed from the Tribette Case, but they have not done so expressly, nor have they ever criticized it, so far as we have been able to find.

We base our conclusion chiefly upon the Tribette Case, which we concede to be the leading authority in the world upon the question of the jurisdiction of equity to prevent a multiplicity of suits. It has been reprinted time and again, and copied into the latest editions of most of the text-

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books upon the subject, as stating the true doctrine. This case has been followed by Mr. Bliss (Code Pl. § 76), by Mr. Beach (Inj. § 543), and Mr. High (Inj. § 65a).

Mr. Pomeroy, in his last edition on Equity Jurisprudence, devotes a great deal of space and attention to the Tribette Case, because it had taken him to task on this question, and adds two new sections to that edition, to wit, 251½ and 251¾, to set himself right in this matter. It is quite evident from an examination of this last edition that the author does not go to the extent of upholding the equity jurisdiction of a case like the one under consideration. While he does criticize the tone of the opinion, and some things that are said by Chief Justice Campbell in the Tribette Case, yet, in the notes to his text, he admits that the decision in that case was correct.

The entire subject under review has been fully considered, and the authorities thereon discussed, in the recent case of Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N. E. 47. That opinion fully sustains the decision of Chief Justice Campbell in the Tribette Case, and that of Chief Justice McClellan in the Turner Case, and criticizes rather severely our former decision in this case.

There is also a recent case (that of Ducktown Sulphur, Copper & I. Co. v. Fain, 109 Tenn. 56, 70 S. W. 813) which cites approvingly the Tribette Case, and sustains the proposition that a community of interest in the subject-matter is necessary, in order for equity to take jurisdiction to prevent a multiplicity of suits. The last two cases cited and reviewed many authorities upon the question, and, we think, show beyond question that our former decision in the Hopkins Case was wrong and should be overruled. In fact, we are of the opinion that the two new sections (the only ones) added in the last edition of Pomeroy's Equity Jurisprudence support us in the conclusion that there is no equity in the bill under consideration.

In § 251½, speaking to this question, "The equity suit must result in a simplification or consolidation of the issues; if after the numerous parties are joined there still remain separate issues to be tried between . . . [the several parties], nothing has been gained by the court of equity's assuming jurisdiction. In such a case, 'while the bill has only one number upon the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the separate and distinct liability of one defendant.'" (The author must have had this case in mind.)

All the text-writers on the subject, who have revised their texts since the decision in the Tribette Case, seem to have followed it; some of them literally quoting it at length. Beach, in his work on Injunctions (§ 543), says: "While courts of equity will freely exercise their jurisdiction in order to prevent an unnecessary and vexatious multiplicity of suits, they will not enjoin the prosecution of several pending actions at law, instituted by different plaintiffs, and compel their consolidation into a single suit in equity, at the instance of the common defendant at law, merely because the cause of action in each of the several actions at law arose from the same act of negligence or other single tort of the common defendant at law." He then sets out the opinion in the Tribette Case at length in a note to the text.

Mr. High, in his last work on Injunctions, adds a new section (85a) which states the rule as follows: "It is to be observed that, in order to justify relief by injunction for the prevention of a multiplicity of suits, there must be some common subject-matter in controversy, or some common right of interest therein, and that without this a mere community of interest in the questions of law and fact to be determined constitutes no basis for equitable relief. Thus, where numerous actions at law have been brought by separate plaintiffs against the same defendant to recover damages resulting from a fire started by sparks from complainant's locomotive, the mere fact that the questions of law and fact are the same in all the actions, and that the various parties have a common interest in those questions, will not authorize an injunction against the prosecution of the actions and the determination of the issues in equity." The only authorities cited in support of this text are the Tribette and Turner Cases.

The distinction between a community of interest in the subject-matter which will support the jurisdiction of chancery to prevent a multiplicity of suits, and a common interest in the questions of law and of fact which will not support it, is well illustrated in the Tribette Case and the authorities cited. It must be a right enjoyed in common with all the parties, and in such manner that the invasion of the right of one is an invasion of the right of all, such as a right of common fishery. Storey, Eq. Jur. 854, 855; Adams, Eq. 199.

"Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the downflow of the water, and may unite to restrain it or abate it as a nuisance; but they cannot unite in an action for damages,

for, as to the injury suffered, there is no community of interest." Bliss, Cole Pl. § 76.

"When several persons, acting independently, combine to produce a nuisance, such persons may be joined as defendants in a suit for injunctive relief. . . . But there can be no joinder, either of complainants nor of defendants, for the purpose of recovering damages for the injuries caused by such nuisance." Vandalia Coal Co. v. Lawson, 43 Ind. App. 242, 87 N. E. 53; Demarest v. Hardham, 34 N. J. Eq. 469.

It is thus made to appear that all of the text-writers who have written since the Tribette Case have followed it and revised their texts accordingly. Even Mr. Pomeroy, though he speaks of the case as sensational in many of its statements, says: "It has been so frequently reprinted that it appears to call for special notice" and he proceeds to quote from it and to comment adversely upon it as to those statements which he calls sensational; yet the effect of his text and notes, as revised, is to say that the case was correctly decided. See § 251½ and note, 1 Pom. Eq. Jur. p. 425. This being true, it follows that our decision in this case on the former appeal was wrong. Roanoke Guano Co. v. Saunders, — Ala. —, 35 L.R.A. (N.S.) 491, 56 So. 198. We deem it just to Mr. Pomeroy, however, to say that we do not think his original text supported the decision of this court on the former appeal, and it is certain that the revised text does not.

The evil consequences of maintaining the equity of a bill like this is illustrated clearly by the record in this case. The explosion which killed the 110 workmen in question, and which is the subject of this controversy, occurred February 20, 1905, and because of this proceeding a trial of those 110 damage suits has been delayed for more than six years. Suppose the equity of the bill should be sustained and the parties proceed to trial, and the complainant fail, then, the parties plaintiff, after a delay of many years, will have to be remitted to courts of law to try each of these cases separately. Or, if the complainant succeeded, still there must be 110 trials in the court of chancery, not only as to the liability *vel non*, as to each of the persons killed, but as to the amount of damages recoverable in each case. If the complainant is liable under the employer's liability act, the amount for which it is liable would be different in each of the 110 cases, depending upon the earning capacity of each decedent, which, in its turn, depends upon age, character, habits, etc.

It would be difficult to select a case that would more clearly demonstrate the im-

practicability of the rule than the one under consideration. Contemplate 110 separate answers, and as many pleas and demurrers in one suit, and the innumerable issues of law and of fact that would be raised thereby, and the defense being conducted by 110 different attorneys, or the parties deprived of the right to have the counsel of their choice—a worse confusion could scarcely be imagined. It could be likened unto the confusion of tongues at the building of the Tower of Babel.

To reach a final decree in this case that would approach justice for all, by a trial of all these issues, and a trial in accordance with our statutes and the rules of law and chancery provided for such cases, would be wholly impracticable, if not impossible. No stronger or more conclusive argument could be produced to show that the rule announced on the former appeal is wrong than would be an attempted trial of this case upon its merits, in a chancery court, under the prayer of the bill quoted above.

No error appearing in the record, the decree of the chancellor is affirmed.

Dowdell, Ch. J., and Simpson, Anderson, McClellan, Sayre, and Somerville, JJ., concur.

Petition for rehearing denied December 21, 1911.

COLORADO SUPREME COURT.

JAMES D. QUINN, Plff. in Err.,
v.
PEOPLE OF THE STATE OF COLORADO.

(51 Colo. 350, 117 Pac. 996.)

Intoxicating liquor—determining age of minor—inspection by jury.

The jury cannot determine the age of the purchaser by inspection only in a prosecution

Note.—Right of jury in criminal case to determine one's age by inspection or observation.

There is considerable diversity of conclusions among the authorities which have passed upon the question stated in the title. An examination of the various cases reveals holding that the jury cannot weight one's age by inspection or observation where attention has not been called to the fact that such person was on inspection for that purpose; holdings that under no circumstances can the jury take one's appearance into consideration, the ground being that such evidence cannot be preserved for review; holdings that the jury may consider personal appearance in connection with other evidence as to age; and holdings that the

cution for illegally selling liquor to a minor, where at no time during the introduction of the evidence was its attention called to the fact that the prosecuting witness was on inspection for that purpose.

(October 2, 1911.)

ERROR to the Juvenile Court for the City and County of Denver to review a judgment convicting defendant of selling intoxicating liquors to a minor. Reversed.

The facts are stated in the opinion.

Mr. Richard Peete for plaintiff in error.

Messrs. Benjamin Griffith, Attorney General, and George D. Talbot, for defendant in error:

The age may be arrived at by view or inspection.

State v. Arnold, 35 N. C. (13 Ired. L.) 184; Garvin v. State, 52 Miss. 207; Com. v. Emmons, 98 Mass. 7; Hermann v. State, 73 Wis. 248, 9 Am. St. Rep. 789, 41 N. W. 171; State v. McNair, 93 N. C. 628.

Hill, J., delivered the opinion of the court:

Prosecution for selling intoxicating liquors to a minor; trial by jury; verdict and judgment for the people; the defendant brings the case here for review upon error. At the close of the people's case, as well as upon the motion for a new trial, the sufficiency of the evidence to sustain the conviction was challenged. Lawrence Doughty, the witness who testified to the purchase of the liquor at the defendant's drug store, was not asked and did not testify to the fact that he was a minor. He was not asked any question concerning his age, nor was any other witness asked any question concerning Doughty's age, and neither he nor any other witness gave any testimony concerning his size, general appearance, etc., pertaining to his age, or otherwise. In no manner, during the introduction of the testimony, was the jury's

jury may determine age by inspection and observation even though there is no other evidence on the subject. The majority of the cases are to the effect that the jury may take personal appearance into consideration in determining age, especially where there is conflicting evidence upon the issue, but it may be of interest to note that every case, down to QUINN v. PEOPLE, in which the report shows that the contention was made that the jury could not determine age by inspection or observation, for the reason that such evidence could not be preserved for review, the court has so held, placing the decision upon that ground.

The first class of cases above referred to is illustrated by QUINN v. PEOPLE and by the similar case of Com. v. Walker, 33 Pa. Super. Ct. 167, holding it reversible

attention called to the appearance of the witness in order to take that fact into consideration in passing upon his age. The learned attorney general admits that there was no testimony, oral or documentary, on this point. So the question presented is: Can the age of the minor be determined by inspection only, when at no time during the introduction of the evidence was the attention of the jury called to the fact that the witness was on inspection for that purpose? Under such a state of the record we do not think that there was any evidence upon which a conviction could be sustained. The gist of the crime charged was not the sale of the liquor; the defendant was licensed to make sales of liquors. In order to make it a crime, the

sale had to be to a minor, unaccompanied by either of his parents, etc., in which case the age of the purchaser was the controlling issue. While it is true, where a witness is ten or twelve years of age, the observation of the jury as to his appearance, in connection with other evidence pertaining to his age, might be entitled to great weight (even controlling, where the evidence is conflicting), yet, where the witness is of the age of twenty years and eleven months, and of the average size and appearance of a person of that age, the observation of the jury from his appearance would be absolutely worthless; and when standing alone would be no evidence at all upon the subject. The record gives us no intimation, by a description of the

error to submit the age of the accused to the jury by charging that it was its privilege to judge by his appearance, there having been no evidence offered as to his age, nor any evidence identifying him to the jury, or offer of his appearance in evidence. The court said that the better rule is that "the defendant may be identified and his appearance called to the attention of the jury as a part of the commonwealth's case, and the jury may take into consideration such appearance in determining" the age of the accused.

And in New York, under a statutory provision that "whenever, in any legal proceeding, it becomes necessary to determine the age of a child, the child may be produced for personal inspection, to enable the magistrate, court, or jury to determine the age thereby," it has been held that when produced as provided, it is for the jury to determine the age. See *People v. Platt*, 1 How. Pr. N. S. 402; *People v. Meade*, 24 Abb. N. C. 357, 10 N. Y. Supp. 943; *People v. Ragone*, 54 App. Div. 498, 67 N. Y. Supp. 23; *People v. Dickerson*, 58 App. Div. 202, 68 N. Y. Supp. 715, and *People ex rel. Zeigler v. Special Sessions, Justices*, 10 Hun, 224.

The second class includes cases from Illinois, Indiana, and Texas. Thus, in *Wisstrand v. People*, 213 Ill. 72, 72 N. E. 748, it was held that the age of one accused of rape, the age being a part of the *corpus delicti*, could not be fixed from an inspection of his person by the jury, where there was no proof on the point other than a voluntary confession, which of itself was insufficient, in which he stated his age as forty-four years, the ground being that although the appearance of the defendant might be conclusive evidence to the jury, it would be difficult to produce evidence of that character for the inspection of a court of review. And in *Stephenson v. State*, 28 Ind. 272, which is set out in *QUINN v. PEOPLE*, the decision was upon the ground that the Indiana statutes give the defendant in a criminal case upon conviction the right to present all the evidence given in the case for review in the appellate court, and 40 L.R.A. (N.S.)

that to allow the court or jury to determine the defendant's age from his personal appearance, without other evidence, would deprive him of his right to review, as the state cannot avail itself of the court's or jurors' knowledge when not in evidence, except upon matters of which the court takes judicial notice. So, in *McGuire v. State*, 4 Tex. App. Civ. Cas. (Willson) 386, 15 S. W. 917, it was held error to instruct the jury to judge from the appearance of the prosecuting witness as to his age, the ground being that the personal appearance of a witness as seen by the jury cannot be put in the record and judged of on appeal.

And in *Ihinger v. State*, 53 Ind. 251, which is also set out in *QUINN v. PEOPLE*, the court, as is therein shown, went still farther by holding upon the same grounds adopted in *Stephenson v. State*, *supra*, that the appearance of the witness could not be considered, even in connection with competent evidence as to his age. *Stephenson v. State* and *Ihinger v. State*, *supra*, are relied upon and followed with approval in *Robinius v. State*, 63 Ind. 235, which was followed in *Swigart v. State*, 64 Ind. 598, and in *Bird v. State*, 104 Ind. 384, 3 N. E. 827, in which it was said that if the question were an open one, one of the judges would be inclined to take a different view.

The third class of cases, which hold that one's personal appearance may be observed by the jury in connection with other evidence, for the purpose of determining his or her age, are, for the most part, bare statements to the effect that the jury may so consider appearance, without citation of authority or statement of reasons for the conclusion. Thus, in *Com. v. Phillips*, 162 Mass. 504, 39 N. E. 109, followed in *Com. v. Hollis*, 170 Mass. 433, 49 N. E. 632, it was held, without citing any authority, that to determine the age of the prosecutrix the jury may take into consideration her appearance in connection with her testimony, the court saying that the appearance of a witness is a proper element for the consideration of the jury in weighing her testimony as to age. And a like con-

witness or otherwise, as to about what his age may have been, or anything from which we can say that there was any evidence to the effect that the witness was a minor.

In *Stephenson v. State*, 28 Ind. 272, where the age of the defendant was material, it was held that the age of the accused must be proven by sworn testimony, and that the court or jury could not determine this fact for themselves from the personal appearance of the accused alone.

The case of *Ihinger v. State*, 53 Ind. 251, goes further. It holds that the appearance of a witness in respect to his age, as seen by the court or jury, cannot be considered as evidence, either with or without competent evidence of his age, in determining whether or not the defendant acted in good faith in selling him the liquor. This last case appears to be reasoned upon the theory that there is no mode of putting such evidence upon the record in order that it may be passed upon by an appellate tribunal. Also, that on the motion for a new trial the judge would have to substitute his impressions as to the appearance of the witness as to age, for those of the jury. The court concluded that the jury could not consider the appearance of the witness in respect to his age, as they viewed him, aside from evidence given as to his appearance.

Other cases take a contrary view and hold that, where there is a conflict of evidence as to the age of the witness, the jury have the right to consider his size, appear-

ance, etc., to aid them in coming to a conclusion as to his age. *State v. McNair*, 93 N. C. 628.

Another class of cases, under statutes which sanction evidence obtained by view in criminal cases, holds that, where the knowledge of the person charged as to the other party being a minor is material, the jury might determine from the personal appearance or view only of the party whether the defendant knew or had reasonable grounds to believe that the witness was under the age of twenty-one years when the act complained of was committed. *Hermann v. State*, 73 Wis. 248, 9 Am. St. Rep. 789, 41 N. W. 171. This line of cases would not be altogether applicable to the case at bar. Here the lack of knowledge of the defendant, or, as alleged in this case, that of his clerk, as to the age of the witness, is immaterial; and we, at this time, do not deem it necessary to lay down any rule as controlling in all such cases.

Our conclusions are that in such cases, where there is a conflict in the evidence concerning the age of the witness, the jury should have a right to take into consideration his size, appearance, etc., in connection with the other evidence, but that when it is to be so considered, the better rule is to have such description, appearance, etc., supplied by evidence, which can be properly preserved in the record; but it probably would not be error were this omitted, where the jury's attention has been called to the appearance of the witness for that

elusion was reached upon a similar state of facts in *Williams v. State*, 98 Ala. 52, 13 So. 333; *People v. Elco*, 131 Mich. 519, 91 N. W. 755 (affirmed on another point on rehearing in 131 Mich. 119, 94 N. W. 1069); *State v. Davis*, 237 Mo. 237, 140 S. W. 902; *State v. McNair*, 93 N. C. 628; *Hunter v. State*, 6 Okla. Crim. Rep. 446, 119 Pac. 445; and *State v. Sullivan*, 68 Vt. 540, 35 Atl. 479. And in *State v. Scroggs*, 123 Iowa, 649, 96 N. W. 723, it was said that "it may be that, in connection with her [prosecutrix] evidence, her appearance and apparent majority might aid the jury in determining the age to which she had attained," citing *Com. v. Phillips*, and *Stephenson v. State*, supra, which holds to the direct contrary. See also *State v. Wilson*, 126 La. 661, 52 So. 981, wherein it was held that the judge could determine the age of the accused by observation, and that his conclusion would not be set aside, although there was evidence which conflicted therewith. And see *Com. v. Terry*, 15 Pa. Super. Ct. 608.

Those cases in which it is held that the jury may determine age by inspection and observation even when there is no other evidence with respect thereto are likewise bare announcements of the conclusions. Thus, in *Com. v. Emmons*, 98 Mass. 6, the court 40 L.R.A. (N.S.)

held that it was not error for the judge to permit the jury to determine by personal inspection of a witness whether or not he was of age at the time of the alleged offense, without other evidence, it being said: "There is nothing in the bill of exceptions from which it can be inferred that the defendant was aggrieved by the ruling of the court in permitting the jury to judge whether one of the alleged minors was under age from his appearance on the stand. There are cases where such an inspection would be satisfactory evidence of the fact. It certainly was not incompetent for the jury to take his appearance into consideration in passing on the question of his age; and, as it does not appear that this may not have afforded plenary evidence of the fact, the defendant fails to show that he was convicted on insufficient evidence, or that he has been prejudiced by the ruling of the court." And in *State v. Arnold*, 35 N. C. (13 Ired. L.) 184, where there was no proof as to age, it was said that it "could only be judged of by inspection, and so far as that goes, it must be taken to have been decided against the prisoner, both by the court and jury."

And see *Hermann v. State*, 73 Wis. 248, 9 Am. St. Rep. 789, 41 N. W. 171, as set out in *QUINN v. PEOPLE*. G. J. C.

purpose. But where no evidence has been offered upon the subject, and where the attention of the jury has not been called to the appearance of the witness for that purpose, it is prejudicial error to accept the finding of a jury concerning the age of the witness, when it is material to a conviction, with no evidence of any kind upon the subject.

As this error necessitates a reversal of the judgment, the others urged will not be considered. The judgment is reversed, and the cause remanded for a new trial.

Gabbert and Musser, JJ., concur.

GEORGIA SUPREME COURT.

C. L. KINNEY, Plff. in Err.,
v.
SOARBROUGH COMPANY.

(— Ga. —, 74 S. E. 772.)

Contract — restraint of trade — sales agent.

1. Where a selling agent of a company engaged in the manufacture and sale of maps, who has as his territory a certain state, except a few counties thereof, contracted that he would not, "without the

Headnotes by LUMPKIN, J.

Note. — Validity of agreement by employee not to engage in competing business, as affected by its scope in time and territorial extent.

This note is supplemental to a note on the same subject in 24 L.R.A.(N.S.) 933.

As to the validity of an agreement in restraint of trade, ancillary to the sale of a business or profession, as affected by its territorial scope, see note in 24 L.R.A.(N.S.) 913.

As to the divisibility in respect of time or territorial extent of contracts in restraint of trade, see note in 24 L.R.A.(N.S.) 942.

As to right, in the absence of a negative stipulation, to enjoin a former employee from soliciting business from the customers of his employer, see note in 31 L.R.A.(N.S.) 260.

As to the right to an injunction to prevent an employee from entering the service of a rival, in violation of an agreement, see note in 31 L.R.A.(N.S.) 249.

As to the validity of an agreement by an employee not to engage in business in competition with his employer, see note in 6 L.R.A.(N.S.) 892.

As pointed out in the note in 24 L.R.A.(N.S.) 933, which the present note supplements, the question whether or not a con- 40 L.R.A.(N.S.)

consent of the company in writing, within six months after the termination of this contract, directly or indirectly, or in any capacity, whether upon his own account or in connection with any other person or persons as salesman or agent of any character, for any other person, company, or corporation, engage in any business of a character similar to that conducted by the company, which might in any manner be injurious to its interests," such a contract, without territorial limitation, was in general restraint of trade, and not enforceable.

Principal and agent — salesman — employment by rival — injunction.

2. If a salesman and local manager in a state for a nonresident corporation, by virtue of his position, became familiar with the business of the company and its customers, and took orders for the delivery of maps by such company, and subsequently, during the term for which he had contracted to serve such company, broke his contract with it, entered the service of another rival company in the same territory, failed to deliver to his former employer orders taken for its maps, and, being solvent, intended to deliver maps of the second company on such orders, he could be enjoined from so doing.

Same — inducing breach of contracts — injunction.

3. If such an employee, after having broken his contract of employment, and being insolvent, was seeking to induce other employees of his former employer to breach their contracts of employment, and to enter with him upon the service of the other company, he could be enjoined from so doing.

tract by an employee not to engage in a similar business within a certain territory is so unreasonably in restraint of trade as to render it unenforceable in a court of equity is not entirely governed by the same rule that is applied to similar contracts in a sale of a business or profession, since contracts of the former character, if covering a large territory, may violate public policy, because the covenantor's means for procuring a livelihood for himself and family are diminished thereby, and he is deprived of the power of usefulness, and the public is deprived of the benefit of the exercise by him of his knowledge and skill. Moreover, such agreements are usually not based on any consideration other than present employment, and because of the difference in the position of the parties, the employee may be coerced into an oppressive agreement.

Indeed, the doctrine has been asserted, though not applied, that the law will not permit a man to bind himself by contract not to pursue at any time or at any place the calling whereby he earns his livelihood, because, being so bound, he may become a charge upon the community. *Moorman v. Parkerson*, 127 La. 835, 54 So. 47.

This distinction is well made in *Allen Mfg. Co. v. Murphy*, a court of appeals case, reported in 23 Ont. L. Rep. 467, revers-

Injunction — modification.

4. Direction is given that the injunction be modified in accordance with this decision.

(April 11, 1912.)

ERROR to the Superior Court for Fulton County to review a judgment in plaintiff's favor in an action brought to enjoin defendant from delivering maps of a competitor on any orders taken while in plaintiff's employment, from engaging in the map business for a certain time from the termination of his contract with the plain-

tiff, and from inducing agents of plaintiff to breach their contract. Affirmed in part.

Statement by Lumpkin, J.:

The Scarbrough Company, a corporation of the state of Maine, filed an equitable petition against C. L. Kinney, alleging in substance as follows: The defendant is indebted to the plaintiff in the sum of \$727.96 on an itemized bill. He was employed by the plaintiff as salesman and local manager for the sale of maps, under a written contract, for a territory to be assigned to him. On or about January 1,

ing 22 Ont. L. Rep. 539, 20 Ann. Cas. 657. On this point Moss, C. J. O., says: "Restraints which may fairly be regarded as entirely reasonable when imposed in connection with the sale of a business or good will, or with the transfer of patent rights or of a trade secret, or with the dissolution of a partnership, should not be accepted in all cases as necessarily or even approximately applicable to restraints imposed upon employees to whom the only consideration for their covenant is employment and receipt of wages or remuneration for a more or less certain number of years. Such persons are ordinarily not on the same plane with one who has disposed of a very extensive business, which, by its very nature, embraces world-wide interests and connections, and involves dealings and transactions with most of the nations of the globe, and has received therefor a very large sum by way of purchase money."

The case immediately preceding holds that a restriction which practically drives an employee out of the only position in which he is at all adept, unless he quits the Dominion of Canada, is invalid *in toto*, because not reasonably necessary for the protection of his employer's business, which was to manufacture and deal in apparel and pressed goods of all kinds, in the machinery, raw materials, ingredients, utensils, and appurtenances necessary to such manufacture, and to carry on a general laundry business, and to manufacture and deal in the machinery, appurtenances, and ingredients pertaining thereto, where there are many places in the Dominion to which no part of such business extends.

The contrary doctrine is, however, apparently asserted in *Eureka Laundry Co. v. Long*, 146 Wis. 205, 35 L.R.A.(N.S.) 119, 131 N. W. 412, holding that it makes no substantial difference whether such a restriction is contained in a term of sale or in a term of hiring. The court reasons that if it is lawful and proper to protect a business about to be acquired, against a competing business by the seller, it is equally lawful to protect an established business from competition by an employee who has become familiar therewith. The court, however, asserts as the proper test to be applied in determining the validity of such a restriction, the rule which would apply where the distinction is made between such

restrictions where incorporated in a contract for the sale of a business, and an employment contract, except that the question whether the restriction is unreasonable because prejudicial to public interest is not considered, the court asserting that such contracts must be held to be valid when reasonably necessary for the fair protection of the employer's business rights, and not unreasonably restricting the rights of the employee, due regard being had to the subject-matter of the contract and the circumstances and the conditions under which it is to be performed. It may very properly be urged, however, that the latter clause of the rule, as asserted, would really require that a distinction be made between the two classes of contracts mentioned.

Without referring to the distinction mentioned, it has been held that an agreement in a contract for the employment of a person as driver of a laundry wagon over a specified route in a city, that the employee will not, during such employment, or for two years thereafter, solicit patronage of this character from the employer's customers on the route covered by the employee, and also that he will not engage, either directly or indirectly, in a competing business in that section of the city included in his route, is a valid limitation, and will be protected by injunction. *Jewel Tea Co. v. Novak*, 146 Wis. 224, 131 N. W. 415.

But an agreement by an employee not to engage in a competing business in a city during the life of a contract of employment will not be enforced by enjoining a breach thereof after the contract has been terminated by the employee quitting his employment. *Ibid.*; *Columbia College v. Turnbull*, 64 Wash. 19, 116 Pac. 280.

However, a proprietor of a large business, on hiring for a fixed term, subject to sooner termination on notice, an employee to occupy a superior and managerial position, wherein he will be possessed with all of his employer's trade secrets, may lawfully provide that during the term of said employment the employee shall not enter the service of a competing concern, and the breach of such an agreement will be restrained. *McCall Co. v. Wright*, 198 N. Y. 143, 31 L.R.A.(N.S.) 249, 91 N. E. 516.

A. G. S.

1911, the plaintiff assigned to him the territory of the state of Georgia, except nine counties thereof, which were attached to the Alabama territory, with the consent of the defendant. The contract contained the following clause: "It is further expressly agreed by and between the parties hereto that, inasmuch as the company must, in the nature of the case, instruct the salesman as to its particular system and method of doing business, and communicate facts to him in confidence, said salesman shall not, without the consent of the company in writing, within six months after the termination of this contract, directly or indirectly, or in any capacity, whether upon his own account or in connection with any other person or persons, as salesman or agent of any character for any other person, company, or corporation, engage in any business of a character similar to that conducted by the company, which might in any manner be injurious to its interests." Under the terms of the contract, as amended by the agreement of the parties, the defendant was obligated to continue in the service of the plaintiff for at least one year from October 28, 1910. In order to equip the defendant for the discharge of his duties as salesman and manager for the plaintiff, it was necessary to impart to him information as to the confidential details of the plaintiff's business, which he expressly agreed to keep in confidence, and the possession of such information by the defendant in the service of a competing concern making and selling maps renders it impossible for the defendant to comply with his obligation to keep such information confidential. On February 13, 1911, the defendant wrote to the plaintiff, stating that he had 175 orders in Atlanta, and that thereafter he would report weekly. At the time this letter was written the defendant was either negotiating with a rival map company having its principal office in Atlanta, to enter its employment, or had already agreed to enter its employment. The defendant had not complied with his duties as to sending in reports, etc., and plaintiff's treasurer determined to make a personal visit to Atlanta to investigate the situation. On February 18th the defendant wrote to the treasurer, advising him not to come, that he had quit selling the plaintiff's maps, and it would be useless for the treasurer to make the trip. The treasurer, nevertheless, went to Atlanta, and advised the defendant of the irreparable injury that would follow to the plaintiff if the defendant insisted on taking employment with a rival or competitor, and endeavored to induce the defendant not to do so, but to continue in the service of the

plaintiff. The defendant declined to do so, and entered the service of the rival company as an agent. The defendant failed and refused to report to the plaintiff the names and addresses of the persons from whom he secured the 175 orders. Such orders were procured by the defendant while actually in the service of the plaintiff. Upon information and belief the plaintiff charges that the defendant intends to fill such orders with the maps of the Hudgins Company, the rival company with which he has taken service, instead of furnishing the plaintiff with information with which it can fill such orders. New maps, based on the census of 1910, will probably be delivered very shortly, and it is necessary to enjoin the defendant from delivering the maps of the Hudgins Company upon the orders taken for the plaintiff. The defendant is constantly endeavoring to "buy off" the salesmen and other agents and representatives of plaintiff in the territory of Georgia, and to induce them to breach their contracts with the plaintiff. The prayers were that the plaintiff have judgment for the amount of its account against the defendant; that the defendant be enjoined from delivering any maps of the Hudgins Company on any orders taken by the defendant while in the employment of the plaintiff; that the defendant be enjoined from taking orders or engaging in the map business with the Hudgins Company or with any other company making and selling maps in the territory of the state of Georgia, for a period of at least six months from the legal termination of the contract between the parties; that the defendant be enjoined from persuading or endeavoring to persuade the agents and salesmen of the plaintiff from leaving its service, or from in any wise interfering with plaintiff's field officers or organization for the conduct of its business, and for process and general relief. By amendment it was alleged that on May 16th the defendant filed his petition in voluntary bankruptcy, and was duly adjudged a voluntary bankrupt. It was also alleged that the plaintiff was engaged in the business of selling maps throughout the United States and Canada, with offices also in London and Paris.

The defendant denied breaking his contract, or that he had taken orders for the plaintiff which he intended to fill with maps of the Hudgins Company. He alleged that on or about December 20, 1910, he ceased to work for the plaintiff, and since that date has not worked for them or taken orders for them; that about February 23d the treasurer of the plaintiff expressly agreed with defendant that the contract set out by the plaintiff was no longer bind-

ing upon either party, and expressly relieved the defendant of all responsibility or obligation under it; and that the treasurer offered to make an entirely new contract with the defendant, but after consideration the latter declined it. He denied that he had received any confidential or peculiar information or instructions from the plaintiff, and alleged that the nature of the services which he agreed to render were of an ordinary, and not of an expert or peculiar, nature. He set up that the only negative covenant contained in the contract, preventing his entering the service of another company after termination of his contract with the plaintiff, was in general restraint of trade and not enforceable.

On the hearing, conflicting evidence was introduced. The presiding judge granted the injunction prayed for by the plaintiff upon its filing a damage bond in the sum of \$1,000, if exception should be taken and the judgment reversed. Defendant excepted.

Messrs. Dorsey & Shelton, for plaintiff in error:

An agreement, without limitations as to space or territory, not to carry on a particular trade or business, said trade in itself being lawful, is unenforceable, as being against the policy of the law. Such a contract has been held to be in general restraint of trade, and therefore null, void, and unenforceable.

Seay v. Spratling, 133 Ga. 27, 65 S. E. 137; Burney v. Ryle, 91 Ga. 701, 17 S. E. 986; Hammond v. Georgian Co. 133 Ga. 1, 65 S. E. 124; Jones v. Van Winkle Gin & Mach. Works, 131 Ga. 336, 17 L.R.A. (N.S.) 848, 127 Am. St. Rep. 235, 62 S. E. 236; Stein v. National Life Asso. 105 Ga. 821, 46 L.R.A. 150, 32 S. E. 615.

Mr. Alexander W. Smith, Jr., with Messrs. Smith, Hammond, & Smith, for defendant in error:

Equity will enjoin an employee from entering the service of a rival concern, provided there is a reasonable limitation as to time, the only limitation as to territory being the scope of the employer's business, and the fact of rivalry or competition between the first and second employers.

Carter v. Alling, 43 Fed. 208; Harrison v. Glucose Sugar Ref. Co. 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304; Knapp v. S. Jarvis Adams Co. 70 C. C. A. 536, 135 Fed. 1008; Prame v. Ferrell, 92 C. C. A. 374, 166 Fed. 702; Turner v. Abbott, 116 Tenn. 718, 6 L.R.A. (N.S.) 892, 94 S. W. 64, 8 Ann. Cas. 150; Taylor Iron & Steel Co. v. Nichols, 73 N. J. Eq. 684, 24 L.R.A. (N.S.) 933, 133 Am. St. Rep. 753, 69 Atl. 186; McCall Co. v. Wright, 198 N. Y. 143, 31 L.R.A. (N.S.) 249, 91 N. E. 516. 40 L.R.A. (N.S.)

Equity will protect trade secrets by injunction.

Vulcan Detinning Co. v. American Can Co. 72 N. J. Eq. 387, 12 L.R.A. (N.S.) 102, 67 Atl. 339; Stevens & Co. v. Stiles, 29 R. I. 399, 20 L.R.A. (N.S.) 933, 71 Atl. 802, 17 Ann. Cas. 140; Simms v. Burnette, 55 Fla. 702, 16 L.R.A. (N.S.) 389, 127 Am. St. Rep. 201, 46 So. 90, 15 Ann. Cas. 690.

Lumpkin, J., delivered the opinion of the court:

1. Two divergent lines of decisions have arisen in regard to the territorial limitation necessary for the upholding of contracts in restraint of trade, in connection with a sale of a business and good will, the retiring of a partner, or the like. Two points of view affect this: First, looking at the matter with a special consideration of the parties immediately concerned and their protection; and, second, viewing it from the standpoint of the public, and the interest which it has in the freedom of trade, and in not having parties cut off from a means of livelihood, thus tending to diminish the resources, wealth, and useful population of the state or country. In the earlier English cases the rule was quite stringently declared against contracts in restraint of trade, and it was thought to have been fully adjudicated that contracts in restraint of trade, without territorial limitation, would not be upheld, as being against public policy. Year Book 2 Henry V, pl. 26; Claygate v. Batchelor, Owen, 143; Price v. Green, 16 Mees. & W. 346, 16 L. J. Exch. N. S. 108, 9 Jur. 880, 6 Eng. Rul. Cas. 406. Contracts in restraint of trade within a limited area, and reasonable in their nature, came to be recognized and enforced as not being in general restraint. In later English cases the older ones have been explained as being cases in which the territory over which the restraint operated was greater than was necessary to protect the business of the contracting party. The earlier decisions had been followed in numerous jurisdictions before this explanation, and a number of courts adhered to the rule. It is considered in such jurisdictions that, where the area within which the limitation operates is so large as to cause the public interest to suffer, the contract cannot be upheld, although the business sought to be protected may extend over the entire area. On the other hand, some of the state and Federal courts have followed the modern English view, and hold that, if the area over which the restraint is to operate is not greater than that covered by the business to be protected, it is not against public policy, although it may include the entire country. 1 Page, Contr. §§ 376-379.

Without undertaking to discuss how large an area may be embraced in a contract in restraint of trade, if reasonably necessary for the protection of the good will of a business transferred, it is settled in this state that a contract in restraint of trade without territorial limitation is contrary to public policy and unenforceable. Civil Code 1910, § 4253; *Seay v. Spratling*, 133 Ga. 27, 65 S. E. 137. We are not now dealing with contracts of monopoly, strictly so called, or contracts merely agreeing not to do business, without being ancillary to a sale of business or good will. They may involve another feature.

The jurisdiction of equity to enjoin a person from doing business or performing service of a certain character has generally been invoked under one of four heads: (1) Where there has been a sale of a business and good will, with an ancillary agreement by the seller not to engage in the business in a certain territory. (2) Contracts by which an employee agrees to give his entire service to the employer, which sometimes include an express negative covenant not to serve any other person within a fixed time and territory. In such cases the negative covenant will not be enforced by injunction, unless the services are of a peculiar merit or character, and cannot be performed by others. *Hammond v. Georgian Co.* 133 Ga. 1 (3), 65 S. E. 124. Contracts binding one to desist from the practice of a learned profession. (4) A contract by an employee, ancillary to his contract of employment, not to engage in a competing business, for himself or as an employee of another. In the present case the effort to obtain an injunction is made under the last head mentioned. The general principles as to territorial limitation upon restraint of trade, above mentioned, are applicable to all of the subdivisions of that topic, though each may have some differentiating features. Indeed, the courts have shown greater reluctance in reference to enjoining a man from performing personal service or labor than from conducting a business.

It was contended in behalf of the defendant in error that in *Rakestraw v. Lanier*, 104 Ga. 188, 201, 69 Am. St. Rep. 154, 30 S. E. 735, 741, a distinction was made between a contract binding one to desist from the practice of a learned profession and a contract binding a person who has sold out a mercantile or other kind of business, and the good will connected therewith, not to again engage in that business. This is true, but the distinction was not that in the former contract no limitation as to space was necessary, but that a reasonable limitation as to time was also necessary. 40 L.R.A. (N.S.)

After referring to contracts in general and partial restraint of trade, Mr. Justice Little said: "We test this contract by the rules before referred to, and find it supported by a legal consideration. Being limited as to space, although unlimited as to time, we find that it may properly be classed among contracts in partial restraint of trade. When we seek its terms to ascertain whether it is reasonable, made to protect the promisee, and not oppressive on the promisor, we find that the facts were such as to render the limitation arbitrary and unreasonable. Thus it was held that in such a case, not only must the restraint of trade be partial, and not general, but it must also be proportioned to the legitimate object to be subserved, and not unreasonable in character. If the doctrine of that case be applied to the present one, it will not help the plaintiff. We are aware that there are a number of cases which have sustained agreements, ancillary to employment, that the employee would not enter into the service of a competitor or rival of the employer for a specified time after leaving his service. In some of them there was a limitation as to space. In some, courts which follow the modern English rule above mentioned looked at the matter from the standpoint of reasonable protection entirely. But we are of the opinion that our decisions require a limitation as to space, and that this rule applies to the present case as well as to one in which there has been a sale of property and good will. We therefore hold that the provision of the contract here involved, which was unlimited as to space, was not enforceable.

2. It does not appear that any secret formula or technical trade secrets were involved. But there was evidence tending to show that the defendant, by virtue of his position, had acquired knowledge of the customers of the plaintiff; that, while pretending to be acting in their interest, informing them that he had taken a number of orders, and promising to make reports, he had actually contracted to represent a rival company; that he pursued a policy of double dealing for some time; that, when he finally left the employment of the plaintiff, and notified them of the fact, he failed to deliver to them the orders which he previously reported that he had taken; and that he intended to fill such orders with maps furnished by his new employer. This can be prevented by injunction; and on the interlocutory hearing the questions of fact involved were for the consideration of the presiding judge.

3. Furthermore, there was evidence tending to show that the defendant had sought to induce his successor in the employment

of the plaintiff to violate the contract of employment with the plaintiff and to join him in the new employment, and that he boasted that he had induced some of the plaintiff's employees to leave its service and take positions with the new employer. As if to emphasize the fact that the plaintiff had no adequate remedy at law for the injuries thus done, the defendant proceeded to go into voluntary bankruptcy. Aside from the question of restraint of trade involved in the preceding discussion, such conduct on the part of a trusted employee furnished sufficient basis to authorize a temporary injunction as to this matter. It is true that the defendant denied most of the allegations of the plaintiff, and claimed that he had been voluntarily released from its service. But the presiding judge was not compelled to accept his theory of the transaction, and there was sufficient evidence on which to base an injunction touching the matters last mentioned.

It was argued on behalf of the defendant that injunction should not be granted to protect the contracts of the plaintiff with its other employees against interference by this insolvent exemployee; and in support of this position were cited the cases of *Stein v. National Life Asso.* 105 Ga. 821, 46 L.R.A. 150, 32 S. E. 615, and *Jones v. Van Winkle Gin & Mach. Co.* 131 Ga. 336, 17 L.R.A. (N.S.) 848, 127 Am. St. Rep. 235, 62 S. E. 236. But in each of those cases it was distinctly declared that no question of inducing violation of contracts was involved. On the general subject, see *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817, 11 L.R.A. (N.S.) 201, and note, 122 Am. St. Rep. 232, 11 Ann. Cas. 332; *Employing Printers' Club v. Dr. Blosser Co.* 122 Ga. 509 (2), 69 L.R.A. 90, 106 Am. St. Rep. 137, 50 S. E. 353, 2 Ann. Cas. 694.

4. In so far as the injunction restrained the defendant from taking orders or engaging in the map business with the second company for six months from the termination of the contract existing between him and the plaintiff, it must be reversed. In so far as it was sought to enjoin the defendant from delivering maps of the new company on orders taken by the defendant while in the employment of the plaintiff, and from inducing or endeavoring to induce the agents and salesmen of the plaintiff to violate their contracts with the plaintiff, and leave its service, in violation thereof, the injunction was authorized. Direction is given that the injunctive order be modified so as to accord with this decision.

The plaintiff in error, having obtained a 40 L.R.A. (N.S.)

material modification of the judgment, is entitled to costs of the exception.

Judgment affirmed in part and reversed in part, with direction.

All the Justices concur.

IOWA SUPREME COURT.

STATE OF IOWA

v.

JOE DEWEY et al., Appts.

(— Iowa, —, 136 N. W. 533.)

Kidnapping — possession by parent — liability.

1. Neither a father nor his assistant is guilty of kidnapping where they obtain by misrepresentation peaceable possession of his child from its mother, who has begun divorce proceedings against the father, but no order has been made affecting the custody of the child.

Criminal law — transcripts of evidence — right to.

2. A defendant with property and one who does not intend to press his appeal are not entitled to free transcripts of notes of evidence taken at the trial.

(June 5, 1912.)

APPEAL by defendants from a judgment of the District Court for Calhoun County, convicting them of conspiring to kidnap certain children. Reversed in part.

Statement by Sherwin, J.:

The defendants were convicted of the crime of conspiracy to commit a felony; to wit, to kidnap the two minor children of the defendant Joe Dewey. The defendants appeal.

Mr. W. E. Gray, for appellants:

A father who takes possession of his minor child from its mother or other person, where its custody has not been awarded to her or them by a competent tribunal, does not commit the crime of kidnapping.

Com. v. Myers, 146 Pa. 24, 23 Atl. 164; *Burns v. Com.* 129 Pa. 138, 18 Atl. 756; *Hunt v. Hunt*, 94 Ga. 257, 21 S. E. 515; *State v. Angel*, 42 Kan. 216, 21 Pac. 1075; *State v. Beslin*, 19 Idaho, 185, 112 Pac. 1055; *John v. State*, 6 Wyo. 203, 44 Pac. 51; *Biggs v. State*, 13 Wyo. 94, 77 Pac.

Note. — The question whether the taking of a child by or at the instance of one parent, from the custody of the other parent, constitutes kidnapping, is considered in the note to *State v. Brandenburg*, 32 L.R.A. (N.S.) 845.

901; *Re King*, 66 Kan. 695, 67 L.R.A. 783, 97 Am. St. Rep. 399, 72 Pac. 263; *Re Peck*, 66 Kan. 693, 72 Pac. 265; *State v. Brandenburg*, 232 Mo. 531, 32 L.R.A. (N.S.) 845, 134 S. W. 529.

The person who assists the father under these circumstances to obtain possession of his minor child or children has not committed the crime of kidnapping.

Com. v. Myers, 146 Pa. 24, 23 Atl. 164; *State v. Beslin*, 19 Idaho, 185, 112 Pac. 1055; *John v. State*, 6 Wyo. 203, 44 Pac. 51; *State v. Angel*, 42 Kan. 216, 21 Pac. 1075.

It is immaterial how reprehensible their actions may have been.

John v. State, 6 Wyo. 203, 44 Pac. 51; *State v. Beslin*, 19 Idaho, 185, 112 Pac. 1055.

It is no crime for a number of persons to confederate, agree, or conspire together to do an act that is lawful in itself.

Com. v. Myers, 146 Pa. 24, 23 Atl. 164; *United States v. Goldberg*, 7 Biss. 176, Fed. Cas. No. 15,223.

Upon a reasonable showing of inability of a person found guilty of a crime to have the shorthand notes extended at his own expense, the court before whom the trial was had shall order the same extended at the expense of the county where tried.

State v. Adams, — Iowa, —, 133 N. W. 706; *State v. Goodsell*, 136 Iowa, 445, 113 N. W. 826; *State v. Wright*, 111 Iowa, 621, 82 N. W. 1013; *State v. Harris*, 151 Iowa, 234, 130 N. W. 1082.

Messrs. George Cosson, Attorney General, and John Fletcher, Assistant Attorney General, for the State:

Two or more persons may be jointly indicted for a criminal act which is of such a nature that it can be actually committed by but one of such persons.

State v. Berger, 121 Iowa, 581, 96 N. W. 1094; *State v. Rowe*, 104 Iowa, 323, 73 N. W. 833; *State v. Comstock*, 46 Iowa, 265.

Slaughter was engaged in the commission of an act which was unlawful for him to commit; and to say that because the person with whom he conspired to commit the act was the father of the children would purge the act of its unlawful character is far exceeding the bounds of good reasoning.

State v. Munchrath, 78 Iowa, 268, 43 N. W. 211; *State v. McCahill*, 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599; *State v. Pasnau*, 118 Iowa, 501, 92 N. W. 682.

Sherwin, J., delivered the opinion of the court:

The defendant Joe Dewey and Orabel Dewey are husband and wife. They have 40 L.R.A. (N.S.)

two little girls under five years of age, and prior to September, 1911, Mrs. Dewey lived with her husband in New Mexico, which place is still his home. In September, 1911, a brother of Mrs. Dewey visited the Deweys in New Mexico, and while there he caused the arrest of the husband, Joe Dewey, and his incarceration in jail; and while Dewey was in jail, Mrs. Dewey left New Mexico with her children and her brother and came to Calhoun county, Iowa. She did not tell Dewey that she was going to leave New Mexico, and, so far as the record discloses, he did not know of her action until she had left. While she had before this time commenced an action for a divorce, which was then pending, no order had been made in the case that would in any way affect the right of either to the custody of the children. On the 19th day of December, 1911, Mrs. Dewey and the two children were at the home of her uncle, Mr. A. N. Sumner, who was a farmer in Calhoun county. About 9 o'clock that night these two defendants, Joe Dewey and Fred Slaughter, went to the home of Mr. Sumner and obtained peaceable possession of the two children by representing that Slaughter was an officer from New Mexico, and that he had an order of court for the delivery of the children to him. This claim was false, and before the children were taken from the state, or in fact far from Mr. Sumner's home, the defendants were arrested and the children were returned to Mrs. Dewey. The appellants insist that many errors were committed by the court in its rulings during the trial, but most of the complaints are wholly without merit; and, in view of our conclusion on the main question, whether the evidence is sufficient to sustain the conviction, we need not more specifically notice these alleged errors. It is conceded by the state that, had Dewey in his own right, as the parent of the children, gone to the Sumner home, and peaceably obtained possession of the children for the purpose of taking them to New Mexico, he would not be guilty of any offense. And it must follow, of course, that under such circumstances Slaughter could not be any more guilty than Dewey, because, if he was simply aiding Dewey to do a lawful act in a lawful way, he could not be more guilty than his principal.

Where a father is entitled to the possession of his minor child as against all of the world except its mother, and where the father and mother are equally entitled to its possession, he does not commit the crime of kidnapping by taking possession of it. *Com. v. Myers*, 146 Pa. 24, 23 Atl. 164; *Hunt v. Hunt*, 94 Ga. 257, 21 S. E.

515; *People v. Congdon*, 77 Mich. 351, 43 N. W. 986; 24 Cyc. 797.

And a person who assists the father under such circumstances is not guilty of the crime. *Com. v. Myers*, 146 Pa. 24, 23 Atl. 164; *State v. Bealin*, 19 Idaho, 185, 112 Pac. 1055; *John v. State*, 6 Wyo. 203, 44 Pac. 51; *State v. Angel*, 42 Kan. 216, 21 Pac. 1075.

The case is then really brought down to the narrow question whether these defendants took possession of the children for Dewey or for Slaughter; the state insisting that the latter was the case. We cannot agree with the contention. Every line of the record points in the one direction,—that Dewey was after his children, and that Slaughter was merely assisting him by personating an officer. For some unaccountable reason, the exact way in which Slaughter came to be connected with the affair does not appear; but enough is shown to convince us that he was only assisting Dewey, and that he should not be punished therefor on the evidence before us. On the main case, therefore, the judgment will be reversed as to both defendants.

Both defendants asked for transcripts of the shorthand notes of the evidence at the expense of the county, and both requests were refused, and we think rightly so. Dewey was shown to have considerable property in New Mexico, and he was clearly not entitled to a free transcript; and, when the court ruled on Slaughter's application, the court had before it Slaughter's own statement that he did not intend to press his appeal to this court.

The judgment convicting the defendants is reversed, and the order refusing them free transcripts is affirmed.

Reversed in part and affirmed in part.

LOUISIANA SUPREME COURT.

JOSEPH DOYLE

v.

FUERST & KRAEMER, Limited, Plff. in Certiorari.

(129 La. 838, 56 So. 906.)

Food — liability for unfitness.

1. The keeper of a public place where food is served is bound to know that the

Note. — Liability for serving unfit food.

The present note does not include the cases of the liability of the keepers of groceries, markets, and the like, for selling unfit food. Cases involving the latter question will be found in the notes in 22 L.R.A. 195 and 15 L.R.A. (N.S.) 884, discussing 40 L.R.A. (N.S.)

articles sold are fresh and fit for human consumption, and is liable in damages for injury due to their vitiated and deleterious character.

Damages — unfit food — elements of allowance.

2. The damages to be recovered from the keeper of a public eating place who serves deleterious food to guests, with imputed but not actual knowledge of its unfit character, may include an allowance for the suffering and expense due to the resulting illness of the customer.

Same — amount — reasonableness.

3. \$100 is not excessive to be allowed in damages for ptomaine poisoning to a patron of a public eating house, due to the unfit character of food furnished him, where, for a time, he suffered great pain and apprehended death, while he did not entirely recover from the injury for six weeks.

(December 11, 1911.)

CERTIORARI to review a judgment of the Court of Appeal of the Parish of Orleans in favor of plaintiff in an action brought to recover damages for injuries alleged to have been sustained from eating unwholesome and poisonous refreshments at defendant's place of business. Affirmed.

The facts are stated in the opinion.

Messrs. Carroll, Henderson, & Carroll for applicant.

Messrs. Teissier & Teissier, for respondent:

The fact of the poisoning gives rise to a presumption of negligence.

Lykiardopoulo v. New Orleans & C. R. Light & P. Co. 127 La. 309, 53 So. 575, Ann. Cas. 1912 A, 976; *Taylor v. United Fruit Co.* 126 La. 575, 52 So. 770; *Gomez v. Tracey*, 115 La. 824, 40 So. 234; *Willis v. Vicksburg, S. & P. R. Co.* 115 La. 53, 38 So. 892; *McCubbin v. Hastings*, 27 La. Ann. 715; *Walton v. Booth*, 34 La. Ann. 915; *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154.

Where one has been ptomaine-poisoned from eating defective food, bought from the manufacturer thereof, and it further appears that such a condition of affairs can be scientifically prevented, and it is not prevented, the law conclusively ascribes a knowledge of the defect to such vendor, and he is liable for damages.

George v. Shreveport Cotton Oil Co. 114 La. 498, 38 So. 432; *Winsor v. Lombard*,

the question of implied warranty on the sale of food. Nor are the cases of liability under the pure food laws within the scope of this note.

On the question indicated, very little authority has been found.

It was declared in an early English decision *arguendo* that "if a man sell victuals

18 Pick. 61; Wallis v. Russell [1904] 2 L. R. 585; Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210; Van Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 339; Houk v. Berg, — Tex. Civ. App. —, 105 S. W. 1176; Hoover v. Peters, 18 Mich. 51; Brenton v. Davis, 8 Blackf. 318, 44 Am. Dec. 769; Kellogg Bridge Co. v. Hamilton, 110 U. S. 114, 28 L. ed. 89, 3 Sup. Ct. Rep. 537; 1 Parsons Contr. § 588, p. 611; 2 Addison, Contr. Morgan's ed. § 621; 1 Page, Contr. § 164; Chitty, Contr. 9th ed. p. 420; Anson, Contr. Knowlton's ed. p. 170, and note; Story, Contr. 1844, § 537; Benjamin, Sales, § 896, and notes (edited by James M. Kerr, 1888); 2 Cooley, Torts, 3d ed. p. 914, and note; McQuaid v. Ross, 85 Wis. 492, 22 L.R.A. 195, 39 Am. St. Rep. 864, 55 N. W. 705; Craft v. Parker, W. & Co. 96 Mich. 245, 21 L.R.A. 139, 55 N. W. 812; Emerson v. Brigham, 6 Am. Dec. 117, note; 15 Am. & Eng. Enc. Law, 2d ed. 1238; 35 Cyc. 407; Passinger v. Thorburn, 34 N. Y. 634, 90 Am. Dec. 753; Williams v. Barton, 13 La. 404; Allen v. Steers, 39 La. Ann. 586, 2 So. 199.

Provosty, J., delivered the opinion of the court:

The defendant keeps a confectionery where refreshments are served to the public, to be consumed on the premises. Plaintiff alleges that he was ptomaine-poisoned from having eaten cakes and chocolate with whipped cream at defendant's establishment, and demands \$750 damages for the sufferings caused by the illness.

The defense is that the said food was wholesome, and plaintiff was not poisoned; but that, if he was, defendant is not responsible, because not guilty of any negligence; and that, at all events, the measure of the damages is simply the restitution of the price.

which is corrupt, without warranty, an action lies, because it is against the commonwealth." Roswel v. Vaughan, Cro. Jac. 196, citing the Year Books, Hen. VI. pl. 53; 7 Hen. IV. pl. 15; 11 Edw. IV. pl. 6.

And it was said that a publican who sold unwholesome food or drink was liable for consequent injuries to a patron. Rolle, Abr. 95, 1 Bl. Com. 430.

In *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154, holding that a public caterer employed to furnish refreshments at a public ball is liable for injuries occasioned by unwholesome provisions furnished by him, the court says that the furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicine, from which a liability springs irrespective of any question of privity of contract between the parties. It was further held that it was not necessary 40 L.R.A. (N.S.)

We agree with the trial court and with the court of appeal in finding that plaintiff was poisoned as alleged. He partook of the said refreshments at about 11 o'clock at night, and, on leaving defendant's establishment, went home and to bed, after having escorted to her home a lady who accompanied him; and at about 5 o'clock the next morning the symptoms of the poisoning manifested themselves. He had taken no other food during that day or the day before except such as all his family had shared with him without being made sick. The lady who accompanied him at defendant's establishment on the occasion in question ate ice cream and cakes, and was, like him, taken sick during the night from ptomaine poisoning.

In proof of absence of negligence on its part, defendant produced its purchasing agent and its head baker and the traders from whom it buys its flour, sugar, eggs, and butter. The clerk testified that he purchased none but the best flour, sugar, eggs, milk, and butter, and that great care was exercised in keeping everything about defendant's establishment clean. The baker testified that he took great care to keep things clean, and that they were kept so. On cross-examination, he said that an investigation had been made of defendant's establishment by the health authorities in the early part of 1909, and that some two months before the time of his testifying the boss had told him of a young man having been made sick. Comparison of dates shows that this young man was not plaintiff, and that the board of health's investigation was some nine months before the poisoning of plaintiff. The traders called as witnesses testified that defendant bought none but the best flour, sugar, eggs, and butter.

This evidence falls short of showing even ordinary care, since it contains not a word

to aver that the defendant knew of the injurious quality of the food, but that it was sufficient if it appeared that he ought to have known of it.

But it is held in *Sheffer v. Willoughby*, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253, that, in order to recover damages from the keeper of a restaurant for injuries resulting from unwholesome food served by him, it must appear that there was negligence on his part; and that the mere fact of the eating of the food and the consequent sickness is not sufficient to make a prima facie case of negligence.

As to criminal liability for adulteration of food by servant, agent, or partner, see the note in 41 L.R.A. 656.

As to whether ignorance that an article furnished as butter is oleomargarin constitutes a defense, see the note in 32 L.R.A. (N.S.) 746.

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touching the time when the particular eggs, milk, cream, and butter served to plaintiff and his lady companion had been bought, or when the ice cream, cakes, and chocolate had been made; so that, for what appears, the materials out of which these refreshments had been made may have had ample time to deteriorate on defendant's hands, and the refreshments themselves may have been of long standing—kept on hand indefinitely until they should be disposed of in due course of business.

The principle which governs in this case is that everyone ought to know the qualities, good or bad, of the things which he fabricates in the exercise of the art, craft, or business of which he makes public profession, and that lack of such knowledge is imputed to him as a fault, which makes him liable to the purchasers of his fabrications for the damage resulting from the vices or defects thereof which he did not make known to them and which they were ignorant of.

This principle obtains both in the civil and the common law, as appears from the excerpts hereinafter given.

It is needless to consider what qualifications or restrictions this principle may suffer in particular cases. Suffice it to say that it has full play in the present case, where chocolate and cakes were sold at a public eating place, to be consumed on the premises. It is easily possible for the keeper of such a place to know in all cases whether the eggs, milk, and butter he sells, or the articles of food he has made out of them, are fresh and fit for human consumption. He is therefore at fault if these articles prove to be vitiated and deleterious.

The measure of damages in a case of this kind, where there was no actual knowledge of the vices of the things sold, but only an imputed knowledge, is not simply reimbursement of the price, as contended by defendant, but liability on the part of the seller for all the damages that were foreseen, or could easily have been foreseen, as likely to result from the putting of the thing sold to the use for which it was sold. This fully appears from the excerpts hereinafter given.

It is common knowledge, to which the keeper of a public eating place must be held, that food in which the process of decomposition has begun is liable to make the person who eats it ill. Indeed, we do not think there can be any serious difference of opinion on the point that an eating establishment which sells unwholesome food to be consumed by its customers must be held to have contemplated the probable effects of such tainted food upon the customer.

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The sole question must then be as to what amount of damages was caused to plaintiff by his illness. He says he was attacked with intense pains in the stomach, with vomiting and great looseness of the bowels; that he tried to get a physician at once, but did not succeed in getting one for two hours; that until the physician came he was badly frightened, thinking himself in danger of death; that he remained in bed that day; that he continued to have pains in his stomach for about a month; that this illness brought on an attack of jaundice which lasted about six weeks.

The physician testified that he found plaintiff prostrated and in a stupor, with small, weak pulse, and that plaintiff was vomiting, and suffering from cramps in the bowels, which seemed to be intense.

The court of appeal allowed \$100 damages.

Excerpts bearing upon imputed fault.

In the case of *McCubbin v. Hastings*, 27 La. Ann. 713, where a druggist's clerk had by mistake sold spirits of camphor instead of camphor water for the purpose of an enema, and the plea of absence of negligence was made, this court said: "It may, however, be assumed that he was competent. The defendant's liability would be none the less certain. The defendant is himself represented as being a most competent druggist. If he had made the mistake, would his proficiency in his calling shield him? Or would it not rather aggravate the fault? Incompetency and carelessness—and such mistakes arise from one or the other of these causes—result in the same way. Either or both produce suffering and sometimes death. And can it be that if a physician should prescribe for his slightly ailing patient a small quantity of calomel and soda, and the druggist were to substitute arsenic for soda, that he could shield himself from the consequences which might result by saying, if the prescription was compounded by himself, that it was a mistake, and, if the act of his servant, that he could not have prevented it? The law does not place a community in the position of being poisoned by mistakes with no one to be held responsible therefor. If it was the master who did the wrong, the master is responsible. If it was his servant who did it, he is still responsible, for the master is responsible for the acts of his servant when done in the course of his usual employment."

From 2 Kent, Com. 588: "Every man is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes, *Spondet peritiam*

artis, and imperitia culpa annumeratur,"—citing Dig. 19, 2, 25, 7.

From Pothier, Vente, § 214: "This is a case where the vendor, although he was entirely ignorant of the vice of the thing sold, is nevertheless bound to repair the damage which this vice may have caused the vendor in his other property; it is the case where the vendor is a workman or a merchant who sells the fabrications of the art or trade of which he makes profession. Such workman or merchant is bound to repair whatever damage the buyer may have suffered from the vice of the thing sold in putting it to the use for which it was intended, even if such workman or merchant would pretend to have been ignorant of said vice.

"The reason is that a workman, by reason of the profession which he makes of being skilled in his craft, *spondet peritiam artis* (makes the solemn promise, or gives the solemn pledge, of his proficiency in his art). He renders himself responsible towards all those who contract with him, for the things he makes being fit for the use to which they are naturally destined. His unskillfulness or lack of knowledge in all that concerns his art is a fault which is imputed to him, as no one should publicly make profession of an art if he is not possessed of all the knowledge necessary for exercising it well; *imperitia culpa annumeratur* (incompetency is reckoned a fault). Dig. L. 132, Reg. Juris."

From Dalloz, Codes Annotés, art. 1645, No. 15, 16: "But there is an hypothesis under which the purchaser will not be required to make this proof" (the proof that the vice was apparent, or that the vendor had knowledge of it). "It is where, by reason of the profession which he exercises, the vendor should have known even the hidden defects of the things he sells."

"Thus, even though the vendor was ignorant of the vices of the thing sold, if by his profession he was bound to know them, he is in fault, and ought to indemnify the purchaser for the damage suffered; good faith does not exclude incompetency,"—citing Aix, 4 Jan. 1872, Dalloz & Journal du Palais, 1873, pt. 2, p. 55; Troplong, Vente, vol. 2, No. 574; Duvergier, Vente, vol. 1, No. 412; Aubry & Rau, Vente, 4th ed. vol. 4, No. 355, bis. p. 389; Gouillouard, 3d ed. vol. 1, No. 462; Baudry-Lacantinerie & Saignat, Vente, No. 436.

This last reference, loc cit., reads as follows: "However, it is generally conceded that the vendor is presumed to know the vices of the thing sold when he is a workman or manufacturer, selling the things of his own fabrication; he ought to know their defects, and, if he makes the sale without

revealing these defects to the purchaser, he ought to repair the damage which the latter may suffer therefrom; he ought to know what he sells, since it is his own production, and, if he does not know it, there is on his part an incompetency which is a professional fault, whereby he is rendered responsible for the damage."

See George v. Shreveport Cotton Oil Co. 114 La. 498-505, 38 So. 432, for a citation from Laurent to same effect.

From Troplong, Vente, art. 1647, C. C. No. 574: "The workman or merchant who sells fabrications of their craft or commerce are assimilated to the person who knows the vices of the thing he sells, and who, by the vice of the thing sold, has caused damage to the purchaser."

In the case of George v. Shreveport Cotton Oil Co. supra, this court had occasion to affirm the doctrine that a manufacturer is conclusively presumed to have known the defects of the things of his own manufacture which he has sold.

That doctrine is well recognized at common law. Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537.

It can be considered to be also well settled at common law that the vendor of articles of food for consumption by the purchaser warrants their wholesomeness. This is shown by the following excerpts:

From Addison on Contracts, Morgan's ed. vol. 2, p. 218, § 621: "Every victualer and dealer in provisions who sells provisions impliedly warrants them to be wholesome and fit for food. If I come to a tavern to eat, and the taverner gives and sells me meat and drink corrupted, whereby I am made sick, an action lies against him without any express warranty, because it is a warranty in law."

And in a note to the above: "In a case of provisions it will readily be presumed that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food for sale implies this, and it may readily be presumed that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, a false and fraudulent representation may readily be presumed. But these reasons do not apply to the case of provisions packed, inspected, and prepared for exportation in large quantities as merchandise,"—per Shaw, Ch. J., in Winsor v. Lombard, 18 Pick. 57.

And see French v. Vining, 102 Mass. 132, 136, 3 Am. Rep. 440; Van Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 339; Marshall v. Peck, 1 Dana, 612; Humphreys

v. Comline, 8 Blackf. 516; *Moses v. Mead*, 1 Denio, 378, 43 Am. Dec. 676; *Hoover v. Peters*, 18 Mich. 51; *Divine v. McCormick*, 50 Barb. 116; *Davis v. Murphy*, 14 Ind. 158; *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 317; *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109. It has been held that there is no implied warranty in selling provisions as articles of merchandise, to one to sell again. *Winsor v. Lombard*, 18 Pick. 57; *Moses v. Mead*, 5 Denio, 617; *Hart v. Wright*, 17 Wend. 267; *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109.

From 22 L.R.A. 195, note: "In the case of the sale of articles of food to be consumed directly in domestic uses, there is, as between the dealer and consumer, an implied warranty that such articles are sound and wholesome,"—citing a long list of cases.

From the note to *Sheffer v. Willoughby*, in 54 Am. St. Rep. 483: "A public caterer employed to furnish refreshments at a public ball is liable for an injury suffered by one attending, by reason of unwholesome provisions furnished by him. *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154. In the sale of provisions for domestic use there is an implied warranty that they are sound and wholesome. *Van Bracklin v. Fonda* (12 Johns. 468), 7 Am. Dec. 339, and note."

It will be noted from the foregoing that the vendor of food to be consumed by the purchaser is conclusively presumed to know the condition of the food he sells, and to represent to the purchaser that such food is wholesome. In other words, the representation which he is thus presumed to make to the purchaser is not merely that he has been careful in the selection, preparation, and preservation of the food, but that the food is, as a matter of fact, wholesome. When, therefore, the food proves to be unwholesome, the warranty is breached, and he is responsible.

Excerpts bearing upon the measure of damages.

From Mourion, arts. 1645, 1646: "A dealer in barrels has sold you a barrel that was defective, but he was ignorant of the defect. He is not guilty of fraud, but he is in fault; for one can easily ascertain the qualities and defects of the things the dealing in which constitutes one's business. In such a case, the vendor owes, in addition to the restitution of price, the damages foreseen, or which could easily have been foreseen, at the time of entering into the contract; for example, the loss of the wine which you have put in the barrel. But he

does not answer for those damages that could not have been foreseen at the time of the contract. So that, if you have put into the barrel a liquor of great value, he owes you only an indemnity equal to the value of ordinary wine to which the barrel was naturally destined."

From Pothier, Obligations, No. 162, Evans's Translation: "Sometimes the debtor is liable for the damages and interests of the creditor, although extrinsic; which is the case when it appears that they were contemplated in the contract, and that the debtor submitted to them either expressly or tacitly, in case of the nonperformance of his obligation. For instance, I sell my horse to a canon, and there is an express clause in the agreement, by which I am obliged to deliver it to him, so that he may arrive at the place of his benefice in time to be entitled to his revenues. If in this case I make default, in discharging my obligation, though without any fraud, and the canon could not either get another horse or any other conveyance, I shall be answerable even for the extrinsic damages arising from the loss of his revenues; for by the clause of the agreement the risk of this damage was foreseen and expressed, and I am deemed to have taken it upon myself.

"So, if I let my house to a person in his quality as a tradesman, or for the purpose of being used as an inn, and the tenant is evicted, the damages and interests, for which I am answerable to him, will not be confined to the expense of removal, and the advance of rents, as in the former instance. The loss of custom, if he cannot meet with any other suitable house in the neighborhood, ought also in some degree to be taken in the account; for having let my house for the purpose of a shop, or an inn, this kind of damage is one whereof the risk is foreseen, and to which I am considered as having tacitly submitted.

"The following is another instance of this distinction: A person sells me some pieces of wood, which I have used to prop my building, and on account of the insufficiency of the props, the building gives way. If the seller was not a person acting in the course of his business, and had fairly sold me these pieces of wood without knowing of their defect, the damages and interests would only consist in a reduction of the price on account of my having given him too much, by buying the wood as good, which was defective, and will not extend to the loss arising from the failure of the building. For the seller, who sold me the wood fairly, and who was not obliged to know any more of it than I, is not deemed to have undertaken this loss. L. 13. ff. de act. empt.

"But if the person who sold me these props acted in the course of his business, and was a carpenter, selling them for the purpose of supporting my building, he will be answerable for my damages and interest arising from the building giving way on account of the insufficiency of the props, and will not be permitted to allege that he thought they were good and sufficient; for, admitting what he says to be true, this ignorance on his part would not be excusable in a person making a public profession of an art; for in this case *imperitia culpa annumeratur*, l. 132. ff. de R. I. In selling me these props, and selling them in his quality of a carpenter, he is held to render himself responsible for their sufficiency, and to have subjected himself to the risk of my building, if they were not so. Melin. tract. de eo quod interest, N. 51."

In the case of Aix, Jan. 1872, Dalloz, Juris. Gen. & Journal du Palais, 1873, pt. 2, p. 55, cited supra, in support of the extract, supra, from Dalloz, Codes Annotés, the court held a merchant who had sold a gun was responsible for the damage caused to the purchaser by the explosion of the gun. From a most learned note to the report of said decision, in Dalloz, we extract the following: "It is impossible not to consider the accident caused by the explosion of the gun as a damage flowing directly from the fault of the seller of the gun."

From 35 Cyc. 443: "The buyer may show not only the diminished value of the goods, but also damage suffered by the breach [of the warranty] in excess of the seller's claim."

From the decisions of the court of appeals of New York in the case of Milburn v. Belloni, 39 N. Y. 53, 100 Am. Dec. 403: "In the recent case of Passinger v. Thorburn, 34 N. Y. 634, 90 Am. Dec. 753, all the cases are reviewed by Judge Davies. There the defendant had sold a quantity of cabbage seed, and had warranted that it would produce Bristol cabbage. It turned out to be seed of an inferior quality, and the crop produced was of little value. Under the ruling of the judge, the jury gave the plaintiff as damages the value of the crop as it would have been if of Bristol cabbage, as ordinarily produced that year, deducting the expense of raising the crop, and deducting the value of the crop actually raised thereupon. This principle was sustained in this court. The case of Smeed v. Foord, 1 El. & El. 602, 28 L. J. Q. B. N. S. 178, 5 Jur. N. S. 291, 7 Week. Rep. 266, laid down the rule that the plaintiff was entitled to recover the damages which are the natural consequence of the breach of the contract. A machine to be used for threshing wheat was not delivered at the

time agreed upon, in consequence of which the wheat was stacked and afterward injured by the rain. This injury, and the loss and expense which it involved, were held to be the natural results of the defendant's delay.

"In *Borradaile v. Brunton*, 8 Taunt. 535, the loss of the anchor was held to be a natural result of the insufficiency of a cable sold for holding an anchor, and warranted to last for two years.

"In *Brown v. Edgington*, 2 Mann. & G. 279, the loss of a pipe of wine by the breaking of a rope attached to a crane, sold for that use, was held to fall properly within the scope of damages for selling an insufficient rope to be used upon such crane."

From *Parsons on Contracts*, 9th ed. vol. 1, *593: "The general rule of the amount of damage would be the price paid if the would be the difference between the price paid and the actual value. But if further damage resulted directly from the breach of warranty, that, too, would be recovered. Thus one selling coal dust to be used in making brick, and warranting it free from soft coal, was held responsible for the damage done to the bricks by the soft coal dust in that which was sold. *Milburn v. Belloni*, 39 N. Y. 53, 100 Am. Dec. 403."

From 15 Am. & Eng. Enc. Law, 2d ed. 1259: "While . . . the ordinary measure of damages applying to warranties of personal property is the difference between the actual value of the articles sold and their value if they had been such as warranted, additional damages may be recovered for breach of the implied warranty of quality, if they are such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract, when they are such as might naturally be expected to follow its violation, and when they are capable of being definitely ascertained."

It is therefore ordered, adjudged, and decreed that the judgment of the Court of Appeal be affirmed. Defendant to pay all costs.

MINNESOTA SUPREME COURT.

JOSEPH H. JONES, Respt.,
v.

TRI-STATE TELEPHONE & TELEGRAPH
COMPANY, Impleaded, etc., Appt.

(118 Minn. 217, 136 N. W. 741.)

Master and servant — negligent use of
X-ray — liability.

1. Plaintiff was injured while in the em-

Headnotes by BUNN, J.

ploy of defendant, and defendant, for its own purposes, employed a doctor to take an X-ray picture of plaintiff's injury. Plaintiff protested against this, but finally consented. An attempt to take the picture resulted in injury to plaintiff. In this action to recover for such injury it is held that in exposing plaintiff to the X-ray the physician was the agent or servant of defendant, and the rule of *respondet superior* applies.

Same — negligence — *res ipsa loquitur*.

2. The instrumentality being entirely under control of defendant, there being evidence that with proper instrumentalities and proper care the exposure to the X-ray does not result in injury to the subject, and evidence that such injury did so result in this case, the rule of *res ipsa loquitur* applies, and defendant failed to show conclusively that it was not negligent.

((June 14, 1912.))

APPEAL by defendant from a judgment of the District Court for Hennepin County, denying its motion for judgment notwithstanding a verdict in plaintiff's favor in an action brought to recover damages for injuries sustained from exposure of plaintiff's person to the X-ray. Affirmed.

The facts are stated in the opinion.

Messrs Harlan P. Roberts and Walter S. Chase, for appellant:

When the company or the master has acted with reasonable prudence and care, it

Note. — Liability of master for negligence of physician or surgeon employed at the master's expense to attend servant.

As to liability for negligence of attendants furnished by a relief department towards which employees contributed, see notes to Phillips v. St. Louis & S. F. R. Co. 17 L.R.A.(N.S.) 1167, and Texas C. R. Co. v. Zumwalt, 30 L.R.A.(N.S.) 1207. And as to liability in general of charitable institutions, for personal injury, see notes to Farrigan v. Pevear, 7 L.R.A.(N.S.) 481; Bruce v. Central M. E. Church, 10 L.R.A.(N.S.) 74; Thornton v. Franklin Square House, 22 L.R.A.(N.S.) 486; and Hordern v. Salvation Army, 32 L.R.A.(N.S.) 62.

The earlier cases upon the question now under annotation in the present note are treated on pages 66, 67, and 68 of 4 L.R.A.(N.S.), the present annotation merely including cases decided subsequently to the compilation of the earlier note.

The statement in the note in 4 L.R.A.(N.S.) 66, to the effect that the general doctrine that a master cannot be held liable for the defaults of a physician or a surgeon whom he employs to treat a sick or injured servant unless he has himself been guilty of negligence in respect to the selection of such physician or surgeon is applicable to cases where the medical at-

tendance is voluntarily furnished by the master at his own expense, finds support in Atlantic Coast Line R. Co. v. Whitney, — Fla. —, 56 So. 937, wherein it was held that in order to recover in an action by a servant for injuries by malpractice by a physician employed by the railroad company, the evidence must show either actual knowledge of the unfitness of the surgeon selected or retained by the railroad company, or that his general reputation was so bad that the law will impute knowledge thereof.

26 Cyc. 1077; Wood v. Chicago, St. P. M. & O. R. Co. 66 Minn. 49, 68 N. W. 462; Murphy v. Great Northern R. Co. 68 Minn. 526, 71 N. W. 662; McKee v. Chicago, R. I. & P. R. Co. 83 Iowa, 616, 13 L.R.A. 817, 50 N. W. 209; Dures v. Chicago, M. & St. P. R. Co. 118 Iowa, 640, 92 N. W. 890; Wabash, St. L. & P. R. Co. v. Locke, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391; Hammack v. White, 11 C. B. N. S. 588, 31 L. J. C. P. N. S. 129, 8 Jur. N. S. 796, 5 L. T. N. S. 676, 10 Week. Rep. 230; Baker v. Fehr, 97 Pa. 72; Nolan v. Shickle, 3 Mo. App. 300; Schultz v. Pacific R. Co. 36 Mo. 32; Standard Oil Co. v. Helmick, 148 Ind. 457, 47 N. E. 14; Erb v. Eggleston, 41 Neb. 860, 60 N. W. 98; McGowan v. Chicago & N. W. R. Co. 91 Wis. 147, 64 N. W. 891; Richards v. Rough, 53 Mich. 212, 18 N. W. 785; Koontz v. Chicago, R. I. & P. R. Co. 65 Iowa, 224, 54 Am. Rep. 5, 21 N. W. 577.

For an injury which results from pure accident, or from causes which could not be reasonably anticipated, unaccompanied by want of ordinary care on the part of the master, he is not liable.

26 Cyc. 1092; Murphy v. Great Northern R. Co. 68 Minn. 526, 71 N. W. 662; Fifer v. Burch, 68 Neb. 217, 94 N. W. 107; Crowley v. Appleton, 148 Mass. 98, 18 N. E.

tendance is voluntarily furnished by the master at his own expense, finds support in Atlantic Coast Line R. Co. v. Whitney, — Fla. —, 56 So. 937, wherein it was held that in order to recover in an action by a servant for injuries by malpractice by a physician employed by the railroad company, the evidence must show either actual knowledge of the unfitness of the surgeon selected or retained by the railroad company, or that his general reputation was so bad that the law will impute knowledge thereof.

JONES v. TRI-STATE TELEPH. & TELEG. CO. is an unusual case, in that the railroad company obviously employed the physician to protect its own interests rather than for the benefit of the injured employee. This, of course, clearly distinguished it from those cases which adhere to the general rule.

As to liability of master for medical attendance engaged by employee, who, by the contract of employment, was entitled to such attendance, see note to Jackson v. Pacific Coast Condensed Milk Co. 37 L.R.A.(N.S.) 757. And as to implied power of employee to employ physician to attend injured employee, see note to Atlantic Refining Co. v. Leffingwell, 34 L.R.A.(N.S.) 351. And as to liability of master for services of physician whom he summons to care for employee, see note to Norton v. Rourke, 18 L.R.A.(N.S.) 174. G. J. C.

675; Cox v. Chicago & N. W. R. Co. 102 Iowa, 711, 72 N. W. 301; Kelsey v. Chicago & N. W. R. Co. 106 Iowa, 253, 76 N. W. 670; Smith v. Chicago, R. I. & P. R. Co. 99 Iowa, 617, 68 N. W. 908; O'Reilly v. Bowker Fertilizer Co. 174 Mass. 202, 54 N. E. 534; Acme Coal Co. v. Kusnir, 71 Ill. App. 446; Independent Tug Line v. Jacobson, 84 Ill. App. 684; Webster Mfg. Co. v. Nisbett, 87 Ill. App. 551; Moore v. Great Northern R. Co. 67 Minn. 394, 69 N. W. 1103; Jenkins v. St. Paul City R. Co. 105 Minn. 504, 20 L.R.A.(N.S.) 401, 117 N. W. 928; Koralewski v. Great Northern R. Co. 85 Minn. 140, 88 N. W. 410.

One who voluntarily assumes the position of danger, the outcome of which he understands and appreciates, cannot recover for resulting injury.

29 Cyc. 519; Wiethoff v. Shedden Cartage Co. 142 Mich. 264, 105 N. W. 748; Arzt v. Lit, 198 Pa. 519, 48 Atl. 297; Harff v. Green, 168 Mo. 308, 67 S. W. 576; Smith v. Day, 117 Fed. 956; Wherry v. Duluth, M. & N. R. Co. 64 Minn. 415, 67 N. W. 223.

Mr. Arthur M. Higgins, with Mr. M. C. Brady, for respondent:

The operator of the X-ray machine was an agent of the defendant company, and for his negligence the company is responsible.

Hall v. Smith, 2 Bing. 156, 2 L. J. C. P. 113, 9 J. B. Moore, 226; Pollock, Torts, 72; Union P. R. Co. v. Artist, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; Richardson v. Carbon Hill Coal Co. 6 Wash. 52, 20 L.R.A. 338, 32 Pac. 1012; Shearm. & Redf. Neg. 331; 9 Am. & Eng. Enc. Law, 772, note; Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675; Haggerty v. St. Louis, K. & N. W. R. Co. 100 Mo. App. 424, 74 S. W. 456; Sawdey v. Spokane Falls & N. R. Co. 30 Wash. 349, 94 Am. St. Rep. 880, 70 Pac. 972; Landon v. Humphrey, 9 Conn. 209, 23 Am. Dec. 333; Texas & P. Coal Co. v. Connaughten, 20 Tex. Civ. App. 642, 50 S. W. 173.

The doctrine of *res ipsa loquitur* applies.

Olson v. Great Northern R. Co. 68 Minn. 155, 71 N. W. 5; Shockley v. Tucker, 127 Iowa, 456, 103 N. W. 360.

Bunn, J., delivered the opinion of the court:

This is an appeal by defendant Telephone Company from a judgment against it after a verdict in favor of plaintiff, and a denial by the trial court of defendant's motion for judgment notwithstanding the verdict. There was no motion for a new trial, and therefore we need only consider whether there was evidence tending to support a verdict for plaintiff.
40 L.R.A.(N.S.)

The somewhat unusual facts may be briefly stated as follows: Plaintiff was in the employ of defendant Telephone Company as a lineman. October 19, 1910, while in the performance of his duties, he received an injury. A physician was called who diagnosed the case as a displacement of the sacro-iliac joint, and used heroic treatment that is claimed to have resulted in forcing the joint into place. Plaintiff was making good progress toward recovery, when the general manager of defendant requested him to submit to an X-ray picture being taken. Plaintiff opposed this, expressing his fear of injurious consequences, assuring defendant's manager he was all right, and offering to release defendant from all claims for damages on account of the injury. Plaintiff's physician also opposed the taking of the X-ray picture. But the manager guaranteed that the taking of the picture would not injure plaintiff, and threatened to discharge him if he refused to submit. After a good deal of hesitation and resistance, plaintiff finally consented that the picture might be taken, and on December 5, 1910, he was taken by defendant's manager to the office of Dr. Roberts, who applied the X-ray over the abdomen for the purpose of taking a picture of the sacro-iliac joint. Dr. Roberts was employed by defendant for the purpose of taking the picture. Plaintiff testified that the current was left turned on for more than seven minutes. He claims to have received a severe burning of the tissues by the application of the X-ray, and, as a result, to be suffering from paralysis of the bowels.

The relation of physician and patient did not exist between Dr. Roberts and plaintiff. The doctor was the servant of defendant. The case is the same, therefore, as if defendant's manager, or any other agent or employee, had inflicted the injury, and the rule of *respondet superior* applies, rather than the law relative to the liability of a physician or surgeon to his patient, or to the liability of a master who employs a physician to treat his servant. There can be no doubt that defendant wanted the picture for its own purposes; probably as evidence in case plaintiff should bring suit against it to recover for the injury received in the accident.

It is quite clear to us that it was a case for the jury. It is not necessary to determine the effect of the manager's guaranty of safety on the liability of defendant. The instrumentality was under the exclusive control of defendant, and there is sufficient evidence that injury to the

subject is not a necessary result of the taking of an X-ray picture, if proper instrumentalities and proper care are used. Certainly we cannot say that plaintiff's injuries were not the result of the exposure. These facts are enough to make the case one of *res ipsa loquitur*, and to make the burden on defendant to show that there was no negligence. Defendant did not show this, at least conclusively. Indeed, there was sufficient evidence of negligence, even without the *res ipsa* rule, to make a case for the jury.

Judgment affirmed.

NORTH CAROLINA SUPREME COURT.

P. J. HUNEYCUTT & COMPANY

v.

WILLIAM THOMPSON, Appt.

(— N. C. —, 74 S. E. 628.)

Parent and child — liability for burial expenses — child driven from home.

That a father has driven his minor child from home, and permitted it to enjoy its own earnings, does not relieve him from liability for its burial expenses.

(April 7, 1912.)

Note. — Liability of parent for necessities furnished minor child who is living away from the parent's home.

For cases on the criminal responsibility of parents for failure to support child, where support is furnished by others, see the note to *State v. Thornton*, 32 L.R.A. (N.S.) 841.

This note does not include cases after a divorce, or where there is a legal or other separation of the parents. For recovery by mother against father for money expended in support of children, see the note to *De Brauwere v. De Brauwere*, 38 L.R.A. (N.S.) 508.

As to the right of one who employs minor without parent's consent, to allowance on account of expenditures for necessities, see the note to *Culberson v. Alabama Constr. Co.* 9 L.R.A. (N.S.) 411.

For parent's duty to support child, as affected by child's interest in trust estate or other property, see the note to *National Valley Bank v. Hancock*, 57 L.R.A. 728.

Upon the question of the lack of parent or guardian, as enlarging infant's capacity to contract for other than necessities, see the note to *Wickham v. Torley*, 36 L.R.A. (N.S.) 57.

It is the doctrine of the English cases that there is no legal common-law duty of a father to furnish necessities for his child, and that he will not be liable for such furnished without authority, or a promise,

APPEAL by defendant from a judgment of the Superior Court for Stanley County in plaintiff's favor in an action brought to recover an amount alleged to be due for burial expenses of defendant's son. Affirmed.

Statement by Allen, J.:

This action is to recover \$40, alleged to be due the plaintiff for the burial expenses of the son of the defendant. The son was a minor, and was living apart from the defendant at the time of his death, and was in the enjoyment of his own earnings; but the plaintiff offered evidence tending to prove that the defendant wrongfully drove him from home. It was in the evidence that the son owned personal property of the value of \$60 or \$70, which was disposed of by his relations; and there was no evidence that the defendant expressly authorized the expense incurred. At the conclusion of the evidence, the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted. Exceptions were also taken to the charge of his Honor; but they are all involved in the motion for judgment of nonsuit.

The following verdict was returned by the jury:

"(1) Had the deceased, William Thomp-

express or implied, and that the authority or promise will not be implied from mere exigency or destitution.

In America some of the cases incline to the English doctrine; others, while holding that the only liability rests on authority or promise, will imply such authority or promise from the exigency of the case alone; and still others hold directly that there is a legal liability of the father to maintain his child.

There are comparatively few cases in the books where the question of the father's liability has been squarely presented without evidence of express or implied authority or promise outside the exigency of the occasion. But the inviting nature of the subject has produced a great amount of *obiter* opinions. So the law in a number of jurisdictions seems to oscillate between the wide extremes of the personal views of the judges writing the opinions.

Besides *P. J. HUNEYCUTT & Co. v. THOMPSON*, the only case in which the question seems to have been raised of the liability of the parent for the funeral expenses of a child living apart from him is *Gobber v. Empting*, 72 Misc. 10, 129 N. Y. Supp. 4, where, in holding that a father was liable for the general expenses of an infant son, although the parents were separated, and the son was living with his mother, who was receiving a small temporary alimony in a pending separation suit, the court said: "It appears that the child was about

son, Jr., been emancipated by his father, and was he still emancipated at the time of his death? Answer: No.

"(2) In what amount, if any, is the defendant indebted to the plaintiff? Answer: Thirty-five dollars."

Judgment was entered on the verdict in favor of the plaintiff, and the defendant appealed.

Messrs. I. R. Burleyson and R. L. Smith, for appellant.

Defendant was not liable for the burial expenses of his son, who had been completely emancipated.

Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499; Chaloux v. International Paper Co. 75 N. H. 281, 139 Am. St. Rep.

694, 73 Atl. 301; Brown v. Ramsay, 29 N. J. L. 117; Farrell v. Farrell, 3 Houst. (Del.) 633; Vance v. Calhoun, 113 Am. St. Rep. 116, note; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Southern R. Co. v. Flemister, 120 Ga. 524, 48 S. E. 160; Lackman v. Wood, 25 Cal. 147; Everitt v. Walker, 109 N. C. 129, 13 S. E. 860; Keaton v. Davis, 18 Ga. 457; 21 Am. & Eng. Enc. Law, 2d ed. 1053; Manning v. Wells, 8 Misc. 646, 29 N. Y. Supp. 1044.

Mr. A. C. Huneycutt, for appellee:

A parent is responsible for reasonable burial expenses of his minor child who has been by himself driven away from home.

Rowe v. Raper, 23 Ind. App. 27, 77

one year old, and was residing with the mother, who was residing apart from the defendant. . . . Passing over the question as to whether the wife was justified in leaving her husband, and as to his liability for the burial as for a necessity for the wife, I think that the husband was liable, on the theory that he is liable for the funeral expenses of a minor child, and that, if the child is not living with him, anyone furnishing a burial for the child can recover from the father the reasonable value of the services and for materials furnished. In his work on Domestic Relations, Mr. Schouler states the rule as follows (5th ed. § 242): 'Liability for minor child's funeral expenses.—A father is, in general, liable for the decent funeral expenses of his deceased minor child.' Here the father and mother were living separate and apart. The child of only one year old could not be well separated from the mother."

Abandonment or driving child away.

It will be seen that in P. J. HUNEYCUTT & Co. v. THOMPSON, the decision is put upon the ground that the absence of the child was because the father had driven him from home.

"If a father abandon his duty to his infant child, so that he is forced to leave his house, he is liable for a suitable maintenance." Owen v. White, 5 Port. (Ala.) 435, 30 Am. Dec. 572 (*obiter*).

In Stanton v. Willson, 3 Day, 37, 3 Am. Dec. 255, a father was held liable for support and education furnished by a stranger to his child, who had fled on account of fear of personal violence. The court said: "If it is admitted, that 'he eloped from his father for fear of personal violence and abuse, and could not with safety live with him,' every reason for the rule that can be given ceased to operate. . . . Because the father has abandoned his duty and trust, by putting the child out of his protection, he cannot thereby exonerate himself from its maintenance, education, and support. The duty remains, and the law will enforce its performance, or there must

be a failure of justice. The infant cast on the world must seek protection and safety where it can be found; and where with more propriety can it apply than to the next friend, nearest relative, and such as are most interested in its safety and happiness? The father, having forced his child abroad to seek a sustenance under such circumstances, sends a credit along with him, and shall not be permitted to say it was furnished without his consent, or against his will." The rule referred to by the court is that minors under the government of parents cannot bind their parents for necessities without their consent.

In Finn v. Adams, 138 Mich. 258, 101 N. W. 533, 4 Ann. Cas. 1186, it was held that a man who had been sentenced to state prison for life was under legal obligation to furnish his minor son with the necessities of life. The court said: "While the authorities are not fully agreed, we think the better rule is that, where the duty to maintain one's children is made a legal duty by statute, as by our statute (§ 4495, 2 Comp. Laws), the same agency to bind the father for necessities is to be implied where there is a total abandonment of a minor child, incapable of supporting himself, as is implied in the wife on desertion by her husband."

An implied promise to pay for necessities consisting of bread and lodging, clothing and personal care furnished a child without the physical ability of providing himself with the necessities of life, is raised by the fact that the father had abandoned and repudiated the child, and had been notified of the whereabouts and the necessities of the child before the supplies in question were furnished. Manning v. Wells, 85 Hun, 27, 32 N. Y. Supp. 601, where the court said, referring to the authorities, that one class held "that, independent of statute, a parent is not liable for necessities furnished his infant child, while another class holds that a person furnishing such necessities may recover of the parent therefor. The principle upon which the latter proceeds is that, as a parent is under a natural obligation to fur-

Am. St. Rep. 411, 54 N. E. 770; 29 Cyc. 1608-1610; Long, Dom. Rel. 316; Sullivan v. Horner, 41 N. J. Eq. 299, 7 Atl. 411; Porter v. Powell, 79 Iowa, 151, 7 L.R.A. 176, 18 Am. St. Rep. 353, 44 N. W. 295.

Allen, J., delivered the opinion of the court:

It is conceded, on the one hand, that the defendant would have been liable for the burial expenses of his son, a minor, incurred without his express authority, if the son had been living with the defendant at the time of his death; and, on the other, that there is no liability if the son left the home of the father voluntarily, and without fault on the part of the fa-

ther. The point in debate, therefore, is whether the defendant can avoid liability when he has wrongfully driven his child from home.

The position taken by the defendant's counsel is sound, that "if a father neglects and refuses to support or maintain his son during his minority, and denies him a home, so that he is forced to labor abroad and procure a living for himself, he is not entitled to the earnings of such son, as, under such circumstances, the law will imply that the father has emancipated his son from his service, and conceded to him the right to enjoy the fruits of his own labor;" but it does not necessarily follow that the father is relieved from all responsibility, because he has

nish necessities for his infant children, if he neglects that duty a person who supplies such necessities is deemed to have conferred a benefit upon the delinquent parent for which the law raises an implied promise on his part to pay. If the latter doctrine is correct, it would follow that the plaintiff's complaint is sufficient, as it shows a clear and palpable omission of duty in that respect on the part of the defendant. Without discussing in detail or attempting to harmonize the various opinions that have been expressed upon this question, we are disposed to hold that upon the facts alleged in the complaint the law raised an implied promise on the part of the defendant to pay for the necessities furnished his infant son. . . . In view of the fact that the plaintiff at once notified the defendant that his son was at the plaintiff's house in a destitute condition, and without the physical ability to provide himself with the necessities of life, as was alleged in the complaint and admitted by the demurrer, under all the cases it must be held that an implied promise on the part of the defendant to pay for the necessities thus furnished arose. In such a case very slight evidence would be sufficient from which to infer such a promise by the parent."

Voluntary absence.

The cases concerning expenses of illness generally present the legal question of the parent's liability more clearly and directly than where the expense is of a different nature. In most of the American cases the question is treated as one of the extent of the emancipation.

Where the defendant's son, while working for the plaintiff with his father's consent, broke his leg, and the plaintiff took him to his house, and the next day notified the defendant to come and care for him, which the defendant refused to do, saying the county would have to care for him, and the plaintiff then told the defendant that if the boy remained at his house, he would care for him and look to the plaintiff for the expense of it, it was held that "the

parent is bound for necessities furnished his minor child, if the parent refuses to furnish them when the child is living apart from the parent, with his consent." *De Wane v. Hansow*, 58 Ill. App. 575.

In *Porter v. Powell*, 79 Iowa, 151, 7 L.R.A. 176, 18 Am. St. Rep. 353, 44 N. W. 295, it was held that a father was liable for a physician's services to his minor daughter, seventeen years of age, attacked with typhoid fever, 30 miles away from her father's house, at a place where she had resided for three years, earning and controlling her own wages, and providing herself with clothing, the father not furnishing or agreeing with his daughter to furnish her with any money, or means of support, but consenting to her absence from home. The court said: "In our view, there was, at most, but a partial emancipation,—an emancipation from service for an indefinite time. The father had a right at any time to require the daughter to return to his home and service; and she had a right at any time to return to his service, and to claim his care, custody, control, and support. There was no such an emancipation as exempted the father from liability for actual necessities furnished to his daughter. In view of the legal as well as the moral duty of appellant to furnish necessary support to his daughter during minority, and especially when unable, from infancy, disease, or accident, to earn her own necessary support, we think he may well be understood as promising payment to any third person for actual necessities furnished to her. . . . He had not relieved himself from the duty to furnish her such support, and, from his obligation to do so, may be presumed to have promised payment to anyone who did furnish it in his absence."

In *Kubic v. Zemke*, 105 Iowa, 269, 74 N. W. 748, where a boy of fifteen, who was living with the plaintiff, became sick, the plaintiff paid the expenses of his illness, and having sued the father for them, the trial court directed a verdict for the plaintiff. But, on appeal, this was set aside on the ground that it was a question of eman-

lost the right to control the earnings of his son.

The objection to such a conclusion is that it would permit the father to take advantage of his own wrongful act, and to relieve himself from responsibility by conduct which the law condemns; and, in our opinion, the charge of his Honor was a clear and accurate statement of the law. He said: "The mere fact that a child is living away from home, with the consent of the parent, does not relieve the parent from liability for necessities furnished to the child, and the parent is liable, where his misconduct or abuse has driven the child to leave him; but ordinarily, where there is no fault upon the part of the parent, a child who voluntarily

abandons the parent's home, for the purpose of seeking its fortune in the world, or to avoid parental discipline and restraint, forfeits the claim to support, and the parent is under no obligation to pay therefor. A boy may be emancipated for some purposes, and may not be emancipated for others. There may be a total emancipation or a partial emancipation. If the plaintiff's contention is true in this case, the father ran the boy off and permitted him to go to work, and to earn wages and to collect his money. That would be an emancipation for certain purposes. That would authorize the boy to make contracts, collect the money, and spend the money. The father couldn't then come and collect his money. That

cipation, on which the burden of proof rested upon the father, and he should have an opportunity to show it.

But where the child goes across the continent as his own master, the father will not be liable. Thus, in *Johnson v. Gibson*, 4 E. D. Smith, 231, a minor who had been living in his father's family in the East, but receiving his own wages, departed for California. His father advanced him money for his passage, but neither received his earnings nor provided for his support abroad. While in California he was taken sick and was nursed by the assignor of the plaintiff, and it was held upon the whole case that there was evidence sufficient to warrant the conclusion that the father had waived his son's earnings, and that he was not responsible for his son's necessities for this reason.

So, in *Brosius v. Barker*, 154 Mo. App. 657, 136 S. W. 18, where the plaintiff, a physician, had rendered medical services to the defendant's son, ill of typhoid fever, in Oregon, and had guaranteed or assumed the hospital charges, of which he had an assignment, the father being resident in Missouri, the court said: "We hold that where the child who is physically and mentally able to take care of himself has voluntarily abandoned the parental roof and turned his back to its protection and influence, and has gone out to fight the battle of life on his own account, the parent is under no obligation to support him. . . . The plaintiff claims he had no knowledge of the fact that the son was no longer under parental control, and for that reason the emancipation defense cannot be made against his claim. We have been unable to find any authorities supporting appellant's contention. . . . In this case, the plaintiff knew, at the time the defendant's son applied to him for assistance, that the boy was not living with his parent. He was informed that the father lived in this state, and therefore, it seems to us that the arrangement between the father and son, under which the boy had left home, was a matter plaintiff should have inquired into before rendering the

services to the boy on the credit of the father."

The English rule was enforced in *Mortimore v. Wright*, 6 Mees. & W. 482, 9 L. J. Exch. N. S. 158, 4 Jur. 465, where the son, for the last two and a half years of his minority, lodged with the plaintiff, having an occupation for which he received about a pound a week, and paid his board, but for the last six or seven months of his minority he was not able, through illness, to pursue his usual occupation, and was supplied with board and the necessities of his illness by the plaintiff. It was held that his father was not liable to the plaintiff therefor.

But if the son returns home and is treated in illness by a physician, with his father's knowledge, while again a member of the family, the father will be liable for the services. *Deane v. Annis*, 14 Me. 26; *Swain v. Tyler*, 26 Vt. 9.

So, on the other hand, the father will not be liable where the credit is given only to the son. Thus, where a son was taken ill while in the service of the plaintiff, under a contract between them that the plaintiff should pay him his wages, and the father, at the request of the plaintiff, had relinquished to the son by a written instrument all claim for his services, authorizing him to contract for himself, and stating that he would pay no debts incurred by the son, and the plaintiff's account for the expenses of the son's illness was charged to the son, it was held that the father was not liable for such expenses, as the credit was given entirely to the son. *Varney v. Young*, 11 Vt. 258.

The cases where expenses other than those of illness are concerned vary so much in the particular circumstances that it is not easy, considering the diverse and often shifting views of the general liability of the parent for necessities, to formulate general rules on the subject. But it is generally conceded that the parent is not liable for the ordinary expenses of his child who lives away from home and is self-supporting. *Gotts v. Clark*, 78 Ill. 229; *Coop-*

would be an emancipation for that purpose. But if the father was in fault, if he ran the boy off from home, then there could be no emancipation which would relieve the father from the duty of providing necessities for the son, in the event he was down sick and died. I charge you that if the plaintiff has satisfied you by the greater weight of the evidence that the defendant drove his young son, William Thompson, away from his home, you will answer the first issue, 'No.' The first issue is: 'Had the deceased, William Thompson, Jr., been emancipated by his father, and was he still emancipated at the time of his death?' So, then, if you find

from this evidence, and by the greater weight of it, that his father drove him away from home, and he remained away, according to the evidence, twelve months or sixteen months, or whatever you may find to be the time, and was taken sick and died, your answer to the first issue will be, 'No,' because that didn't emancipate, didn't relieve the father from his duty to look after and protect and care for his son, because he was in fault, if you find that he ran him away from home. But if you find that the boy left of his own volition, because he wanted to go, because he was tired of home and wished to escape parental control and correction

er v. McNamara, 92 Iowa, 243, 60 N. W. 522; Weeks v. Morrow, 40 Me. 151 (where, however, it is not clear whether the minor received his own wages); Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499; Raymond v. Loyl, 10 Barb. 483.

Where the action was founded on an account which the plaintiff had against the defendant for necessary articles of clothing, which he had furnished to the defendant's minor daughter while she was at work for him (with the defendant's consent), beyond the price of her labor, and there was no proof that the defendant had relinquished his right to the earnings of his daughter, or that he consented to her buying any of the articles of clothing of the plaintiff, or that the defendant had neglected to furnish her with clothing necessary and proper for her condition in life, it was held that there could be no recovery, as the defendant gave his daughter no authority to procure the clothing, and the plaintiff had none from the defendant to let her have any; and also there was no omission of duty on the part of the defendant as to furnishing his daughter with all necessary clothing. Clinton v. Rowland, 24 Barb. 634.

In Gordon v. Potter, 17 Vt. 348, where a boy, with the consent of his father, who allowed him part of his earnings, worked away from home, it was held that the father would not be liable for clothes furnished his son without some authority from him, express or implied; and the court seemed to be of the opinion that no authority would be implied from absolute destitution.

So, where the minor is away without the parent's consent, the parent is, in general, not liable for necessities furnished. Miller v. Davis, 49 Ill. App. 377, where the court said: "Where the child resides away from home without the consent of the parent, in order to hold the parent for goods furnished, an express promise must be proven, or the facts and circumstances must be such that a promise can be inferred. There is a difference between circumstances from which a promise may be inferred, and circumstances that would lead a reasonable man to believe the goods would be paid for. Parents often pay debts improvidently made 40 L.R.A. (N.S.)

by children when there is no legal obligation to do so. It is sometimes done from a spirit of pride, and sometimes to prevent unpleasant consequences following the child. Under such circumstances a reasonable man would be led to infer that the parent would pay."

"If a child leave his father's house, to seek his fortune in the world, or avoid domestic discipline and restraint, or escape from justice, the authority of the father to purchase necessities is not implied." Owen v. Wright, 5 Port. (Ala.) 435, 30 Am. Dec. 572 (*obiter*).

In Carney v. Barrett, 4 Or. 171, where the defendant engaged board for his son at the plaintiff's hotel, and after paying for the same for two weeks, he told the landlord that he would not be responsible for his son's board any longer, and to put him out of the hotel, it was held that the defendant was not liable for any further board for his son.

In Schnuckle v. Bierman, 89 Ill. 454, it was held that where a daughter leaves her father's house without cause, and is sequestered by a neighbor, the neighbor cannot recover for her board.

But a girl between eight and nine years of age is subject to the parents' will, and does not forfeit her claim to support by voluntarily remaining away from her father's house, against his will. Bradley v. Keen, 101 Ill. App. 519.

In Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118, an action against a father for necessities furnished in a foreign country to a son, who was a fugitive from the justice of his native country, the court said: "The father is obliged to support his children while they remain part of his family. Perhaps if he fail to furnish them with clothing and food necessary for the support of life, anyone who furnished such necessities may maintain an action against the father, upon the presumption of an assent on his part. Perhaps, also, if he cruelly and causelessly turn them out of doors, they would carry with them a credit on the father for the means of support. . . . However this may be, we think it clear that, when a child leaves his parent's house voluntarily, for the purpose of seeking his

and seek his fortune in life for himself, and was earning money, and had on hand at the time of his death this buggy, which sold for \$37.50, according to the testimony, and the watch, which sold for \$5, and this balance in the hands of Mr. Efrd of \$16.20, then you would find, gentlemen, the answer to this first issue to be 'Yes.'"

The authorities are not uniform on this question; but they fully sustain the charge. 2 Kent, Com. 193; Tyler, Infancy, 114; 29 Cyc. 1609; Owen v. White, 5 Port. (Ala.) 435, 30 Am. Dec. 573; Weeks v. Merrow, 40 Me. 151; Bennett v. Gillette, 74 Am. Dec. note on page 782.

In 2 Kent, supra, the author says: "If

fortune in the world, or to avoid the discipline and restraint so necessary for the due regulation of families, he carries with him no credit; and the parent is under no obligation to pay for his support."

In Hunt v. Thompson, 4 Ill. 179, 36 Am. Dec. 538, an action for clothes furnished a minor son, it was held that it was not reasonable to presume that a father, because he allowed a son between fifteen and eighteen years of age to visit friends in another state, also gave him authority to take board at a tavern for five or six months, and until he should outgrow his clothes or wear them out, and then purchase others at will; the court stating that those who supply the infant must know of his relations with his father.

Knowledge of the relations between the parent and the child which is required of one supplying the child, in Hunt v. Thompson, supra, and Brosius v. Barker, 154 Mo. App. 657, 136 S. W. 18, has been held not to be required in a case where there had been an agency, as the continuance of that might be presumed until actual or constructive notice was received of its termination. Murphy v. Ottenheimer, 84 Ill. 39, 25 Am. Rep. 424.

The question whether the child had the parent's authority for a course of conduct which made necessary the incurring of the obligation in question is sometimes one of ordinary business agency. Thus, in Bushnell v. Bishop Hill Colony, 28 Ill. 204, where articles had been ordered for a farm, the question was simply one of fact whether a young man under twenty-one was carrying on a farm on his own account, his mother keeping house for him, or whether they were cultivating and conducting the farm for the benefit of the father, who owned it and lived in another state.

But a son supplied with expenses for a week or ten days, and sent to London to look out for a ship, may not bind his father for his board during an indefinite stay without authority. Shelton v. Springett, 20 Eng. L. & Eq. Rep. 281.

Miscellaneous.

Where a man abandoned his wife and daughter, the wife took shelter in the alms-
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a father suffers the children to remain abroad with their mother, or if he forces them from home by severe usage, he is liable for their necessities."

In Tyler on Infancy, supra: "If the parent turn away his child from home, or so cruelly treat him that he cannot remain under the parental roof, or abandon him without adequate provision, the rule is well settled that such parent may be made to pay for necessities furnished such infant child."

In Cyc. supra: "The mere fact that a child is living away from home, with the consent of the parent, does not relieve the latter from liability for necessities fur-

house, and the daughter was for many years supported by her grandmother. After the father's decease an application was made in equity by his representatives to be relieved of a judgment in favor of the personal representatives of the grandmother, for the daughter's support, and it was held that equity would not interfere. Tomkins v. Tomkins, 11 N. J. Eq. 512.

While children at school are not within the scope of this note, reference may be made here to Parker v. Tillinghast, 19 Abb. N. C. 190, where a resident of New York placed his minor son at school in New Hampshire, and the boy, who (stated that he) had only a thin overcoat, and had outgrown his other clothes, ordered clothes of the plaintiff; and the court, in holding that the question of the father's liability was one for the jury, stated that the boy was entitled to clothing suitable to the climate, and which would permit him to make a presentable appearance at the school, and that "if the father failed to supply these necessities, the son had the right to procure them on the father's credit. This is founded on the rule that if the parent neglects his duty, any other person who supplies the necessities is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent."

In Farmington v. Jones, 36 N. H. 271, where the plaintiff's daughter, over eighteen years of age, was residing, presumably with his consent, at the house of another person, smallpox broke out at that house and she became ill with it. The town authorities declared it a pesthouse, and quarantined the inmates without authority. It was held that they could recover of the father for the expenses of the girl's sickness, paid out for her while she was so detained.

It may be noted that in cases where the question arises of the liability of the father for the support of a child when the parents are separated, it is sometimes laid down as a principle that the father is liable for the support of a young child where he suffers the child to remain with a person from whose custody he could have regained him by habeas corpus.

B. B. B.

nished the child; and the parent is liable, where his misconduct or abuse has driven the child to leave home."

In *Owen v. White*, supra, the court says: "If a child leave his father's house to seek his fortune in the world, or avoid domestic discipline and restraint, or escape from justice, the authority of the father to purchase necessities is not implied. But if a father abandon his duty to his infant child, so that he is forced to leave his house, he is liable for a suitable maintenance. And the principle of the distinction is that in the one case the father is blameless, and in the other blamable." And in *Weeks v. Merrow*, supra: "If a minor is forced out into the world by the cruelty or improper conduct of the parent, and is in want of necessities, such necessities may be supplied, and the value thereof collected of the parent, on an implied contract."

It follows, therefore, as there was evidence that the defendant had driven his minor son from home, that there was no error in denying the motion for judgment of nonsuit; and the charge being in accordance with law and justice, the judgment is affirmed.

OKLAHOMA SUPREME COURT. (Division No. 2.)

FORT SMITH & WESTERN RAILROAD
COMPANY, Impleaded, etc., Plff. in Err.,
v.

J. P. WILLIAMS.

(30 Okla. 726, 121 Pac. 275.)

Damages — carrier — failure to deliver merry-go-round.

Where a carrier contracts with a shipper to deliver certain machinery, a merry-go-round, to a certain place by a certain day for a specific purpose, and has full notice of the nature of the purpose, is fully warned of the use to which the machinery is to be put, and of the importance of having it there on the particular day specified, and of the damage or loss of earnings which would result from failure to deliver same on the day agreed upon, and undertakes such shipment with full knowledge that such conditions and the expected earnings

Headnotes by HARRISON, C.

Note. — As to liability of carrier for loss of profits incident to delay in delivery of articles intended for use, and not for sale, see note to *Harper Furniture Co. v. Southern Exp. Co.* 30 L.R.A.(N.S.) 483. And see also note to *Weston v. Boston & M. R. Co.* 4 L.R.A.(N.S.) 569, as to measure of carrier's liability for preventing ex-

are the moving motive on the part of the shipper, and thereupon through want of diligence fails to deliver such machinery until after the day agreed upon, and after the time has expired when such machinery can be operated with any profit, such carrier is liable in such amount as will reasonably compensate the shipper for the damage done. And, if the amount of earnings or profits can be estimated with a reasonable degree of accuracy, they then become the most just and adequate measure of damages.

(January 16, 1912.)

ERROR to the County Court for Marshall County to review a judgment in plaintiff's favor in an action brought to recover damages for the negligent failure of defendants to deliver a shipment of freight as required by contract. Affirmed.

Statement by Harrison, C.:

This action was filed in the county court of Marshall county December 7, 1908, by J. P. Williams against the St. Louis & San Francisco Railroad Company and the Ft. Smith & Western Railroad Company for damages for failure of the two carrier companies to deliver a certain merry-go-round from the town of Indianola, Oklahoma, to Madill, Oklahoma, within time to be used by plaintiff at a picnic held in Madill, Oklahoma, on August 14 and 15, 1908. On August 10, 1908, plaintiff, J. P. Williams, tendered for shipment to the Ft. Smith & Western Railroad Company at Indianola, Oklahoma, the merry-go-round in question, the same being accepted by said railroad company under an agreement between plaintiff and said company that said property would be delivered to plaintiff at Madill, Oklahoma, not later than the morning of the 14th of August, and was loaded for shipment August 10th. The Ft. Smith & Western Railroad Company delivered same to the St. Louis & San Francisco Railroad Company at Weleetka, Oklahoma, and the St. Louis & San Francisco Company carried it from Weleetka to Madill; the same reaching Madill about 5 o'clock in the evening of August 14th. The evidence shows that the defendant Ft. Smith & Western Railway Company was informed of the nature of the shipment and of the necessity for having the merry-go-round at Madill in time for use on the morning of the 14th of August, and that

hibition or show by breach of contract of carriage.

Numerous other aspects of the general question as to loss of profits as measure of damages are covered in notes cited in the Index to Notes under the title "Damages," subtitle "Loss of Profits."

it was fully explained to the defendant company by plaintiff that plaintiff was going to use said merry-go-round at Madill during the two days' picnic, and particularly and definitely informed plaintiff that he wanted it to reach Madill in time to be put up and ready for use on the morning of the 14th of August; that being the first day of the two days' picnic. The waybill issued by the defendant company to plaintiff, a copy of which is made a part of the record, bears this notice: "Please hurry through. MUST be at Madill by the 8-14." From the evidence in the record the distance from Indianola over the Ft. Smith & Western Railway to Weleetka is 28 miles, and the distance from Weleetka over the St. Louis & San Francisco Railway to Madill is 109 miles. It also appears from the evidence that the merry-go-round was received by the St. Louis & San Francisco Railroad Company at Weleetka some time during the evening of August 13th, and was handled or forwarded by such company on the first train out to Madill, reaching Madill over the Frisco about 5 o'clock on the evening of the 14th, having been three days in transit from Indianola to Weleetka, a distance of 28 miles, and having been carried by the Frisco road, a distance of 109 miles, in something like twenty-four hours' time. The plaintiff below sued for \$425 alleging that he had been damaged in the sum of \$400 in loss of profits, and the sum of \$25 in amount paid as license to run his machine at Madill, and that all of such losses were the direct result of the negligence and unnecessary delay in shipment by the defendant carriers.

Each of the defendant carriers appeared and filed their separate answers to plaintiff's petition; the same being, in effect, general denials of the allegations contained in the petition. Upon a trial of the cause, which was had to a jury, the plaintiff obtained a verdict against the Ft. Smith & Western Railroad Company for \$200, the court having peremptorily instructed the jury to return a verdict releasing the San Francisco Railway Company from any liability, upon which verdict the court rendered judgment in favor of plaintiff and against defendant Ft. Smith & Western Railroad Company in the sum of \$200, from which judgment and order of court overruling the motion for new trial the Ft. Smith & Western Railroad Company appeals to this court.

Messrs. C. E. Warner and H. P. Harper for plaintiff in error.

Messrs. F. E. Kennamer and Charles A. Coakley for defendant in error.
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Harrison, C., filed the following opinion:

Plaintiff in error complains of nineteen separate assignments of error, but in its brief discusses and reviews them all under three general heads, viz.: First. It was error for the court to admit evidence tending to show, and to instruct the jury, that plaintiff was entitled to recover the profits which he alleges he would have received. Second. The court erred in refusing to give instruction No. 1, asked by the defendant, which reads as follows: "You are instructed that upon the evidence in this case it is your duty to return a verdict for the defendant, Ft. Smith & Western Railroad Company." Third. The measure of damage in any event could not be the gross receipts; but plaintiff's recovery should have been limited to the net receipts. These three propositions are all included in the one general proposition "whether a loss of contemplated profits is a proper element of damage."

This has ever been looked upon and treated by the courts as a vexed and difficult question. It has been, and will always be, impossible to lay down any fixed and definite rule correctly applicable in all cases. There has never been a rule established which was decisive and universally followed by the courts in all cases, but the inclination of the earlier authorities to hold that contemplated profits *per se* were improper elements of damage has given way under the riper wisdom of jurisprudence, and, instead of holding to the earlier inclination, the weight of authorities in modern jurisprudence either holds or concedes that, where a loss of profits is not too remote or conjectural to be susceptible of computation with reasonable accuracy, they are proper elements of damage. This rule is recognized with approval by each and all of the following authorities cited by counsel for plaintiff in error in support of his first proposition: *Strawn v. Cogswell*, 28 Ill. 461; *Frazer v. Smith*, 60 Ill. 145; *Galveston, H. & S. A. R. Co. v. Jessee*, 2 Tex. App. Civ. Cas. (Willson) 351, and authorities cited; *People's Sav. Bank v. Waterloo & C. F. Rapid Transit Co.* 118 Iowa, 740, 92 N. W. 691; *Bartow v. Erie R. Co.* 73 N. J. L. 12, 62 Atl. 489; *Houston & T. C. R. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642; *Western U. Teleg. Co. v. Crall*, 39 Kan. 580, 18 Pac. 719; *Moulthrop v. Hyett*, 105 Ala. 493, 53 Am. St. Rep. 139, 17 So. 33; *Williams v. Island City Mercantile & Mill. Co.* 25 Or. 573, 37 Pac. 51; *Brigham v. Carlisle*, 78 Ala. 244, 56 Am. Rep. 28; *Paola Gas Co. v. Paola Glass Co.* 56 Kan. 622, 54 Am. St. Rep. 598, 44 Pac. 621; *Cutting v. Miner*, 30 App. Div. 457, 52 N. Y. Supp. 288; *Griffin v. Colver*, 10

N. Y. 489, 69 Am. Dec. 718; *Western Gravel Road Co. v. Cox*, 39 Ind. 263; *Florida Northern R. Co. v. Southern Supply Co.* 112 Ga. 1, 37 S. E. 130; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 55; *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58. In each of the above cases the rule had been either rejected or followed in the lower courts; and the appellate courts in reversing the judgment where the rule had been followed, or in affirming the judgments where the rule had been denied, did so purely upon the ground that the profits contended for in such cases were entirely too remote, speculative, and conjectural to be estimated with any degree of accuracy, and not upon the ground that, though the profits might be estimated with a reasonable degree of certainty, they were *per se* improper elements of damage.

In the case of *Paola Gas Co. v. Paola Glass Co.* 56 Kan. 622, 54 Am. St. Rep. 598, 44 Pac. 621, cited by plaintiff in error, Mr. Justice Johnston in rendering the opinion says: "It is urged that damages cannot be measured by the anticipated profits, as the calculation is necessarily based on conjecture rather than upon facts. It is the aim of the law to give a party injured by the breach of a contract all the damages which he may suffer from such breach; and, where the contract is made with a view to future profits and such profits are within the contemplation of the parties, they may, where they can be established with certainty, form a just measure of damage. It has been said that as a general rule, with a few exceptions, 'anticipated profits prevented are not recoverable in the way of damages for the breach of contract; but it is well settled in this state that damages based on prospective profits which would have been realized had the contract been performed may be allowed, providing they are fairly within the contemplation of the parties, are the direct and natural consequence of the breach of the contract, and are susceptible of being ascertained with reasonable certainty,'—citing *Hoge v. Norton*, 22 Kan. 374; *Brown v. Hadley*, 43 Kan. 267, 23 Pac. 492; *Arkansas Valley Town & Land Co. v. Lincoln*, 56 Kan. 145, 42 Pac. 706. In the case of *Williams v. Island City Mercantile & Mill Co.* 25 Or. 573, 37 Pac. 49, cited by plaintiff in error, Mr. Justice Bean in rendering the opinion says: "The object of damages is, primarily, compensation to an injured party for a loss sustained; and the rule is, primarily, that only such damages can be recovered as are the natural and proximate result of a breach, and that damages which are purely speculative or conjectural are

not recoverable. But the application of this rule varies as much as the facts of the adjudged cases in which it has been applied. There is nothing in the term 'profits' which of itself excludes their being given in evidence, and used as the measure of damages; and when excluded, it is because they are either unnatural or remote, or there are no criteria by which to estimate them with that certainty which the law requires. Indeed, in many cases, profits are the only certain or reliable measure of damages." In case of *Moulthrop v. Hyett*, 105 Ala. 493, 53 Am. St. Rep. 139, 17 So. 33, cited by plaintiff in error above, Mr. Justice McClellan, in rendering the opinion of the supreme court of Alabama, says: "It seems reasonable that, where profits are thus lost, the defaulting party should make them good, for the machinery is purchased with a view to the profits, and the contract would not be entered into if the profits were not expected and counted upon. But the difficulty in measuring damages by profits is that they are commonly uncertain and speculative, and depend upon so many contingencies that their loss cannot be traced with reasonable certainty to the breach of the contract. When that is the case, they are said to be too remote, and the damages must be estimated on a consideration of such elements of injury as are most directly and certainly the result of the failure of performance. But in some cases profits are the best possible measure of damages, for the very reason that the loss is indisputable and the amount can be estimated with almost absolute certainty."

None of the above authorities have held against the justness of the rule of applying profits as a measure of damages, but have merely held it inapplicable to the cases decided. There is more or less inaccuracy in every action for damages for breach of contract, but in order to justify a recovery in any case, assuming that a breach has been committed, there are two necessary elements to be considered: One, that a damage has been done; the other, that such damage is the result of the breach. The amount of the one should be computed with reasonable accuracy. The fact of the other must be determined with reasonable certainty. A less degree of accuracy is required in the former than of certainty in the latter, but neither is required to be absolute or beyond conjectural possibilities. Where it reasonably appears that a party has been damaged, and that such damage is the direct result of the breach, then a recovery is justified. The next step is to ascertain how much will reasonably compensate the injured party. This should be

computed by the plainest, easiest, and most accurate measure which will do justice in the premises, and if from the conditions in the contract, and the nature of the breach, it reasonably appears that the extent or amount of damages may be more readily, easily, correctly, and justly ascertained by applying the loss of profits as a measure, if it is evident that profits were lost and the amount thereof can be calculated with reasonable accuracy, then such profits are the true measure to be applied. In such cases, however, it should appear evident that profits were lost. The amount may be estimated with only reasonable accuracy; but the fact that profits were lost should require stricter proof. This doctrine is deduced from a vast weight of authorities, both American and English, including 2 Joyce on Damages, and authorities; 1 Sutherland, Damages, 3d ed. and notes and cases cited; 1 Sedgw. Damages, 8th ed.; 8 Am. & Eng. Enc. Law, 2d ed., and authorities cited in notes; 13 Cyc. and cases cited; Bryson v. McCone, 121 Cal. 153, 53 Pac. 637; Blagen v. Thompson, 23 Or. 239, 18 L.R.A. 315, 31 Pac. 647; Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291; Brown v. Hadley, 43 Kan. 267, 23 Pac. 492; Hoge v. Norton, 22 Kan. 374; Hadley v. Baxendale, 9 Exch. 341, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302, 26 Eng. L. & Eq. Rep. 398, 5 Eng. Rul. Cas. 502 (a leading case both in England and America); Tootle v. Kent, 12 Okla. 674, 73 Pac. 310; Choctaw O. & G. R. Co. v. Jacobs, 15 Okla. 493, 82 Pac. 502; Mace v. Ramsey, 74 N. C. 11; Butler v. Manhattan R. Co. 143 N. Y. 417, 26 L.R.A. 46, 42 Am. St. Rep. 738, 38 N. E. 454; Bluegrass Cordage Co. v. Luthy & Co. 98 Ky. 583, 33 S. W. 835; Simpson v. London & N. W. R. Co. L. R. 1 Q. B. Div. 274, 45 L. J. Q. B. N. S. 182, 33 L. T. N. S. 805, 24 Week. Rep. 294.

Hence we conclude that where a carrier contracts to deliver certain machinery to a certain place by a certain day for specific purposes, and has full notice of the nature of the purpose, is fully warned of the use to which the machinery is to be put, and of the importance of having it there on the particular day specified, and of the damage or loss of earnings which would result from failure to deliver same on the day agreed upon, and undertakes such shipment with full knowledge that such conditions, and the expected earnings, are the moving motive on the part of the shipper, and thereupon through want of diligence fails to deliver such machinery until after the day agreed upon, and after the time has expired when such machinery can be

operated with any profit, such carrier is liable in such amount as will reasonably compensate the shipper for the damage done. And, if the amount of earnings or profits can be estimated with a reasonable degree of accuracy, they then become the most just and adequate measure of damages.

This, we think, correctly presents the real conditions of the case at bar. The plaintiff herein owned the merry-go-round. It was at Indianola on the day the contract was entered into. There was going to be a two days' picnic at Madill, Oklahoma. Plaintiff had purchased a right from the picnic committee to operate his machine there during the two days. He informed the carrier of all these circumstances, and asked the carrier if delivery of the machinery could be made by at least one day before the picnic began, or in time to have the merry-go-round ready for operation on the morning of the first day of the picnic. The agent of defendant company fully understood from the evidence in the record, undenied, all the conditions involved in the case, fully understood the importance of having the machinery at Madill on the first day of the picnic, and understood that it would be worthless for operation if it failed to reach Madill until after the picnic was over, and with this understanding promised plaintiff that he would deliver the machinery on time. And thereupon, with this understanding between the parties, plaintiff delivered the machinery to the defendant company for shipment to Madill. These facts are undisputed in the record. It also appears from the record that the machinery in question was turned over to defendant for delivery on the 10th of August, and that defendant company was nearly four days shipping such machinery a distance of only 28 miles, from Indianola to Weleetka, no excuse whatever being given for the delay; that on the evening of the 13th it was delivered by defendant company to the Frisco Company and by the Frisco Company, within the next twenty-four hours, delivered a distance of 109 miles to consignee, at Madill, reaching Madill near the close of the first day of the picnic. The evidence showed, also, that plaintiff upon receipt of the machinery immediately set to work with a number of hands and worked all night in order to get the machinery ready for operation, but failed to do so until between 9 and 10 o'clock of the last or second day of the picnic.

The record further discloses that the number of people present on the first day

was, if any difference, greater than on the second day. It showed, also, that the plaintiff, after getting his machinery ready for operation, at about 10 o'clock the second day, from about 10 o'clock on the morning of the second day to the close of the evening of the same day, took in \$245. The plaintiff claimed that he lost \$400 by reason of not having his machinery ready as agreed upon. He testified that he would have taken in \$400 more had he had his machinery ready for operation during the whole of the two days. This testimony, of course, was a mere supposition, and not to be treated as a basis upon which to compute the amount of damages. But the fact that he took in \$245 during a little more than two thirds of the second day, and the witness Jorden, who operated the machine and who had been operating merry-go-rounds for seven years, testifying that the net profits of the time lost on the second day would have been at least \$40, reckoning from what had been taken in during the remaining portion of the day, and the fact that the crowd was larger, if any difference, on the first day than on the second, it appears to be reasonable that under ordinary circumstances he would have taken in \$200, the amount of the judgment, during the one and one third days lost to him. The record shows there were 2,500 to 3,000 people present each day; that there was no other merry-go-round on the grounds; that the receipts were from \$1 to \$5 each run of the machine; that a run lasted three to four minutes. This, it seems to us, would offer a reasonable basis upon which to estimate an approximate loss. It is not unreasonable to suppose that the receipts would have been approximately the same on the first as on the last day. Had he been able to run all of the second day at the same rates which he did run, his receipts would have been from \$325 to \$380. Hence we do not feel that it would be unreasonable for the jury to say from all the facts before them that defendant was damaged at least \$200 for the one and one third days lost. It would appear more unreasonable and conjectural and more out of harmony with business experience and common judgment to say that he would not. And in view of all the circumstances we think the verdict is not the result of mere guesswork or conjecture, but that it is fair, reasonable, and should be allowed to stand.

The judgment is therefore affirmed.

Per Curiam:

Adopted in whole.

40 L.R.A. (N.S.)

OKLAHOMA SUPREME COURT.

GEORGE P. TURNER, Plff. in Err.,

v.

BERT WILCOX.

(— Okla. —, 121 Pac. 658.)

Landlord and tenant — negotiation for renewal — holding over.

1. Where landlord and tenant are negotiating for a new lease for farm land at the time of the expiration of the original lease, and the tenant remains in possession pending the negotiations, with the express or tacit consent of the landlord, the landlord is estopped from treating the tenant as holding over for another term under the condition prescribed in the original lease, but the tenant becomes a tenant from year to year.

Same — removal of crops — attachment.

2. Under § 4101, Comp. Laws 1909, a landlord is entitled to an attachment on the crops grown by his tenant, whether the rent be payable in money or other things, in case the tenant has, within thirty days, removed, or is moving, or intends to remove, his property, or crops, or any part thereof, from the leased premises, and neither the intent of the tenant in removing, nor the distance, nor the place to which the crops or portion thereof, or other property, is removed, is material. It is the removal, or the intent to remove, which is the justification for the attachment.

Same — refusal — error.

3. In a case where the undisputed evidence and admitted facts show that the tenant had paid the landlord no rent for a farm, but had removed a large portion of the crop grown thereon, and deposited the same in an elevator in a town, it was error for the court to refuse to sustain an attachment brought under § 4101, Comp. Laws 1909.

(February 6, 1912.)

Headnotes by ROBERTSON, C.

Note. — Landlord and tenant: effect of holding over pending unsuccessful negotiations for a new lease.

Although the relation of landlord and tenant is ordinarily founded upon express contract, the relation is sometimes presumed from the conduct of the parties towards each other, it being the general rule that a tenant holding over after the expiration of his lease continues, by implication of law, to be a tenant upon the same terms, without any other or new agreement with his landlord. (24 Cyc. 1011.) The class of cases under annotation, however, seems to form an exception to the general rule, the decisions in the main being founded upon the principle that since a holding over constitutes a renewal only when the landlord so elects, a holding over

ERROR to the District Court for Canadian County to review a judgment in defendant's favor in an action brought to enforce a landlord's rights in crops grown on rented premises under the terms of the lease contract. Reversed.

The facts are stated in the commissioner's opinion.

Mr. Charles H. Garnett, for plaintiff in error:

A tenant holding over after the expiration of a written lease for a year, with the assent of the landlord, and without making and signing a new lease, holds under the terms of the old lease. If the landlord elects to treat him as tenant, he has a right to exact from him a compliance with the terms of the old lease, so far as applicable.

pending negotiations for a new lease cannot be said to be pursuant to the original lease, especially where the holding over is with the consent of the landlord. This is illustrated by *Woodstrom v. Freeman*, 159 Ill. App. 340, wherein it was held that a holding over under an arrangement for a new lease which was void and unenforceable was not under the terms of the old lease, the ground being that such an implication arises only when the landlord has so elected; and that when negotiations for a new lease are pending, it cannot be said that the landlord was relying on the original lease; and by *Schilling v. Klein*, 41 Ill. App. 209, wherein it was held that negotiations for a new term are inconsistent with an election to hold one holding over pending such negotiations as a tenant upon the old terms upon the failure of the negotiations. And in *Burckle v. Adams Bros. Co.* 59 App. Div. 109, 69 N. Y. Supp. 40, where the prior lease was regarded as terminated by both parties, and the holding over was upon new terms, with an understanding that there was to be a new lease, it was held that there could be no claim of a holding over such as would give the landlord the right to regard the tenant as a tenant for another year under the terms of the original lease.

In some instances the question is made to depend upon whether or not the holding over is with the landlord's consent, it being quite generally held that a holding over pending negotiations for a new lease with the landlord's consent does not constitute a renewal, while, if such consent has not been extended, either expressly or impliedly, a renewal is effected at the option of the landlord.

Thus, in *Mastin v. Metzinger*, 99 Mo. App. 613, 74 S. W. 431, it was said: "In this case there was no evidence whatever that plaintiff [landlord] consented to defendant's [tenant's] holding over. There was no evidence of an implied consent; indeed, the implication is to the contrary. It is true that the agent [of the landlord] did not bodily eject him from the premises, nor did he, immediately on the expiration 40 L.R.A. (N.S.)

24 Cyc. 1031-1033; *Okl. Comp. Laws*, 1909, § 4076; *Belding v. Texas Produce Co.* 61 Ark. 377, 33 S. W. 421; *Stoppelkamp v. Mangeot*, 42 Cal. 316; *Goldsborough v. Gable*, 140 Ill. 269, 15 L.R.A. 294, 29 N. E. 722; *Kleespies v. McKenzie*, 12 Ind. App. 404, 40 N. E. 648; *Wheat v. Brown*, 3 Kan. App. 431, 43 Pac. 807; *Moshier v. Reding*, 12 Me. 478; *Jackson ex dem. Wood v. Salmon*, 4 Wend. 327; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Webster v. Nichols*, 104 Ill. 160; *Leggett v. Louisiana Purchase Exposition Co.* 134 Mo. App. 175, 114 S. W. 92; *Gardner v. Dakota County*, 21 Minn. 33; *Gergens v. McCollum*, 27 Okla. 155, 111 Pac. 208.

Tender of the amount due after suit brought, without tender of costs, is not

of the lease, institute an action against him; but there was at no time the slightest indication that he consented to a continuance of the tenancy. It would be a strange condition of affairs if a landlord, in order to avoid implied consent to a continued tenancy under an expired lease, would be compelled to refuse to listen to a proposition of further lease, and set about immediately to eject the tenant."

And in *Salas v. Davis*, 120 Ga. 95, 47 S. E. 644, where the tenant held over pending unsuccessful negotiations for a new lease, it was held that he became a tenant by sufferance, there being no evidence that the holding over was by permission of the landlord. (In Georgia a tenant at sufferance is a wrongdoer; i. e., one in possession without the consent of the landlord, but as the result of laches or neglect.)

And in *Smith v. Allt*, 7 Daly, 492, 4 Abb. N. C. 205, it was held in effect that remaining, pending negotiations for a new lease, if with the consent of the landlord, did not constitute a renewal of the original lease upon the same terms.

And that a landlord is estopped from treating a tenant holding over for another term on the conditions prescribed by the original lease, where he remained in possession pending negotiations for a new lease, with the express or tacit consent of the landlord, see *Leggett v. Louisiana Purchase Exposition Co.* 157 Mo. App. 108, 137 S. W. 893, prior appeal 134 Mo. App. 175, 114 S. W. 92, as set out in *TURNER v. WILCOX*.

In *Fall v. Moore*, 45 Minn. 515, 48 N. W. 404, where the subsequent holding over was referable to a new lease which was void, it was held that the tenant could not be regarded as a tenant from year to year, holding over under the old lease, where there was no acknowledgment by the landlord that the tenancy was so continued, but was a tenant at will. And in *Doe ex dem. Hollingsworth v. Stennett*, 2 Esp. 717, 6 Revised Rep. 769, a case upon all fours with *Fall v. Moore*, a similar conclusion was reached. And in *Woodstrom v. Freeman*, supra, it was held that where the

good, and will not prevent the plaintiff from recovering the principal sum and costs.

Wagner v. Wagner, 9 Pa. 214; *Belknap v. Godfrey*, 22 Vt. 288; *Marshall v. Vincent*, 58 Mo. App. 647; *E. B. Millar & Co. v. Olney*, 80 Mich. 293, 45 N. W. 140; *Martin v. White*, 1 Bibb, 583; *Bendit v. Annesley*, 27 How. Pr. 184; *Keeler v. Van Wie*, 49 How. Pr. 97; *Jeffersonville R. Co. v. Weinman*, 39 Ind. 231; *Atherholt, F. & Co. v. Robinson*, 6 Houst. (Del.) 428; *Harris v. Swanson*, 67 Ala. 486.

Messrs. Phelps & Cope, for defendant in error:

Where the parties are negotiating for a new lease, and the tenant remains with the express or tacit acquiescence of the landlord pending such negotiations, the landlord cannot treat him as a tenant holding over for another term.

Wilcox v. Raddin, 7 Ill. App. 594; *Pusey*

holding over is under an agreement for a new lease which is void and unenforceable, the tenant is a tenant at will. And that where the holding over is pending a treaty for a further lease, and with the permission of the landlord, the tenancy is at will, and not from year to year, see *Grant v. White*, 42 Mo. 285; *Leggett v. Louisiana Purchase Exposition Co.* supra; and *Re Grant*, 8 Ont. L. Rep. 297.

And in *Henderson v. Schuylkill Valley Mfg. Co.* 24 Pa. Super. Ct. 422, it was held that continued occupation under an agreement for a new lease which was never executed did not convert the occupancy into a tenancy from year to year under the original lease. But in *Gardner v. Dakota County*, 21 Minn. 33, where a tenant held over with the consent of the landlord, but negotiations for a new lease were never completed, it was held that the tenancy was one from year to year upon the terms of the original demise, so far as applicable to the new conditions.

And in *Schilling v. Klein*, 41 Ill. App. 209, a tenant, remaining in possession by consent of the landlord pending a treaty for a new lease, and paying monthly rental after the expiration of the original lease, which was one for years, was held not to be a tenant upon the former terms, but to be a tenant by the month. See also *Burckle v. Adams Bros. Co.* supra, which is to the same effect.

In *Kenwood Hotel Co. v. Hiland*, 153 Ill. App. 108, where the tenant, induced by the conduct of the landlord, held over pending unsuccessful negotiations for a new lease, it was held that the tenant had a reasonable time after the termination of such negotiations in which to vacate, and that the landlord could not enforce against such tenant liquidated damages, as provided for in the original lease, beyond the rental value of the premises for the time over-held.

40 L.R.A. (N.S.)

v. Presbyterian Hospital, 70 Neb. 353, 113 Am. St. Rep. 788, 97 N. W. 475; *Burckle v. Adams Bros. Co.* 59 App. Div. 109, 69 N. Y. Supp. 40; *Leggett v. Louisiana Purchase Exposition Co.* 134 Mo. App. 175, 114 S. W. 92.

The burden of proof is on the landlord to establish, by a preponderance of the evidence, the holding over on the old terms.

Montgomery v. Willis, 45 Neb. 434, 63 N. W. 794.

The presumption of a continuance of the tenancy upon the same terms may be rebutted by proof of a different agreement between the landlord and tenant, or of facts which are inconsistent with the presumption.

24 Cyc. 1014, 1015, 1033; *Montgomery v. Willis*, 45 Neb. 434, 63 N. W. 794; *Rosenberg v. Sprecher*, 74 Neb. 176, 103 N. W. 1045, 105 N. W. 293; *Hoffman v. McCollum*, 93 Ind. 326; *Goldsbrough v. Gable*, 49 Ill.

So it is held that a tenant holding over by consent of the landlord pending a treaty for a new lease cannot be treated as a trespasser. *Schilling v. Klein* and *Doe ex dem. Hollingsworth v. Stennett*, supra.

In *Smith v. Snyder*, 168 Pa. 541, 32 Atl. 64, it was held that a tenant was not justified in holding over upon the failure of the landlord's agent to notify him as to the acceptance or refusal of an offer to lease the premises for a further term upon terms different from those of the original lease, where the agent had promised to let him know before the end of the original term. And the mere demand of a tenant that certain conditions be complied with will not qualify the effect of a holding over, where the landlord's conduct is not such as to induce him to believe that the terms would be accepted or the conditions complied with. *Abeel v. McDonnell*, 39 Tex. Civ. App. 457, 87 S. W. 1066. But where the landlord promises to comply with the condition imposed as one precedent to the taking of a new lease, a holding over in reliance thereon cannot be treated as a renewal, where the condition was not complied with. *Williams v. Houston Cornice Works*, 46 Tex. Civ. App. 72, 101 S. W. 839, 1195.

As to effect of holding over after expiration of lease, with option for extension or renewal, without promptly exercising option, see note to *Kuhlman v. William J. Lemp Brewing Co.* 29 L.R.A. (N.S.) 174.

As to whether each holding over by a tenant after expiration of a term for years constitutes a new and separate term, distinct from that which preceded or followed, see note to *Kennedy v. New York*, 25 L.R.A. (N.S.) 847. And as to rent period as the criterion of the term implied by holding over after the expiration of a lease for a fixed term, see the note to *Kaufman v. Martin*, 25 L.R.A. (N.S.) 855.

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App. 554; *West v. Lungren*, 74 Neb. 105, 103 N. W. 1057; *Secor v. Pestana*, 37 Ill. 525; *Harty v. Harris*, 120 N. C. 408, 27 S. E. 90; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Martin v. Hamersky*, 63 Kan. 360, 65 Pac. 637; *Ives v. Williams*, 50 Mich. 100, 15 N. W. 33; *Ambrose v. Hyde*, 145 Cal. 555, 79 Pac. 64.

Whether or not the tenant holds under the terms and conditions of the former lease is a question of fact to be determined by the jury.

Grant v. White, 42 Mo. 285; *Withnell v. Petzold*, 17 Mo. App. 689; *Phoenixville v. Walters*, 147 Pa. 501, 23 Atl. 776; *Prosser v. Pretzel*, 8 Kan. App. 856, 55 Pac. 854; *Frost v. Akron Iron Co.* 1 App. Div. 449, 37 N. Y. Supp. 374; *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25, 84 S. W. 216.

Robertson, C., filed the following opinion:

Plaintiff in error, who was plaintiff below, commenced this action against defendant in error, who was defendant below, in the district court of Canadian county, on the 3d day of October, 1908, and alleged in his petition, in substance, that he was the owner of a certain farm in Canadian county; that defendant entered into possession of said premises as tenant on or about the 1st day of January, 1907, under a written lease for a period of one year; that at the end of the year 1907 the defendant, with the assent of the plaintiff, held over in possession of said premises for the year 1908; that the rent for the premises for the year 1908 had not been paid by the defendant according to the terms and provisions of the said lease, and that said premises had not been cultivated and cared for by the defendant, as provided for in said lease, for which plaintiff asked damages. And he further alleged that the defendant had begun to gather and market the crop grown on the premises, without the consent of the plaintiff, and without having first delivered and set apart to the said plaintiff his share of the said crop as rent, and that plaintiff claimed a lien as landlord on the premises for the year 1908 for the rent thereof, and prayed for judgment for damages and his rent, and that an attachment be issued and levied upon the crops grown on said premises. On the same day he filed his affidavit in attachment, also an undertaking which was duly approved by the clerk of the court, and a writ of attachment was issued, and was levied upon the crops grown on the premises. On the 11th of November, 1908, the defendant made a forthcoming bond, and thereby secured the release of said

crops from the levy of said attachment. On December 21, 1908, defendant filed his answer, which was a general denial, except that he admitted that plaintiff was the owner of the premises, and that the defendant went into possession thereof under a written lease on January 1, 1907, but denied specially that he held over under the terms and conditions of said lease, and he prayed judgment for costs and for the discharge of the attachment. On the issues thus formed by the pleadings the cause was tried before a jury on March 25, 1909, and a verdict returned for the defendant for his costs. Motion for new trial was presented, considered, overruled, exceptions taken, and the plaintiff prosecutes this appeal to reverse said judgment.

The first error complained of, and treated in the brief of plaintiff in error, is that the court erred in permitting defendant to introduce evidence showing the usual and customary rental for premises, such as the farm in question, in the neighborhood where this farm was situated.

The second assignment of error is that the court erred in refusing to give instructions numbered 1 and 2, requested by the plaintiff, which stated that, as a matter of law, the terms of the lease for the year 1907 would extend to the year 1908, and would govern the payment of rent for that year. The determination of the second proposition will suggest the answer to the first, and we will therefore consider the second specification of error first. Plaintiff in error contends that a tenant holding over after the expiration of a written lease for a year, with the assent of the landlord, and without making and signing a new lease, holds over under the terms of the old lease. As a general proposition, subject to some exceptions, this was true under the common law, and also under the statute in force in this state; and the many authorities in support of this doctrine, cited by plaintiff in error, amply sustain this contention, and their correctness is conceded by defendant in error. However, this is but a presumption of law, and a rebuttable presumption at that; and when the undisputed facts show that the parties are negotiating for a new lease, and the tenant remains in possession with the understanding, or by acquiescence, of the landlord, pending such negotiations, the landlord cannot treat him as a tenant holding over under the old term. In this case the defendant in his answer charged that, while he remained in possession of the premises, yet that his holding over is not by virtue of the 1907 lease, but by reason of negotiations for a new lease, which were pending between the parties long prior to

the termination of the former term, and in such case the burden is on the landlord to show that the holding over is under and by virtue of the terms of the old contract. In this case the testimony, while conflicting, warrants us in saying that there was a holding over by the tenant, but the jury found by its general verdict that it was not by virtue of the terms of the 1907 contract, and this verdict is sustained by the testimony, which shows that in September, 1908, the parties had a conversation relative to the occupancy of the farm for the next year; that the tenant at that time objected to the terms of the old contract, and stated that, while he wanted the farm for the year 1908, yet he would not assent to some of the conditions imposed by the old agreement, and it further appears from said conversation that the landlord agreed to eliminate certain terms and conditions of the same, but as to the extent of the modification we cannot determine from the record. The subject was again considered by the parties some time in January, 1908, and the landlord at that time submitted a written lease to the tenant for his signature, who, for some reason or other, failed to sign it. The testimony further shows that the landlord called the tenant's attention to this lease, and several times requested him to sign it, but that finally in April the tenant refused to sign the same, giving as his reasons for such refusal that the terms were unsatisfactory. Whereupon the landlord suggested that the tenant draw a lease in accordance with his ideas, and submit the same to the landlord, which was done, but which was unsatisfactory to the landlord, and which was never signed. These facts are cited merely to show that there was a dispute between the parties as to the supposed terms of the tenancy, and that the parties did not intend to rely upon the old contract, but that they were then negotiating for a new lease agreement.

Counsel for plaintiff, in support of his contention, cites the rule laid down in 24 Cyc. 1031, that "where a tenant, under a demise for a year or more, holds over at the end of his term without any new agreement with the landlord, he may be treated as a tenant from year to year,"—and cites in addition thereto § 4076, Snyder's Comp. Laws (Okla.) 1909, which reads as follows: "When premises are let for one or more years, and the tenant, with the assent of the landlord, continues to occupy the premises after the expiration of the term, such tenant shall be deemed to be a tenant from year to year." But the above has reference solely to those cases where there is no agreement between the parties

to change or alter the terms of the tenancy; or, rather, to those cases where nothing has been said by the parties relative to the same, the presumption being in such case that it is the intent of the parties to continue the relation of landlord and tenant under the identical terms of the old lease. In the case at bar, as has been seen, the old lease was, in effect, abrogated because the tenant had told the landlord, in September, before the term ended, that, while he would like to remain on the farm for the year 1908, yet he would not remain under the terms of the old contract, and the landlord, by then and there agreeing to eliminate the objectionable features, as suggested by the tenant, thereby acquiesced, so to speak, in the abrogation, or, rather, the termination on January 1, 1908, of the old lease contract. In *Leggett v. Louisiana Purchase Exposition Co.* (decided in 1911) 157 Mo. App. 108, 137 S. W. 893, it was held that "where a tenant holds over after the end of his term, the common law presumes an intention to continue the tenancy for a similar term, and on the same conditions as to rental stipulated in the lease, and all that is necessary to complete the contract for such new term is the acquiescence of the landlord." A similar holding by the same court in *Leggett v. Louisiana Purchase Exposition Co.* 134 Mo. App. 175, 114 S. W. 92, is cited by plaintiff in error as supporting his position, but it will be noticed that the court in both cases held further, and especially in the case decided in 1911, that "where landlord and tenant are negotiating for a new lease at the time of the expiration of the original lease, and the tenant remains in possession pending the negotiations, with the express or tacit consent of the landlord, the landlord is estopped from treating the tenant as holding over for another term on the conditions prescribed in the original lease, but the tenant becomes a tenant at will." This case also holds that, where a matter turns on a question of intention (as it does in the case at bar), it is relevant to show the situation at the time in order to reach the truth as to the intentions of the parties. In 24 Cyc., at page 1014, the rule laid down is that the presumption of a continuance of the tenancy upon the same terms, or of the character of the tenancy, from remaining in possession after the expiration of the terms, is a rebuttable one, although it will not be overcome merely by the intention of the tenant, and it will not conclude either party as against proof of a different agreement between the landlord and the tenant, or of facts which are inconsistent with the presumption. In this case there was testi-

mony, not only from the tenant, in support of his position, but also he was corroborated by the testimony of the landlord to the effect that negotiations for a new lease were pending prior to the termination of the old term, as well as for several months subsequent thereto; and it seems to be a well-settled rule that whether or not the tenant holds under the terms and conditions of the former lease, it is a question of fact, to be determined by the jury under proper instructions (*Grant v. White*, 42 Mo. 285; *Withnell v. Petzold*, 17 Mo. App. 669; *Prosser v. Pretzel*, 8 Kan. App. 856, 55 Pac. 854); and where there is evidence on material issues reasonably tending to support the verdict of the jury, the same will not be disturbed by this court on appeal. The presumption raised by the section of our statute above cited, having been rebutted by proof of a different speaking, by an agreement to make a new contract eliminating certain objectionable features of the old, and thereafter failing to agree upon the terms, shows beyond question that Wilcox did not hold over under the terms of the 1907 lease, but was in fact a tenant from year to year; and the measure of recovery for rent for the year 1908 was therefore, under the facts of this particular case, correctly stated by the court in his instructions to the jury, and this, therefore, disposes of the first specification of error hereinabove referred to, and no further consideration of this phase of the case need be given. Having concluded that Wilcox did not hold over under the terms of the 1907 lease, it becomes evident that no error was committed by the court in admitting testimony offered by defendant, showing the usual and customary rental for premises such as the farm in question in the same neighborhood.

Therefore the only remaining question in this case to be considered is: "Was the attachment in this case wrongfully issued?" Section 4098, *Snyder's Comp. Laws (Okla.)* 1909, reads as follows: "Any rent due for farming land shall be a lien on the crop growing or made on the premises. Such lien may be enforced by action and attachment therein, as hereinafter provided." Section 4101 reads as follows: "When any person who shall be liable to pay rent (whether the same be due or not, if it be due within one year thereafter, and whether the same be payable in money or other things) intends to remove or is removing, or has within thirty days removed his property, or his crops, or any part thereof, from the leased premises, the person to whom the rent is owing may commence an action in the court having jurisdiction; and upon making an affidavit, stating the

amount of rent for which such person is liable, and one or more of the above facts, and executing an undertaking as in other cases, an attachment shall issue in the same manner and with the like effect as is provided by law in other actions." Section 4102: "In an action to enforce a lien on crops for rent of farming lands, the affidavit for attachment shall state that there is due from the defendant to the plaintiff a certain sum, naming it, for rent of farming lands, describing the same, and that the plaintiff claims a lien on the crop made on such land. Upon making and filing such affidavit and executing an undertaking as prescribed in the preceding section, an order of attachment shall issue as in other cases, and shall be levied on such crop, or so much thereof as may be necessary, and all other proceedings in such attachment shall be the same as in other actions."

In this case the undisputed facts show that Wilcox was Turner's tenant; that he was liable to Turner for rent for said land, and that nothing had been paid by him to Turner on the rent; that Turner had a statutory landlord's lien on the crops grown on said land to secure the payment of the rent; that this action was begun on October 3, 1908, and the attachment issued the same day; that the tenant had gathered a large portion of the crops within thirty days prior to the issuance of the attachment, and was engaged in gathering and removing the same at the time the attachment was served; that he had removed the same from said farm and deposited it in an elevator in the town of Yukon; that no agreement had been reached by the parties as to what amount of the crop Turner was to have, or Wilcox was to give. Under these facts and provisions of the statute cited above, Turner undoubtedly had a cause of action and a right to an attachment on October 3, 1908. These facts are undisputed. On the contrary, they appear affirmatively of record, and stand admitted by the parties. Turner never waived his landlord's right, nor is it anywhere in the record charged that he did; and, in fact, no attempt was made to show that he had. In *Knowles v. Sell*, 41 Kan. 171, 21 Pac. 102, the supreme court of Kansas, in discussing this question, under a statute identical with paragraph 4101, *supra*, says: "It is admitted by the defendant that he took the 22 bushels of corn from the premises without the consent or knowledge of the plaintiff, and there was no testimony showing that there was any other amount of grain removed. It is also apparent from the evidence that this load of corn was not taken away for the purpose of hinder-

ing or delaying the plaintiff in the collection of his rent, or with any intent to defraud him. The testimony shows, further, that there were 1,500 bushels of corn grown on the place that year. Under these facts, the question is presented whether the removal of this part of the crop is sufficient to sustain an attachment by the landlord, who claims a lien thereon. Section 24 of chapter 55 provides that the landlord shall have a lien upon the crops growing or made upon the premises, and such lien may be enforced by action and attachment therein. Under this statute his lien extends to the entire crop that may have been grown, not simply to any part of it; and in keeping with its provisions said § 27 provides in plain terms that the removal of any part of the crop from the premises is ground for an attachment. It does not require any intention of the tenant to delay, hinder, or defraud the landlord. By the terms of this statute the intent of the party is immaterial. The simple fact of removal is enough. The language of the statute compels this construction. No other could be given without doing violence to the language used. If the motive of the tenant was material, then probably the judgment would have been correct, and the manner of removal and the purpose of defendant would have been proper matters to inquire into, but under the view we take of the case, all that it was necessary for the plaintiff to establish was that the tenant had removed an appreciable part of the crop within thirty days, without the consent of the landlord." In a later case, *viz.*, *Harmon v. Payton*, 68 Kan. 67, 74 Pac. 618, it was said: "It would seem clear that, under the facts found in the case at bar, the attachment should have been sustained. While the tenants were authorized, under the contract as found, to dispose of the broom corn, and pay the landlord his share in money, and while the kafir corn had been cut and delivered to the landlord in accordance with the custom of the neighborhood, there being no contract regulating the matter, yet the field corn was still to be husked and delivered, and the landlord had the right to his lien upon the entire crop to compel this. Under the statute quoted, a landlord is not required to rely upon the promise or purpose of the tenant to carry out his part of the contract. He is given a lien upon the entire crop to secure from the tenant the performance of his contract, and the tenant may not remove any appreciable portion of the same, no matter how good his purpose, without subjecting himself to the penalty of the statute, except by the consent of the landlord or a waiving of 40 L.R.A. (N.S.)

the lien. In this case there were neither pleadings nor findings . . . that the tenants owed the landlord nothing at the time of the commencement of his action. This finding was based upon the fact that the time for husking and delivery of the field corn had not then arrived. This, however, was immaterial, as the lien continued until the rent had been paid or the share delivered. If the rent is to be paid in a share of the crop, it is the landlord's right to have this matter adjusted, and his share delivered, before the tenant removes any portion from the premises. This right inheres in the contract of rental; and, if the tenant removes any portion of the crop, he breaks his contract, and the landlord may then recover from the tenant the value of his share at the time it should have been delivered, in money, the same being secured by an attachment." Turner, without doubt, had a cause of action against Wilcox on October 3, 1908, and was entitled, under the provisions of our statute, to sue out an attachment and to have the same levied on the crops grown on his land. This statute gives to the landlord a positive right to an attachment to crops grown on his land when the tenant intends to remove, or is removing, or has, within thirty days, removed, his property, or his crops, or any part thereof, from the leased premises; and neither the intent of the tenant in removing, nor the distance, nor the place to which the crops or other property is removed, is material. It is the removal, or the intent to remove, which is the justification for the attachment. As was well said in *Masterson v. Bentley*, 60 Ala. 520: "The language of the statute renders it incapable of any other construction, and no other can be given it. . . . So long as the crop remains on the rented premises, the lien of the landlord will prevail over any alienation the tenant may make of it. . . . Therefore, whenever, by the removal, the lien of the landlord is left in peril,—is liable to be defeated by an alienation, which could not have affected it so long as the crop remained upon the demised premises,—the right of the landlord to an attachment is confirmed by the statute."

It therefore follows that, as to this phase of the case, Turner was entitled to a judgment holding that the attachment had properly issued, and sustaining the same, and for costs of the action, and it became and was the duty of the court, under the undisputed facts of this case and the law applicable thereto, to enter judgment sustaining the attachment, and to tax the costs of the action to the defendant. There being no dispute whatsoever as to the

facts on this phase of the case, the same should not have been submitted to the jury, nor can we say from the record before us that it was.

As to the first proposition, the judgment of the court as entered on the general verdict of the jury in favor of the defendant was undoubtedly correct.

The judgment is silent as to the attachment proceedings, yet this phase of the case should have been covered, and for the reasons hereinabove given, the judgment, in so far as the attachment proceedings are concerned, should be reversed, and the cause should be remanded to the District Court of Canadian County, with instructions to modify the judgment so entered, so as to hold that the attachment was properly issued and levied, and to tax the costs in both courts to the defendant in error.

Per Curiam:

Adopted in whole.

**UNITED STATES CIRCUIT COURT
OF APPEALS, EIGHTH CIRCUIT.**

ARTHUR C. HUIDÉKOPER, Plff. in Err.,

v.

HERBERT S. HADLEY et al.

(100 C. C. A. 395, 177 Fed. 1.)

Action—state equalization board.

1. A suit to compel a state board of equalization to make a true equalization of the valuation of the property throughout the state for purposes of taxation is not against the state, within the meaning of a constitutional provision exempting the state from suit.

Taxes—equalization board—control of court.

2. The courts are not deprived of power to interfere with an arbitrary inequality in property values throughout the state, and an undervaluation of a portion of it, effected by the state board of equalization in violation of the provisions of the statute, on the theory that the act of the board is an exercise of discretion and beyond the control of the courts.

Mandamus—governor—ministerial duty.

3. The governor of a state is exempt from the control of the courts through a writ of mandamus even when performing duties imposed upon him as member of the state board for equalization of taxes.

Note.—For mandamus to governor, see notes to *State ex rel. Irvine v. Brooks*, 6 L.R.A.(N.S.) 750, and *Rice v. Draper*, 32 L.R.A.(N.S.) 355.
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Same—governor's exemption—effect on others.

4. That mandamus will not lie to coerce the action of the governor of a state as a member of the state board for equalization of taxes will not prevent its running against the other members of the board, where by statute a majority of the board may transact the business required.

(March 21, 1910.)

ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment sustaining a plea to the jurisdiction of the court and dismissing the petition for a writ of mandamus to compel respondents to make a true equalization of the valuation of property for the purposes of taxation. Affirmed in part.

The facts are stated in the opinion.

Argued before Adams, Circuit Judge, and Riner and Wm. H. Munger, District Judges.

Mr. E. Y. Mitchell, with Mr. W. D. Tatlow, for plaintiff in error.

Messrs. Elliott W. Major, Attorney General, John M. Atkinson, Assistant Attorney General, Guthrie & Franklin, B. R. Dysart, E. S. Jones, and John T. Barker, for defendants in error:

Respondents, acting under the Constitution and laws of the state in equalizing the property of the various counties and cities of the state, as the state board of equalization, represent the state, and their action is the action of the state.

Raymond v. Chicago Union Traction Co. 207 U. S. 35, 36, 52 L. ed. 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; *Pennoyer v. McConaughy*, 140 U. S. 9–11, 35 L. ed. 365, 366, 11 Sup. Ct. Rep. 699; *Ex parte Young*, 209 U. S. 158, 160, 52 L. ed. 728, 729, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Gunter v. Atlantic Coast Line R. Co.* 200 U. S. 283, 284, 50 L. ed. 483, 484, 26 Sup. Ct. Rep. 252; *Prout v. Starr*, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398.

The suit at bar being a suit to control the discretion of respondents as executive officers of this state, while acting in their official capacity as members of the state board of equalization, cannot be maintained.

Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; *Cunningham v. Macon & B. R. Co.* 109 U. S. 452, 454, 27 L. ed. 994, 995, 3 Sup. Ct. Rep. 292, 609; *Atty. Gen. v. Sanilac County*, 42 Mich. 732, 3 N. W. 260; *Howland v. Eldredge*, 43 N. Y. 461; 2 Cooley, Tax. 3d ed. 1353, 1355.

The governor is not subject to the writ of mandamus to require him to even perform a ministerial duty of any kind. He is a member of the board of equalization, and

if he is not subject to the writ neither is the board.

State ex rel. Robb v. Stone, 120 Mo. 428, 23 L.R.A. 194, 41 Am. St. Rep. 705, 25 S. W. 376; State ex rel. North & South R. Co. v. Meier, 143 Mo. 446, 45 S. W. 306; High, Extr. Legal Rem. 3d ed. 119-121; People ex rel. Sutherland v. The Governor, 29 Mich. 320, 18 Am. Rep. 89; 6 Am. & Eng. Enc. Law, 2d ed. 1013, 1014; People ex rel. Broderick v. Morton, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791; Householder v. Morrill, 55 Kan. 317, 40 Pac. 664; Martin v. Ingham, 38 Kan. 641, 17 Pac. 162; Miles v. Bradford, 22 Md. 170, 85 Am. Dec. 643; State ex rel. Journal Co. v. Boyd, 36 Neb. 60, 53 N. W. 1116; Mitcheson v. Harlan, 7 Am. L. Reg. 468; Insane Asylum v. Wolfly, 3 Ariz. 132, 8 L.R.A. 188, 22 Pac. 383; Hawkins v. The Governor, 1 Ark. 570, 33 Am. Dec. 346; State ex rel. Bisbee v. Drew, 17 Fla. 67; People ex rel. Bacon v. Cullom, 100 Ill. 472; Hovey v. State, 127 Ind. 588, 11 L.R.A. 763, 22 Am. St. Rep. 663, 27 N. E. 175; State ex rel. Hope v. Board of Liquidation, 42 La. Ann. 647, 7 So. 706, 8 So. 577; Re Dennett, 32 Me. 508, 54 Am. Dec. 602; Rice v. Austin, 19 Minn. 103, Gil. 74, 18 Am. Rep. 330; State v. Dinkins, 77 Miss. 874, 27 So. 832; State, Gledhill, Prosecutor, v. The Governor, 25 N. J. L. 331; Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564; Woods v. Sheldon, 9 S. D. 392, 69 N. W. 602; State ex rel. Latture v. Board of Inspectors, 114 Tenn. 516, 86 S. W. 319; State ex rel. Peck v. Rusk, 55 Wis. 465, 13 N. W. 452; Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717.

In performing its duties the state board of equalization acts judicially. The writ of mandamus can only require the performance of a ministerial duty, not a judicial one involving discretion.

Black v. McGonigle, 103 Mo. 198, 15 S. W. 615; St. Joseph Lead Co. v. Simms, 108 Mo. 225, 18 S. W. 906; State ex rel. Wyatt v. Vaile, 122 Mo. 47, 26 S. W. 672; New York v. Davenport, 92 N. Y. 613; Grand Rapids v. Welleman, 85 Mich. 239, 48 N. W. 534; 1 Cooley, Taxn. 3d ed. 784, 786; 2 Cooley, Taxn. 3d ed. 1382, 1386; 26 Cyc. 158; Jacobs v. San Francisco, 100 Cal. 121, 34 Pac. 630.

Adams, Circuit Judge, delivered the opinion of the court:

This was a petition for a writ of mandamus against the members of the board of equalization of the state of Missouri, the members of a like board of the county of Macon, and the assessor and collector of the revenue of that county, to compel them to discharge duties which the relator,

Huidekoper, avers they declined to perform. The circuit court sustained a plea to the jurisdiction, and, treating it also as a demurrer, dismissed the petition on two grounds: (1) Because the suit was against the state of Missouri in violation of the 11th Amendment of the Constitution, and (2) because the court was asked to review action of state officers resting in discretion. From that judgment error is prosecuted.

In order to understand the several questions which we are called upon to decide, a general statement of the case as made by the petition seems to be required.

Pursuant to authority conferred by law, Macon county in May, 1870, made a subscription to the capital stock of the Missouri & Mississippi Railroad Company and issued its negotiable bonds in payment therefor. The only recourse the holders of the bonds had for their payment was the right to compel the levy of a tax of $\frac{1}{20}$ of 1 per cent, upon the assessed value of the taxable property of the county, and to participate with other creditors of the county in the proceeds of a tax of $\frac{1}{2}$ of 1 per cent authorized for general county purposes. Macon County Ct. v. Huidekoper (Macon County Ct. v. United States) 134 U. S. 332, 33 L. ed. 914, 10 Sup. Ct. Rep. 491, and cases cited. The relator became the owner of some of these bonds with attached coupons, and on default of payment recovered final judgments thereon. The subsequent securing of warrants upon the county treasurer, and other futile proceedings taken to secure satisfaction of his judgments, need not, for our present purposes, be dwelt upon. Suffice it to say the relator has not been able to collect his judgments, which amount in the aggregate to over \$263,000, and has resorted to this proceeding to enable him to do so.

The gravamen of his petition is: That the annual levies of $\frac{1}{2}$ and $\frac{1}{20}$ of 1 per cent upon the valuation of the property in the county, as assessed by the assessor and equalized by the state board of equalization, are entirely inadequate to raise the necessary fund to pay his judgments. That the present assessor of Macon county and his predecessors, for some time past, have intentionally, purposely, and fraudulently failed to assess the property of the county at its true value in money, but have assessed it at as low a fractional part thereof as would suffice to meet local needs, and have so done for the purpose of preventing the creation of a fund to pay the indebtedness of the county. That assessors of other counties of the state have also placed low values upon the property of their counties for the purpose of escaping their just proportion of the state tax.

That the state board of equalization, well knowing these facts, has for many years divided the counties of the state into groups, and, instead of equalizing the property among all the counties as required by law, has equalized it among the several groups only, so that the property of the same class in one group of counties has been assessed at a different per cent of its value than the same property in other counties or in different groups of counties. That in no case has the property of the different counties of the state been so assessed or equalized at its true value in money, but on the contrary has been assessed and equalized on an average of from 30 to 50 per cent only of that value. That the relator appeared before the state board at its last session, and informed its members of the fact that he was a judgment creditor of Macon county, advised them that the facts already detailed prevented the collection of his judgments, and demanded that the board equalize the various classes of property in Macon county on the basis of the real value in money, and certify the same to the proper officer of that county, to the end that, by the annual levies of $\frac{1}{4}$ and $\frac{1}{20}$ of 1 per cent allowed by law, a fund might be created to satisfy his judgments. That after a hearing of his petition a resolution was offered by Governor Hadley, a member of the board, in the words following: "That the true value in money of each class of property as the same is returned to this board for equalization in each county be ascertained by this board; that this true value in money of each class of such property in each county be set aside in a tabulation to be prepared, and that where the value of any of the classes of property in any of the counties, as returned to this board, is less than its true cash value, that such per centum of its true value be added thereto by this board as will make its assessed value as equalized by this board, equal to its true value in money, so that all classes of property in all the counties will be and is hereby equalized and assessed on a basis of its true value in money." That this resolution was voted down by a vote of three out of the five members constituting the board. That afterwards a resolution was offered by Mr. Cowgill, vice president of the board, providing that the true value in money of each class of property be ascertained by the board and set aside in a tabulation to be prepared, and that in the event the value of any of the classes of property in any of the counties as returned to the board is less than 50 per centum of its true cash value such per centum shall be added thereto as will make its assessed value equal to at

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least 50 per cent of its true value in money, to the end that all classes of property in the counties shall be equalized and assessed on a basis of not less than 50 per centum of its true value in money. That this resolution also failed to carry by a vote of three to two.

It is then alleged that by the action of a majority of the board in the particulars just mentioned and in other respects unnecessary now to be repeated, it arbitrarily, capriciously, and maliciously refused to equalize the property of the state and particularly that of Macon county on the basis of its true value in money, and knowingly, unlawfully, and fraudulently pretended to equalize the property of Macon county at \$8,270,123, when its members knew that its true value was in excess of \$25,000,000, that the act of the majority in so refusing was done intentionally, malevolently, and fraudulently with a view and for the purpose of assisting the officers of Macon county to defeat the payment of relator's judgments.

It is further alleged that the pretended equalization of the property of Macon county as well as that of the property of the entire state has been fictitious and fraudulent, and that the majority of the board have given out that at the sessions of the board to be held in the years 1910, 1911, and 1912, during which years they remain in office, they will continue the unlawful and fraudulent method of equalizing the property of the state by fixing the value at only a fraction of its real value not in excess of 33 per cent thereof.

In short, the petition discloses that, by a majority of its members, the state board has resorted to a method of dividing the counties of the state into groups and equalizing the values of property in each group without reference to values in counties embraced in other groups, and that as a result of that and other methods complained of and of a deliberately formed and expressed purpose to continue them, the property of the state as a whole has been equalized and will be continued to be equalized, not at its true value in money, but at a small fractional part thereof only. It is conceded in argument that the state board cannot take action solely with respect to Macon county, but must act in the equalization of values on a comprehensive plan embracing the property of all the counties and independent municipalities of the state.

Notwithstanding the fact that the members of the board of equalization and the assessor and collector of taxes of Macon county are made parties to this action, it is conceded that the performance of the duty upon which relator's remedy depends rests primarily with the state board; and it

is only when that body shall have done its duty that the officers of the county can take effective action. In other words, it is the position of counsel for the relator that no relief can be granted to the judgment creditor as against the action of the county assessor and other county officers until the state board, as the final arbiter of values, shall have been appealed to and shall have done its duty.

Accordingly, the argument on both sides has been directed chiefly to the question whether the members of the state board are amenable to this proceeding by mandamus.

It is claimed by the respondents that for three reasons they are not: First, because the proceeding against them is, in effect, one against the state of Missouri and, therefore, prohibited by the 11th Amendment of the Constitution of the United States; second, that their action in declining to equalize the property of the state, as requested by the relator, was the exercise of a discretion which is not reviewable by the courts; third, that as respondent Hadley is the governor of the state he is not subject to the writ of mandamus to compel him to do a duty as a member of the board of equalization.

1. Is this proceeding a suit against the state?

Section 9140, Rev. Stat. Mo. 1899 (Anno. Stat. 1906, p. 4210), provides that the assessor of each county shall take an oath to faithfully and impartially perform the duties of his office and to assess all the property in the county at what he believes to be its actual cash value.

Section 9180 provides that the assessor shall value and assess all the property of his county according to its true value in money at the time of the assessment.

Sections 9127 and 9195 provide that a statement or abstract of the taxes so assessed in each county shall be forwarded to the state auditor on blanks furnished by him, to be by him laid before the state board of equalization.

The Constitution of the state (art. 10, § 18) creates the board and ordains that "there shall be a state board of equalization, consisting of the governor, state auditor, state treasurer, secretary of state, and attorney general. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the state, and it shall perform such other duties as are or may be prescribed by law."

Section 9126 provides that a majority of the members of the board shall constitute a quorum, and that the members shall each take an oath or affirmation that he will, "to the best of his knowledge and ability, equalize the valuation of real and personal

property among the several counties in the state, according to the rules prescribed by this chapter for equalizing and valuing real property."

Section 9127 provides that the board, after receiving from the auditor abstracts or statements of all the taxable property in the state, and after classifying the same under certain headings, "shall proceed to equalize the valuation of each class thereof among the respective counties of the state in the following manner: "First—it shall add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money, such percentum as will increase the same in each case to its true value. Second—it shall deduct from the valuation of each class of the property, real or personal, of each county which it believes to be valued above its real value in money such percentum as will reduce the same in each case to its true value."

This brief epitome of the legislation clearly discloses that the policy of the state requires property to be assessed on the basis of its true value in money, and that a duty is cast upon the state board to equalize the property among the several counties of the state on that basis. Without now discussing the exact nature of that duty, its extent, or its limitations, it is sufficient, for our present purpose, to observe that it is an imperative duty imposed by the law of the state. A majority of its members constituting a working quorum refused to permit the board to perform that duty, and compelled it to decline to do so. In so acting they did not stand for the state of Missouri, and were not the state within the meaning of the 11th Amendment of the Constitution. A sovereign state must be presumed to be willing that its laws shall be obeyed. Through its laws it spoke to its servants and commanded them to do something. Certainly those servants, by their act of disobedience, do not represent or stand for the state. This suit, therefore, instead of being against the state, is against its servants to compel them to do a duty which, by accepting office, they agreed to perform.

A few authorities out of the many which might be referred to may not be out of place here.

In *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623, a decree restraining the board of liquidation of the state of Louisiana from making improper use of certain bonds was under review. The Supreme Court, speaking by Mr. Justice Bradley, said: "The objections to proceeding against state officers by mandamus or injunction are: "First, that it is, in effect,

proceeding against the state itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance."

That the petition filed in this case does not seek to control the discretion of the members of the board will appear later in the discussion of that branch of the case.

In the case of *Rolston v. Missouri Fund Comrs.* (*Rolston v. Crittenden*), 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599, the trustees in a mortgage made by the Hannibal & St. Joseph Railroad Company sought to restrain the executive officer of the state from selling mortgaged property under a prior statutory mortgage in favor of the state, on the ground that the liability for which the earlier lien was created had been satisfied, and that they, as trustees, were entitled to an assignment of the lien. Whether the suit was in effect a suit against the state and prohibited by the 11th Amendment arose. The court, speaking by Mr. Chief Justice Waite, said: "It is next contended that this suit cannot be maintained because it is in its effect a suit against the state, which is prohibited by the 11th Amendment of the Constitution of the United States; and *Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128, is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state."

In *Graham v. Folsom*, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. Rep. 245, judgment creditors of a township, whose judgment was founded upon certain bonds issued in favor of a railroad, sought by mandamus to compel county officers to levy and collect a tax to satisfy their judgment. It was contended that those officers were state officers, and, being so, that the suit was an attempt to require the state to perform its contract, and was therefore in effect a suit against the state, which was prohibited by the Constitution. This contention was 40 L.R.A. (N.S.)

denied on the authority, among other cases, of *Rolston v. Missouri Fund Comrs.* supra.

In *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, a suit was instituted to enjoin certain state officers from certifying a tax which they claimed the right to do by authority of the state, but which the complainant averred was without authority. Judge Taft, speaking for the court of appeals for the sixth circuit in that case, said: "This is not a suit against the state. It is a suit against individuals, seeking to enjoin them from doing certain acts which they assert to be by the authority of the state, but which the complainant avers to be without lawful authority. The point has been so often decided by the Supreme Court of the United States that it is sufficient to refer to a few of the cases."

We find nothing in the later decisions of the Supreme Court, particularly in *Ex parte Young and General Oil Co. v. Crain*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, and 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475, where the subject under consideration was exhaustively discussed, in conflict with the foregoing.

In the case of *Raymond v. Chicago Union Traction Co.* 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757, many expressions are found and urged upon our attention by learned counsel for respondents to the effect that the action of the state board of equalization in making the assessment there involved was the action of the state, but those expressions in our opinion are inapplicable to the present case. In that case the traction company was contending that the assessment of its property as made by the board, if enforced, would violate the 14th Amendment of the Constitution of the United States by taking its property without due process of law, and would deprive it of the equal protection of the laws. It was there held that the state board was an instrumentality through which the state acted, and that the provisions of the 14th Amendment prohibited the taking of property without due process of law by the state, not only through its legislature or by its executive or judicial department, but by or through any other instrumentality whatsoever. The conclusion there announced was not that the board of equalization was the state within the meaning of the 11th Amendment, so as not to be suable without its consent, but that the board was an agent of the state in taking steps preliminary to the imposition and collection of taxes charged to have been illegal, and was therefore the state within the meaning of the 14th Amendment. Most obvious-

ly the doctrine of this case has nothing to do with the question now under consideration.

The contention that the present suit is prohibited because against the state, and therefore in violation of the 11th Amendment of the Constitution, is not sound, and cannot be sustained.

2. Was the action of the board here complained of the exercise of a discretion with which the courts cannot interfere? The learned trial court, from the showing made by the petition alone, answered this question in the affirmative. Whether that answer is correct or not depends upon the applicatory law and the facts stated in the petition, which for the purposes of this case must be taken to be true.

Article 10, § 3, of the Constitution of Missouri, ordains that "taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

The legislature of the state, by way of executing this constitutional mandate, provided a scheme for equalizing the valuation of property among all the counties of the state, based on actual value, as a standard of procedure. Rev. Stat. 1899, § 9127. To work out this general scheme the state board of equalization was created (art. 10, § 18, Mo. Const.) and endowed with the power and charged with the duty of equalizing the values of property as classified by the legislature in the manner prescribed by § 9127, *supra*. The words "equalize" or "equalization," as used in revenue statutes of the kind now under consideration, have an accepted meaning throughout the country. Cooley, in his work on Taxation, 2d ed. p. 421, says: "Equalization of assessments has, for its general purpose, to bring the assessments of different parts of a taxing district to the same relative standard so that no one of the parts may be compelled to pay a disproportionate part of the tax."

The statute imposing a duty upon the state board, taken in connection with the constitutional requirements of uniformity, is imperative that the equalization shall comprehend all the counties and similar subdivisions of the state, and shall be accomplished by taking the abstracts or returns of the county and city assessors as the basis, and adding to or deducting therefrom enough to bring the equalized valuation to the true value of the property of such county or city.

With this understanding of the legal duty resting upon the state board, let us examine the petition and ascertain therefrom 40 L.R.A. (N.S.)

what the board actually did in response to the demand of the relator that it proceed to equalize the property of Macon and other counties according to its true value in money.

In the first place, it is made to appear that the board arbitrarily divided the counties of the state into several groups, and proceeded to equalize the property in the counties composing each group without equalizing the property of the several groups themselves, and thereby, as it is claimed, defeated the uniformity of values among all the counties as contemplated by the law. It is also charged that the board ignored the statutory command requiring it to equalize the valuation of the property in the several counties and independent cities by adding or deducting from the valuation as returned by the local assessing boards such sum as would bring the same to the true value of the property, and in lieu thereof adopted a standard of valuation not in excess of 33 per cent of the real value of the property, and equalized the valuations throughout the state on that basis; that the standard so adopted and the method so employed by the state board was by direction of a working majority arbitrarily, capriciously, and uniformly followed for many years with the intent and purpose, among other things, of aiding the officers of Macon county in defeating the collection of the relator's judgments.

The rule is well settled and fully recognized by us that when discretion is conferred upon public agents or officers their acts in the lawful exercise of that discretion cannot be controlled by mandamus. The rule is also well settled that, although the exercise of discretion will not be controlled by mandamus, yet the writ will lie to compel the person or the body in whom the discretion is lodged to proceed to its exercise. In view of these rules, we are of opinion that the discretion which cannot be controlled by mandamus is that discretion, and that only, which the law has vested in the person or body to be exercised. If the law has pointed out how or in what way the discretion shall be exercised, it is obviously not the exercise of the discretion imposed by law to proceed in any other way. To so proceed would be contrary to the law, and would be the exercise of arbitrary power, rather than discretion. To decline or refuse to proceed according to law or in the way pointed out by law is, in our opinion, equivalent to not proceeding at all. In other words, the discretion which will withstand review by the courts must be exercised under law, and not contrary to law.

In *Madison v. Smith*, 83 Ind. 502, 516, it is said: "It is no doubt the general rule

that an inferior tribunal will only be compelled to act,—not to make a decision one way or the other; but where a body not strictly judicial, although possessing quasi judicial powers, is under an absolute duty to act, and to act only in a certain way, the performance of that duty, both as to the action and its character, will be coerced by mandate. . . . Where there is a discretion, courts will not compel its exercise in any given direction; but where, upon the facts, the duty is a plain and absolute one, it is otherwise."

In *State ex rel. Wayne County v. Her-rald*, 36 W. Va. 721, 15 S. E. 974, it was held that where the assessor was required to impose a value upon property as town lots, and undertook to do so by the acre or tract, its action was not the exercise of discretion, and could be corrected by mandamus.

In the case of *State Board v. People*, 191 Ill. 528, 58 L.R.A. 513, 61 N. E. 339, the state board adopted a method of assessing property contrary to that prescribed by law. A mandamus proceeding was instituted to correct it. The trial court commanded the board to proceed to value and assess the property in the manner prescribed by law, and specified what that was. The supreme court, in affirming that judgment, said: "The court does not, by its said order and judgment, undertake to control the discretion or judgment of the respondents in the valuation or assessment of the capital stock, including the franchises, of said corporations. It only lays down the rules of law which govern and the methods which should be pursued by the respondents in making such valuation and assessment. This we think proper."

In the case of *Ramsay v. Hayes*, 187 N. Y. 367, 80 N. E. 193, it was held by the court of appeals of that state that where a commissioner of a relief fund adopted a method for determining the amount, contrary to law, the remedy was by mandamus to compel him to fix the pension according to the rules prescribed by statute therefor. To the same effect is *People v. Sanilac County*, 71 Mich. 16, 38 N. W. 639, and *Cleveland v. United States*, 93 C. C. A. 274, 166 Fed. 677.

In *State ex rel. McCleary v. Adcock*, 206 Mo. 550, 121 Am. St. Rep. 681, 105 S. W. 270, the supreme court of Missouri sustained a proceeding by mandamus against the state board of health, and held that the law does not place in the hands of administrative parties arbitrary power, and that their simple *ipse dixit* is not sufficient evidence of exercise of lawful discretion.

In *Illinois State Dental Examiners v. People*, 123 Ill. 227, 13 N. E. 201, the supreme court of Illinois observed: "A public officer or inferior tribunal may be guilty of so gross an abuse of discretion or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law; in such a case mandamus will afford a remedy,"—citing *Tapping, Mandamus*, 66 and 19; *Wood, Mandamus*, 64.

The United States circuit court of appeals for the sixth circuit, in the case of *Cunningham v. Cleveland*, 82 C. C. A. 55, 152 Fed. 907, in a case involving a question similar to that now before us, observed: "So long as the board acts lawfully and in good faith, its discretion cannot be supervised by the court. But it cannot, under the guise of its discretion, be permitted to accomplish an unlawful purpose."

We conclude, therefore, that the proceedings of the state board of equalization, in so far as they were not taken according to law and certainly in so far as they were taken in disregard and violation of the law, are not protected from judicial control as the exercise of a vested discretion.

3. The conclusions already reached dispose of the objections made in the trial court to issuing the writ of mandamus in this case; but it is now urged as an additional reason against it that the governor of the state, who constitutes one member of the board of equalization, cannot be coerced by the writ of mandamus to perform any executive duty, and that the balance of the board cannot be compelled to act without his co-operation. The governor, who is the chief executive officer of the state and as such required "to perform such duties as may be prescribed by law" (art. 5, § 1, Const.), including service upon the state board of equalization art. 10, § 18, Const. and § 9127, Rev. Stat.), when acting in that capacity, is performing an executive duty in no other or different sense than when performing any ministerial act devolving upon him as chief executive of the state.

Mr. High, in his work on *Extraordinary Legal Remedies*, 3d ed. § 120, after citing and considering many authorities on the subject, says that, according to the clear weight of authority, "the chief executive of the state is, as to the performance of any and all official duties, entirely removed from the control of the courts; and that he is beyond the reach of mandamus, not only as to duties of a strictly executive or political nature, but even as to purely ministerial acts whose performance the legislature may have required at his hands."

Judge Cooley, in delivering the opinion of the supreme court of Michigan in *People ex rel. Sutherland v. The Governor*, 20

Mich. 320, 18 Am. Rep. 89, calls attention to the practical difficulty of distinguishing between political and ministerial duties, and says: "But when duties are imposed upon the governor, whatever be their grade, importance, or nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a secretary of state, or a sheriff of a county or other inferior officer, and that inasmuch as, in case it had been so imposed, there would have been a judicial remedy for neglect to perform it, therefore there must be the like remedy when the governor himself is guilty of a similar neglect. The apportionment of power, authority, and duty to the governor is either made by the people in the Constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the Constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."

In *State ex rel. Robb v. Stone*, 120 Mo. 428, 23 L.R.A. 194, 41 Am. St. Rep. 705, 25 S. W. 376, the supreme court of Missouri cited and considered the numerous authorities relating to this subject, and stated the following conclusion: "Abundant authority establishes the position here taken that mandamus will not issue to the governor to compel the performance of any duty pertaining to his office, whether political or merely ministerial; whether commanded by the Constitution or by some law passed on the subject."

This doctrine was afterwards affirmed in the later case of *State ex rel. North & South R. Co. v. Meier*, 143 Mo. 439, 45 S. W. 306.

Whether, therefore, the duty imposed upon the governor of Missouri to act as a 40 L.R.A. (N.S.)

member of the state board of equalization is ministerial, executive, or political in its character, he is not, according to the law of this state as interpreted by its highest judicial tribunal, responsible to the judiciary for his action. The high sense of duty which must be presumed to actuate the chief executive of a state is the sole arbiter to which appeal can be made in such matters.

Whether the decision of the highest judicial tribunal of the state exempting the governor from coercion by the writ of mandamus is so a construction of the Constitution and statutes of Missouri or so a rule of property or action in the state, as under familiar rules bind the Federal courts and forbid their independent judgment may be doubted. As to this we desire to express no opinion.

The Supreme Court of the United States, in *Burgess v. Seligman*, 107 U. S. 20, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10, 21, after laying down the rule governing the exercise of independent judgment by the Federal courts in cases where state courts have made decisions which were not, properly speaking, controlling upon the national courts, said: "But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts."

In view of these wise and temperate observations, and of the fact that the Missouri doctrine is in harmony with the great weight of authority, we shall conform to that doctrine, and hold that the respondent Hadley is not subject to the writ of mandamus in the present case.

But this is not conclusive of the inquiry before us. The governor is only one out of five members of the state board of equalization. Any three of them, according to the statute (§ 9126, Rev. Stat.) constitute a quorum for the transaction of business. The reason why the governor cannot be coerced by mandamus is that he needs no such coercion; he is conclusively presumed to be willing to perform all his executive duties. His constitutional obligation is to see that the laws of the state shall be faithfully executed (art. 5, §§ 4, 6, Const.) and his oath of office requires him to support the Constitution and demean himself faith-

fully in office (art. 14, § 6, Const.). The very reasons which exempt him from liability to the writ of mandamus are the ones which insure the performance of his duty as a member of the board of equalization. Not only is this theoretically true, but the petition in this case shows that it is actually so. He led a movement in the board to secure equalization of values according to law, and it must be conclusively presumed that he will take no different course when occasion requires him to act.

But whatever the fact may be in this regard, the board is not one which requires either unanimity of consideration or of action by all its members. By special provision of law (§ 9126, Rev. Stat.) any three of them constitute a quorum and are therefore competent to transact the business of the board in the absence of the other members. If the governor should be disabled by sickness or other infirmity from attending the sessions of the board, can it be doubted that the remaining members of that body could be compelled to proceed with the performance of their duty? Obviously not. Accordingly, we think the writ of mandamus may lawfully be awarded to secure action by a statutory quorum of the board in this case when circumstances are such that the entire membership cannot be reached by that writ.

Other less important questions have been argued to us, but they involve nothing which compels a different conclusion from that which we have reached.

When the writ shall be issued, as it must be, the return made and the proof, if any, taken, the court will doubtless better understand all the facts and circumstances of the case, and be better able to consider some of the contentions of learned counsel concerning the fiscal policy of the state and the proper exercise of discretion by its officers. As it is, however, the petition, to the averments of which we are necessarily confined, makes it appear that the relator's judgments against Macon county, which a just regard for civil rights requires should be paid, are rendered practically worthless by a failure to discharge a duty imposed by law upon the respondents. For such a breach of duty there ought to be a remedy.

The judgment must be reversed as to all the respondents except Governor Hadley, and the cause remanded to the Circuit Court, with directions to proceed in the usual way in such cases, and in harmony with the views here expressed.

Appeal dismissed by the Supreme Court of the United States, October 19, 1911.
40 L.R.A.(N.S.)

IOWA SUPREME COURT.

MINNEAPOLIS SELLING COMPANY

v.

R. N. COWIN & COMPANY, Appt.

(— Iowa, —, 133 N. W. 338.)

Sale — by description — acceptance — effect.

One who offers to manufacture a quantity of cards of a certain description does not, by displaying work for the inspection of the purchaser, warrant that the cards will equal the work displayed, and therefore if the purchaser accepts the cards delivered without inspecting them within a reasonable time to see if they conform to the description, or if he makes sales after learning of defects, he will be precluded from claiming damages because of an alleged nonconformity.

(November 20, 1911.)

APPEAL by defendant from a judgment of the District Court for Blackhawk County in plaintiff's favor in an action brought to recover the amount alleged to be due on goods sold and delivered by plaintiff to defendant. Affirmed.

Statement by Weaver, J.:

Action at law to recover the selling price of a quantity of post cards. There was trial to a jury, and at the conclusion of the testimony the court upon plaintiffs' motion directed a verdict in their favor. From the judgment entered upon this verdict, the defendants have appealed.

Messrs. Courtright & Arbuckle and F. S. Merriau, for appellant:

Plaintiff warranted the quality and merchantability of the post cards in the contract of sale.

Williston, Sales, 260, 341, ¶ 251; 1 Beach, Contr. ¶ 259; Benjamin, Sales, 612; 35 Cyc. 381; Love v. Barnesville Mfg. Co. 3 Penn. (Del.) 152, 50 Atl. 536; Imperial Portrait Co. v. Bryan, 111 Ga. 99, 36 S. E. 291; Atwater v. Clancy, 107 Mass. 369; Texas Fruit Co. v. Lane, 101 Mo. App. 712, 74 S. W. 400; Christian v. Knight & Co. 128 Ga. 501, 57 S. E. 763; Conkling v. Standard Oil Co. 138 Iowa, 596, 116 N. W.

Note. — The above case is authority for the doctrine that the exhibition by the seller to the buyer of post cards as illustrative of the quality and excellence of the card which the former agrees to manufacture for the latter is not a sale by sample because the cards to be manufactured under the agreement were not to represent the same views as the card exhibited, and hence the rule that a sale by sample constitutes a warranty of quality which sur-

822; *Briggs v. M. Rumely Co.* 96 Iowa, 202, 64 N. W. 784; *Callanan v. Brown*, 31 Iowa, 333.

The warranty survived acceptance of the goods.

1 *Beach, Contr.* 340, 341, ¶ 270; 2 *Mechem, Sales*, ¶ 1395; 35 *Cyc.* 423; *Zabriskie v. Central Vermont R. Co.* 131 N. Y. 72, 29 N. E. 1006; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753, 23 N. E. 372; *Minnesota Thresher Mfg. Co. v. Hanson*, 3 N. D. 81, 54 N. W. 311; *Briggs v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63, 3 N. E. 51; *Gurney v. Atlantic & G. W. R. Co.* 58 N. Y. 358; *Iroquois Furnace Co. v. Wilkin Mfg. Co.* 181 Ill. 582, 54 N. E. 987; *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. Rep. 40, 23 N. E. 698; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Bradford v. Manly*, 13 Mass. 138, 7 Am. Dec. 122; *Myer v. Wheeler*, 65 Iowa, 300, 21 N. W. 692; *Aultman, M. & Co. v. Theirer*, 34 Iowa, 275; *Upton Mfg. Co. v. Huiske*, 69 Iowa, 560, 29 N. W. 621; *Getty v. Rountree*, 2 Pinney (Wis.) 379, 54 Am. Dec. 138; *Laporte Improv. Co. v. Brock*, 99 Iowa, 485, 61 Am. St. Rep. 245, 68 N. W. 810.

Messrs. Reed & Tuthill, for appellee:

The statements made by plaintiff's agent at the time of sale did not constitute a warranty, but were merely descriptive of the article to be manufactured.

2 *Mechem, Sales*, ¶¶ 1241, 1245; *Richardson v. Coffman*, 87 Iowa, 121, 54 N. W. 356.

The defendant by acceptance and partial payments of the postal cards, without objection or notice to plaintiff for nearly eighteen months, has waived any right he may have had to either return the cards or recover damages.

Jones Bros. v. McEwan, 91 Ky. 373, 12

L.R.A. 399, 16 S. W. 81; *Makey v. Swartz*, 60 Iowa, 710, 15 N. W. 576; *Winelander v. Jones*, 77 Iowa, 401, 42 N. W. 333; *Schopp v. Taft*, 106 Iowa, 612, 76 N. W. 843; *Hirshorn v. Stewart*, 49 Iowa, 418; *Allison v. Vaughan*, 40 Iowa, 421; *Laporte Improv. Co. v. Brock*, 99 Iowa, 485, 61 Am. St. Rep. 245, 68 N. W. 810.

Weaver, J., delivered the opinion of the court:

At the date of the transaction out of which this litigation has arisen, the defendants were proprietors of a news stand in the city of Waterloo, Iowa, and plaintiffs were manufacturers and jobbers of post cards at Minneapolis, Minnesota. On May 3 and 4, 1907, plaintiffs' traveling representative called upon defendants and solicited their order for cards. On the day first mentioned defendants gave the solicitor an order for certain Christmas goods amounting to \$62.70, over which, as we understand the record, there is no controversy. On the following day defendants gave him another order for 30,000 post cards. These cards were to be decorated with colored pictures of specified views of scenery in and about Waterloo, to be copied from photographs obtained for that purpose. The cards were manufactured by plaintiffs and shipped in three separate consignments, namely, June 17th, July 1st, and November 19th, following the date of the order. The larger part of the cards was contained in the consignment of July 1st. Upon the account thus created defendants made payments as follows: August 22, \$50; October 14, \$50; and November 6, \$25. The remainder of \$132.70 not being paid on demand therefor, this action was begun at law to recover the same.

Defendants admit giving the orders re-

vives acceptance does not apply. This doctrine seems to be in accord with the weight of authority. See note in 70 L.R.A. 653, as to warranty on sale of goods by sample.

And upon the question of whether the implied warranties raised by a sale of a character very similar to that involved in *MINNEAPOLIS SELLING Co. v. R. N. COWIN & Co.* will survive acceptance, see *Heath Dry Gas Co. v. Hurd*, 25 L.R.A. (N.S.) 160, and note thereto.

The doctrine of *MINNEAPOLIS SELLING Co. v. R. N. COWIN & Co.* that a sale by description does not constitute a sale by warranty which will survive acceptance after inspection, with knowledge that the article does not correspond with the description, at least, where the sale is by executory contract, is discussed at length in a note in 35 L.R.A. (N.S.) 258, considering effect of a sale by a particular description of kind or quality. And as bearing upon the same question, see note in 36 L.R.A. 40 L.R.A. (N.S.)

(N.S.) 467, discussing the question of use as a waiver of the right to rescind for breach of warranty or noncompliance with the contract.

And see also note in 4 L.R.A. (N.S.) 1167, as to the right of the buyer to retain the goods and defeat an action for the purchase price on discovering that the goods do not comply with the requirements of the contract; also note in 8 L.R.A. (N.S.) 1167, as to the effect of delivery to carrier upon buyer's right to reject goods for lack of quality.

As to the right of a purchaser of goods deliverable in instalments to rescind the contract or refuse further deliveries for breach of quality, see note in 38 L.R.A. (N.S.) 539.

For an exception to the general rule that a sale by description does not constitute an express warranty of quality, see note in 37 L.R.A. (N.S.) 79, on the liability of the vender of seeds.

ferred to, but alleged by way of counterclaim that plaintiffs' agent negotiating with them for a sale of the post cards produced a sample of the kind of work which plaintiffs could or would do for the defendants; that such card so exhibited was "of artistic quality and a character of card which would have been easily and readily salable on the market in Waterloo." They further allege that the cards when made and delivered to them "were imperfect and defective from the standpoint of salability, and the views represented thereon were dim and imperfect," by reason of which they were "inartistic, absolutely unsalable, and of no value whatever."

Giving the evidence its most favorable construction in support of the defense and counterclaim, it tends to show plaintiffs' agent displayed to defendants one or more cards which had been made in Germany, and said that the cards with which plaintiffs would fill the order given him would be as good or better than those of German make. The cards delivered upon this order, defendants testify, were plainly of quality and finish inferior to the German cards had in view at the time the order was given. The pictures were not composed of as many colors, and the colors were blurred or run together and less distinct in perspective than they should have been to equal the sample, and according to defendants' testimony had little or no market value.

It is conceded, however, that defendants did sell and dispose of some 13,000 of them. No complaint of the quality or workmanship of the cards appears to have been made to plaintiffs until some time after the last small shipment made in November, 1907. Apparently in the latter part of December, 1907, this last consignment was reshipped to the plaintiffs without any letter of explanation; but plaintiffs refused to receive it. Indeed, no express objection or complaint of the character or quality of the cards is shown until after this action was begun.

The position taken by appellants is that upon the record so made the jury would have been justified in finding that plaintiffs warranted the quality and workmanship of the cards, and that the cards were not in fact as warranted. Under such conditions they claim they are entitled to the benefit of the rule which permits a purchaser with a warranty to receive and retain the subject of the purchase and still preserve his right of action for a breach of the warranty. That there is a well-recognized rule in this state to the effect here stated is not open to question. 2 Mechem, Sales, § 1811; Upton Mfg. Co. v. 40 L.R.A.(N.S.)

Huiske, 69 Iowa, 557, 29 N. W. 621; Aultman, M. & Co. v. Theiler, 34 Iowa, 272.

The serious question at this point is whether, under the facts in the case as stated by defendants themselves, they come within the benefit of the principle which they invoke. Is any warranty shown? The cards which the plaintiffs were to deliver were not then in existence. They were yet to be printed and colored and put in completed shape for the market.

The agreement stated by defendants themselves in their testimony on the trial was in substance an agreement to manufacture and deliver certain specified described goods. Many courts, including this court, have been disposed to draw a distinction between executory contracts of this character and ordinary executed contracts of sale and warranty, and to hold that representations which might sustain a claim of warranty in cases of the latter kind will, in cases of the former class, be treated not as warranties, but as what is sometimes denominated "sales by description." *Chantler v. Hopkins*, 4 Mees. & W. 399, 1 Hurlst. & N. 377, 8 L. J. Exch. N. S. 14, 3 Jur. 58; *Allison v. Vaughan*, 40 Iowa, 421; *Hirshhorn v. Stewart*, 49 Iowa, 418; *Mackey v. Swartz*, 60 Iowa, 710, 15 N. W. 576; *Schopp v. Taft*, 106 Iowa, 612, 76 N. W. 843; *Berthold v. SeEVERS Mfg. Co.* 89 Iowa, 506, 56 N. W. 669; *Electric Storage Battery Co. v. Waterloo, C. F. & N. R. Co.* 138 Iowa, 369, 19 L.R.A.(N.S.) 1183, 116 N. W. 144.

In cases of this kind it is held that the purchaser is required to inspect the goods, when delivered or tendered for delivery, and if he finds they do not conform, in kind or quality or description, to the terms of his order or contract, he may refuse to accept them and so notify the seller. Failing to do so within a reasonable time, or proceeding to use or sell the property as his own after inspection has disclosed its nonconformity to his order, he is held to waive objection thereto, and must pay the agreed price. The writer of this opinion is not impressed with the soundness of this distinction or the logical sufficiency of the arguments by which it is supported, but the court has been too long committed to it to justify us in overruling the numerous precedents to that effect. The most plausible ground for the distinction is in the proposition that an order given for property of a particular kind or description, and particularly where it is contemplated that the article is to be manufactured and prepared for the special purpose of filing the order, the undertaking of the seller with reference to the quality and description of the article is not so much a warranty as a condition precedent to the duty

of the purchaser to accept it. If then, when the tender is made of an article differing in any respect from the one ordered, and the defect is plainly apparent upon examination, and purchaser does not insist upon the condition precedent and refuse to accept the tender as a fulfillment of the seller's contract, he is held to have admitted the sufficiency thereof and to waive his right to thereafter raise the objection, and the seller is entitled to recover the agreed price.

In *Berthold v. Seevers Mfg. Co.* 89 Iowa, 508, 56 N. W. 669, which involves the question we are here considering, this court said: "When goods are delivered on an existing contract requiring a particular quality, the absence or presence of which can be seen on mere view, in such case the purchase is without warranty or [and?] the acceptance without objection leaves the seller relieved of all responsibility for the goodness, quality, or fitness of the property." This fairly sums up the effect of our decisions applicable to the issue here submitted.

In this connection it should be said defendants testify that the inferior quality of the cards delivered to them was clearly visible from the first. They received them without objection or complaint, and proceeded to sell nearly half of them before suggesting any dissatisfaction with the purchase. If the rule of our prior decisions is to be adhered to, the trial court did not err in holding it applicable to this situation.

It is to be remembered, also, that in this case the German card exhibited to the defendants was not in any proper sense a "sample," because, as we have noted, the cards to be sold were as yet unmanufactured, and no sample of them either as to kind or quality could be produced. It was rather an exhibit illustrating the quality or excellence of the work plaintiffs claimed they were able to do. The matter of artistic excellence or degree of artistic perfection, which is the question most insisted upon by the defendants, is so much a matter of taste, and taste is so much a matter of education and training, that a promise that a picture to be produced shall be "as good or better" than one which is referred to as a standard can hardly be more than a mere expression of opinion on which no one can be supposed to rely as a warranty.

Millions of the American people, who would look with more or less weariness upon the masterpieces of Raphael, Titian, Turner, and West, discover great merit in the highly colored supplements of their Sunday morning newspapers. Under the golden dome of a Western capital is a 40 L.R.A. (N.S.)

specimen of the painter's art for which the people cheerfully paid many thousand dollars, but the writer has the word of an eminent Scotch-American that in his judgment "it is not worth 50 cents." The same canvas which appeals to one as an excellent portrait by Whistler will be readily recognized by another of less technical learning, but perhaps keener perception, as a graphic portrayal of a Western cyclone.

While the use of the word "warranty" or "warrant" is of course not essential to sustain such a defense or counterclaim, its absence is a circumstance of some significance; and, if the words actually employed are under all the circumstances clearly to be understood as mere expressions of opinion or boastful praise of an article yet to be manufactured, neither the court nor jury is at liberty to treat them as a warranty.

An examination of the record in this case leads us to the conclusion that no express warranty was shown, and that under the rule established by our own cases the facts presented do not call for an application of the law as to implied warranties.

It follows that the judgment of the District Court must be affirmed.

MICHIGAN SUPREME COURT.

ANASTASIA GOODELL, Plff. in Err.,

v.

CASIMER J. YEZERSKI et al.

RE ESTATE OF ANNA CAMERON, Deceased.

(— Mich. —, 136 N. W. 451.)

Statutes — adoption — judicial construction at origin — effect.

1. A judicial construction of a statute made by the courts of its origin after its adoption in another state is not controlling there.

Bastardy — inheritance of child — death before mother.

2. The death of an illegitimate before his mother does not prevent his children from inheriting from the latter, under a statute providing that every illegitimate child shall be considered as the heir of his mother.

Note. — The right of lineal descendants of an illegitimate to inherit through him is discussed in the note to *Truelove v. Truelove*, 27 L.R.A. (N.S.) 220. As to right of adopted child to inherit property from a relative of the adopted parent, see notes to *Warren v. Prescott*, 17 L.R.A. 435; *Hockaday v. Lynn*, 8 L.R.A. (N.S.) 117; and *Merritt v. Morton*, 33 L.R.A. (N.S.) 139.

er, and shall inherit her estate in like manner as if born in lawful wedlock.

(May 31, 1912.)

ERROR to the Circuit Court for Alpena County to review a judgment affirming an order of the Probate Court distributing the estate of Anna Cameron, deceased. Reversed.

The facts are stated in the opinion.

Mr. Ignatius J. Salliotte, for plaintiff in error:

The death of the illegitimate before descent case will not preclude his issue from receiving the estate which would have vested in him and be thereby transmitted to his issue were he alive.

5 Cyc. note 96, p. 642; *Johnson v. Bodine*, 108 Iowa, 594, 79 N. W. 348; *Mathis v. Mathis*, 12 Ky. L. Rep. 941; *Ash v. Way*, 2 Gratt. 203; *Turnmier v. Mayes*, 121 Tenn. 45, 114 S. W. 478; *Houston v. Davidson*, 45 Ga. 574; *Bales v. Elder*, 118 Ill. 436, 11 N. E. 421; *Jenkins v. Drane*, 121 Ill. 217, 12 N. E. 684; *McGuire v. Brown*, 41 Iowa, 650; *Brewer v. Hamor*, 83 Me. 251, 22 Atl. 161; *Coor v. Starling*, 54 N. C. (1 Jones, Eq.) 243; *McByrde v. Patterson*, 78 N. C. 412; *Powers v. Kite*, 83 N. C. 156; *Grundy v. Hadfield*, 16 R. I. 579, 18 Atl. 186; *Re Magee*, 63 Cal. 414; *Keeler v. Dawson*, 73 Mich. 603, 41 N. W. 700.

Mr. Joseph Cavanagh, for defendants in error:

In all cases it is the duty of the court not to extend a statute by construction beyond its obvious import.

Morrill v. Seymour, 3 Mich. 67.

The lawful issue of a deceased illegitimate parent does not inherit the estate of a paternal or maternal ancestor of the parent, to which the bastard would have been entitled if living.

27 Am. & Eng. Enc. Law 2d ed. 333; *Curtis v. Hewins*, 11 Met. 294; *Edwards v. Gaulding*, 38 Miss. 118; *Vorhees v. Sharp*, 63 N. J. Eq. 216, 49 Atl. 722; *Jackson v. Jackson*, 78 Ky. 390, 39 Am. Rep. 246.

This law has been construed by the supreme court of Massachusetts and comes to us weighty with such decision.

Preston Nat. Bank v. Wayne Circuit Judge, 142 Mich. 272, 105 N. W. 757; *Besser v. Alpena Circuit Judge*, 155 Mich. 633, 119 N. W. 902; *Steckel's Appeal*, 64 Pa. 493; *Croan v. Phelps*, 94 Ky. 213, 23 L.R.A. 757, 21 S. W. 874.

Brooke, J., delivered the opinion of the court:

Anna Cameron died intestate April 16, 1910. She was never married, but had an illegitimate son, Antoine Dennoyer, who 40 L.R.A. (N.S.)

died November 13, 1900. The appellant, Anastasia Goodell, is the legitimate and only child of Antoine Dennoyer. The estate of Anna Cameron was duly administered in probate court and an order there made assigning the residue thereof to Casimir Yezerski and Elizabeth Blavet, the brother and sister of Anna Cameron. An appeal was taken to the circuit court, where the order of distribution was affirmed. Anastasia Goodell has now removed the case to this court for review by writ of error. The sole question raised upon the record is the proper construction to be given to Comp. Laws 1897, § 9065: "Every illegitimate child shall be considered as an heir of his mother, and shall inherit her estate, in like manner as if born in lawful wedlock; but shall not be allowed to claim, as representing his mother, any part of the estate of any of her kindred, either lineal or collateral."

Michigan adopted this statute from Massachusetts, and it will be found in the Revised Statutes of 1838 at page 268. Some eight years after it became a part of the statute law of Michigan, it received judicial construction by the Massachusetts court. *Curtis v. Hewins*, 11 Met. 294. In that case the precise situation had arisen which is here presented, and the court held, without discussion, that "the statute provision did not apply to grandchildren of the mother of an illegitimate child."

It is contended by the appellees that this construction is controlling upon this court, under the authority of *Besser v. Alpena Circuit Judge*, 155 Mich. 631, 119 N. W. 902; *Preston Nat. Bank v. Wayne Circuit Judge*, 142 Mich. 272, 105 N. W. 757. In the latter case it is said that "it is an established rule of construction that the adoption of a statute of a sister state is presumed to have been had with reference to the previous construction given to such statute by the courts of such state,"—citing cases. This rule is not absolutely imperative. *Stellwagen v. Wayne Probate Judge*, 130 Mich. 166, 89 N. W. 728. The rule, however, can have no application in the instant case, because the statute under consideration did not receive judicial construction in Massachusetts until long after its adoption by this state. The decision in that state should receive just that consideration as authority to which it would be entitled under ordinary circumstances. Examined in this light, it is not convincing. The statute is not analyzed, and no reason or authority is advanced in support of the conclusion. It is a bald determination of the point at issue without more.

We are therefore free to adopt such a construction of the law in Michigan as

commends itself to our judgment. Cyc. vol. 5, p. 642, note 95, states the rule as follows: "The death of the illegitimate before descent cast will not preclude his issue from receiving the estate which would have vested in him and be thereby transmitted to his issue were he alive." Cases from various jurisdictions are cited by the author in support of the rule. In addition to those cited, the following cases also lend strength in some measure to the proposition: *Turnmire v. Mayes*, 121 Tenn. 45, 114 S. W. 478; *Houston v. Davidson*, 45 Ga. 574; *Bales v. Elder*, 118 Ill. 436, 11 N. E. 421; *Jenkins v. Drane*, 121 Ill. 217, 12 N. E. 684; *McGuire v. Brown*, 41 Iowa, 650; *Brewer v. Hamor*, 83 Me. 251, 22 Atl. 161; *Coor v. Starling*, 54 N. C. (1 Jones, Eq.) 243; *McBryde v. Patterson*, 78 N. C. 412; *Powers v. Kite*, 83 N. C. 156; *Grundy v. Hadfield*, 16 R. I. 579, 18 Atl. 186. It is stated in 27 Am. & Eng. Enc. Law, at page 333: "According to the construction placed upon some of the statutes which confer inheritable qualities upon illegitimate children, the lawful issue of a deceased illegitimate parent does not inherit the estate of a paternal or maternal ancestor of the parent, to which the bastard would have been entitled if living." Four cases are cited in support of the text, only one of which is direct authority upon the point. That one is *Curtis v. Hewins*, supra. The text continues: "But the statutes of some of the United States are given a different construction, and the children of a deceased illegitimate child succeed to any estate which the illegitimate would have inherited if alive,"—citing many of the cases noted above. An examination of all the decisions will disclose that the statutes under which they were pronounced were not exactly like our own, nor are the facts the same in any case except *Curtis v. Hewins*, supra. The facts in the case of *Grundy v. Hadfield*, supra, are not similar to those in the case at bar, and the Rhode Island statute differs from our own. It provides: "Bastards shall be capable of inheriting or transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother." In an earlier case (*Briggs v. Greene*, 10 R. I. 495) the court in construing the statute said: "They shall inherit as the same mother's legitimate children might. The illegitimate are put upon the same footing as the legitimate for the purpose of inheritance, and for this purpose are legitimate. They have then all the same kindred as her legitimate children have, and when those born in lawful wedlock take by descent according to degrees 40 L.R.A. (N.S.)

prescribed by the statute, the others take also."

It will be noted that the foregoing excerpt deals only with the rights of the bastard to inherit under the statute. His right to transmit such inheritance collaterally is granted by the statute. He could always at common law transmit his inheritance lineally to his own descendants. This case dealt with the right of one illegitimate daughter to inherit under the statute from another illegitimate daughter of the same mother, the mother having predeceased her. The Iowa statute provides that "illegitimate children inherit from the mother and the mother from the children." In the case of *McGuire v. Brown*, supra, this statute was construed. There, the deceased left surviving him two brothers and one Martha L. Gibbins, an illegitimate daughter of his deceased sister, Sarah McGuire. The facts therefore are, upon principle, the same as those in the case at bar. The court said: "This section constitutes an illegitimate child a lawful heir of the mother, for, the capacity to inherit being conferred, it follows that the child is in effect an heir to the mother and the mother an heir to the child." The North Carolina cases are not of value because they do not deal with the precise question here at issue. The Illinois statute is so much broader than our own that the decisions in that state lose value as direct precedents. The case of *Ash v. Way*, 2 Gratt. 203, is instructive. See also *Turnmire v. Mayes*, supra.

While many of the cases cited have no direct or controlling effect upon the question now before us, they do serve to illustrate the fact that the progress of civilization and the spread of correct ideas upon the subject have tended largely to the amelioration of the condition of illegimates and to the obliteration of the old common-law doctrine that they were to be regarded as outcasts. The statute in question is remedial in character, and it is to be presumed that the legislature intended the most beneficial construction of the act consistent with a proper regard for the ordinary canons of construction. Notwithstanding the rule that a statute in derogation of the common law must be construed strictly, it is well settled that it must be construed sensibly and in harmony with the legislative purpose. What was that purpose as indicated by the statute? If it was the legislative intent to take care of the interest of the illegitimate alone, the statute would have been complete when it said: "Every illegitimate child shall be considered as an heir of his mother." Those words alone were sufficient to clothe the il-

legitimate himself with heritable qualities so far as his mother's estate was concerned. But other words were added: "And shall inherit her estate in like manner as if born in lawful wedlock." This language is used to qualify or define the character of his heirship provided for earlier in the section. He is an heir of his mother. What kind of an heir? An heir the same as if born in lawful wedlock. What are the incidents of heirship of one born in lawful wedlock? Obviously the first and most important is the right to transmit his inheritance to the heirs of his body. But we are of opinion that, even without the definitive words, the situation would be the same, for at common law the illegitimate could transmit his inheritance to the heirs of his body.

The judgment assigning the residue of the estate to the brother and sister of Anna Cameron is reversed, and the case remanded, for further proceedings in accordance with this opinion.

PENNSYLVANIA SUPREME COURT.

MARGARET MOSER

v.

PHILADELPHIA, HARRISBURG, &
PITTSBURG RAILROAD COMPANY,
Appt.

(233 Pa. 259, 82 Atl. 362.)

Railroad — lease — discrimination in sidings — liability.

1. A railroad company is not liable for

Note. — Liability of lessor of railroad for discrimination by lessee against shippers.

On the question as to the liability of the lessor of a railroad for injuries caused by negligence of another company using the road under a lease, license, or contract, see note to *Caruthers v. Kansas City, Ft. S. & M. R. Co.* 44 L.R.A. 737.

The grant of a franchise to a railroad company is a trust carrying with it the duty to serve the public faithfully and impartially and to perform the duties and obligations imposed upon it by its charter or the general laws of the state; and the railroad company cannot, in the absence of charter stipulation or legislative authority to the contrary, by lease or other contract, transfer to another company its road and the use of its franchise, and thereby absolve itself from responsibility for the conduct and management of the road, or evade any duty it may owe the public. This is because the leasing is without authority of law, and the lessee stands in the relation of agent of the lessor, acting for the lessor, and binding the lessor by every act done in the management of the road. But even where there is due authority of law for the 40 L.R.A. (N.S.)

discrimination in siding facilities, made contrary to the provisions of a statute, by its lessee, against an adjoining mill owner, after the lease was executed, and the lessee had gone into possession of the property.

Same — duty to furnish siding facilities.

2. A railroad company is under no obligation to furnish siding facilities to adjoining landowners.

Estoppel — position in litigation — subsequent denial.

3. A property owner who has asserted the validity of a lease of a railroad to compel the lessee to furnish him siding facilities cannot, in another proceeding to hold the lessor liable in damages for refusal to do so, deny its validity.

Judgment — equity decree — effect of law action.

4. A decree in chancery in a suit against a lessor and lessee railroad, requiring them to furnish siding facilities to an adjoining mill owner, as required by statute, is not conclusive of the liability of the lessor in a subsequent action at law to hold it liable in damages for refusal to furnish such facilities.

Estoppel — finding of facts — effect in subsequent action.

5. A finding in an equity suit to compel the furnishing of siding facilities by a railroad of repeated demands upon the railroad company to do so, covering a long period of time, not necessary to the decree, and based upon immaterial evidence, is not sufficient to establish such demand in a subsequent action at law to hold the company liable in damages for failure to do so.

leasing of a railroad, the company cannot, by leasing its line, discharge itself of those responsibilities which are imposed upon it by the law of its incorporation and the positive duties which it owes to the public. Considerable discussion upon the liability for duties absolutely imposed by law upon the lessor company and duties arising from the manner of the operation of trains is found in the cases passing upon the liability of the lessor for negligence of the lessee.

No case has been found passing upon the liability of the lessor for discrimination by lessee against shippers, where a lease of the road was authorized by law, as was the case in *MOSER v. PHILADELPHIA, H. & P. R. Co.*

Accordingly it has been held that the original grantee of the franchise is liable in damages to a shipper for the refusal of its lessee to furnish transportation facilities upon demand, where such lease is not authorized by law. *Central & M. R. Co. v. Morris*, 68 Tex. 49, 3 S. W. 457.

Generally, as to power to compel a railroad to build, maintain, or connect with, side tracks for accommodation of shippers, see *State ex rel. Mt. Hope Coal Co. v. White Oak R. Co.* and note appended thereto in 28 L.R.A. (N.S.) 1013. A. L. R.

Damages — Increase in cost — Liability under decree.

6. The mere fact that a stranger offered to construct a railroad siding for a certain amount before the entry of the decree requiring a railroad company to do so, and some time after the decree, complainant was compelled to pay him a much larger amount for the work, does not establish the liability of the railroad company for the difference especially where there is nothing to show when demand was made upon it or its duty began.

(Mestrezat, J., dissents.)

(January 2, 1912.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Cumberland County in plaintiff's favor in an action brought to recover damages for undue and unreasonable discrimination in the matter of furnishing facilities for transportation. Reversed.

The facts are stated in the opinion.

Messrs. Conrad Hambleton and John W. Wetzel, for appellant:

The defendant having leased its railroad prior to the cause of action, there can be no recovery against it for an act of the lessee, in discriminating in the furnishing of rates or facilities.

Pinkerton v. Pennsylvania Traction Co. 193 Pa. 229, 44 Atl. 284; *Caruthers v. Kansas City, Ft. S. & M. R. Co.* 59 Kan. 629, 44 L.R.A. 737, 54 Pac. 673.

The character of injuries set up by the plaintiff is not such as is contemplated by the act of 1883.

Hoover v. Pennsylvania R. Co. 156 Pa. 220, 22 L.R.A. 263, 36 Am. St. Rep. 43, 27 Atl. 282; *Wright v. Baltimore & O. R. Co.* 32 Pa. Super. Ct. 5.

There can be no recovery for any part of the cost of the siding, except through a reformation of the decree.

Head v. Meloney, 111 Pa. 99, 2 Atl. 195; *Monongahela Nav. Co. v. Wood*, 194 Pa. 47, 45 Atl. 73; *Peebles v. Pittsburgh*, 101 Pa. 304, 47 Am. Rep. 714; *De la Cuesta v. Insurance Co. of N. A.* 136 Pa. 78, 9 L.R.A. 631, 20 Atl. 505.

Messrs. Joseph P. McKeehan and S. B. Sadler, for appellee:

An adjoining landowner has, as such, a special and peculiar right to a railroad siding. In estimating damages for land taken, a railroad takes credit for the benefit conferred incidental to this right. No credit can be taken for benefits incident to rights enjoyed by the public.

Moser v. Philadelphia, H. & P. R. Co. 35 Pa. Co. Ct. 49; *Pittsburgh & L. E. R. Co. v. Robinson*, 95 Pa. 426; *Reeser v. Philadelphia & R. R. Co.* 215 Pa. 136, 64 Atl. 40 L.R.A. (N.S.)

376; *Beech Creek R. Co. v. Olanta Coal Min. Co.* 85 C. C. A. 148, 158 Fed. 36.

No statute authorizes the transfer, by lease or otherwise, of the right to take land and build a railroad. The owner company must pay for its right of way, and if, in building its road, it discriminates in constructing permanent shipping facilities, such as sidings, it must answer.

Noyes, Intercompany Relations, §§ 210, 216, 217; *Snyder v. Baltimore & O. R. Co.* 210 Pa. 500, 60 Atl. 151; *St. Louis, W. & W. R. Co. v. Curl*, 28 Kan. 622; *Caruthers v. Kansas City, Ft. S. & M. R. Co.* 44 L.R.A. 727, note.

Stewart, J., delivered the opinion of the court:

The judgment in this case can be sustained only as it can be made to appear that liability for the injury complained of attached to the defendant company prior to the lease of its road to the operating company. The action was for the recovery of damages for undue and unreasonable discrimination in the matter of furnishing facilities for transportation. The appellee not only admits that the action was based on the statute of June 4, 1883 (P. L. 72), which prohibits such discrimination and allows recovery of triple damages for any violation, but insists upon it, in view of the contention made by appellant to the contrary. Without this, it is too apparent for argument that the action was so based, and there can be no question as to the sufficiency of the declaration for that purpose. That appellee was unduly and unreasonably discriminated against by the refusal of siding privileges, which, under similar conditions, had been allowed to others, is a fact established by the verdict.

The governing question, however, remains, Where did legal liability for the injury attach? The defendant had constructed its road long before the plaintiff became an adjoining landowner. Fifteen years before she became such owner, the defendant company, in the exercise of a statutory right, leased its entire road to the Philadelphia & Reading Railway Company, which latter company has ever since continued to operate it. It is settled law in Pennsylvania that, when a railroad company leases its road to another company, the former is exempted from liability for any default or negligence in the operation of the road by the lessee. *Pinkerton v. Pennsylvania Traction Co.* 193 Pa. 229, 44 Atl. 284. This exemption, of course, does not extend to liabilities incurred by the owning company prior to the lease. Whatever legal liability the owning company incurred before the lease, and which re-

mained undischarged, continued as an obligation of that company, from which neither lease nor statute could discharge it. No authority is needed for so plain a proposition. When did the liability arise which the plaintiff is here seeking to enforce? There can be but one answer: When the discrimination was practised. When was it practised? To this, also, there can be but one answer. When plaintiff was denied facility which, under like conditions, had been allowed to others. This was fifteen years after the defendant company had parted with the control of its road. How, then, could liability attach to the defendant company for the default?

The effort of appellee is to refer the default to an antecedent original obligation resting on the defendant company to allow siding privileges to adjoining landowners. We know of no such antecedent obligation. The right to siding connection as specific privilege is purely statutory. Under our acts of assembly, the owners of mills and manufactories may of right connect their private sidings with railroads in their vicinity. So much was decided in *Pittsburgh & L. E. R. Co. v. Robinson*, 95 Pa. 426. The right there spoken of, it is to be observed, is not a right incident to adjoining ownership, but to the ownership of mills and manufactories in the vicinity of the railroad; and the right is given whenever such ownership has associated with it the right, however acquired, whether through ownership of all the land between mill or manufactory and the railroad, or by privilege, through grant, license, or otherwise of an intervening owner, to construct a siding from the mill or manufactory, up to the line of the railroad. The one test is the right of ownership of the mill or manufactory, and, with it, the right to construct a siding therefrom to the line of the railroad. When these concur, the right to the connection follows: Mere ownership of land adjoining a railroad, without more, confers no such right as here claimed. The plaintiff only acquired the right to build a siding up to the line of defendant's right of way in 1905, when she purchased the land lying between her land, on which were her quarries and lime kilns, and the defendant's right of way; and not until then was she in position to demand, under the statute, a connection with the railroad. That, as we have seen, was fifteen years after the defendant company had leased its road. Clearly, the railroad company owed no antecedent statutory duty to the plaintiff in this regard. Nor did it owe any original duty distinguishable from the original duty it owed to every citizen of the commonwealth. All such duties, by the act of leas-

ing, devolved upon the defendant's lessee. Corporate liability for disregard of them attaches, of course; but it attaches only to the company that inflicts the injury. An examination of the case of *Chicago & N. W. R. Co. v. Crane*, 113 U. S. 424, 28 L. ed. 1064, 5 Sup. Ct. Rep. 578, cited and relied upon by appellee's counsel, will show that it gives no support whatever to their contention in this regard. There the original company had engaged, for a consideration paid it, to construct its road to a point within a certain township. After building its road conformably to the agreement, it leased it to another company, which, in reconstructing the road, avoided the point designated in the agreement. At the suit of a taxpayer of the township against both lessor and lessee, it was held that the change in the road had been improperly made, and that the lessor was a necessary party for the determination of the controversy, because it had incurred whatever liability there was before it leased the road. We are unable to see anything in the case now before us that this case illustrates in the remotest degree. Admittedly there was a distinct, express agreement, for a consideration which the lessor company had received, to maintain the line to a certain point, and this agreement antedated the lease. In the present case, there never was any agreement, and the duty arose only after the defendant had leased its road. Without agreement to be observed, and without duty to be performed, no liability could arise. The only original duty that rested on the original company in this regard was the duty to treat all citizens of the commonwealth alike with respect to transportation facilities. Quite as much of an antecedent duty rested upon the lessor to see that all were treated alike with respect to rates of transportation; and yet appellee concedes that for discrimination in rates the lessee alone is liable. It is difficult to understand the logic that would exempt the lessor in the one case and make it liable in the other.

It is argued that, even though the effect of a lease from one railroad to another is to exempt the owning company from liability for discrimination in transportation facilities, the rule cannot be applied in the present case, because here the roads of lessor and lessee were not in fact connecting roads at the time the lease was executed, and the lease therefore was invalid, since the statute gives the right to lease only where the roads connect. In what has already been said, no reference is made to the fact of an earlier equity proceeding, in which this plaintiff sought and obtained a mandatory injunction against

both the defendant company and the Philadelphia & Reading Railway Company, as the former's lessee, requiring them and each of them to do the very thing for the nondoing of which the present action against lessor was brought, and which has since been done by the Philadelphia & Reading Railway Company, pursuant to the decree against it, obtained at the instance of the plaintiff. The claim there made by the plaintiff was a distinct assertion of the validity of the lease which she here would assail. She obtained against the lessee the decree which compelled it to build the siding across the railroad's right of way to her land solely on the ground that it was lessee, and she reimbursed the lessee for the cost and expense of constructing the siding, as she was directed by the terms of the decree. She is now concluded by these facts from asserting the invalidity of the lease. "It is settled [law]," says Trunkey, J., in *McQueen's Appeal*, 104 Pa. 595, 49 Am. Rep. 592, "that 'a man who obtains or defeats a judgment by pleading or representing an act in one aspect will be precluded from giving it a different and inconsistent character in a subsequent suit upon the same subject.'" To the same effect will be found *Campbell v. Stephens*, 66 Pa. 314; *Aronson v. Cleveland & P. R. Co.* 70 Pa. 68. The general rule in such cases is thus stated in 16 Cyc. 799: "A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding, to the prejudice of the adverse party, where the parties are the same, and the same questions are involved." The plaintiff thus being estopped from questioning the validity of the lease, discussion on our part of the matter here sought to be raised is wholly unnecessary.

In support of the judgment, it is contended that appellant is estopped by the decree in the earlier equity proceeding from asserting its nonliability in the present action for damages for unfair discrimination, inasmuch as by that decree the defendant company was adjudged in default with respect to furnishing plaintiff with siding privileges. It is undoubtedly a general rule that, where, in an equity proceeding, the merits, or any facts material to the final determination of the controversy, have been considered and passed upon, such matters are as much *res judicata* as they would be by a judgment at law. Nevertheless a certain distinction between a decree in equity and a judgment at law remains; for, as said in *Larkins v. Lindsay*, 205 Pa. 534, 55 Atl. 184, in de- 40 L.R.A.(N.S.)

termining what was or might have been involved in the decree, regard must be had to the reasons of the chancellor, as well as to his decree. In the equity proceeding, the Philadelphia, Harrisburg, & Pittsburgh Railroad Company, the lessor company, was made codefendant with the Philadelphia & Reading Railway Company, the lessee. The facts material to the final determination in the case must be gained from an examination of the decree. It was as follows: "And now, 23d day of August, 1907, it is adjudged, ordered, and decreed that the defendant the Philadelphia, Harrisburg, & Pittsburgh R. R. Company, and the Philadelphia & Reading Railway Company shall and do proceed, without further delay, forthwith to place in position and construct, at a convenient point opposite the adjoining land of the complainant, a switching or siding connection, and lay tracks therefrom across its right of way to the border of her land, in order that it may be connected with a siding to be constructed by said Margaret Moser, the complainant in the bill, and she is hereby authorized to connect her track with the said switching or siding connection. The cost price of the switching, frogs, necessary rails, and other material requisite, and the expense of putting them in place by the defendants, to be paid by the plaintiff." All that was required to support such decree was that plaintiff should have established, to the satisfaction of the chancellor, that she was the owner of a mill or manufactory in the vicinity of the railroad; that the connection she asked for was reasonably practicable; and that her request for the privilege had been refused. These were the only material facts, and all outside of them, no matter how specifically passed upon by the chancellor, were only incidentally cognizable, and as to these estoppel cannot be asserted. "The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another court. . . . But neither the judgment of a [court of] concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." This rule, derived from the *Duchess of Kingston's Case*, 20 How. St. Tr. 538, has been accepted and applied in this state without qualification. *Hibshman v. Dulleban*, 4 Watts, 183.

The particular finding by the chancellor in the equity proceeding that is here relied upon as an estoppel is the affirmation of the

following request, submitted on part of complainant: "That frequent and persistent demands, covering a period of more than two years, were made by the complainant, and on her behalf, upon the defendants, for a switch connection or siding to be constructed on her 26-acre tract, adjoining the right of way of defendants, for use in her business," etc. Here we have a finding that for two years before the case was tried the complainant had been repeatedly and persistently demanding of this defendant a siding connection,—a matter of no consequence whatever in the issue then being tried, since all that was necessary to support the decree entered in the case was that the defendant, without respect to the time it occurred, had neglected or refused to accede to complainant's demand. If there was evidence to support such finding as this in that case, it is manifest that it was introduced, not for the purpose of establishing complainant's right to a siding, but for the purpose of recovering damages covering this period of two years during which complainant was denied the siding. But the court having declined to pass on the question of damages, the evidence was left without relevancy, except as establishing the fact that complainant, some time or other before filing her bill, had made a demand of this defendant. As to this latter fact, the decree is conclusive, since without it appearing the decree would hardly have been entered; but as to the time when the first demand was made, the finding is incidental, because not entering into the decree.

In the present action, two item of damage were claimed; the first being the excess in cost which plaintiff was obliged to pay for the transportation by wagons of the coal she required during the two years next preceding the construction of the siding, amounting to \$168.68. No effort was made to show that any demand at any time had been made of this defendant for the construction of the siding, aside from the introduction of the findings of the court in the equity proceedings, saving that plaintiff's desire for a siding had been communicated to Mr. Wetzell, who, it appears, was the legal counsel of both railroads. If the finding did not conclude the defendant in this subsequent action, then it was no evidence of the fact sought to be established thereby, *viz.*, that defendant company had neglected or refused a siding upon demand made before or during the period when this item of damage is alleged to have been sustained; and it was incumbent on the plaintiff to establish such fact by competent evidence. We have examined the evidence with care, and find

nothing in it that would justify an inference that any request for a siding was ever made of this defendant. That the learned trial judge, in submitting to the jury this branch of the case, relied wholly upon the findings in the equity case, is apparent from his answer to the defendant's second point, which was: "That the evidence in the case fails to show that any application was ever made by the plaintiff or her agents to the defendant for the installation of a siding in connection with her land." The answer was: "In the light of the record of the bill in equity filed in No. 4, October term, 1906, and the findings of fact and conclusions of law, and the decree, the point is refused." This answer is the subject of the first assignment of error. The point should have been affirmed. This assignment, for the reasons stated, is sustained.

The other item of damage claimed was the increased cost of the siding that was finally constructed over and above what it could have been constructed for two years previous, when the first demand for it is alleged to have been made. It was in evidence that in 1906 the Philadelphia & Reading Railway Company had submitted to the plaintiff an estimate of the cost of a proposed siding; that estimate being \$400. It was further in evidence that for the siding constructed in 1908, the plaintiff paid to the Philadelphia & Reading Railway Company \$969.08. The claim was for the difference, and for this recovery was bad against the defendant. The decree, adjudging it the legal duty of this defendant to install a siding, was made August 23, 1907. True, this defendant made no attempt whatever to comply with that decree of the court, nor does the evidence disclose that any request was ever made of it to comply, or any complaint that it had not so complied; but, on the other hand, the evidence shows that negotiations looking to the construction of the siding were conducted wholly and exclusively with the Philadelphia & Reading Railway Company, which company, in June, 1908, constructed and completed the siding. The cost of the siding—\$969.08—was voluntarily paid by the complainant to the Philadelphia & Reading Railway Company. There is not the slightest evidence that in the construction of this siding there was any community of effort or interests between the two companies. However conclusive this evidence might be against the Philadelphia & Reading Railway Company, it is not apparent how it could affect this defendant. The offer of the former in 1906 to construct it for \$400 was not in anyway binding on this defendant; nor was this

defendant affected by what plaintiff paid the Philadelphia & Reading Railway Company for the siding, especially in view of the claim now made, that it was paid under protest, reserving to the plaintiff the right to recover back excessive charges which the plaintiff claimed were made for various items. The whole transaction, from the original offer to construct for \$400, down to the final payment of the \$969.08, was *res inter alios*. Admitting the binding force of the decree requiring the defendant to construct the siding, there was no evidence as to when the defendant's liability before the decree was entered began, and there was no evidence from which defendant's liability for the increased cost of the siding could be derived. In any event, it was incumbent on the plaintiff to show that increased cost resulted after the time when defendant's liability to construct the siding arose. The evidence was wholly lacking in respect to when this liability began. As we have said, it could only have arisen upon demand made, and there was no evidence as to when that occurred.

The fifth point submitted by the defendant was as follows: "The defendant is not liable to the plaintiff in this action for all or any part of the cost of the installation of the siding in connection with her land by the Philadelphia & Reading Railway Company." The refusal of this point is made the subject of the third assignment of error. This assignment, for the reasons stated, is also sustained. In view of what we have said, the other assignments of error do not call for present consideration.

The judgment is reversed.

Mestrezat, J., dissenting:

The defendant, the Philadelphia, Harrisburg, & Pittsburg Railroad Company, constructed and operated a railroad from Harrisburg to Shippensburg, passing through Cumberland county. In October, 1890, for the annual consideration of \$200,000, it leased to the Philadelphia & Reading Railway Company its railroad, together with its "lands, real estate, tracks, sidings, depots, freight stations, water stations, improvements rights of way, and other appurtenances," for 999 years, and "also agreed to lease to the said lessee . . . all railroads hereafter by it acquired." The lessee company has since operated the road.

Subsequent to the date of the lease, the plaintiff became the owner of certain lands adjoining the right of way of the defendant company in Upper Allen township, Cumberland county. On this land are rich deposits of limestone, with quarries opened for the purpose of shipping the stone to market; also kilns built for the

purpose of manufacturing lime, which, prior to 1906, had been sold in large quantities for many years. In that year the plaintiff applied to the defendant company for a siding and switch connections between her quarries and its railroad, and the application was refused. Subsequently she filed a bill in equity against the lessor and lessee companies to compel the construction of the siding connection, and a decree in her favor was entered, directing the defendants to build the siding as prayed for in the bill. There was an averment in the bill that damages had been sustained by the plaintiff by reason of the refusal of the defendants to perform the duties by law imposed upon them, and the plaintiff prayed for the assessment of damages under the act of June 4, 1883 (P. L. 72). The court, however, declined to pass upon the question.

The present action was brought against the lessor or owning company to recover damages for unreasonable discrimination in the matter of furnishing facilities for transportation under the act of 1883. The case was submitted to the jury, which returned a verdict in favor of plaintiff, and, judgment having been entered thereon, the defendant took this appeal. It was found by the jury that the plaintiff was unduly and unreasonably discriminated against by the refusal of siding privileges; and hence she was entitled to recover damages against the party who was responsible for such discrimination. A majority of the court reverses the judgment, upon the ground that the lessor or owning company is not liable to the plaintiff, because it had leased its road prior to the time the plaintiff was entitled to demand siding facilities. On every other question raised by the defendant, the majority inferentially holds with the plaintiff.

With deference to the majority, I think the position assumed is untenable. It is settled law in this country that one railroad corporation cannot, without statutory authority, divest itself of, or relieve itself from, any duty or liability imposed by its charter or the general laws of the state by leasing its road and appurtenances to another. *York & M. Line R. Co. v. Winans*, 17 How. 30, 15 L. ed. 27. The owning company cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees; and the operation of a road by the lessees does not change the relation of the original company to the public. *Washington A. & G. R. Co. v. Brown*, 17 Wall. 445, 21 L. ed. 675. Legislation authorizing the transfer of corpo-

rate franchises and property is strictly construed, and the courts have uniformly held that such transfers can only be made when permitted, expressly or by necessary implication, in the statute. A statute alleged to confer a power to lease will not be aided by construction. *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950. If the state grants the right to lease, the lessor company remains liable for the discharge of its duties to the public, unless expressly relieved therefrom by a statute.

The lease involved in this case was made under the act of April 23, 1861 (P. L. 410; 4 Purdon, 3880), which authorizes a railroad company to enter into contracts for the "use or lease" of any other railroad and confers upon the lessee the authority "to run, use, and operate such road, not, it will be observed, to contract or build." Per Sharswood, J., in *Pittsburgh & C. R. Co. v. Bedford & B. R. Co.* 81 Pa. 104, 112. It does not authorize a sale of the road; nor does it empower the lessor company to divest itself of the duties and obligations assumed under its charter. It does not expressly or by implication permit a railroad company to sell or lease its franchises; nor does a lease, made pursuant to the statute, annul the charter or end the corporate existence of the owning company. The company retains its corporate existence, and must perform the duties to the public required by its charter, except in so far as the statute can and does expressly authorize it to delegate the performance of those duties to the lessee. There was no authority vested in the defendant to lease its unexercised franchises of appropriation and construction; and hence, no matter how ample the terms of the demise, the Philadelphia & Reading Railway Company, the lessee, took nothing more than the power "to run, use, and operate" the lessor's road, and to do such other acts as were necessary to the successful operation of the existing road. *Lewis v. Germantown, N. & P. R. Co.* 16 Phila. 608. It will be observed in the present case that it was the physical property, and not the franchises, that was leased. The lessor company does not contend that the right of eminent domain passed to the lessee; on the contrary, since the lease was executed, the lessor has continued to exercise its right to condemn property for additional tracks, as is disclosed in numerous cases in this court. In brief, it may be said that the lessor company, after the lease, still retained all of its charter powers, subject to the right of the lessee company to exercise such of those powers as, under the

statute, could be and were transferred to the latter company for the operation of the road.

When the Philadelphia, Harrisburg, & Pittsburg Railroad Company, the lessor and defendant here, was chartered, it became subject to the Constitution and laws of the commonwealth, prohibiting unreasonable discrimination in furnishing facilities in transportation of freight in this state. It is contended, and so held by the majority of the court, that when the defendant company made the lease, it relieved itself from the performance of its duties to the public to the extent that it was entirely absolved from the duties imposed upon it by the Constitution and laws, which required it to furnish to all parties equal and reasonable transportation facilities. The lessee or operating company, and not the lessor company, should, on principle, be held liable for any injuries inflicted by the lessee, or for the failure of the performance of any duty resting upon it in operating the road. It cannot discriminate as to rates or in furnishing cars; nor can it successfully defend against its own negligence or against any other default of its own. The statute expressly confers on a railroad company the power to lease to another company to operate the road; and it necessarily follows that any default, negligence, or failure of duty in operating the road must be visited on the lessee. But, whatever may be the liability of the lessee company to the plaintiff for the unlawful discrimination in furnishing siding facilities, the lessor company is clearly in default by reason of its failure to furnish the sidings. The Constitution and laws of the state were written into and became a part of its charter, and they prohibit discrimination in furnishing transportation facilities to the plaintiff, or any other party entitled to them. To furnish such facilities is a continuing duty owed to the public; it is the same to-day as it was prior to the lease. It was a duty imposed on the lessor by acceptance of the charter, from the performance of which its lease could not and did not discharge it. As the authorities hold, the lessor company retains its corporate existence and its charter powers after the lease; and it necessarily follows that its duties to the public are continuing and must be performed.

The majority of the court hold that, without statutory authority, it can divest itself of its duties to the public, and, at the same time, retain and enforce the powers and privileges granted it by the state. It continues to exercise the power to condemn land adjacent to its right of way for additional tracks. It has, since

the lease and by virtue of the authority conferred by its charter, taken the plaintiff's land to widen its road, and thereby increased the rentals paid it; yet this court holds that it cannot be compelled to perform the duty imposed upon it by the Constitution and laws of the commonwealth to give the plaintiff siding facilities. The owning company may condemn and appropriate the plaintiff's dwelling house to widen its road, and turn over the additional trackage to the lessee (*Snyder v. Baltimore & O. R. Co.* 210 Pa. 500, 60 Atl. 151), and may construct sidings on the plaintiff's land to furnish facilities to others; but, under the ruling in this case, the plaintiff cannot compel it to furnish her transportation facilities for the products of her own farm and lime kilns, like those constructed by it for her neighbors. When the original appropriation for the right of way through this tract of land was made by the defendant company, the damages were diminished by reason of the opportunity for siding and other advantages special and peculiar to the land. It will be conceded that, prior to the lease, the defendant, under the facts found by the jury, would have been compelled to furnish siding facilities to the plaintiff as the owner of the premises. The extent to which the damages were diminished was part of the consideration paid for the siding privileges. Shall the defendant retain the consideration and refuse the siding? Nearly a century ago the highest judicial tribunal in this country declared, in the *Dartmouth College Case*, 4 Wheat. 518, 4 L. ed. 629, and all the courts of this country, Federal and state, have since enforced the doctrine, that the charter of a corporation is a contract between the state and the incorporators, within the meaning of the constitutional limitation that a legislature can pass no law impairing the obligation of contracts. Adhering to this doctrine, this court has never permitted the people, through the legislature, to infringe in the least on the rights, privileges, powers, or franchises of a corporation. Can it be possible that the same doctrine of inviolability of contract, in the absence of preventive constitutional legislation, will not protect the other party to the contract,—the state,—and compel the corporation to keep its covenants and perform its constitutional and statutory duties to the public?

The covenant in the lease, that the lessee would operate the road and perform all the lessor's obligations to the public, is valid and binding *inter partes*; but it does not relieve the lessor from the performance of its duties to the public. Nu-
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gent v. Boston, C. & M. R. Co. 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797. Our statute does not and could not so provide, as legislation does in some jurisdictions; and hence the lessor could not thus divest itself of its charter obligations. It follows that in this action the defendant cannot set up as a defense that it had leased its road before the plaintiff was entitled to a siding,—the controlling reason assigned by the majority of the court for ruling the present case against the plaintiff.

There is another and conclusive reason why the vital and controlling question in this case must be resolved against the defendant company. The plaintiff filed a bill, January 16, 1907, against the defendant company and its lessee, averring *inter alia*, that on or about May 1, 1906, she applied to the defendants for the construction of a siding from their lines near her quarries and lime kilns, and for the necessary switching connections, so as to enable her to ship her products to market, and from that time to the filing of the bill had made frequent applications to the defendants' officers for a siding and switching connections, but that the defendant companies had refused to make them. It is further averred that the defendants are common carriers under the laws of the state, and as such are required to grant the plaintiff the same shipping facilities that they grant to other persons under like circumstances; that the defendant companies were unjustly and illegally discriminating against the plaintiff, and thereby causing her to suffer great damage and loss in her property and business, and praying for a decree that the defendant companies should proceed to construct a siding and switching connections and give the plaintiff the same facilities for shipping and transporting her product to market that were furnished to other shippers and owners of lime and stone on the defendants' lines. The defendants filed an answer, in which, *inter alia*, they admit that an application had been made by the plaintiff for switching connections and the construction of a siding along their railroad, and that the same "was refused wholly because, upon a careful investigation of the situation and business of the complainant, it was found inexpedient and unnecessary for the public service, and would simply be a private convenience for the complainant alone." The answer admits that the defendants are common carriers, but denies the illegal discrimination.

Testimony was taken, and the case was disposed of on it and the bill and answer. The chancellor found, under the issue thus made by the pleadings, that, after prelimi-

nary negotiations by correspondence with the defendants' officers, the plaintiff, on May 10, 1906, made a formal request for the siding, and offered to pay the entire expense of the installation, and comply with any reasonable regulation of the company; that the defendants' general superintendent unconditionally refused to grant the plaintiff a siding on June 8, 1906, and thereafter continued to decline to furnish such transportation facilities; that sidings under like conditions and circumstances were furnished to other owners of land contiguous to defendants' railroad; that the plaintiff, upon compliance with the regulations of the defendant companies as to the payment of the cost of construction, has, as an adjoining landowner, the right to a private switch connection with the defendants' railroad; and "that the defendant companies, in furnishing siding facilities to competitors of the complainant, and refusing such facilities to plaintiff, under conditions and circumstances similar in all essential points, have been guilty of an illegal discrimination, in violation of the provisions of the Constitution of Pennsylvania and of the act of June 4, 1883." Pursuant to these findings, the chancellor, on August 23, 1907, entered a decree that the defendant companies "shall and do proceed, without further delay, forthwith to place in position and construct, at a convenient point opposite the adjoining land of the complainant, a switching or siding connection, and lay tracks therefrom across its right of way to the border of her land, . . . the cost . . . to be paid by the plaintiff." The chancellor, for reasons stated, refused to award damages, but entered, as part of the decree, that "this refusal, however, is without prejudice to her right to proceed to recover the same in another action." This reservation from the operation of the decree permitted the plaintiff to bring a subsequent action for damages. 23 Cyc. of Law and Procedure, 1145. No appeal was taken from the decree, and the siding and switching connections were furnished in pursuance of it.

The present action was brought July 8, 1908, to recover damages, as averred in the statement, resulting from the illegal discrimination against the plaintiff by the defendant company which was found and decreed to exist in the equity proceeding. With the exception of the additional averment of the equity proceeding in the statement in the present action, the latter and the bill in equity aver substantially the same facts. On the trial of the cause, the record in the equity proceeding was put in evidence, and the plaintiff proved by proper evidence, *aliunde* the equity rec-

ord, the damages which she alleged in her statement were caused by the illegal discrimination by the defendant companies. She did not rely upon the finding of the chancellor as to the items or amount of damages which she sustained, but proved them on the trial of this case. She was not required to prove again, what was found by the chancellor, that a demand for a siding had been made, or when it had been made, nor that she had been illegally discriminated against by the defendant company. Those were facts averred in the bill, and were material and indispensably necessary, under the statute, to support the decree entered in the equity proceeding. The chancellor distinctly found in the equity proceeding that a demand for the siding and switching connections was made on May 10, 1906, and was unconditionally refused on June 8, 1906. These findings were a prerequisite to an intelligent and proper decree requiring the defendant company to furnish the siding facilities. Without a demand, which necessarily implies the date thereof, and without a definite refusal to comply therewith, the decree would have been lacking in material facts to support it. The liability of the defendant for damages began immediately after June 8, 1906, the date of the unconditional refusal to comply with the plaintiff's demand. It did not and could not arise before. As correctly said by the learned trial judge in his opinion in this case: "The issues [in the equity case] were fully and fairly made up whether there had been an unlawful discrimination by the defendants, the Philadelphia, Harrisburg, & Pittsburg Railroad Company and the Philadelphia & Reading Railway Company, against the plaintiff, and also whether she was entitled, under the law, to have them establish a siding and switching connections. Both of these questions were resolved in her favor by a decision rendered on August 23, 1907. No appeal was taken from the findings and decree of the court, and a siding and connections were installed in May, 1908, and the charges for the same paid on July 3d following."

The plaintiff proved on the trial of this case, to the very cent, the damages which resulted to her from the illegal discrimination which the chancellor found to exist. The decree, as will be observed, was entered against both companies; and hence both and each were liable for the tort resulting in the plaintiff's injuries. If, in addition to finding the illegal discrimination, the learned chancellor had awarded damages against the defendant companies, it would not be pretended that the decree

could not have been enforced against the property of either of them. Both of the defendants were found to have been guilty of the tort which caused the plaintiff's injuries. The chancellor therefore necessarily found that each of the defendants had contributed to the plaintiff's injuries by illegal discrimination. Had he found no culpability in one of them, the decree would necessarily have not gone against the innocent defendant. The material facts found in the equity case were therefore conclusive in a subsequent action against both or either of the defendants, for torts are joint and several; one may be answerable for the wrong done by both tortfeasors,—it cannot be apportioned. *Philadelphia v. Collins*, 68 Pa. 106.

If there is anything settled in the law of this state, it is that a judgment, sentence, or decree of a court of competent jurisdiction is conclusive, not only as to the judgment or decree, but of every fact directly or necessarily adjudicated, or which was necessarily involved in or was material to the adjudication. That principle is settled by a beadroll of cases decided by this court. The rule applies as well to decrees in equity as to judgments at law. *Westcott v. Edmunds*, 68 Pa. 34; *Columbia Nat. Bank v. Dunn*, 207 Pa. 548, 56 Atl. 1087; *Klick v. Gernert*, 220 Pa. 503, 69 Atl. 1034. In the equity suit, the right to the siding and switching connections, the discrimination in not furnishing them, the date of the discrimination, and every other fact material to the adjudication, were directly involved, and were found against the defendants. The present action was brought to recover damages for the illegal discrimination, and the equity proceeding is set up in the plaintiff's statement, and the record was put in evidence on the trial of the cause. That decree remains unimpeached, and is therefore conclusive as to all facts material to support it. The facts thus found by the chancellor are therefore conclusively evidential that the plaintiff was denied a siding and switching connections with the defendant companies' railroad after a specific demand in May, 1906, and a refusal in June, 1906, and that the defendants, in furnishing siding facilities to competitors of the plaintiff, and refusing such facilities to her, under conditions and circumstances similar in all essential points, were guilty of illegal discrimination, in violation of the provisions of the Constitution of Pennsylvania, and of the act of June 4, 1883.

While the plaintiff may, under the law, rely upon the finding by the chancellor that a demand was made by her upon the defendant

company to install the siding, yet she is not compelled to do so, as there is positive evidence by an official of the operating company, given on the trial of the present action, that a demand was made, and when it was made. A reading of the testimony discloses that, both upon the examination in chief and cross-examination of the witnesses, with one exception, the parties treated the demand and date thereof by the plaintiff as an established fact.

Mr. Stackhouse, superintendent of the operating company, was called as a witness by the defendant, and while on the stand testified as follows:

Mr. Sadler: Q. At the time demand was originally made by Miss Moser for the installation of the siding, your double tracking had not begun around Bowman'sdale, had it? . . .

A. Her application was made for a siding before my time. I have her first application on file here. It was before my time; but shortly after I came there she communicated with me concerning this siding, as well as Mr. McKeehan. I have a number of those letters here.

Mr. Wetzel: Q. When was the first application—have you the first letter?

A. May 13, 1905. I guess it is 1904. I am not certain whether it is 1904 or 1905.

It also appears in the testimony offered in this case that the siding was constructed in pursuance of the compulsory proceeding in equity resulting in the decree compelling its installation. It is contended, however, that in the ruling which is the subject of the first assignment of error the learned judge relied for this fact upon the findings in the equity case. Concede that he did, the testimony above quoted, given subsequently to his ruling, cured any error which might have arisen upon his relying upon the equity proceeding. It will be observed that the last answer in the testimony quoted was given in response to a question by appellant's counsel. The appellant company, therefore, is not in a position to raise the question that the plaintiff failed to show in the present action that a demand was made upon it for the siding.

The reversal of the judgment of the court below on the ground of the nonliability of the lessor company by reason of the prior lease is, I submit, sustained neither by reason nor precedent, and establishes a principle fraught with the gravest consequences to the property owners of the state. I would affirm the judgment.

ILLINOIS SUPREME COURT.

HARRY W. STANDIDGE

v.

CHICAGO RAILWAYS COMPANY, Appt.

(254 Ill. 524, 98 N. E. 963.)

Courts — jurisdiction to enforce attorneys' lien.

1. Courts of law as well as of equity have jurisdiction to enforce attorneys' liens, under a statute providing that any court of competent jurisdiction shall, on petition, adjudicate the rights of the parties and enforce the lien.

Jury — right — enforcement of attorneys' lien.

2. The constitutional right to trial by jury does not extend to a proceeding to enforce an attorneys' lien.

Note. — Constitutionality of statutes providing for attorneys' liens.

There have been but few cases prior to *STANDIDGE v. CHICAGO R. CO.*, wherein the question has been raised as to the constitutionality of statutes providing for attorneys' liens, and so far as similar objections may have been urged against the constitutionality of such acts the cases are in accord.

In *O'Connor v. St. Louis Transit Co.* 198 Mo. 622, 115 Am. St. Rep. 495, 97 S. W. 150, 8 Ann. Cas. 703, an action to recover on a percentage contract for services rendered in a negligence action, an act providing for an attorneys' lien on judgments was attacked as unconstitutional, on the ground, first, that it was a special law; second, that it deprived one of his rights without due process of law; third, that it was restrictive of the right to contract. In holding these contentions untenable, and declaring that the act is constitutional, and that the lien attached to a compromise agreement entered into between the plaintiff and defendant in the negligence action, the court said: "It is clearly not class legislation. . . . This act undertakes to cover a certain class of persons engaged in a particular profession. It does not undertake to select any particular person in that class, but applies to all alike who fall within the class of attorneys at law. . . . It is now no longer an open question in the courts of this state, that legislation applicable to a particular class is not violative of the constitutional provision which prohibits the enactment of special laws. That lawyers in this state belong to a particular class we think there can be no dispute, and we can see no reason, even though they be only lawyers, why legislation which deals in a general way with the affairs of that class should be held unconstitutional. We have legislation in this state respecting other classes of persons, such as fellow servants, mechanics, landlords, bankers, insurance laws, and other legislation which have reference to only one line of trade or class" 10 L.R.A. (N.S.)

Procedure — uniformity — enforcement of attorneys' lien.

3. A statute permitting attorneys' liens to be enforced in any court of competent jurisdiction, by petition filed in the cause of the client wherein the employment is made, does not violate a constitutional requirement of uniform procedure.

Attorney — lien — settlement of claim — money recovered.

4. Money paid to a litigant in settlement of a claim is recovered, within the meaning of a statute giving an attorneys' lien.

Same — special legislation — constitutionality.

5. A statute conferring attorneys' liens is not unconstitutional special legislation because it applies only to attorneys at law, since those who follow that profession form a class constituting a proper basis for legislation.

of persons, yet wherever these laws have been in judgment before the courts of this state, they have been held constitutional and valid. . . . While the business of these classes may be essentially different, we are unable to assign any legal valid reason why a distinction should be made against the legal profession."

Nor were they able to give assent to the insistence that this act restricts or destroys the defendant's right to contract. "The provisions of this act simply create a lien upon the cause of action in favor of the attorney at law, and require of the defendant, after due notice, which creates such lien, in dealing with the party as to such cause of action, as such lien shall be respected. . . . It does not deprive him of the right to make a settlement, but in making such settlement it simply requires that he shall take into consideration the fact that the attorney at law has a lien upon the cause of action, and if such lien is ignored he will be required to account to him in an action at law for the amount of such lien."

The act was also vigorously assailed on the ground that it tended to lead to the commission of unprofessional acts on the part of attorneys, and it was said that, though this may be true in some instances, the profession of law, when practised upon a high plane, is an honorable one, and an act presumably enacted for the benefit of honorable practising lawyers should not be declared invalid for the reason that instances may arise, by reason of the law, which enable some of the less reputable attorneys to do acts which are not commendable along professional lines.

And in *Taylor v. St. Louis Transit Co.* 198 Mo. 715, 97 S. W. 155, where the same arguments were urged against the constitutionality of the same act, the court followed *O'Connor v. St. Louis Transit Co.* supra, in upholding the constitutionality of the act.

And also in *Taylor v. St. Louis Merchants' Bridge Terminal R. Co.* 207 Mo. 495, 105 S. W. 740, the same act was de-

Same — property right — interference — validity.

6. A statute giving attorneys' liens on money recovered by their clients is not unconstitutional as depriving their adversaries of a property right to buy their peace by making contracts of settlement.

(June 21, 1912.)

APPEAL by defendant from a judgment of the Superior Court for Cook County in plaintiff's favor in a proceeding to enforce an attorneys' lien. Affirmed.

The facts are stated in the opinion.

Mr. John R. Guilleams, with Messrs. John W. Walsh and Frank L. Kriete, for appellant:

At the time of the enactment of the attorneys' lien law of 1909, an attorney had no lien for his fees, and his client had the right to dismiss his suit and settle his case, and the defendant had the right to buy his peace.

Henchey v. Chicago, 41 Ill. 136; Cameron v. Boeger, 102 Ill. App. 649; North Chicago Street R. Co. v. Ackley, 171 Ill. 100, 44 L.R.A. 177, 49 N. E. 222.

A court of law has no jurisdiction to enforce an attorneys' lien; it belongs exclusively to a court of chancery.

1 Pom. Eq. Jur. § 187; 25 Cyc. 681, 682; Cairo & V. R. Co. v. Fackney, 78 Ill. 116; National Bank v. Petterson, 200 Ill. 215, 65 N. E. 687; West Chicago Park v. Western Granite Co. 200 Ill. 527, 66 N. E.

37; Gilchrist v. Helena H. S. & Smelter R. Co. 58 Fed. 708; Turnes v. Brenckle, 249 Ill. 394, 94 N. E. 495.

There is no authority of law for an attorney filing a petition to enforce his lien for fees in his client's cause, and if the attorneys' lien law of 1909 be construed to authorize the filing of such a petition, it is unconstitutional.

Clowry v. Holmes, 238 Ill. 577, 87 N. E. 303; David v. Commercial Mut. Acci. Co. 243 Ill. 43, 90 N. E. 286; People v. Hibernian Bkg. Asso. 245 Ill. 522, 92 N. E. 305; People ex rel. Ely v. Rumsey, 64 Ill. 44.

Even if the attorneys' lien law of 1909 is constitutional, there can be no lien in this case, because there was no money or property recovered in the sense in which the word "recovered" is used in the attorneys' lien law.

Lapham v. Almy, 13 Allen, 301; Atchison v. Owensboro, 114 Ky. 706, 71 S. W. 864; North Chicago Street R. Co. v. Ackley, 171 Ill. 100, 44 L.R.A. 177, 49 N. E. 222.

The attorneys' lien law of 1909 is unconstitutional and void.

Board of Education v. Blodgett, 155 Ill. 441, 31 L.R.A. 70, 46 Am. St. Rep. 348, 40 N. E. 1025; Fish v. Farwell, 160 Ill. 236, 43 N. E. 367; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Ramsey v. People, 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206,

clared constitutional on authority of Taylor v. St. Louis Transit Co. and O'Connor v. St. Louis Transit Co. supra.

And again in Wait v. Atchison, T. & S. F. R. Co. 204 Mo. 491, 103 S. W. 60, it was said that, since the decisions in O'Connor v. St. Louis Transit Co. and Taylor v. St. Louis Transit Co. supra, it may be considered as settled that the attorneys' lien act of 1901 is constitutional.

In Illinois C. R. Co. v. Wells, 104 Tenn. 706, 59 S. W. 1041, an action to recover for services rendered in a negligence action, an act giving attorneys of record in actions brought in courts of record, a lien for fees upon a right of action from the date of the institution of the suit, or of subsequent employment of attorney with notice of that fact, was declared constitutional and valid, and it was held that the lien attached to a compromise agreement entered into between the parties to a negligence action. The grounds upon which the constitutionality of the act was attacked were that it created a new right without prescribing a remedy; that it declared a lien on a right of action after suit commenced, and unduly deprived plaintiff of control of his suit, and made all defendants in suits brought in courts of record liable for the fees of plaintiff's attorneys. The court said: "We are unable to discover that any of the objections urged

against the act make it unconstitutional. . . . It is true as suggested that the present act does not prescribe any method for the enforcement of the lien declared; yet that omission does not render the act unconstitutional, since there is no provision in the organic law requiring that acts granting new rights shall likewise provide new remedies. That statute would undoubtedly have been more complete within itself, and more simple in its application, if that omission had been supplied; nevertheless, it was manifestly within the legislative power to declare the lien without more, and leave the enforcement of it to the general law in reference to liens, as was in fact done. Nor was it beyond the power of the legislature to declare a lien on a 'right of action' after suit commenced. It may be conceded that a right of action is 'an intangible, incorporeal something,' but that concession does not justify the insistence that the act is therefore violative of the Constitution. That instrument does not limit legislation to matters tangible and corporeal." And in answer to the other objections urged, it was said that "since the passage of this act, as before, plaintiff may prosecute or compromise or dismiss his suit at will; and the defendant is liable only for such sum as may be adjudged or stipulated in the plaintiff's favor." J. H. B.

35 N. E. 62; *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; *Kipp v. Elwell*, 65 Minn. 525, 33 L.R.A. 435, 68 N. W. 105; *Gillespie v. People*, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; *Bailey v. People*, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Harding v. People*, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; *Eden v. People*, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 356, 43 N. E. 1108; *State v. Julow*, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Lippman v. People*, 175 Ill. 101, 51 N. E. 872, 11 Am. Crim. Rep. 356; *Ruhstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453.

Messrs. David K. Tone, Henry M. Ashton, and Richard J. Cooney, for appellee:

A court of law has jurisdiction to enforce attorneys' liens.

Cairo & V. R. Co. v. Fackney, 78 Ill. 116; *Ackerman v. Ackerman*, 14 Abb. Pr. 229; *Re King*, 168 N. Y. 53, 60 N. E. 1054.

An attorneys' lien may be enforced in the client's cause where the services are rendered.

Johnson v. Breckinridge, 4 Ky. L. Rep. 994; *Fischer-Hansen v. Brooklyn Heights R. Co.* 173 N. Y. 492, 66 N. E. 395; *Ackerman v. Ackerman*, 14 Abb. Pr. 229; *Peri v. New York, C. & H. R. Co.* 152 N. Y. 521, 46 N. E. 849; *Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge*, 161 Mich. 181, 137 Am. St. Rep. 495, 126 N. W. 56; *Galveston, H. & S. A. R. Co. v. Ginther*, 96 Tex. 205, 72 S. W. 166; *Wait v. Atchison, T. & S. F. R. Co.* 204 Mo. 491, 103 S. W. 60; *Miedreich v. Rank*, 40 Ind. App. 393, 82 N. E. 117; *Farmer v. Stillwater Water Co.* 108 Minn. 41, 121 N. W. 418; *Reynolds v. Reynolds*, 10 Neb. 574, 7 N. W. 322; *Howard v. Osceola*, 22 Wis. 453; *Potter v. Ajax Min. Co.* 22 Utah, 273, 61 Pac. 999.

The word "recovered," as used in the attorneys' lien law, should be construed to mean any money or property received by the client on account of his cause of action, whether by litigation or compromise.

Powell v. Powell, 84 Va. 415, 4 S. E. 744; *People ex rel. Bussey v. Gaultier*, 149 Ill. 39, 36 N. E. 576.

The attorneys' lien law of 1909 is constitutional.

Fischer-Hansen v. Brooklyn Heights R. Co. 173 N. Y. 492, 66 N. E. 395; *O'Connor v. St. Louis Transit Co.* 198 Mo. 622, 115 Am. St. Rep. 495, 97 S. W. 160, 8 Ann. Cas. 703; *Wait v. Atchison, T. & S. F. R. Co.* 204 Mo. 491, 103 S. W. 60; 4 Cyc. 1006, note 42.
40 L.R.A. (N.S.)

Vickers, J., delivered the opinion of the court:

John F. Cleary commenced an action at law in the superior court of Cook county against the receivers of the Chicago Railways Company, to recover compensation for a personal injury alleged to have been sustained by him through the negligence of the receivers of said Chicago Railways Company. The defendants appeared and pleaded to the declaration. The appellee, *Harry W. Standidge*, was the attorney for *Cleary* in that cause. Pending the litigation the receivers of the Chicago Railways Company were discharged, and the Chicago Railways Company appeared in said cause, and became obligated to pay anything that the plaintiff in said cause was entitled to recover. After *Standidge* was employed, and before any adjustment was made of *Cleary's* claim, he served upon the receivers a written notice claiming a lien for one third of any amount of money that might be collected or paid on settlement of *Cleary's* claim, in accordance with the proviso of § 1 of the attorneys' lien law, enacted in 1909. Laws of 1909, p. 97. After the service of said notice, and after appellee had been representing *Cleary* for about one year in the prosecution of said claim, a settlement was made on behalf of the Chicago Railways Company with *Cleary*, and he was paid \$900 and signed a stipulation in pursuance of which his case against the appellant was dismissed without costs. The order of dismissal was entered on August 21, 1911. Two days later, on August 23d, appellee, *Standidge*, filed a petition entitled "In the Cause of *Cleary v. Chicago R. Co.*" alleging his contract with *Cleary*, notice served of his claim of lien, alleging that said claim had been settled with his client without his knowledge or consent, and claiming a lien for his fees under his contract, in accordance with the attorneys' lien law of 1909. On August 30th appellant appeared and filed its answer to appellee's petition, which said answer was joined in by the receivers of the Chicago Railways Company. The answer admitted that appellee had begun and filed suit as the attorney for *Cleary*, but denied that he had any contract to commence and prosecute said cause. The answer admitted the service of notice and the settlement with *Cleary* and payment to him of \$900, but denied that appellee is entitled to any lien, as against appellant, for any sum of money, because, as alleged in said answer, the attorneys' lien law is unconstitutional and void, as being repugnant to § 2 of article 2, and § 22 of article 4, of the Constitution of Illinois. The record shows that, after the petition was amended, the cause came on to be heard

upon evidence before the court, which resulted in a finding in favor of appellee and against appellant, and the rendition of a judgment for \$300, which appellant was ordered to pay, and in default of such payment an execution was ordered to issue. It is to obtain a review of this judgment that the present appeal is prosecuted.

Appellant relies upon the following points as grounds for a reversal of the judgment below: First, that a court of law has no jurisdiction to enforce an attorneys' lien, such lien being enforceable only in a court of equity; second, such lien, under the act of 1909, cannot be enforced by petition in the client's cause; third, no money or property was "recovered" in this cause, in the sense in which that word is used in the attorneys' lien law; fourth, the attorneys' lien law of 1909 is unconstitutional and void; fifth, the finding that appellee was employed as the attorney of Cleary is not established by a preponderance of the evidence.

It will be observed that the first four assignments of error above enumerated raise questions of law. The fifth assignment raises a question of fact, which may be disposed of without discussion, since a consideration of the evidence sustains appellee's averment that he was employed under a contract by which he was to receive one third of whatever amount was collected on said claim. The four legal questions will be considered in the order in which they are above stated.

First. Appellant's first contention is that, even if the attorney's lien law be valid, the lien thereby created can only be enforced in a court of equity. Appellant's contention in support of this assignment of error is that the enforcement of liens ordinarily belongs to the jurisdiction of courts of equity; and cases are cited holding that, where a statute creates a lien and makes no provision as to how it may be enforced, courts of equity will take jurisdiction to enforce such liens. The case of *Cairo & V. R. Co. v. Fackney*, 78 Ill. 116, is relied on by the appellant in support of its position on this point. That was an action of assumpsit brought by the plaintiff against the railroad company upon a claim that the plaintiff had for money which he had advanced to various employees of the company, and others who had furnished supplies and material in the construction of the railroad. Under the statute then in force (Rev. Stat. 1874, ¶ 51, p. 671), all persons who furnished labor or material in the construction or maintenance of a railroad were given a lien upon the property of the railroad corporation superior to all other liens. The court, in rendering

judgment on the action at law, found and adjudged that the plaintiff was entitled to a lien for the amount found due him upon all of the property of the railroad company. Upon the appeal of the railroad company, this court held that, while the open accounts of laborers and others against the railroad company might be assigned in equity, they were not assignable at law, and in no event could they be so assigned as to transfer the statutory lien to the assignee. Having thus disposed of the case by holding that Fackney had no lien whatever, it was further said that, if such lien existed, it could only be enforced in a court of equity.

Appellant also cites *National Bank v. Petterson*, 200 Ill. 215, 65 N. E. 687, and *West Chicago Park Comrs. v. Western Granite Co.* 200 Ill. 527, 66 N. E. 37. Both of these cases arose under § 24 of the mechanics' lien law. That section of the statute creates a lien upon "money, bonds, or warrants due or to become due" a contractor for a public improvement, in favor of any person who may have furnished any material, apparatus, fixtures, machinery, or labor to such contractor for such improvement, and provides for notice of the claim to be given to the officials of the municipality whose duty it is to pay the contractor. The statute also provides that it shall be the duty of the officials, when so notified, to withhold a sufficient amount of money to pay such claim, and also provides that any officer violating the duty imposed upon him shall be liable in an action on his official bond, in favor of the person having such claim, for any damages resulting from a failure to withhold a sufficient amount of funds to pay such claim. The contention there was that the statute making the officer liable on his official bond, for the amount of damages sustained by a person furnishing material or labor to the contractor, was an exclusion of the right to file a bill in equity to enforce the lien. This contention was not sustained, and it was held that a court of equity had jurisdiction to enforce the lien against the municipality, notwithstanding the remedy against the officers personally upon their official bonds. It was held in the *Petterson* Case that the remedy by suit upon the bond by the officer was not an enforcement of the lien, and did not in any way affect the right of the claimant to maintain his bill in equity against the municipality or the person into whose hands the funds, subject to such lien, had been placed.

None of the above cases are in point here. They all recognize the power of the legislature to provide other methods of enforcing a lien than by a resort to a court of equity. The attorneys' lien law contains

the following provision: "On petition filed by such attorneys or their clients, any court of competent jurisdiction shall, on not less than five days' notice to the adverse party, adjudicate the rights of the parties and enforce such lien in term time or vacation." Without this language in the act, undoubtedly a court of equity would be the only court that would have jurisdiction to enforce such liens. The legislature must be presumed to have used the language above quoted for some purpose. If appellant's position is sustained, and a court of equity is the only court that has jurisdiction to enforce the lien, then the clause above quoted has no effect. The clause above quoted was manifestly used by the legislature to confer jurisdiction to enforce such lien upon courts that could not exercise it without such provision. The provision for enforcing the lien by petition and on five days' notice strengthens the conclusion that the legislature intended this jurisdiction should be exercised by law courts as well as courts of equity. The bill in chancery and the declaration at law are usually the pleadings by which those respective jurisdictions are invoked, while a "petition" is common to both courts.

Appellant further contends that to so construe the statute as to authorize a court of law to enforce the lien by petition would deprive the defendant of the right of trial by jury, and the case of *Turnes v. Brankle*, 249 Ill. 394, 94 N. E. 495, is relied on in support of this branch of its argument. In the case cited this court held that a provision of the mechanics' lien law authorizing a court of chancery to enter judgment for the amount of the complainant's claim in case it was found that no lien existed was unconstitutional, for the reason that it deprived the defendant of the right to a trial by jury. In that case the statute purported to confer jurisdiction upon a court of chancery in a matter that was purely legal, and authorized the court to adjudge the same without the intervention of a jury, or, at all events, with the aid of a jury whose verdict would be merely advisory. The distinction between a verdict of a jury in a law court and one in chancery was there pointed out, and it was held that a defendant was entitled to a jury to determine the issues that might arise in regard to a claim after it had been ascertained that no lien existed, and to a verdict of a jury that was binding upon the court, and not merely advisory, as a verdict in chancery is held to be. There is nothing in that case that has any application to the facts in the case at bar. There the complaint was that the statute trans-

ferred a purely legal matter, in which the defendant had a right to a jury trial, to the chancery court, where the right to a trial by jury did not exist except in the discretion of the court. Here the complaint is that a purely equitable matter, in which the defendant would have no right to a jury trial, is transferred to a law court, where the right to a trial by jury exists. The constitutional provision that "the right of trial by jury as heretofore enjoyed shall remain inviolate" means that the right to a jury trial shall continue in all cases where such right existed at common law at the time the Constitution was adopted, but that constitutional provision has never been held to prohibit the legislature from creating new rights unknown to the common law, and provide for their determination without a jury. *Ibid.* Appellant concedes that the attorneys' lien law creates new rights which have heretofore not been recognized in this state. This being conceded, it is clearly within the power of the legislature to provide for the enforcement of such rights without a jury trial. This same objection was made to a similar statute of the state of New York, and was there determined in accordance with the views above expressed. *Ackerman v. Ackerman*, 14 Abb. Pr. 229; *Re King*, 168 N. Y. 53, 60 N. E. 1054. Appellant's first assignment of error cannot be sustained.

Second. Appellant next contends that an attorneys' lien cannot be enforced by petition in the cause of the client wherein the employment is made. Appellant's contention is that, if said act be so construed as to permit the filing of an intervening petition in the client's cause, it renders the act unconstitutional, in that it destroys the uniformity required in the practice of our courts of the same class or grade. We fail to see any force in this contention. The statute is not limited to any particular court or class of courts, but the petition may be filed, under the statute, in "any court of competent jurisdiction." This would include any court of record, either of law or chancery, and is not, therefore, limited to any particular court or class of cases; hence it cannot be said to violate the uniform procedure required by our Constitution.

Third. Appellant contends that the judgment in this case should be reversed because there was no money "recovered" in the cause, in the sense in which that word is used in the attorneys' lien law. Appellant insists that the word "recover," where the same is found in the statute under consideration, must be limited in meaning to money recovered as the result of a for-

mal judgment or decree of a court. The word "recover" is often used in the sense of "received" or "come into possession of." It is so used in § 2 of our statute on injuries (Hurd's Rev. Stat. 1909, chap. 70), where it is provided that "the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed," etc. No one would doubt that money received by way of compromise or settlement would be subject to distribution in the same manner and to the same persons as it would if it were collected as the result of a judgment; and the word is also used in the same sense in § 9 of the dramshop act (Hurd's Rev. Stat. 1909, chap. 43). The language of the act under consideration clearly indicates that the word "recover" is here used in the sense of receive. The language is, "such lien shall attach to any verdict, judgment, or decree entered, and to any money or property which may be recovered, on account of such suits, claims, demands, or causes of action, from and after the time of service of the aforesaid notice." If the lien only attached when there had been a judgment or a decree entered, the latter portion of the said sentence, "and to any money or property which may be recovered," etc., would be wholly unnecessary. Aside from this, if the statute were so construed as to only apply when a judgment was rendered, it would fall far short of accomplishing the purpose which the legislature manifestly had in view in the enactment of this statute. Clearly it was the intention of the legislature to give attorneys a lien from and after the service of notice on the defendant, which would protect them against any settlements that might thereafter be made, regardless of whether the suit had been commenced, was pending, or had been finally determined by the rendition of a judgment. The money paid by appellant to appellee's client in settlement of this claim was money "recovered," within the meaning of the statute.

Fourth. Appellant's final contention is that the statute under consideration is unconstitutional. Two constitutional objections are urged against the act. It is first said the act is special legislation, in that it only applies to attorneys at law. But little need be said in answer to this contention. Those who follow the legal profession constitute a class, and laws may be passed applicable only to members of a class, where the classification rests upon some disability, attribute, or classification 40 L.R.A. (N.S.)

marking them as proper objects for the operation of such special legislation, in any case wherein such local or special legislation is not expressly forbidden by the Constitution. *Gillespie v. People*, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; *Starne v. People*, 222 Ill. 189, 113 Am. St. Rep. 389, 78 N. E. 61; *Charles J. Off & Co. v. Morehead*, 235 Ill. 40, 20 L.R.A. (N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434; *People v. Wilcox*, 237 Ill. 421, 86 N. E. 672. Laws applicable only to persons following a particular profession or occupation requiring skill and special training have never been supposed to be open to the constitutional objection now urged against this act. Laws applicable only to physicians, architects, pharmacists, bankers, inn or tavern keepers, and other classes, have been enacted and are now in force in this state, and we are not aware that their constitutionality has been seriously questioned, especially since the decision of this court in *Meadowcroft v. People*, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 991, where it was held that a criminal statute applicable only to bankers was not unconstitutional because applicable only to a particular class of persons.

Appellant also assails the statute under consideration on the ground that it deprives persons against whom suits are brought or claims held by attorneys for collection, of their constitutional and property right to buy their peace by making contracts of settlement. This argument proceeds upon a false assumption. The statute does not affect the right of the defendants in suits, or persons against whom claims or demands are held for collection, from settling the same, but it requires, after notice, that in making such settlement they shall take into account the attorney's claim for his fees. A settlement may be made with a claimant, under this statute, to the same extent and with like effect as it could have been made before the statute was enacted, the only difference being that under the statute a party, in settling with an attorney's client, must take into account his liability to the attorney for whatever amount of fees would accrue under his contract at the time of the settlement. This same contention was made in the case of *Fischer-Hansen v. Brooklyn Heights R. Co.* 173 N. Y. 492, 66 N. E. 305, and in the case of *O'Connor v. St. Louis Transit Co.* 198 Mo. 641, 115 Am. St. Rep. 495, 97 S. W. 150, 8 Ann. Cas. 703; and in both cases it was

held that the act was not open to the objection urged against it. The supreme court of Missouri, in disposing of this objection in the case above cited, uses the following language: "It is insisted by appellant that this act restricts or destroys the defendant's right to contract. We are unable to give our assent to this insistence. The provisions of this act simply create a lien upon the cause of action in favor of the attorney at law, and require of the defendant, after due notice, which creates such lien, in dealing with the party as to such cause of action, that such lien shall be respected. If we are dealing with the owner of a horse, and have notice that there is a valid subsisting lien upon the horse, we would not contend for a moment that such lien could be ignored. So it is in respect to other property. In dealing with the owner of it, if we have notice of the existence of a lien, such lien cannot be ignored. Is there any difference if a defendant has notice of the existence of a lien of an attorney upon a cause of action, and the instances above cited? We think not. This law does not deprive a defendant of any of his rights. When the lien is created, in dealing with the plaintiff in respect to such cause of action he must act accordingly. It does not deprive him of the right to make a settlement, but in making such settlement it simply requires that he shall take into consideration the fact that the attorney at law has a lien upon the cause of action, and, if such lien is ignored, he will be required to account to him in an action at law for the amount of such lien. This act is vigorously assailed by learned counsel for appellant on the ground that it tends to lead to the commission of unprofessional acts on the part of attorneys. This may be true in some instances, but the profession of law, when practised upon a high plane, is an honorable one, and by no means should an act of the general assembly, presumably enacted for the benefit of the honorable practising lawyers of the state, be declared invalid for the reason that instances may arise, by reason of the law, which enable some of the less reputable attorneys to do acts which are not commendable along professional lines. In our opinion this law is constitutional and valid."

It follows from what has been said that the statute under consideration is not open to any of the objections urged against it, and that none of the errors assigned by appellant can be sustained.

The judgment of the Superior Court of Cook County is affirmed.
40 L.R.A. (N.S.)

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA

v.

EDWARD BREFFEIHL, Appt.

(130 La. 904, 58 So. 763.)

Voter — preparation of ballot — information as to politics of candidate.

Requesting assistance to determine which names on a primary election ballot are politically in accord with the voter does not subject one to the penalty provided for any voter who shall make a false statement as to his inability to mark his ballot, where the statute provides that the voter shall be at liberty, if he is unable to prepare his own ballot, to request assistance.

(May 6, 1912.)

A PPEAL by defendant from a judgment of the Criminal District Court for the Parish of Orleans convicting him of crime. Reversed.

The facts are stated in the opinion.

Messrs. Henriques & Otero, J. O. Henriques, C. C. Luzenberg, Adams & Generelly, and Charles Byrne for appellant.

Mr. Walter Guion, Attorney General, for the State.

Note. — Assisting voter.

Right to assistance.

Persons who are qualified by law to vote, but because of some disability are unable to do so without assistance, are entitled to such assistance, subject, of course, to provisions and restrictions safeguarding the ballot.

Thus in *Detroit v. Rush*, 82 Mich. 532, 10 L.R.A. 171, 46 N. W. 951, it is held that if the effect of the election law was to deprive those who cannot read, the blind, and cripples who cannot walk, of the opportunity of voting, it would be void, as they are given this right by the Constitution; but that mere failure to provide for assistance to such voters does not render the statute unconstitutional, as, in the absence of express prohibition against assisting such persons, they are entitled to such assistance as is necessary to enable them to vote.

In *Pearson v. Brunswick County*, 91 Va. 322, 21 S. E. 483, it is held that a statute which provides for election officers who "may" assist disabled voters is mandatory, and such officers are required to render assistance to those entitled to it.

And in *Rogers v. Jacob*, 88 Ky. 502, 11 S. W. 513, a provision for secrecy of the ballot is held to be nugatory in so far as it operates to deprive illiterate voters of the right to vote.

As affected by requirement of secrecy of the ballot.

As to the effect of provisions for assist-

Provosty, J., delivered the opinion of the court:

A few days before the day fixed for the recent Democratic primary election, question arose as to whether a voter who could read his ballot, and was not physically unable to mark it, had the right to have a person go into the polling booth with him to aid him in the preparation of his ballot. An opinion which had been given by the attorney general to the chairman of the Democratic state central committee had been understood to be in affirmance of such right, and the district attorney for the parish of Orleans had given expression to a contrary opinion, and the governor had considered the point to be of sufficient public importance for him to issue a proclama-

tion indorsing what he understood to be the view of the attorney general. The attorney general had then announced that his said opinion had been misunderstood; and that he, on the contrary, concurred in the view taken by the district attorney for the parish of Orleans.

In voting at said election, the accused in the present case, though able to read, and not afflicted with any physical disability, called for assistance in the preparation of his ballot; and an information was filed against him for the violation of the primary election law (act 49 of 1906).

The information alleges that he "did falsely state that he was unable to mark and prepare his ballot."

He demurred to the information, and

ance of disabled voters by certain election officers, on the right of the voter to secrecy, the court in *Pearson v. Brunswick County*, supra, says: "The secrecy of the ballot is a right which inheres in the voter and of which he cannot, against his will, be lawfully deprived. It must be, however, in some degree subordinate to the right to vote by ballot, of which it is but a part; and the main object, which is the right to vote, must not be defeated by a too rigid observance of the incidental right, which is that of secrecy. A blind man, or a man unable to read, must, in the nature of things, so far compromise the secrecy of his ballot as to invoke and obtain the aid of others in the preparation of his ballot; but as it would be a violation of confidence, were he to seek of a friend assistance on such an occasion, for that friend to betray the secret and disclose the vote, so it is a violation not only of confidence, but of official duty, for the constable to lift the veil of the secrecy which should be impenetrable, and violate the confidence which the law requires the voter to repose in him."

Provisions for secrecy of the ballot are incidental to the right to vote, and should not be construed so as to prevent illiterate or disabled persons from voting. *People ex rel. Klein v. McDonald*, 52 N. Y. Supp. 898.

And as it is the privilege of each voter to decline to make known for whom he voted, it is error for the court to permit those assisting voters to testify as to how they voted. *Gill v. Shurtleff*, 183 Ill. 440, 56 N. E. 164.

What necessary to entitle voter to assistance.

—oath or declaration of disability.

Generally, provision is made for an oath or declaration by the voter as to his disability, and, as a rule, such provisions are held to be mandatory. *Huston v. Anderson*, 145 Cal. 320, 78 Pac. 626; *Patrick v. Runyon*, 20 Ky. L. Rep. 1914, 50 S. W. 538; 40 L.R.A. (N.S.)

Preston v. Price, 27 Ky. L. Rep. 588, 85 S. W. 1183; *Browning v. Lovett*, 139 Ky. 480, 94 S. W. 661; *Cole v. Nunnelle*, 140 Ky. 138, 130 S. W. 972; *Hill v. Mottley*, 142 Ky. 385, 134 S. W. 469, modified in other respects in 143 Ky. 158, 136 S. W. 134; *Atty. Gen. ex rel. Reynolds v. May*, 99 Mich. 538, 25 L.R.A. 325; 58 N. W. 483; *Hickson v. Abbott*, 25 Lower Can. Jur. 290.

Thus in *Major v. Barker*, 99 Ky. 305, 35 S. W. 543, it is held that provision for the voter declaring on oath his disability is mandatory, and cannot be supplied by the appearance of the voter or personal knowledge of the inspectors, and ballots voted without such oath should not be counted.

And in *Gill v. Shurtleff*, supra, it is held that provision for oath as to disability is mandatory even though the voter is blind.

But in *Re Ellis*, 21 Ont. L. Rep. 74, appeal dismissed in 23 Ont. L. Rep. 427, it was held that as to a blind voter no declaration of disability was necessary.

In *Hope v. Flentge*, 140 Mo. 390, 47 L.R.A. 806, 41 S. W. 1002, it is held that the statutory requirement for an oath as to the voter's disability is not mandatory, and a mere failure of the officers to administer it will not, in the absence of fraud or imposition, invalidate the ballots cast without it. And this case is followed on similar facts by *Morgan v. Brase*, 140 Mo. 415, 41 S. W. 1101; *Howard v. Caldwell*, 140 Mo. 416, 41 S. W. 1101; *Drum v. Ude*, 140 Mo. 417, 41 S. W. 1100; *Frissell v. Cotner*, 140 Mo. 418, 41 S. W. 1101.

And in *Patton v. Watkins*, 131 Ala. 387, 90 Am. St. Rep. 43, 31 So. 93, the court says that it is the fact of disability, rather than the sworn declaration, that merits the assistance for which the law provides, the oath being required only as evidence of the fact, and its omission, while an irregularity, does not render the vote invalid.

But although the oath is mandatory, it need not be formal and exact, so that where a voter, after stating to the officials his disabilities, was required to raise his right hand, and the judge said, "You swear now to this: that what you have told me is true,"—it was sufficient. *State ex rel. Bra-*

also moved to quash it, on the ground that there was no law which made it a crime for a voter at a primary election to call for assistance in the preparation of his ballot, who, though able to read and not physically disabled, yet from some other cause was unable to prepare his ballot.

On the trial it developed that the accused had made no statement at all, but had simply asked one of the watchers to assist him in preparing his ballot, and that the assistance had consisted in the giving of information with regard to which ones of the candidates on the ticket were in sympathy with his own factional affiliation, and that so far as the physical act of marking his ballot was concerned he had done that himself.

This being the condition of the evidence, his counsel moved the judge, who was trying the case without a jury, to discharge him, for the reason that, in the first place, he had not made any statement at all; and, in the second place, if he had made any, it had not been of inability to mark his ballot, but of inability to prepare his ballot, in the sense of whom to vote for, and that no statute makes the latter statement criminal.

The learned trial judge denied these motions, for reasons which in no wise dispute the facts above stated, but involve simply and purely the proper interpretation of the said act 49 of 1906,—the primary election law.

The principal purposes for which the con-

vey v. Gay, 59 Minn. 6, 50 Am. St. Rep. 389, 60 N. W. 676.

—what constitutes disability and who is judge of it.

In *Re Election Instructions*, 2 Pa. Dist. R. 1, the court, in response to a request from election officers as to what constituted disability which would entitle a voter to be assisted, answered as follows: "Under this law it includes physical, mental, and educational incapacity, but not complete mental incapacity, such as insanity; as, one who is blind or cannot see so as to read the ballot; who is paralyzed or has lost his hands. The disability to see the ballot may, in some instances, be supplied by artificial means; but if the voter have no glasses, or cannot be supplied with suitable ones conveniently, he cannot be turned away from the polls without an assistant, because of the want of such artificial aid, any more justly than can the man without feet to walk to the booth be refused the aid of carriers, because he has not provided himself with artificial limbs; for, in each case, the disability is an actual one. . . . Again, one who cannot read, or cannot read understandingly, the English language (in which the ballot is required to be printed), is disabled and entitled to the assistance of another voter, just as much as if he should be stone blind. There are many other instances of disability, which, not now occurring to us, we do not give. But one who voluntarily disables himself, without just warrant, and not through any laudable or dutiful effort of the body or mental faculties, is not entitled to the benefit of the provisions; as, where one gets drunk. Drunkenness is no excuse for crime, neither does it constitute a disability under this law. We do not include in the definition the voter who, purposely, or who, through want of time, inattention, or other apparently good reason, has not informed himself of the manner of voting under the act." Whether the voter has shown such disability as entitled him to assistance is for the election board to determine, the court 40 L.R.A. (N.S.)

saying: "If his alleged disability is a palpable mistake, fraud, or subterfuge, and is so found by the board, they, as in any other case affecting the right to vote, in the exercise of their judicial discretion, may deny his request."

In *Re Instructions to Election Officers*, 2 Pa. Dist. R. 275, a different court, in response to a request for instructions as to what constituted such a disability, said that "a voter's disability may result from ignorance of the law, inability to read or write, defective vision, palsy, excessive nervousness producing abnormal self-distrust, or other causes." But the court further said that the voter himself is the sole judge of his own disability, and his declaration of disability entitles him to assistance.

The conflict in the two preceding cases as to who is to judge as to whether a voter is entitled to assistance is discussed in *Re Contested Election*, 3 Lack. Leg. News, 74, in which the court says: "We cannot agree to the construction of the law already alluded to, that the voter is the sole judge of this, and that he has merely to declare that he needs assistance, and it must, without more, be accorded him. If this be the case, what, then, is the use of his having to ask? In our judgment the declaration of disability and the request for the allowance of assistance is no such idle ceremony as this would make it. If the permission of the judge of election has first to be obtained, it is certainly within his discretion to grant or withhold it, and to do this understandingly the grounds of the disability must be made known to him. When this has been done it becomes his duty to decide whether a real disability exists, and, if it does not, to refuse the assistance asked for." And the court further indicated some of the disabilities which will entitle the voter to assistance, as follows: "If the voter is blind, or palsied, or cannot read, or cannot read the English language, either of these would be good grounds for assistance. What others might be, we cannot now undertake to decide. But ignorance of how to mark the ballot, we do not hesi-

stitutional convention that formed the Constitution of 1898 was called were to provide for the reorganization of the electorate of the state, and to provide the means of securing honesty and fairness in the elections. As to the former, the object being to eliminate the undesirable, ignorant colored voter without at the same time eliminating the unlettered, but none the less desirable, white voter. This was accomplished by excluding from the suffrage all unregistered voters, and by allowing none to register who could not qualify either under the so-called grandfather clause of the Constitution, or under the clause providing for educational and property qualifications. Honesty and fairness in elections was secured by the adoption of the so-called Australian ballot system, by which the voter is required to prepare his ballot in secrecy; and the legislature was directed to make provision for that manner of voting. It being fully realized, however, that under this new régime the situation, for a time at least, would be that nomination by the Democratic party would be equivalent to election, and that therefore the primary election held for the nomination of the

candidates would be the real election, and the election under the general election would be practically nothing more than a mere formal confirmation of the result of the primary election, it was deemed necessary to regulate also the primary elections. But here an insurmountable difficulty presented itself in connection with the secrecy of the ballot. How could voters prepare their ballots in secret when they could not read and write? This difficulty had been met in so far as the general election was concerned by requiring the political parties to adopt party emblems to be printed on the ticket opposite the names of the nominees of the party, to indicate to the unlettered voter who were the nominees of his party, and enable him to vote by simply stamping this emblem. The Democrat would stamp the rooster, and the Republican the elephant. But this device would be of no avail for party nominations, because the several candidates would have to be voted for and might be very numerous, and, unless the voter could read the names on his ticket, he could not possibly prepare it. Not knowing how to get over this difficulty, the constitutional convention had to

tate to say is not; let a voter in such a case get his instructions from someone without; he has no business to receive it in the voting compartment."

The fact that a voter is obliged to wear glasses, and has left them at home, is held to be insufficient to entitle him to assistance in State ex rel. Braley v. Gay, supra.

And in Preston v. Price, 27 Ky. L. Rep. 588, 85 S. W. 1183, under a statute providing for assistance to a voter who is so disabled as to be unable to mark his ballot and shall so declare on oath, what constitutes such disability is for the election judges to decide, and when they decide such disability exists the ballot must be counted, though they err in their judgment.

Effect of illegal or irregular assistance.

Cases involving the validity of ballots prepared with the assistance of unauthorized persons are collected in a note to Board v. Dill, 29 L.R.A.(N.S.) 1170.

The effect of rendering assistance to voters in an illegal or irregular manner is by some courts held to invalidate the ballot.

Thus in Cole v. Nunnelley, 140 Ky. 138, 130 S. W. 972, the court says it is not contemplated that voters shall be permitted to vote at any other than the regular voting place, and ballots taken by an election officer outside of the polling place to disabled and infirm voters, who then marked them and returned them to the officer, are invalid.

Disregard of provisions for oath of dis-
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ability and for secrecy is held to be ground for rejecting the ballots in Banks v. Sergeant, 104 Ky. 843, 48 S. W. 149, and Napier v. Cornett, 24 Ky. L. Rep. 576, 68 S. W. 1076.

In Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821, modified on rehearing in 68 Pac. 975, ballots cast by assisted voters, who had not declared under oath when registered that they were unable to mark their ballots, and were assisted by officers who were not sworn and otherwise failed to comply with the statute, were rejected.

In Combs v. Combs, 30 Ky. L. Rep. 161, 97 S. W. 1127, rehearing denied in 30 Ky. L. Rep. 1005, 99 S. W. 1150, it was held that disregard of provisions for secrecy made the votes illegal.

Under a statute providing that the officer assisting a voter shall mark the ballot as directed by the voter, without suggestion or interference, the substitution of his own for the voter's choice is a flagrant violation of an official trust, and vitiates the ballot. Patton v. Watkins, 131 Ala. 387, 90 Am. St. Rep. 43, 31 So. 93.

However, some courts hold that such irregularities do not invalidate the ballots, in the absence of some showing of fraud or imposition.

Thus in Freeman v. Lazarus, 61 Ark. 247, 32 S. W. 680, where the judges disregard the statute by permitting one judge only to assist the voters when the statute required that the ballots be prepared by two judges in the presence of each other and the voter, and by marking the ballots opposite to voter's directions, the result of the election was declared by the court to

content itself with a general direction to the legislature to adopt the best means possible to secure fairness in primary elections. This it did by article 215, providing that "the legislature shall enact laws to secure fairness in party primary elections, conventions, or other methods of naming party candidates."

The legislature promptly, at its first session after the adoption of the Constitution of 1898, carried out the constitutional behest to "provide some plan by which voters may prepare their ballots in secrecy at the polls," by passing act 152, page 286, of that year, known as the "general election law." This law enables the uneducated voter to prepare his ballot by simply stamping the party emblem.

Nothing was done in the matter of a primary election law until the session of 1904, when a joint primary election committee was appointed by the house and senate for the purpose of drafting a primary election law. The report of this committee was presented at the session of 1906, and is embodied in act 49, p. 66, of that year.

This act was copied verbatim from the

general election law (act 152 of 1898) in most of its provisions; but on the crucial point of the preparation of the ballot in secrecy it had to and did make a wide departure from it. For comparison of the two provisions we give them side by side.

General Election Law
(Act 152 of 1898.)

"Sec. 76. Be it further enacted, etc., . . . Any voter who declares to the presiding commissioner that by blindness or other physical disability he is unable to mark his ballot shall, upon request, receive the assistance of two of the commissioners, who shall be of different political parties or factions, represented among the commissioners, in the marking thereof, and neither the voter nor the said commissioners shall thereafter give any information regarding the same. The commissioner shall require such declaration of disability to be made by

Primary Election Law
(Act 49 of 1906.)

"Sec. 24. Be it further enacted, etc., . . . The voter shall be at liberty, if he is unable to prepare his own ballot, to call upon one of the commissioners or watchers or clerks of election to assist him."

be in accordance with the vote as the evidence showed it would have been but for the misconduct of the election judges.

But where the ballots were prepared without fraud and as the voter desired, although not always as the statute directed for the maintenance of secrecy, they were held by the same court to be valid on the ground that secrecy was a personal privilege, which could be waived; there being no proof of the voters being restrained from a free exercise of their privilege. Schuman v. Sanderson, 73 Ark. 187, 83 S. W. 940.

In *Montgomery v. Oldham*, 143 Ind. 34, 42 N. E. 474, under a statute providing for assistance to a voter who declares his inability to read, it was held that a vote by a person who in fact could not read and write intelligently, and was assisted, should be counted though he stated he could read, when interrogated by an election official.

The fact that judges went into the booths to assist voters in preparing their ballots, although the statute prohibited such action and required that the judges prepare the ballots of such voters as directed by them, without leaving their respective positions, was held not to invalidate such ballots, in the absence of any showing that such misconduct was in furtherance of a design to unduly influence the electors, or that they were in fact imposed upon, there being no provision that such action on the part of the judges should avoid the election or render ballots so prepared illegal and void. *Hope v. Flentge*, 140 Mo. 390, 47 L.R.A. 806, 41 S. W. 1002; *Morgan v. Brase*, 140 Mo. 415, 41 S. W. 1101; *Howard v. Caldwell*, 140 Mo. 416, 41 S. W. 1101; *Drum v. Ude*, 140 Mo. 40 L.R.A. (N.S.)

417, 41 S. W. 1100; *Frissell v. Cotner*, 140 Mo. 418, 41 S. W. 1101.

In *Hanscom v. State*, 10 Tex. Civ. App. 638, 31 S. W. 547, it is held that where a statute provides for assistance to the voter by two judges, but does not provide that rendering assistance in any other way shall invalidate the ballot, the fact that a voter was assisted by one judge only will not render the ballot void, in the absence of a showing of fraud.

And in *Re Ellis*, 21 Ont. L. Rep. 74, appeal dismissed in 23 Ont. L. Rep. 427; *Re Schumacher*, 21 Ont. L. Rep. 522, and *Re Prangley*, 21 Ont. L. Rep. 54, where it appeared that election officers disregarded statutory provisions in assisting voters, by failing to require declarations of disability, and by marking the ballots without the presence of agents for and against the proposition being voted upon, and by failing to make the proper entries in the poll book, the court held ballots which were so marked in good faith and in accord with the wish of the voter to be valid, but disallowed a ballot marked by the officer to suit himself without the voter giving any direction.

Under a statute providing that the duties of assisting voters shall be discharged by the clerk alone, an occasional or accidental performance of them by a judge or sheriff of election will not render such officer liable to prosecution as wilfully performing his duty in such a way as to hinder the objects of the election law. *Com. v. Kaufman*, 126 Ky. 624, 104 S. W. 740.

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the voter under oath to him, and he is hereby qualified to administer same."

It will be noted that the one statute requires an express declaration of inability to prepare the ballot to be made, and to be made under oath, and that no other cause of inability is recognized than the physical disability to mark the ballot; whereas, the requirement that an express declaration be made of inability to prepare the ballot is omitted from the other statute, and the inability to prepare the ballot is not restricted to physical disability, but is extended to disability from any cause, the language being general, to wit, "if he is unable to prepare his ballot;" i. e., from any cause.

The general election law had restricted the inability to physical inability to "mark" the ballot, because nothing but physical disability could prevent a voter from recognizing the party emblem on the ticket and stamping it. But, when it came to selecting from a long list of names appearing on the ticket, the situation was entirely different. Hence, instead of restricting the inability to physical inability to "mark" the ballot, the committee extended it to inability from any cause.

The voter, being thus left at liberty to call for assistance whenever he finds himself unable from any cause to prepare his ballot, cannot be convicted of crime if, finding himself unable to determine who in the list of candidates for the several offices are the candidates favored by the political party with which he is in sympathy, he calls for assistance.

The contention of the prosecution is that it is not possible for a voter who can read, and who is not physically disabled, to be unable to prepare his ballot, and that therefore any voter who can read, and is not physically disabled, who calls for assistance, violates the provision of the primary election law, § 24, which denounces a penalty for "any voter who shall make a false statement as to his inability to mark his ballot."

This contention might be well founded if the statute restricted the inability to physical disability and the inability to read the ballot; but it does not. It extends it to inability from any cause. If interpreted as here contended, the statute would be made to say something which it does not expressly say, and does not even by necessary implication say. Conduct would be made a crime which the statute does not expressly, or even by necessary implication, make a crime.

To enlarge in this way a criminal statute

would be to go counter to what is universally recognized to be the cardinal rule of interpretation for criminal statutes, namely, that they must be construed strictly. In the language of Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 95, 5 L. ed. 42, quoted approvingly by this court in *State v. Fontenot*, 112 La. 642, 36 So. 635: "It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of the statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated."

On the same subject other courts and judges have expressed themselves, as follows: "There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute." *United States v. Lacher*, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37; *Re McDonough* (D. C.) 49 Fed. 360. "Criminal statutes are inelastic, and cannot be made to embrace cases plainly without the letter, though within the reason and policy, of the law." *State v. Lovell*, 23 Iowa, 304. "Doubts as to the interpretation of a statute must be resolved in favor of the accused." *State v. Bryant*, 90 Mo. 534, 2 S. W. 836; *People v. Reilly*, 50 Mich. 384, 45 Am. Rep. 47, 15 N. W. 520; *State v. Leo*, 108 La. 496, 508, 32 So. 447, 15 Am. Crim. Rep. 272; *State v. Finch*, 37 Minn. 433, 34 N. W. 904.

In *State v. Peters*, 37 La. Ann. 730, this court said: "Criminal statutes cannot be extended to cases not included within the clear import of their language."

In *State v. King*, 12 La. Ann. 594, Justice Cole, as the organ of the court, said: "Nothing would be more dangerous to the liberties of the people than that courts should consider as the law, not statutes in actual existence, but the motives of the legislature. If such was the rule, there would then be no certainty in the administration of justice; different courts would vary as to the motives of the sovereign power; in one part of the state particular actions would be viewed and punished as crimes, and in other parts they would be justified. Judicial tribunals derive their power of condemnation from the legislature, and have no more right to condemn without authorization of law than any private individual. Personal rights would never be secure if courts were guided by a desire to punish and prevent crimes without regard to the law and the legal power." 12 La. Ann. at page 595: "We regret to be

obliged to set the prisoner at liberty, but it is far wiser and safer for society and the rights of the citizen to allow him to be liberated than to violate a great principle in the interpretation of statutes which has had the sanction of the most learned and enlightened members of the judiciary."

In *Simms v. Bean*, 10 La. Ann. 346, Chief Justice Slidell said: "The law is not prone to . . . extend punishments and penalties; and this statute, highly severe in the consequences it inflicts, and penal in its character, should receive a strict judicial construction; that is to say, it should not be extended to derelictions of duty and not specially and clearly described and comprehended in it."

In *State v. Leo*, 108 La. 496-508, 32 So. 447, 451, 15 Am. Crim. Rep. 272, Chief Justice Nicholls, as the organ of the court, interpreting § 833 of the Revised Statutes, said: "The object of the general assembly in enacting § 833 is very evident, but it does not suffice in a statute (particularly in a criminal statute) that its purpose should be manifest. To be effective, the purpose must find expression in the language of the law itself, as required by legal rules. We have held permissible sometimes to restrain the generality of the terms of a law so as to exclude from its operations exceptional cases, but we are not authorized to eke out or enlarge the terms of a limited law so as to place thereunder cases which evidently should have been included therein to fully effectuate their object, by which, by inadvertence or other causes, were omitted."

In *Shaw v. Clark*, 49 Mich. 384, 43 Am. Rep. 474, 13 N. W. 786, it was held that an act not expressly prohibited by the statute cannot be reached by the statute merely because it resembles the offenses provided against, or may be equally and in the same way demoralizing or injurious.

In England the same rule of construction of penal statutes prevails: "We must not extend a penal law to other cases than those intended by the legislature, even though we think they come within the mischief intended to be remedied." Lord Kenyon in *Jenkinson v. Thomas*, 4 T. R. 665, 666. "We are called upon to construe a penal enactment. Those who contend that the penalty may be inflicted must show that the words of the act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty." *Dickenson v. Fletcher* (1873) L. R. 9 C. P. 1, at page 7; Brett, J. "In construing a 40 L.R.A. (N.S.)

statute like the present by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offense within the section." *Graff v. Evans* (1832) L. R. 8 Q. B. Div. 373, Field, J. "But then comes the question whether the plaintiffs are also entitled to recover penalties under § 6 [25 & 26 Vict. chap. 68]. We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal sections." *Tuck v. Priester* (1837) L. R. 19 Q. B. Div. 629, at page 638, Lord Esher, M. R. "The well-settled rule that the court will not hold that a penalty has been incurred unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it." *Id.* at page 645, Lindley, L. J. "It is a sound rule of construction that, when any penalty or disability is imposed by statute on any of her Majesty's subjects, the court before which any charge is preferred must be able to see clearly what the conduct is which will render a person liable to the penalty so imposed." *Crane v. Lawrence* (1890) L. R. 25 Q. B. Div. 152, at page 154, Mag. Cas. Cave, J. "I have certainly always understood the rule to be that, where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language." *London County Council v. Aylesbury Dairy Co.* [1898] 1 Q. B. 106, at page 109 Wright, J.

The act of the accused in this case could be brought within this criminal statute only by construction; and, as the foregoing excerpts indicate, conduct not expressly or unmistakably made criminal by statute cannot be made so by construction. Nothing is a crime which is not clearly and unmistakably made a crime.

In the present case the very fact itself of the division of opinion on the point would indicate sufficiently that the matter was very far from being clear or unmistakable.

Judgment set aside, and the accused ordered released without day.

Land J.:

I concur in the decree on the ground that the statement of facts shows that the ac-

cused did not make a false statement as to his inability to mark and prepare his ballot. This is the only charge against the accused. Whatever construction may be placed on the phrase, "unable to prepare his own ballot," act 240 of 1910 does not penalize the request for, or the receiving of, assistance by the voter, but only false statements as to the voter's "inability to mark his ballot." The statute does not define the particular grounds of inability which entitle a voter to receive assistance, and in this respect should be clarified by amendment. It is fortunate that the general assembly will soon have an opportunity to express its will on the subject-matter of the assistance of voters in primary elections.

Petition for rehearing denied June 4, 1912.

GEORGIA SUPREME COURT.

M. T. LANG, Plff. in Err.,

v.

H. T. VAUGHN et al.

(137 Ga. 671, 74 S. E. 270.)

Will — ademption — conveyance.

Where a testator conveys to another spe-

Headnote by FISH, Ch. J.

Note. — Disposal, loss, or destruction of subject-matter, or payment of debt, as ademption of specific legacy or devise.

As to ademption of specific legacy or devise by change in or substitution of other for property bequeathed, see note to Gardner v. McNeal, post, 553.

As to collection of insurance policy during lifetime of testator as ademption of specific legacy thereof, see note to Re Pruner, post, 561.

As to gift by testator as ademption of general legacy to donee, see note to Johnson v. McDowell, 38 L.R.A.(N.S.) 588.

As to gift to one spouse by parent of the other as advancement or ademption, see note to Ireland v. Dyer, 26 L.R.A.(N.S.) 1050.

The present note does not include cases of strict revocation of a will by a subsequent conveyance of devised property, except as that term is applied to what is more properly termed ademption of a specific devise.

The reader, in examining the note, should remember that it does not treat the question whether or not a particular legacy is specific, but proceeds upon the premise that the legacies under consideration are specific.

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cific property devised or bequeathed, and does not afterwards become possessed of the same, and the will contains no provision for such contingency, the devise or legacy is adeemed, and such legal result cannot be obviated by extrinsic evidence tending to show that the testator did not intend it.

(February 28, 1912.)

ERROR to the Superior Court for Chatham County to review a decree construing the will of Mary Tupper, deceased, and holding a devise therein to have been adeemed. Affirmed.

Statement by FISH, Ch. J.:

Miss Mary Tupper executed her will in September, 1905. She was then in possession of a certain improved lot in the city of Savannah. She owned in her own right an undivided half interest in the lot and improvements, and held the other undivided half interest as executrix under the will of her sister, Cornelia T. Lang, the mother of Mary T. Lang. The will of Cornelia T. Lang was executed in 1884, and in the second item thereof the undivided half interest belonging to Cornelia T. was devised to her daughter, Mary T. Lang; such devisee to hold and enjoy all of the profits as long as she might remain unmarried, with the provision that upon her marriage this undivided half interest belonging to Cornelia T. should be divided equally between her four children, including Mary

In general.

It may be stated as a general rule that the disposal, loss, destruction, or extinction of the subject of a specific legacy adeems the legacy. This is the tenor of the following decisions, the subject of the respective legacies and the act which worked their ademption being parenthesized: Georgia Infirmary v. Jones, 37 Fed. 750 (claim against government collected by testator); Kenaday v. Sinnott, 179 U. S. 606, 45 L. ed. 339, 21 Sup. Ct. Rep. 233 (*dictum*); Spencer v. Higgins, 22 Conn. 521 (*dictum*); Capron v. Capron, 6 Mackey, 340 (*dictum*); Douglass v. Douglass, 13 App. D. C. 21 (government bonds sold by testator); New Albany Trust Co. v. Powell, 29 Ind. App. 494, 64 N. E. 640 (stock disposed of by testator); Ross v. Carpenter, 9 B. Mon. 367, 50 Am. Dec. 514 (slave died during testator's lifetime); Lilly v. Curry, 6 Bush, 590 (horse sold by testator); Hepp v. Lafonta, 4 Mart. N. S. 428 (debt partially paid during testator's lifetime); Batchelor's Succession, 48 La. Ann. 278, 19 So. 283 (note collected at instance of testator); Stilphen's Appeal, 100 Me. 146, 60 Atl. 888, 4 Ann. Cas. 158 (specific legacy of money adeemed by failure of fund); Kunkel v. Macgill, 56 Md. 120 (*dictum*); Gelbach v. Shively, 67 Md. 498, 10 Atl. 247

T., and that, in the event Mary T. should never marry, she should have the power to dispose, by deed or will, of one undivided fourth of this half interest, receiving, however, the rents and profits from the interest so long as she remained single. By the eleventh item of the will of Mary Tupper, she devised to Mary T. Lang, "all my interest, to wit, an undivided one-half interest, in that lot on Bay street, Savannah, Georgia, known as lot No. 4 Jekyl Tything, Derby ward," this being the same lot and the improvements in which Miss Tupper owned an undivided half interest, the other undivided half interest belonging to the estate of her sister, Cornelia T. Lang; and of this Miss Tupper had possession individually and as executrix of Cornelia T.

By the twelfth item of her will, Miss Tupper made Mary T. Lang, Helen T. Vaughn, Clara B. Vaughn, Isabelle V. Smith, and Cornelia C. Vaughn her residuary legatees. On May 18, 1906, Miss Tuppe individually and as executrix of the will of her sister, Cornelia T. Lang, and by virtue of a power of sale in the will of Cornelia T., sold the western half of this lot to the Hibernia Bank for \$5,000. On the 12th day of the same month she invested \$2,400 of the proceeds of such sale in stock of the Georgia State Building & Loan Association, and took a certificate for it, No. 1,428, in her individual name, and at the same time invested a like amount of such proceeds in stock of the same association, and took a certificate, No. 1,429, in her

(specific legacy adeemed by failure of fund); *Brady v. Brady*, 78 Md. 461, 28 Atl. 515 (cows died during lifetime of testator; horses disposed of under power in will); *White v. Winchester*, 6 Pick. 48 (stock sold by testator); *Tomlinson v. Bury*, 145 Mass. 346, 1 Am. St. Rep. 464, 14 N. E. 137 (*dictum*); *Unitarian Soc. v. Tufts*, 151 Mass. 76, 7 L.R.A. 390, 23 N. E. 1006 (stock sold by testator); *Thayer v. Paulding*, 200 Mass. 98, 85 N. E. 868 (*dictum*); *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576 (*dictum*); *Wheeler v. Wood*, 104 Mich. 414, 62 N. W. 577 (legacy of \$400 to be paid by assignment of specific mortgage held adeemed by discharge of the mortgage); *Malone v. Mooring*, 40 Miss. 247 (slaves emancipated); *Ford v. Ford*, 23 N. H. 212 (*dictum*); *Healey v. Toppan*, 45 N. H. 243, 86 Am. Dec. 159 (specific legacy of perishable articles for life, with remainder over, adeemed as to remainderman by perishing of such articles during the life term); *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604 (corporate stock sold by testator); *Gardner v. Gardner*, 72 N. H. 257, 56 Atl. 316 (corporate stock disposed of by testator); *Drake v. True*, 72 N. H. 322, 56 Atl. 749 (corporate stock surrendered by testator); *Wyckoff v. Perrine*, 37 N. J. Eq. 118 (debt paid); *Johnson v. Conover*, 54 N. J. Eq. 333, 35 Atl. 291 (*dictum*); *Abernethy v. Catlin*, 2 Dem. 341 (bond and mortgage paid to testator); *Peck v. McGillis*, 9 Barb. 35 (bond and mortgage paid to testator); *Humphrey v. Robinson*, 52 Hun, 200, 5 N. Y. Supp. 164 (bond and mortgage discharged upon payment to testator); *Hosea v. Skinner*, 32 Misc. 653, 67 N. Y. Supp. 527 (corporate stock sold by testator); *Newcomb v. St. Peter's Church*, 2 Sandf. Ch. 636 (stocks sold by testator); *Snowden v. Banks*, 31 N. C. (9 Ired. L.) 373 (slave sold by testator); *Taylor v. Bond*, 45 N. C. (Busbee, Eq.) 5 (slave sold by testator); *Anthony v. Smith*, 45 N. C. (Busbee, Eq.) 188 (*dictum*); *Nooe v. Vannoy*, 59 N. C. (6 Jones, Eq.) 185 (*dictum*); *Tillman v. Tillman*, 59 N. C. (6 Jones, Eq.) 206 (slave sold by testator); *Starbuck v. Starbuck*, 93 N. C. 40 L.R.A. (N.S.)

183 (debt collected by testator); *Grogan v. Ashe*, 156 N. C. 286, 72 S. E. 372 (*dictum*); *Sharp v. McPherson*, 10 Ohio C. C. 181, 6 Ohio C. D. 634 (sale of property out of which legacy was to be paid); *Gilbreath v. Alban*, 10 Ohio, 64 (claim collected by testator); *Bell's Estate*, 8 Pa. Co. Ct. 454 (bank deposit withdrawn by testator); *Blackstone v. Blackstone*, 3 Watts, 335, 27 Am. Dec. 359 (corporate stock sold by testator); *Alsop's Appeal*, 9 Pa. 374 (legacy of corporate stock adeemed when not in testator's possession at his death); *Ludlam's Estate*, 1 Pars. Sel. Eq. Cas. 116 (legacy of United States loan certificate adeemed by testator himself receiving payment); *Ludlam's Estate*, 13 Pa. 188, affirming 3 Clark (Pa.) 332 (same as preceding case); *Walls v. Stewart*, 16 Pa. 275 (land which was source of payments of legacy was sold by testator); *Hoke v. Herman*, 21 Pa. 301 (debt partially paid during testator's lifetime); *Smith's Appeal*, 103 Pa. 559 (testator withdrew deposit out of which specific legacies were payable); *Black's Estate*, 223 Pa. 382, 72 Atl. 631 (*dictum*); *Re Tillinghast*, 23 R. I. 121, 49 Atl. 634 (subject of legacy converted by testator to his own use); *Cogdell v. Widow*, 3 Desauss. Eq. 346 (*dictum*); *Bailey v. Wagner*, 2 Strobb. Eq. 1 (slave sold by testator); *Rogers v. Rogers*, 67 S. C. 168, 100 Am. St. Rep. 721, 45 S. E. 176 (claims against an interest in a certain estate collected by testator); *Tipton v. Tipton*, 1 Coldw. 262 (note disposed of by testator); *Skipwith v. Cabell*, 19 Gratt. 758 (*dictum*); *Hood v. Haden*, 82 Va. 588 (state bonds sold by testator); *Ellis v. Walker*, 1 Ambl. 309 (interest in partnership withdrawn from partnership by testator); *Hambling v. Lister*, 1 Ambl. 401 (debt called in by testator,—adeems at least in absence of proof of a contrary intention); *Purse v. Snaplin*, 1 Atk. 414 (*dictum*); *Lawson v. Stitch*, 1 Atk. 507 (*dictum* as to collection of debt by testator); *Jeffreys v. Jeffreys*, 3 Atk. 120 (bank stock sold by testator); *Davies v. Morgan*, 1 Beav. 405, 3 Jur. 284 (bond invalid at time of testator's death); *Cowper v. Mantell*, 22 Beav. 223, 2 Jur. N.

name as executrix of the will of Cornelia T. Lang. The balance of the proceeds of the sale she put in "the 5 per cent stock of said loan association," and took two pass books of deposits for the same, one of the books in the name of herself individually for half of such balance, and the other in her name as executrix of the will of Cornelia T. Lang for the other half of the balance of the proceeds of the sale. Miss Tupper died June 12, 1910, not having withdrawn either of such deposits, and having made no change in her will.

Under a bill for interpleader, filed by the executor of the will of Miss Tupper, the question was presented whether the sale and conveyance by Miss Tupper to the bank of her undivided half interest in the

city lot and the improvements thereon,—she not afterwards becoming possessed of the same,—and the investment by her of the half interest she owned individually in the proceeds of the sale in corporate stock, was an ademption of the devise of her interest in such property to Mary T. Lang. The residuary legatees under the will of Miss Tupper contended that the specific devise to Mary T. was adeemed *pro tanto* by the sale and reinvestment, and that therefore the corporate stock purchased by Miss Tupper with the proceeds of the sale belonging to her individually, the certificate for which was issued in her name individually, went to them under the residuary clause of her will. The contention of Mary T. Lang was that the specific

S. 475, 4 Week. Rep. 500 (leasehold conveyed by testator); Jones v. Southall, 32 Beav. 31, 32 L. J. Ch. N. S. 130, 9 Jur. N. S. 93, 8 L. T. N. S. 103, 1 New Reports, 152, 11 Week. Rep. 247 (claims paid to testator); Ashburner v. Macguire, 2 Bro. Ch. 108, 2 Eng. Rul. Cas. 18 (company stock sold by testator); Badrick v. Stevens, 3 Bro. Ch. 341 (bond paid during testator's lifetime); Stanley v. Potter, 2 Cox, Ch. Cas. 180, 2 Revised Rep. 26 (debt paid to testator); Humphreys v. Humphreys, 2 Cox, Ch. Cas. 184 (stock disposed of by testator); Durrant v. Friend, 5 DeG. & S. 343, 21 L. J. Ch. N. S. 353, 16 Jur. 709 (subject of legacy lost at sea at same time testator lost his life); Sidebotham v. Watson, 11 Hare, 170, 1 Week. Rep. 303 (debt paid in testator's lifetime); Harrison v. Jackson, L. R. 7 Ch. Div. 339, 47 L. J. Ch. N. S. 142 (corporate stock redeemed by corporation during testator's lifetime); Macdonald v. Irvine, L. R. 8 Ch. Div. 101, 47 L. J. Ch. N. S. 494, 38 L. T. N. S. 155, 28 Week. Rep. 381 (bonds sold by testator); Re Lane, L. R. 14 Ch. Div. 856, 49 L. J. Ch. N. S. 768, 43 L. T. N. S. 87, 28 Week. Rep. 764 (stock surrendered by testator); Re Bridle, L. R. 4 C. P. Div. 336 (mortgage paid during testator's lifetime); Re Gibson, L. R. 2 Eq. 669, 35 L. J. Ch. N. S. 596, 14 Week. Rep. 818 (stock sold by testator); Oliver v. Oliver, L. R. 11 Eq. 506, 40 L. J. Ch. N. S. 189, 24 L. T. N. S. 350, 19 Week. Rep. 432 (stock sold by testator); Birch v. Baker, Mosely, 373 (stock sold by testator); Pattison v. Pattison, 1 Myl. & K. 12, 2 L. J. Ch. N. S. 15 (stock sold by testator); Rider v. Wager, 2 P. Wms. 328 (debt called in by testator); Gardner v. Hatton, 6 Sim. 93 (principal of mortgage received by testator); Clark v. Browne, 2 Smale & G. 524, 18 Jur. 903, 2 Week. Rep. 665 (*dictum*); Fryer v. Morris, 9 Ves. Jr. 360, 7 Revised Rep. 222 (debt collected by testatrix); Pawlet's Case, T. Raym. 335 (*dictum*); Aston v. Wood, 43 L. J. Ch. N. S. 715, 31 L. T. N. S. 293 (gift of balance due from a partnership admitted by collection thereof by testator); Lee v. Lee, 27 L. J. Ch. N. S. 824, 6 Week. Rep. 846 40 L.R.A.(N.S.)

(stock sold by testator); Makeown v. Ardagh, Ir. Rep. 10 Eq. 445 (bond paid to testator); Longfield v. Bantry, Ir. L. R. 15 Eq. 101 (*dictum*); Re Rally, 25 Ont. L. Rep. 112, 20 Ont. Week. Rep. 482 (debt paid to testatrix).

But a direction to solicitors to sell stock which had been specifically bequeathed, for the purpose of reimbursing themselves for a sum drawn upon them by the testator, was held in Harrison v. Asher, 2 DeG. & S. 436, 17 L. J. Ch. N. S. 452, 12 Jur. 833, not to adeem the legacy where the solicitors did not dispose of the stock until after the testator's death.

In a few early cases, in case of debts, etc., being bequeathed, a distinction was drawn between voluntary and compulsory payments, it being held that voluntary payment was not a circumstance from which to infer an intention to adeem, but that such an intention might be presumed, unless otherwise accounted for, when the testator himself called in the money. See Stout v. Hart, 7 N. J. L. 414; Lawson v. Stitch, 1 Atk. 507 (*dictum*); Partridge v. Partridge, Cas. t. Talb. 226, 9 Mod. 269; Orme v. Smith, 1 Eq. Cas. Abr. 302, 2 Vern. 681; Crookat v. Crookat, 2 P. Wms. 164; and Drinkwater v. Falconer, 2 Ves. Sr. 623. And in the early case of Ford v. Fleming, 1 Eq. Cas. Abr. 302, 2 P. Wms. 469, 2 Strange, 823, Lord Chancellor King went so far as to hold that the fact that the testator sued for a claim which had been specifically bequeathed, and recovered it, did not adeem the legacy, the ground being that the suit might have been brought merely because the testator thought the debt was in danger. But these distinctions no longer prevail, they being repudiated as unsound and fallacious by the modern decisions, the question resolving itself into one of identity rather than intention. See Wyckoff v. Perrine, 37 N. J. Fq. 118; Abernethy v. Catlin, 2 Dem. 341; Ashburner v. Macguire, 2 Bro. Ch. 108, 2 Eng. Rul. Cas. 18, holding that a legacy of a debt is not adeemed by receiving dividends in bankruptcy; Stanley v. Potter, 2 Cox, Ch. Cas. 180, 2 Revised Rep. 26, and

devise to her was not adeemed. By consent the case was tried by Judge Walter G. Charlton without a jury. Evidence was submitted on behalf of Miss Lang, to the effect that Miss Tupper, in January, 1905, consulted her counsel as to the advisability of selling the city lot and reinvestment of the proceeds of the sale. She was advised, as the buildings on it were in a dilapidated condition and practically untenable, and bringing in little or no income, that it would be best to sell and reinvest the proceeds in stock of the Georgia State Building & Loan Association; and her counsel soon thereafter, at her instance, wrote a letter to Mary T. Lang informing her that Miss Tupper was of the opinion that it was best to sell the

property in question and to reinvest the proceeds in other property. After the sale the same counsel advised Miss Tupper to invest the proceeds of the sale as she did invest it. It was shown that Mary T. Lang was the niece of Miss Tupper, and that the residuary legatees were close friends of hers, with whom she lived for a number of years prior to her death, and with whom she was living when she died. Other facts appearing upon the trial are set forth in the opinion rendered by Judge Charlton, as follows:

"This proceeding, which is substantially a bill of interpleader, is brought by the executor of the will of Mary Tupper to determine whether a designated sum of money

dictum in Innes v. Johnson, 4 Ves. Jr. 568.

So a conveyance by testator during his lifetime, of property specifically devised, adeems or revokes the devise. Coulson v. Holmes, 5 Sawy. 279, Fed. Cas. No. 3,274; Bissell v. Heyward, 96 U. S. 580, 24 L. ed. 678; Re Tillman, — Cal. —, 31 Pac. 563; Connecticut Trust & S. D. Co. v. Chase, 75 Conn. 683, 55 Atl. 171; Worrill v. Gill, 46 Ga. 482; Re Miller, 128 Iowa, 612, 105 N. W. 105; Tanner v. Van Bibber, 2 Duv. 550; Miller v. Malone, 109 Ky. 133, 95 Am. St. Rep. 338, 58 S. W. 708; Carter v. Thomas, 4 Me. 341; Emery v. Union Soc. 79 Me. 334, 9 Atl. 891; Hawes v. Humphrey, 9 Pick. 350, 20 Am. Dec. 481; Webster v. Webster, 105 Mass. 538; Cozzens v. Jamison, 12 Mo. App. 452; Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187; Hoitt v. Hoitt, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; Barstow v. Goodwin, 2 Bradf. 413; Philson v. Moore, 23 Hun, 152; Hoffmann v. Steubing, 49 Misc. 157, 98 N. Y. Supp. 706; Adams v. Winne, 7 Paige, 97; Herrington v. Budd, 5 Denio, 321; McNaughton v. McNaughton, 34 N. Y. 201; Burnham v. Comfort, 108 N. Y. 535, 2 Am. St. Rep. 462, 15 N. E. 710; Skerrett v. Burd, 1 Whart. (Pa.) 246; Hunter v. Mills, 29 S. C. 72, 6 S. E. 907; LeFebvre's Estate, 100 Wis. 192, 75 N. W. 971; Gale v. Gale, 21 Beav. 349; Manton v. Tabois, L. R. 30 Ch. Div. 92, 54 L. J. Ch. N. S. 1008, 53 L. T. N. S. 289, 33 Week. Rep. 832; Re Clowes [1893] 1 Ch. 214, 2 Reports, 115, 68 L. T. N. S. 395, 41 Week. Rep. 69; Castle v. Fox, L. R. 11 Eq. 542, 40 L. J. Ch. N. S. 302, 24 L. T. N. S. 536, 19 Week. Rep. 840 (*dictum*); Re McMillan, 4 Ont. L. Rep. 415. And this is true although a purchase money mortgage is taken back. Re Clowes and Re McMillan, *supra*. And in Baxter v. Dyer, 5 Ves. Jr. 656, it was held that a devise is not revoked by a mortgage in fee to the devisee. But in McTaggart v. Thompson, 14 Pa. 149, it was said that a mortgage executed by the testator to the devisee on the devised property operated as a revocation *pro tanto*. See *contra*, Harkins v. Bayley, Prec. in Ch. 514, wherein it was said that the rule as 40 L.R.A. (N.S.)

announced in McTaggart v. Thompson applied only where the mortgage was to a stranger, and that in case of a mortgage to the devisee it operated as an *ademption in toto*.

In California it is provided by statute (Civil Code, § 1304) that an instrument altering the testator's interest in a thing disposed of by will, if inconsistent with the testamentary disposition, shall operate as a revocation of the devise. Re Benner, 155 Cal. 153, 99 Pac. 715, holding that a devise was revoked by the sale of the subject thereof.

And a legacy of freedom from slavery upon the death of the testator is revoked by a sale of the slave by the testator, especially where the manumission was not rendered effectual by delivery of a certificate or writing to the slave or to some person for his benefit. Re Nan Mickel, 14 Johns. 324.

But it has been held that a devise of a specific tract of land is not adeemed *in toto* by a subsequent lease, the reversion continuing in the lessor subject to the conditions contained in the lease, as such a lease changes only the tenure of the estate. Brady v. Brady, 78 Md. 461, 28 Atl. 515, involving a lease renewable forever; Hodgkinson v. Wood, Cro. Car. 23, involving a lease for a term of years.

—contract of disposal.

A valid contract for the sale of lands specifically devised is a revocation of the devise in equity. Walton v. Walton, 7 Johns. Ch. 258, 11 Am. Dec. 456; Donohoo v. Lea, 1 Swan, 119, 55 Am. Dec. 725; Watts v. Watts, L. R. 17 Eq. 217, 22 Week. Rep. 105. And this is true although the sale is rescinded by the mutual consent of the parties, so that the testator is restored to his former title and dies seised of the same estate. Walton v. Walton, *supra*; Herrington v. Budd, 5 Denio, 321.

But a mere option to purchase which was not exercised during the testator's lifetime was held not to work an *ademption*, in Emuss v. Smith, 2 DeG. & S. 722, and in

and certain shares of stock shall go under the eleventh item of the will as a specific legacy, or under the twelfth item be turned over to the residuary legatees. The property specifically devised in the eleventh item was sold by the testatrix subsequently to the making of the will. She and her deceased sister had owned the property in common, and she was the executrix of her sister's will. She sold the property in both capacities, took the purchase money check, and, without cashing it, indorsed it over to the Georgia State Building & Loan Association, in payment of stock in that concern; the balance after payment for such being deposited to her credit on the books of the company. The devisee under the eleventh item is a niece of the

testatrix, not in good health, and living west. The residuary legatees are the children of an adopted daughter of the testatrix, with whom the latter lived until the adopted daughter died, since which event she continued to live with the residuary legatees. During the lifetime of the daughter, she paid nominal board; since her death she paid none. In her will all of the interpleaders are remembered. The interesting contention arising is whether or not the sale of the interests in the realty to have passed under the eleventh item adeemed the devise? The residuary legatees urge that the common law prevails in Georgia, and that the language of the Code of 1895 (§§ 3332, 3333) is to be construed with reference to it. The specific dev-

Re Pyle [1895] 1 Ch. 724, 64 L. J. Ch. N. S. 477, 13 Reports, 396, 72 L. T. N. S. 327, 43 Week. Rep. 420.

So, a mere offer by an agent to sell the subject-matter of a specific legacy made before, but accepted after, the testator's death, was held not to operate as an ademption, in Re Pearce, 8 Reports, 805, as set out in 15 Mews, Eng. Case Law Dig. 1577.

And a contract for the sale of property specifically devised, together with delivery of a deed in escrow, upon the condition that it be delivered to the vendee upon the payment of the cash balance required by the contract, has been held not to revoke the legacy where such payment and delivery of the deed do not take place until a few hours after the testator's death, the ground being that the legatee held the legal title during the interval between the death and the delivery of the deed, and, being subject to the infirmity of the agreement, was entitled to any advantage arising therefrom, and therefore to the consideration paid for the land. Van Tassel v. Burger, 119 App. Div. 509, 104 N. Y. Supp. 273.

But in Weeding v. Weeding, 1 Johns. & H. 424, 4 L. T. N. S. 616, 9 Week. Rep. 431, it was held that a valid contract entered into after the execution of the will, giving an option of purchase, adeemed a devise of the property, although the option was not exercised until after the testator's death.

But an unenforceable contract of sale does not revoke a specific devise of the property. Crowe v. Menton, Ir. L. R. 28 Eq. 519.

And an attempt to convey the property specifically devised, which fails, leaving the specific property in the testator, does not adeem the legacy or devise, as the property may still be delivered over to the legatee *in specie*. Whitlock v. Vaun, 38 Ga. 562, holding that an attempted sale of property specifically devised, which failed because the purchaser failed to pay for it, did not adeem the devise.

In New York, under 2 Rev. Stat. 64, § 45, a contract to sell property specifically bequeathed does not revoke the devise when the sale is not consummated during the testator's lifetime.

Van Tassel v. Burger, supra.

—hypothecating as security.

The mere hypothecating of stock to secure a debt does not adeem a specific legacy of such stock, where the stock is not sold to pay the debt secured until after the testator's death. Re Young, 32 Pittsb. L. J. 403, as set out in 49 Century Dig. col. 3018.

And in Knight v. Davis, 3 Myl. & K. 358, 3 L. J. Ch. N. S. 81, it was held that the pledging of a specific legacy does not work an ademption thereof, and that the legatee is entitled to have his legacy redeemed or exonerated by the executor.

—wrongful sale.

Where the sale of lands specifically devised is made by the testator's son without the assent or knowledge of the father, such a sale does not adeem the specific devise. Beal v. Crafton, 5 Ga. 301. And the same is true of an unauthorized investment by the testator's agent of the specific sum bequeathed. Basan v. Brandon, 8 Sim. 171. And the wrongful sale by a third person of property specifically bequeathed does not adeem the legacy. Domville v. Taylor, 32 Beav. 604, 8 L. T. N. S. 624, 2 New Reports, 258, 11 Week. Rep. 796.

—effect of subsequent acquisition or reversion.

Where the property specifically bequeathed or devised is alienated, but is subsequently again acquired by the testator, and remains in his possession at his death, the legacy or devise is held operative, in Woolery v. Woolery, 48 Ind. 523, and in Brown v. Brown, 16 Barb. 569.

And it is held that the sale of property specifically bequeathed does not revoke the legacy where there was a simulated transfer acknowledged by the vendee, the property returning to the testator and being *in esse* at his death. Re Blakemore, 43 La. Ann. 845, 9 So. 496. But in Walton v. Walton, 7 Johns. Ch. 258, 11 Am. Dec. 456, a contrary conclusion was reached, it being held

isee claims that in Georgia the rule of intention as taken from the civil law prevails, and the devise has not been adeemed, but merely transferred or substituted, and the fair and conclusive deduction is that the intention of the testatrix was not to adeem the devise, but, by practically segregating the purchase money, investing the major portion, and even preserving the fractional residue in bank, to preserve the devise in substance. This, it is urged, is also shown by the fact that, having been tenant in common of the realty with the mother of the specific devisee, the testatrix, as executrix, invested the proceeds belonging to that estate in identically the same manner.

"We may eliminate from the discussion

the relations between the testatrix and the contending parties. She was apparently on affectionate terms with all of them. In doing this, it seems to me that the question of intention is also practically eliminated. The suggestion is strong that the course pursued by the testatrix in immediately investing the proceeds and depositing the fractional sum would indicate an intention to keep the thing itself distinct, however changed its general aspect. The difficulty about such a conclusion arises from the uncertainty of a deduced intention, as distinguished from intention expressed. This may have been the intention of the testatrix, or it may not. There is no presumption arising from the conduct of the testatrix. She may have

that where a testator lawfully and validly conveys the estate devised, the devise is revoked, even though he take it back again by the same instrument, and dies seised of the same estate. And see *Herrington v. Budd*, 5 Denio, 321.

—gift to legatee.

A gift or conveyance to the legatee by the testator during his lifetime, of a thing specifically bequeathed or devised to him, will adeem the legacy. *Gilmer v. Gilmer*, 42 Ala. 9, holding that a gift to the legatee of certain notes, of one of such notes, adeemed the legacy to that extent; *Reed v. Copeland*, 50 Conn. 473, 47 Am. Rep. 663; *Worrill v. Gill*, 46 Ga. 482, holding that a gift to the legatee of property specifically devised to him adeemed the devise, notwithstanding a life estate was reserved in the testator; *Davis v. Close*, 104 Iowa, 261, 73 N. W. 600, to the same effect as *Gilmer's Case*, supra; *Rice v. Rice*, — Iowa, —, 119 N. W. 714, holding that a specific devise of lands was adeemed by gift thereof to the legatee; *Rice v. Rice*, 147 Iowa, 1, 34 L.R.A.(N.S.) 917, 125 N. W. 826, same as next preceding case; *Kean's Will*, 9 Dana, 25, holding that a deed to the devisee during life of testator revoked a specific devise, whether so intended or not; *Floyd v. Floyd*, 7 B. Mon. 290, holding that a gift to the legatee of slaves which had been specifically bequeathed him adeemed the bequest; *Gregory v. Lansing*, 115 Minn. 73, 131 N. W. 1010, same as *Rice v. Rice*, supra; *Marshall v. Hartzfelt*, 98 Mo. App. 178, 71 S. W. 1061, same as *Rice v. Rice*, supra; *Pickett v. Leonard*, 104 N. C. 326, 10 S. E. 460, same as *Rice v. Rice*, supra.

—sale under process of law.

The fact that the alienation is by process of law, as by a sale for taxes, has been held not to affect the question, the alienation adeeming the devise. *Borden v. Borden*, 2 R. I. 94.

And the same conclusion has been reached where the sale was made in eminent domain proceedings. *Ametrano v.* 40 L.R.A.(N.S.)

Downs, 170 N. Y. 388, 58 L.R.A. 719, 88 Am. St. Rep. 671, 63 N. E. 340; *Re Manchester & S. R. Co.* 19 Beav. 365; *Manton v. Tabois*, L. R. 30 Ch. Div. 92, 54 L. J. Ch. N. S. 1008, 53 L. T. N. S. 289, 33 Week. Rep. 832; *Re Dowsett* [1901] 1 Ch. 398, 70 L. J. Ch. N. S. 149, 49 Week. Rep. 268; *Re Bagot*, 31 L. J. Ch. N. S. 772, 6 L. T. N. S. 774, 10 Week. Rep. 607; *Watts v. Watts*, L. R. 17 Eq. 217, 22 Week. Rep. 105.

And in *Re Sprague*, 13 Ont. Week. Rep. 741, affirmed in 15 Ont. Week. Rep. 49, it was said that, in the absence of statute, a sale of lands specifically devised, even though effected by act of Parliament, would work an ademption.

As to effect of sale under orders in lunacy, see *Re Freer*, *Jones v. Green*, *Holmes v. Goodworth*, and *Miller v. Miller*, as set out infra, subdivision "Alienation while testator is insane."

—removal of subject of legacy.

Where property is described in a specific bequest as at a particular place, a permanent removal of the property from such place adeems the legacy. *Spencer v. Spencer*, holding that a specific devise of the furniture in a certain house was adeemed by the permanent removal of all the testator's furniture from such house. See, to the same effect, *Glagrove v. Coore*, 27 Beav. 138; *Green v. Symonds*, 1 Bro. Ch. 129, note, *Houlding v. Cross*, 1 Jur. N. S. 250, 3 Week. Rep. 334; *Heseltine v. Heseltine*, 3 Madd. Ch. 276; *Colleton v. Garth*, 6 Sim. 19, 2 L. J. Ch. N. S. 75; and *Shaftsbury v. Shaftsbury*, 2 Vern. 747.

But it has been intimated that a different rule would apply where the removal is temporary only (*Spencer v. Spencer*, 21 Beav. 548; *Land v. Devaynes*, 4 Bro. Ch. 537; *Brooke v. Warwick*, 2 DeG. & S. 425, 12 Jur. 912, affirmed in 1 Hall & T. 142, 18 L. J. Ch. N. S. 137, 13 Jur. 547); or for purposes of safety (*Norreys v. Franks*, Ir. Rep. 9 Eq. 18); or for a necessary purpose (*Moore v. Moore*, 1 Bro. Ch. 127; *Chapman v. Hart*, 1 Ves. Sr. 271, wherein a distinction was drawn between a house

known that the common-law rule prevailed, and still have been satisfied to have it so. Or she may have been ignorant that such a rule ever existed, or that any change in the language of her devise was necessary. Who cannot tell with any degree of approximate certainty? Intention is the law of wills in Georgia; but the Georgia authorities on this line are chiefly concerned with the interpretation of wills, not in the ascertainment of modifications of doctrines which involve conduct. If the common-law rule applies, then this devise would be adeemed, unless that rule is subject to modification through intention. If this be a true rendition of the rule in Georgia in its last analysis, then manifestly the intention which is so controlling

as to set aside a rule must be clear and explicit, and the conclusion from the evidence showing it must not be susceptible of two constructions. In other words, the conclusion must be exclusive. Even in the construction of legacies, when the courts are enjoined to seek diligently for the intention of the testator, and give effect to the same, there must be consistency with the rules of law, and, notwithstanding the great power to remodel sentences, the intention must at last be clear and unquestionable; and if the clause as it stands may have effect, it is given that effect, however well satisfied the court may be of a different testamentary intention. Code, § 3324. If this be true when the matter under consideration is specifically subjected to the

and a ship, it being said that removal from the latter would not work an ademption); or by a third party by fraud, to defeat the legacy (*Shaftsbury v. Shaftsbury*, 2 Vern. 747).

So, it has been held that where a testator bequeaths the household furniture in a certain house, and such goods are not there at the time of his death, because of a prior refusal of the tenant occupying such place to permit them to be stored there, the legacy is not adeemed, and the goods, which had been stored in another place, passed under the legacy. *Rawlinson v. Rawlinson*, L. R. 3 Ch. Div. 302.

—ademption by acquisition of different estate.

Upon the purchase of the fee to property, a leasehold held by the purchaser merges therein and adeems a specific legacy of such leasehold. *Emuss v. Smith*, 2 DeG. & S. 722; *Capel v. Girdler*, 9 Ves. Jr. 509, 7 Revised Rep. 289.

And a bequest of a sublease is adeemed by the testator taking an assignment of the original lease. *Porter v. Smith*, 16 Sim. 251, 12 Jur. 931.

And the devise of a mortgage in fee is adeemed by a subsequent purchase of the equity of redemption. *Yardley v. Holland*, L. R. 20 Eq. 428, 33 L. T. N. S. 301.

So, it is held that a specific devise of the equitable fee in an estate is revoked where the testator afterwards takes a conveyance to uses, to bar dower in his own favor. *Jacob v. Jacob*, 82 L. T. N. S. 270, affirming 78 L. T. N. S. 825, which affirmed 78 L. T. 451; *Plowden v. Hyde*, 2 Sim. N. S. 171, 21 L. J. Ch. N. S. 329, 16 Jur. 512, reversed on other grounds in 2 DeG. M. & G. 684, 21 L. J. Ch. N. S. 796, 16 Jur. 823; *Rawlins v. Burgis*, 2 Ves. & B. 382.

However, where the testator owns a partial freehold and a leasehold, and bequeaths both, a subsequent purchase of the reversion of the leasehold will not adeem the devise, but the whole of the messuage will pass by the devise. *Miles v. Miles*, 40 L.R.A.(N.S.)

L. R. 1 Eq. 462, 35 Beav. 191, 35 L. J. Ch. N. S. 315, 12 Jur. N. S. 116, 13 L. T. N. S. 697, 14 Week. Rep. 272.

And a devise of an equitable estate in specific property is held not adeemed by the subsequent acquisition by the testator of the legal title. *Dingwell v. Askew*, 1 Cox, Ch. Cas. 427.

And a bequest of the beneficial interest in personalty has been held not adeemed by the vesting of the legal interest in the testator. *Clough v. Clough*, 3 Myl. & K. 296.

—alienation while testator is insane.

It has been held that the expenditure by the lunatic's committee, of a deposit of money which had been specifically bequeathed, did not adeem the legacy, and that the legatee was entitled to the amount of the legacy from the remainder of the estate. *Re Carter*, 71 Misc. 406, 130 N. Y. Supp. 201.

And under the rule that legacies are adeemed only where such an intention appears on the part of the testator himself, it was held in *Wilmerton v. Wilmerton*, 28 L.R.A.(N.S.) 401, 100 C. C. A. 366, 176 Fed. 896, that the collection of a part of a specific legacy by the conservator of an incompetent testator did not adeem the legacy *pro tanto*, in the absence of other evidence that such was the testator's intention.

But a contrary conclusion was reached in *Hoke v. Herman*, 21 Pa. 301, wherein it was held that payment of a debt to the committee of the insane testator adeemed a legacy of the debt.

And in *Re Freer*, L. R. 22 Ch. Div. 622, 52 L. J. Ch. N. S. 301, 31 Week. Rep. 426, it was held that a sale of stock which had been specifically bequeathed, under an order in lunacy, adeemed the legacy. And the same conclusion was reached in *Jones v. Green*, L. R. 5 Eq. 555, 37 L. J. Ch. N. S. 603, 16 Week. Rep. 603; and in *Holmes v. Goodworth*, 7 L. J. Ch. 128; and in *Miller v. Miller*, 25 Grant. Ch. (U. C.) 224, as to farm stock and implements. As to

test of intention, how much more imperative is the necessity for clearness of intention where the subject does not involve the construction of language, but the interpretation of conduct. Nor is this at all affected by the fact that intention enters frequently into the question of ademption. For instance, where money bequeathed is paid over during the lifetime of the testator, the intention with which the money is paid over may well determine whether the testator had in mind the legacy, or gift and legacy were distinct matters. Whatever may be deduced from the general language of *Beall v. Blake*, 16 Ga. 119, the Code of Georgia expresses substantially the common-law rule, and in §§ 3332 and 3333 expresses the exceptions which may

well have been suggested by the indignant protest in that case. These exceptions are (the property having been conveyed to another): (1) Redemption of the property. (2) Abortive conveyance. (3) Exchange for property of like character. (4) Change of investment of a fund. In the last two instances the law deems the intention to substitute merely. Unless some one of these exceptions applies, then the general rule in Georgia, as it was under the common law, is ademption when the specific property is conveyed to another. There is nothing said in any of the sections in regard to the tracing of funds. If there is exchange, it must be for property of like character, and this whether it be swapping or reinvestment. If the legacy is a fund,

power of one lacking testamentary capacity, to revoke a will, see note to *Re Goldsticker*, 18 L.R.A. (N.S.) 99.

—ademption *pro tanto*.

In connection with the foregoing cases, it may be worthy of note that the doctrine of ademption by alienation is generally held to operate *pro tanto* only, so that where but part of the legacy or devise has been alienated, the remainder still passes to the legatee. See the following cases, which so hold: *Gilmer v. Gilmer*, 42 Ala. 9; *Jacobs v. Button*, 79 Conn. 360, 65 Atl. 150; *New Albany Trust Co. v. Powell*, 29 Ind. App. 494, 64 N. E. 640; *Warren v. Taylor*, 56 Iowa, 182, 9 N. W. 128; *Floyd v. Floyd*, 7 B. Mon. 290; *Hepp v. Lafonta*, 4 Mart. N. S. 428; *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 247; *Brady v. Brady*, 78 Md. 461, 28 Atl. 515; *White v. Winchester*, 6 Pick. 48; *Hawes v. Humphrey*, 9 Pick. 350, 20 Am. Dec. 481; *Webster v. Webster*, 105 Mass. 538; *Wells v. Wells*, 35 Miss. 638; *Cozzens v. Jamison*, 12 Mo. App. 452; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; *Gardner v. Gardner*, 72 N. H. 257, 56 Atl. 316; *Drake v. True*, 72 N. H. 322, 56 Atl. 749; *Gardner v. Printup*, 2 Barb. 83; *Philson v. Moore*, 23 Hun, 152; *Walton v. Walton*, 7 Johns. Ch. 258, 11 Am. Dec. 456; *Pickett v. Leonard*, 104 N. C. 326, 10 S. E. 466; *Alsop's Appeal*, 9 Pa. 374; *McTaggart v. Thompson*, 14 Pa. 149; *Hoke v. Herman*, 21 Pa. 301; *Borden v. Borden*, 2 R. I. 94; *Re Tillinghaast*, 23 R. I. 121, 49 Atl. 634; *Bailey v. Wagner*, 2 Strobb. Eq. 1; *Tipton v. Tipton*, 1 Coldw. 252; *Ellis v. Walker*, 1 Ambl. 309; *Jeffreys v. Jeffreys*, 3 Atk. 120; *Jones v. Southall*, 32 Beav. 31, 32 L. J. Ch. N. S. 130, 9 Jur. N. S. 93, 8 L. T. N. S. 103, 1 New Reports, 152, 11 Week. Rep. 247; *Humphreys v. Humphreys*, 2 Cox, Ch. Cas. 184; *Hodgkinson v. Wood*, Cro. Car. 23; *Birch v. Baker*, Mosely, 373; *Aston v. Wood*, 43 L. J. Ch. N. S. 715, 31 L. T. N. S. 293.

In *New York* it was provided by 2 Rev. 40 L.R.A. (N.S.)

Stat. 64, §§ 46-48, that a change in the property of the testator subsequent to the execution of the will could operate as a revocation of the devise in the will just so far as the alteration in the property has had the effect to place it beyond the operation of the provisions of the will, and no farther. *Vandemark v. Vandemark*, 26 Barb. 416, holding that a devise was revoked *pro tanto* by the conveyance of a portion thereof by the testator.

Intention as affecting question.

In case of a sale or other extinction of the subject-matter of the legacy or devise, many courts have presumed an intention that the legacy should fail. See *Kenaday v. Sinnott*, 179 U. S. 606, 45 L. ed. 339, 21 Sup. Ct. Rep. 233; *White v. Winchester*, 6 Pick. 48; *Borden v. Borden*, 2 R. I. 96; and *Hambling v. Lister*, 1 Ambl. 401. The only case to the contrary seems to be the early case of *Birch v. Baker*, Mosely, 373, in which it was said that no such presumption would be indulged.

And the courts in some instances have expressly held that a conveyance during the testator's lifetime of property specifically devised operates as an ademption or revocation of the devise, whether so intended or not, the question being held to be one of identity rather than of intention. *Kean's Will*, 9 Dana, 25; *Beck v. McGillis*, 9 Barb. 35; *Walton v. Walton*, 7 Johns. Ch. 258, 11 Am. Dec. 456; *Hoke v. Herman*, 21 Pa. 301; *Humphreys v. Humphreys*, 2 Cox, Ch. Cas. 184; *Harrison v. Jackson*, L. R. 7 Ch. Div. 339, 47 L. J. Ch. N. S. 142; *Re Bridle*, L. R. 4 C. P. Div. 336; *Oliver v. Oliver*, L. R. 11 Eq. 506, 40 L. J. Ch. N. S. 189, 24 L. T. N. S. 350, 19 Week. Rep. 432; *Longfield v. Bantry*, Ir. L. R. 15 Eq. 101 (*dictum*).

But it has been broadly stated (*Beall v. Blake*, 16 Ga. 119, set out at length in *LANG v. VAUGHN*) that whether a specific legacy has been adeemed or not depends upon whether the testator's intention was to adeem it, but in *LANG v. VAUGHN* it is said that this rule does not extend to abso-

reinvestment of the fund does not affect the legacy.

"The case at bar comes within none of these declared exceptions. The property was real. It was sold,—so far as the testatrix was concerned, destroyed. It was not exchanged, either by act of the parties or by her individual act, for property of like character. On the contrary, the proceeds, having become personal property, remained so until she died. She happened to have put it in a certain stock. She could have spent it, or done anything else with it. She did none of the things the Code recognizes, or the common law recognized, as substitution which would avoid ademption. I do not understand that Beall v. Blake, undertakes to declare that the common law in regard to the doctrine of ademption was not law in Georgia at the time it was rendered. The attack was on Lord Thurlow's construction of the common law, which apparently eliminated intention in all events. This was not apparently the common law, as is clearly shown by the excepted instances set out in the opinion in that case. But it would make Beall v. Blake as extreme as Lord Thurlow if it were to be held that in every instance intention governs. To do this would be to ignore the positive law of the Code; and that may not be done, even if it conflicts with intention. In the presence of posi-

tive law, a testator is not helpless, nor is the disposition of his property taken from him. He could add a codicil, if he saw fit. If he elects to allow the item to stand, and the property to so change as, under the law of Georgia, to bring about ademption, then the legacy or devise is adeemed. I therefore conclude that the devise in the eleventh item has been adeemed, and the property concerned in the interpleader falls within the operation of the residuary clause. Even if I had concluded that the intention of the testatrix might govern the situation, and modify either the common-law rule or the language of the Code, I cannot deduce from the facts presented an intention on the part of the testatrix to avoid ademption. The argument is persuasive, and the relations between the testatrix and the residuary legatees are equally suggestive. That the one was of her blood and not in good health might well influence her mind; that the others resided with her, sustained the most intimate relations with her, and were the companions of her last years, constitute, as we know, demands on the heart, and frequently of more potency than those based upon mere relationship."

A decree was entered in accordance with the opinion. To this decree Mary T. Lang excepted.

lute sales by the testator of property specifically bequeathed, but should be limited to the facts of the Beall Case, in which the disposal depended upon a contingency. And in *Rue v. Connell*, 148 N. C. 302, 62 S. E. 306, where the testator clearly intended that all the testator's right, title, and interest to certain land should pass, it was held that the successful prosecution after the testator's death of a claim of a third person of a right to purchase the property did not adeem the devise, although the claim existed before the testator's death. And some of the early English cases contain statements to the same effect. See *Bronsdon v. Winter*, 1 Amb. 57, and *Coleman v. Coleman*, 2 Ves. Jr. 639.

In a number of jurisdictions, however, the legislature, in order to avoid the strict rule of the common law that the testator's intention, except as it is gathered from the will itself, cannot affect the question of ademption, have regulated the question by statute, the general tenor of such enactments being to make the question depend upon the testator's intent.

Thus, in Kentucky it is provided by statute (Rev. Stat. chap. 46, art. 3, Kentucky Stat. § 2068) that the conversion in whole or in part of property devised to one of testator's heirs into other property or thing shall not be an ademption of the legacy or devise unless the testator so intended, but the devisee shall receive the value of such

devise unless a contrary intention appear; and that the removal of property devised shall not operate as an ademption unless a like contrary intention is manifest. See *Wickliffe v. Preston*, 4 Met. (Ky.) 178, holding such statute applicable to both realty and personalty; *Lilly v. Curry*, 6 Bush, 590, holding such statute limited to heirs of the testator; *Haselwood v. Webster*, 82 Ky. 409, holding that the common-law rule of ademption by alienation applied except as to heirs of the testator; *Miller v. Malone*, 109 Ky. 133, 95 Am. St. Rep. 338, 58 S. W. 708, and *Franck v. Franck*, 24 Ky. L. Rep. 1790, 72 S. W. 275, holding that the statute did not apply to a devise of personalty to testator's daughter-in-law.

And in Wisconsin, under Rev. Stat. 1878, § 2278, which provides that every devise of land shall be construed to convey all the estate of the devisor therein, unless it shall clearly appear by the will that he intended to convey a less estate, a specific devise of land has been held not revoked by a subsequent contract of sale, where there is nothing to indicate an intention to revoke. *Lafevre's Estate*, 100 Wis. 192, 75 N. W. 971.

And in Alabama it is provided by statute (Code, §§ 1602, 1603) that a contract for conveyance of any property specifically devised does not revoke the devise where any part of the purchase money remains unpaid, unless an intention to revoke plainly

Messrs. Saussy & Saussy for plaintiff in error.

Messrs. Adams & Adams for defendants in error.

Fish, Ch. J., delivered the opinion of the court:

Counsel for the plaintiff in error contend that "when the testator conveys to another the specific property bequeathed, and does not afterward become possessed of the same," whether such legacy is adeemed depends upon the intention of the testator, and they rely largely upon the case of *Beall v. Blake*, 16 Ga. 119, as authority to sustain such contention. One of the headnotes to that case is as follows: "Whether a specific legacy, if not illegal, has been adeemed or not, depends on whether the testator's intention has been to adeem it." While this language is broad, it must be construed in connection with the facts of the case then under consideration. A testatrix, in one item, bequeathed \$1,000 to a certain legatee, but provided that the legacy should remain in the hands of her executor for four years, for the purpose of defraying therefrom the expenses of any lawsuit which might be commenced within that time, by the relatives of the husband of the testatrix, "for the recovery of any of the property left by him to me; and if such suit should terminate in favor of my

estate, then the above legacy, after deducting said expense, to be paid to [the legatee],—if unfavorable, then the said legacy to be null and void." In another item she bequeathed certain negro slaves and other property to another legatee. Thus, on the face of the will, the first specific legacy mentioned was made subject to the result of a possible litigation which might be prosecuted by the relatives of the husband of the testatrix. It was expressly coupled with a condition. There was no condition attached to the second specific legacy, and the court held that as to it the intention was to bequeath the property absolutely. After the death of the testatrix, the relatives of her husband brought the suit which she had apprehended. Proceedings in equity were had, and a decree was rendered finding and decreeing one half of the estate which had been left by the husband of the testatrix in favor of her legal representatives, and the other half to be divided among the husband's relatives. By agreement of the legatees under the will of the testatrix, this verdict was changed by striking the words "legal representatives of Rebecca Bostwick" (the testatrix), and putting in their place the words "legatees of Rebecca Bostwick." The relatives of the husband agreed to such a division of the property as placed the negroes composing the specific bequest in the

appears. *Powell v. Powell*, 30 Ala. 697; *Welsh v. Pounders*, 36 Ala. 668; *Slaughter v. Stephens*, 81 Ala. 418, 2 So. 145, construing Code § 2287, which is the same in effect as the provision of the earlier Code.

In Alabama it is further provided by statute (Code § 1603) that "a charge or encumbrance upon any real or personal property to secure any money or the performance of any contract does not operate as a revocation of any devise or bequest of such estate previously executed, unless it appears from the will or instrument creating such charge or encumbrance that such was the intention of the testator." *Stubbs v. Houston*, 33 Ala. 555, holding a devise of property not revoked by a subsequent mortgage thereof, where no such intention appeared either in the mortgage or in the will itself.

And where the object of the statute is to prevent a partial alienation from destroying the devise, except in cases where the purpose of the testator to give that effect to the alienation is manifest, or where the provision by which the alienation is made is inconsistent with the terms or nature of the devise, no revocation occurs by a partial alienation of the property specifically devised, where no intention to revoke is manifest in the deed and its provisions are not inconsistent "with the terms and nature of the devise." *Swails v. Swails*, 98 Ind. 511.

40 L.R.A. (N.S.)

Admissibility of extrinsic evidence of testator's intent.

In determining whether a specific legacy has been adeemed, the intention to adeem will not be considered beyond the expression in the will. *Ford v. Ford*, 23 N. H. 212. In arriving at this conclusion, the court said that, "indeed, the rule that if the thing devised ceases to exist, the legacy will be adeemed, must be abrogated, if evidence of the testator's intention, either by his declarations, or by circumstances, or by a consideration of the peculiar condition of his property, can be considered by the court." See also *LANG v. VAUGHN*.

But in a few instances it has been held that the presumption of intention to revoke may be rebutted by evidence of a contrary intent. See *White v. Winchester*, 6 Pick. 48; *Wells v. Wells*, 35 Miss. 638; *Stout v. Hart*, 7 N. J. L. 414; and *Hambling v. Lister*, 1 Ambl. 401.

In some cases where the statutes provide that the sale or removal of the property must have been intended as an ademption in order to give it that effect, it is also expressly provided that the testator's intention may be shown by parol or other evidence. See, for example, *Kentucky Rev. Stat. chap. 46, art. 3, § 1* (afterwards known as *Kentucky Stat. § 2068*) as set out in *Wickliffe v. Preston*, 4 Met. (Ky.) 178.

G. J. C.

share which the executor of the testatrix was to retain. It was held that the verdict and these agreements amounted to agreeing that these negroes might be administered as if the testatrix had had the entire interest in them. It will thus be seen that in the case under discussion the question arose, not from any conduct on the part of the testatrix after making the will, but upon the fact that she bequeathed the entire title in certain negroes as a specific legacy, when in fact she only had a complete title to a half interest in them, and from the further fact that, by virtue of the subsequent litigation and agreements, the negroes were delivered to her estate to be administered as if she had in fact held a complete title in them. This is an entirely different question from that arising in a case where a testator owns property, but subsequently sells it, or places it out of the power of the executor to deliver the legacy. The opinion in that case discussed at considerable length what was deemed an extreme ruling by Lord Thurlow in *Ashburner v. Macguire*, 2 Bro. Ch. 108, 2 Eng. Rul. Cas. 18, and also a number of other cases tending to show that the rule stated by Lord Thurlow was not absolute and without exceptions.

This decision was rendered in 1854, prior to the adoption of the Code of 1863. When the law of this state was codified, the codifiers evidently reviewed the entire subject, and sought to lay down both the general rule and the exceptional cases. Of course, a testator may provide in his will for a substitution of one piece of property for another in case of a sale of the former, or that, if property is sold and the fund reinvested, how the reinvestment shall pass, or make like provision. But if he leaves a specific legacy with no such express provision in the will, and subsequently deals with the property by way of sale or exchange, the law provides what shall be the result. If a testator makes a will containing a specific legacy, and subsequently does certain specified acts, the fact that the law declares what will be the result of those acts in the absence of any provision in the will on the subject in no way conflicts with the rule that the intention of the testator controls in construing his will. It no more conflicts with that rule than does the fact that certain words, such as "heirs," "heirs of the body," "heirs male," "fee simple," "fee tail," and others, have a certain legal meaning, and, if a testator employs them in making his will, the legal result of using them follows. The law on this subject, as codified in the Code of 1863, now appears as § 3908 of 40 L.R.A. (N.S.)

the Code of 1910, which reads as follows: "A legacy is adeemed or destroyed, wholly or in part, whenever the testator after making his will, during his life, delivers over the property or pays the money bequeathed to the legatee, either expressly or by implication, in lieu of the legacy given; or when the testator conveys to another the specific property bequeathed, and does not afterward become possessed of the same, or otherwise places it out of the power of the executor to deliver over the legacy. If the testator attempts to convey and fails for any cause, the legacy is still valid." And § 3909 reads as follows: "If the testator exchanges the property bequeathed for other of the like character, or merely changes the investment of a fund bequeathed, the law deems the intention to be to substitute the one for the other, and the legacy shall not fail." It will be seen that the general rule that where a testator conveys to another specific property bequeathed, the bequest is adeemed, as stated in § 3908, is coupled in that section with two exceptions: First, where he afterwards becomes possessed of the same; and, second, if he attempts to convey, and fails for any cause, the legacy is still valid. In the next section the subject of substitution is dealt with. Where the testator leaves the question for the law to determine, it is declared that the law deems the intention to be to substitute one piece of property for the other, and that the legacy shall not fail in two cases: First, if the testator exchanges the property bequeathed for other property of like character; or, second, if he merely changes the investment of a fund bequeathed. The statement that "the law deems the intention to be," etc., shows that if the testator makes no provision in his will on the subject, expressive of his intent in case of a sale or the like, the law declares what it deems is his legal intent, or, in other words, provides what shall be the result in such case. This excludes the idea that in every case what the law deems to be the intent has no force, and that the courts will go afield hunting for an intent expressed in parol or to be gathered from conduct or acts of the testator after the making of the will. In the former of the two sections quoted, there are certain cases where parol evidence is admissible. Thus it is stated that if a testator, after making his will, delivers over the property or pays the money bequeathed to the legatee, "either expressly or by implication, in lieu of the legacy given," etc. But this is very different from the question arising under a sale and reinvestment by a testator after the making of his will.

In the case before us, none of the four instances provided in the two cited sections of the Code occurred. After selling the property, the testatrix did not become possessed of it again. She did not attempt to convey it, and fail for any cause to do so. She did not exchange the property bequeathed for other property of like character. She sold real estate and invested a part of the proceeds in personalty. It is immaterial that she thought the personalty would produce a better income than the realty. The obtaining of more income may have been a satisfactory reason moving the testatrix to adeem the legacy, but did not constitute the transaction an exchange of one piece of property for another of like character. Nor did the testatrix bequeath a fund and merely change the investment of it. It was not a bequest of a fund, but a devise of realty. There are no words in the will giving to the legatee not only the realty, but the proceeds of any sale of it. The sale of real property and the investment of a portion of the proceeds thereof in personal property, standing alone, cannot fall within the provision as to changing the investment of a fund bequeathed. Several of the decisions of this court have been cited as tending to hold a doctrine different from that now announced, *viz.*: *Smith v. Smith*, 23 Ga. 21; *Reed v. Reed*, 68 Ga. 589; *Clayton v. Akin*, 38 Ga. 333, 95 Am. Dec. 393; *Whitlock v. Vaun*, 38 Ga. 562; *Worrill v. Gill*, 46 Ga. 482. But in each of them it will be found that the legacy which was declared not to be adeemed was either held not to be a specific legacy, or was construed as including not only land, but proceeds in case of sale, or they were dependent on other facts which plainly distinguish them from the present case.

Judgment affirmed.

All the Justices concur, except Atkinson, J., disqualified, and Hill, J., not presiding.

MARYLAND COURT OF APPEALS.

CHARLES R. GARDNER et al.

v.

JOSHUA V. McNEAL et al.

(— Md. —, 82 Atl. 988.)

Will — revocation — inconsistent will.

1. A will giving all testator's property to one person is revoked by the execution of another will giving practically all of the property to another, although it contains no express words of revocation, under a statute providing that no will shall be revocable 40 L.R.A. (N.S.)

otherwise than by some other will or codicil in writing, or other writing declaring the same, unless the same be altered by some other will declaring the same.

Same — delivery to legatee — ademption.

2. Delivery by testator in his lifetime of specific property bequeathed by his will to the legatee has the same effect as an ademption.

Same — bequest to unincorporated church — parcel of other institution — right to take.

3. A bequest to a church will not fail because the church is not incorporated, if it is part of an incorporated college which is, by law, authorized to take and hold property on behalf of the church.

Same — bequest to church — right to take.

4. A bequest to a church cannot be turned over to it without ratification of the legislature, where the Constitution makes it void without such ratification.

Same — bank deposit — demonstrative legacy — ademption.

5. The exception in a bequest of stocks and all money remaining in bank except a specified sum, which is bequeathed to another, is demonstrative, and therefore is not adeemed by the withdrawal by testator of the bank deposit.

Same — bequest of stock — specific.

6. A bequest of "my railroad stock" is specific.

Same — sale of stock — effect.

7. A bequest of corporate stock is adeemed by its sale by testator or his agent, whose acts are ratified, and the investment of the proceeds in other stock, and the newly purchased stock cannot be substituted for the former to answer the bequest.

(December 6, 1911.)

Note. — Change in subject-matter or substitution of other property as an ademption of a specific legacy or devise.

As to ademption of specific legacy or devise by disposal, loss, or destruction of property bequeathed, see note to *Lang v. Vaughn*, ante, 542.

As to collection of insurance policy during lifetime of testator as ademption of specific legacy thereof, see note to *Re Pruner*, post, 561.

As to gift by testator as ademption of general legacy to donee, see note to *Johnson v. McDowell*, 38 L.R.A. (N.S.) 588. And as to gift to one spouse by parent of the other, as advancement or ademption, see note to *Ireland v. Dyer*, 26 L.R.A. (N.S.) 1050.

In examining the following note, the reader should note whether the specific case under examination deals with the question from the view point of a mere change in or alteration of the subject of the legacy, or from the view point of a substitution of a

CROSS APPEALS from a decree of the Circuit Court of Baltimore City, construing the wills of Ellen McNeal Gardner; plaintiffs appealing from so much as held the will of 1899 revoked by the execution of the will of 1905; and defendant Joshua V. McNeal appealing from so much as held the legacies to him adeemed in part. Affirmed.

The facts are stated in the opinion.

Messrs. Rufus W. Applegarth and Charles T. Reifsnider for plaintiffs.

Messrs. Thomas A. Whelan and Washington Bowie, Jr., for defendant Joshua V. McNeal:

The revocation of the will of July 26th, 1899, was effected by the execution of the will of June 6th, 1905.

Colvin v. Warford, 20 Md. 357; Barnum v. Baltimore, 62 Md. 275, 50 Am. Rep. 219; Crisp v. Crisp, 65 Md. 422, 5 Atl. 421; Littig v. Hance, 81 Md. 416, 32 Atl. 343; Reilly v. Union Protestant Infirmary, 87 Md. 664, 40 Atl. 894; Trinity M. E. Church v. Baker, 91 Md. 539, 46 Atl. 1020; Woman's Foreign Missionary Soc. v. Mitchell, 93 Md. 199, 53 L.R.A. 711, 48 Atl. 737; Doan v. Ascension Parish, 103 Md. 662, 7 L.R.A. (N.S.) 1119, 115 Am. St. Rep. 379, 64 Atl. 314; Re Snyder, 11 L.R.A. (N.S.) 67, note; Taylor v. Watson, 35 Md. 524; Gerke v. Colonial Trust Co. 114 Md. 289, 79 Atl. 587; Semmes v. Semmes, 7 Harr. & J. 388; Deakins v. Hollis, 7 Gill & J. 311; Plenty v. West, 6 C. B. 201.

The legacies were not adeemed.

materially altered or new thing for the one specifically bequeathed or devised. By so doing, many apparent conflicts may be dissipated. It should also be remembered that the note does not treat the question whether or not a particular legacy is specific, but proceeds upon the premise that the legacies under consideration are specific.

Early rule.

Under the early rule, which is no longer adhered to, that a legacy of a debt or claim is not adeemed by a voluntary payment thereof, it was held that the legatee was entitled to the proceeds of the sale, provided they could be traced. Orme v. Smith, 1 Eq. Cas. Abr. 302, 2 Vern. 681; Drinkwater v. Falconer, 2 Ves. Sr. 623; Coleman v. Coleman, 2 Ves. Jr. 639. And the same conclusion was reached in Jones v. Fraser, 13 Can. S. C. 342, as regards the proceeds of a sale of seigniories which had been specifically bequeathed, the ground being that the sale was made *necessitate urgente*.

Modern rule.

But it is the well-settled modern rule that a specific legacy is adeemed by a radical and material alteration or change in the subject-matter thereof, and that the property into which it was converted by the sale or other material change cannot be substituted as a specific bequest. Georgia Infirmary v. Jones, 37 Fed. 750 (holding that a bequest of claims against the government was adeemed by their collection by the testator, although such proceeds were invested in other securities sufficient to have paid the legacy); Updike v. Tompkins, 100 Ill. 406 (holding that subsequent notes could not replace canceled notes); Ross v. Carpenter, 9 B. Mon. 367, 50 Am. Dec. 514 (holding that a sum recovered by the testator in his lifetime as damages for injuries wrongfully inflicted upon a slave, which resulted in its death, could not be decreed to the specific devisee of the slave); Durham v. Clay, 142 Ky. 96, 134 S. W. 153 (holding that a specific legacy of money was adeemed when invested in real estate,

even though the money could be accurately traced); Tolman v. Tolman, 85 Me. 317, 27 Atl. 184 (holding that where notes secured by a mortgage were specifically bequeathed and later surrendered, and a reconveyance of the land for which they had been given made, after which the land was again sold to another, and notes taken which remained unpaid when the testator died, the legacy was adeemed and the new notes could not be substituted); Unitarian Soc. v. Tufts, 151 Mass. 76, 7 L.R.A. 390, 23 N. E. 1006 (set out in GARDNER v. MCNEAL); Hosea v. Skinner, 32 Misc. 653, 67 N. Y. Supp. 527 (holding that corporate bonds purchased with the proceeds of stock which had been specifically bequeathed and later sold could not be substituted so as to pass under the legacy); Snowden v. Banks, 31 N. C. (9 Ired. L.) 373 (holding that legatee was not entitled to price of slave sold by testator); Tayloe v. Bond, 45 N. C. (Busbee, Eq.) 5 (holding same as Snowden v. Banks, supra); Tipton v. Tipton, 1 Coldw. 252 (holding that a note given by a person upon the transfer to him of a note which had been specifically bequeathed could not be substituted so as to pass under the legacy); Gale v. Gale, 21 Beav. 349 (holding a legatee not entitled to the proceeds of lands devised her, but subsequently sold during testator's lifetime); Durrant v. Friend, 5 De G. & S. 343, 21 L. J. Ch. N. S. 536, 16 Jur. 709 (holding that the insurance on goods lost at sea at the same time testator lost his life could not be taken in lieu of the goods, under a specific bequest thereof); Sidebotham v. Watson, 11 Hare, 170, 1 Week. Rep. 303 (holding that the proceeds of a debt could not be taken in lieu of the debt, although the specific proceeds could be traced); Harrison v. Jackson, L. R. 7 Ch. Div. 339, 47 L. J. Ch. N. S. 142 (holding that where corporate stocks were paid off during the testator's lifetime, and the proceeds invested by his desire in other securities, such other securities could not be taken under the legacy in lieu of the stocks specifically bequeathed, although such result might defeat the testator's intention); Macdonald v. Irvine, L. R. 8 Ch. Div. 101, 47 L. J. Ch.

Brady v. Brady, 78 Md. 461, 28 Atl. 515; Littig v. Hance, 81 Md. 416, 32 Atl. 343; Harley v. Moon, 1 Drew. & S. 623, 31 L. J. Ch. N. S. 140, 7 Jur. N. S. 1227, 10 Week. Rep. 146; Baker v. Farmer, L. R. 3 Ch. 537, 16 Week. Rep. 923; Dryden v. Owings, 49 Md. 356; Kunkel v. Macgill, 56 Md. 120; Gelbach v. Shively, 67 Md. 498, 10 Atl. 247; England v. Prince George's Parish, 53 Md. 466; Barnum v. Baltimore, 62 Md. 275, 50 Am. Rep. 219; Jenkins v. Jones, L. R. 2 Eq. 323, 35 L. J. Ch. N. S. 520, 12 Jur. N. S. 368, 14 L. T. N. S. 540, 14 Week. Rep. 665; Oakes v. Oakes, 9 Hare, 666; Bronsdon v. Winter, 1 Ambl. 57; Partridge v. Partridge, 9 Mod. 269, Cas. t. Talb. 226; Re Pilkington, 6 New Reports, 246; Walton v. Walton, 7 Johns. Ch. 258,

N. S. 494, 38 L. T. N. S. 155, 26 Week. Rep. 381 (holding that a bond purchased with the proceeds of the sale of bonds which had been specifically bequeathed could not be substituted therefor, but went into the residue); Re Clowes [1893] 1 Ch. 214, 2 Reports, 115, 68 L. T. N. S. 395, 41 Week. Rep. 69 (holding that the sum secured by mortgage on property sold does not pass to the specific devisee of such property); Gardner v. Hatton, 6 Sim. 93 (holding that a mortgage in which the proceeds of a mortgage which had been specifically bequeathed were invested could not be taken in lieu of the satisfied mortgage); Re Rally, 25 Ont. L. Rep. 112, 20 Ont. Week. Rep. 482 (holding that the proceeds of a debt which had been collected by testatrix did not pass under a specific legacy of the debt). See also Re Lane, as set out infra.

And where a bond and mortgage are taken back upon the sale of lands which had been specifically devised, such bond and mortgage do not pass to the legatee. Beck v. McGillis, 9 Barb. 35; Adams v. Winne, 7 Paige, 97; Re Clowes [1893] 1 Ch. 214, 2 Reports, 115, 68 L. T. N. S. 395, 41 Week. Rep. 69; Moor v. Raisbeck, 12 Sim. 123; Re McMillan, 4 Ont. L. Rep. 415.

So, where stock which has been specifically bequeathed is sold under an order in lunacy, and the proceeds reinvested in other securities, it has been held that the new securities do not pass under the legacy. Re Freer, L. R. 22 Ch. Div. 622, 52 L. J. Ch. N. S. 301, 31 Week. Rep. 426. And this, although the court, in directing the sale, ordered that the proceeds be earmarked, *Ibid*. But merely transferring securities from the testator into court, under an order in lunacy, will not cause an ademption, although the securities given were described as standing in the testator's name, and the legatee is entitled to the securities as held by the court. Re Wood [1894] 2 Ch. 577, 8 Reports, 817, 63 L. J. Ch. N. S. 772. And merely transferring a trust fund which has been specifically bequeathed, to the testator's name, has been held not to adeem the legacy. Re Vickers, 81 L. T. N. S. 719.

And a will of specific real estate will not 40 L.R.A. (N.S.)

11 Am. Dec. 456; Maynard v. Mechanics' Nat. Bank, 1 Brewst. (Pa.) 483; Stout v. Hart, 7 N. J. L. 414; Snyder's Estate, 217 Pa. 71, 11 L.R.A. (N.S.) 49, 118 Am. St. Rep. 900, 66 Atl. 157, 10 Ann. Cas. 488.

Stockbridge, J., delivered the opinion of the court:

On July 26, 1899, Ellen McNeal Gardner executed her will in accordance with the requirements of the statute, in the following language: "I, Ellen McNeal Gardner, of the city, county, and state of New York, being of good and sound mind, do hereby make, declare, and publish this to be my last will and testament, revoking any former wills made by me. I hereby give, devise,

pass the amount received for the property under eminent domain proceedings consummated during the testator's lifetime, there being no distinction between voluntary and compulsory severance of title. Ametrano v. Downs, 170 N. Y. 388, 58 L.R.A. 719, 83 Am. St. Rep. 671, 63 N. E. 340, affirming 62 App. Div. 405, 70 N. Y. Supp. 833, which affirmed 33 Misc. 180, 67 N. Y. Supp. 128; Re Manchester & S. R. Co. 19 Beav. 365; Manton v. Tabois, L. R. 30 Ch. Div. 92, 54 L. J. Ch. N. S. 1008, 53 L. T. N. S. 289, 33 Week. Rep. 832; Re Dowsett, [1901] 1 Ch. 398, 70 L. J. Ch. N. S. 149, 49 Week. Rep. 268; Watts v. Watts, L. R. 17 Eq. 217, 22 Week. Rep. 105; Re Bagot, 31 L. J. Ch. N. S. 772.

And in *Frewen v. Frewen*, L. R. 10 Ch. 610, 33 L. T. N. S. 43, 23 Week. Rep. 864, it was held that a specific devise of advowsons was adeemed by an act passed during the testator's lifetime, abolishing advowsons, and giving their owners a right to compensation, and that the devisees could not claim the compensation.

But where property is wrongfully alienated by a third person during the testator's lifetime, the legatee is entitled to the proceeds. *Domville v. Taylor*, 32 Beav. 604, 8 L. T. N. S. 624, 2 New Reports, 258, 11 Week. Rep. 796. And in *Taylor v. Taylor*, 10 Hare, 475, where a testator, after specifically bequeathing a certain leasehold, became insane, and the interested parties joined in an agreement for the sale of the property, which, after the testator's death, was approved by the court, it was held that the legacy was not adeemed, and must be regarded as unconverted at the time of the testator's death. *Jenkins v. Jones*, L. R. 2 Eq. 323, 35 L. J. Ch. N. S. 520, 12 Jur. N. S. 368, 14 L. T. N. S. 540, 14 Week. Rep. 665, which involved a bequest of farm stock and implements, is to the same effect.

And a slight change or alteration in property specifically bequeathed will not operate as an ademption of the legacy. *Durham v. Clay*, 142 Ky. 96, 134 S. W. 153 (*dictum*).

And it is held that a mere change in the form of the evidence of the thing specifical-

and bequeath unto my husband, William Rodgers Gardner, all the property, of every description whatsoever, both real and personal, of which I may be possessed at the time of my death, or which I would hereafter have become possessed." In February, 1900, William Rodgers Gardner, the sole legatee under the foregoing will, died, and on June 6, 1906, Mrs. Gardner, the testatrix before named, executed in the manner required by law for the execution of wills the following instrument: "Washington, D. C., June 6th, 1906. I, Ellen Gardner, devise and bequeath to my brother, J. V. McNeal, my railroad stock and all money remaining in bank excepting the sum of \$300, which I leave to Mary Finnegan. My pearl necklace to my niece Marie

McNeal and the pearl pin and earrings to my niece Stella McNeal, my diamond ring and earrings to the church (St. Ignatius), my bureau silver to my friend Mary A Fenwick." After the death of Mrs. Gardner, which took place in July, 1910, the instrument executed by her in 1906 was found among her papers, presented to the orphans' court as the last will of the deceased, and admitted to probate on October 4, 1910. Subsequently the will which she had executed in 1899 was discovered, and upon its production and proof of its execution was also admitted to probate by the orphans' court of Baltimore city on December 10, 1910, and by its order on that date the orphans' court, directed "that the said two instruments of writing shall be con-

ly bequeathed does not revoke the bequest. *Irwin's Succession*, 33 La. Ann. 63 (holding that exchanging the original evidence of a debt which had been specifically bequeathed, for a bond or other evidence of the indebtedness, did not revoke the legacy); *Ford v. Ford*, 23 N. H. 212 (holding that a renewal of notes did not adeem a specific legacy thereof); *Stout v. Hart*, 7 N. J. L. 414 (holding that the acceptance of one bond in lieu of another bond did not adeem); *Anthony v. Smith*, 45 N. C. (Busbee, Eq.) 188 (holding that merely renewing a bond does not adeem a legacy of the original bond); *Skipwith v. Cabell*, 19 Gratt. 758 (holding that the exchange of corporate bonds which had been guaranteed by the state for state bonds, as authorized by statute, did not adeem a legacy of such corporate bonds, and that the legatees were entitled to the state bonds).

And it has been held that a legacy of notes does not lapse by the accepting of new notes, where the only purpose was to render the indebtedness more secure, and the new notes were substantially the same as the old ones. *Shaffer's Succession*, 50 La. Ann. 601, 23 So. 739. So it has been held that a specific legacy of the proceeds of a certain bond and mortgage will not be adeemed by the sale of the premises in proceedings for the collection of the bond, where a new bond is taken, but such bond will be considered as subject to the legacy. *Gardner v. Printup*, 2 Barb. 33. (But upon similar facts a contrary conclusion was reached in *Beck v. McGillis*, 9 Barb. 35.) So, the mere changing of an account from a designated bank to another does not adeem a specific legacy of the bank account named in the legacy. *Prendergast v. Walsh*, 58 N. J. Eq. 149, 42 Atl. 1049. And the fact that the specific bank in which the deposit was made goes into the hands of a receiver bank, which issues a pass book for the amount of the dividend payable, does not adeem the legacy, and the legatee is entitled to such balance. *Re Howard*, 46 Misc. 204, 94 N. Y. Supp. 86. So, a legacy of stock of a New Jersey corporation has been held not to have been adeemed by a surrender of such stock and the acceptance in lieu thereof of voting

trust certificates, which were to be exchanged for stock of the New Jersey corporation, as reorganized under the laws of another state. *Pope v. Hinckley*, 209 Mass. 323, 95 N. E. 798. And in *Re Pilkington*, 6 New Reports, 246, where corporate bonds which had been specifically bequeathed "according to the nature and quality thereof respectively" were, between the date of the will and the testator's death, converted into shares of a succeeding corporation, pursuant to a general agreement entered into with the bondholders prior to the execution of the will, it was held that the legacy was not adeemed, and that the new shares passed under the legacy. And the exchanging of bequeathed bank stock for stock issued upon the reorganization and consolidation of that and other banks was held, in *Re Peirce*, 25 R. I. 34, 54 Atl. 588, not to adeem the legacy. And where stock of an insurance company which lost its capital stock was specifically bequeathed, and, pursuant to legislative act, the stock was again filled, and the testator paid up a part of his shares, it was held that as to such part of the stock, the legacy was not adeemed. *Havens v. Havens*, 1 Sandf. Ch. 324. But, on the other hand, it has been held that the exercise of an option, given by the corporation which issued the bequeathed debentures, upon their becoming payable, of converting them into permanent debenture stock, adeemed the legacy so that the new debenture stock did not pass by the will, the ground being that the new stock was a substantially different thing from that which he gave, and did not answer the description in the will. *Re Lane*, L. R. 14 Ch. Div. 856, 49 L. J. Ch. N. S. 768, 43 L. T. N. S. 87, 28 Week. Rep. 764. And in *Re Slater* [1907] 1 Ch. 665, 76 L. J. Ch. N. S. 472, 97 L. T. N. S. 74, 8 Ann. Cas. 141, affirming [1906] 2 Ch. 480, 75 L. J. Ch. N. S. 660, 54 Week. Rep. 602, 95 L. T. N. S. 350, it was held that a specific legacy of corporate stock was adeemed when the testator exchanged it for stock in a corporation which had succeeded the corporation, the stock of which was specifically bequeathed. And in *Pattison v. Pattison*, 1 Myl. & K. 12, 2 L. J. Ch. N. S.

strued together as the last will and testament of the said deceased."

This presents, as the first question for determination in this case, the effect of the instrument executed by the testatrix in 1905. It did not in terms revoke the will of 1899, and, in the absence of any expressed purpose of revocation, is it to be given the legal effect of a revocation? The statute in regard to revocation of wills (Code, art. 93, § 318) provides, in substance, that "no will . . . shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same . . . unless the same be altered by some other will or codicil in writing or other writing of the deviser, signed as hereinbefore said, in the

presence of two or more witnesses, declaring the same." It is true the instrument executed in 1905, with all the formal requisites to constitute it a will under all the requirements of the law, did not in terms revoke the will of 1899, but this is not necessary. A will may be just as effectively revoked by an inconsistent disposition of previously devised property. 30 Am. & Eng. Enc. Law, 2d ed. 624; *Colvin v. Warford*, 20 Md. 357; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Joynes v. Hamilton*, 98 Md. 665, 57 Atl. 25. By the will of 1899 Mrs. Gardner had given her entire estate of every description to her husband. By the second instrument she gave all her railroad stock and all money in bank except \$300 (which was bequeathed

15, it was held that a specific bequest of "long annuities" was adeemed by a sale thereof, and that other "long annuities" purchased with the proceeds could not be substituted therefor, although the only difference was that the new annuities terminated three months sooner than the others.

So, the mere agreement of a testator to accept a note which was to be convertible into bonds in lieu of stock specifically bequeathed does not work an ademption of the legacy, where the note was not delivered until after the testator's death. *Re Frahm*, 120 Iowa, 85, 94 N. W. 444.

And where a mere option to purchase the property bequeathed was given, and not exercised until after the testator's death, it was held that the legatee was entitled to the proceeds. *Emuss v. Smith*, 2 De G. & S. 722; *Re Pyle* [1895] 1 Ch. 724, 64 L. J. Ch. N. S. 477, 13 Reports, 396, 72 L. T. N. S. 327, 43 Week. Rep. 420; *Duffield v. M'Master* [1896] 1 I. R. 370.

And an attempt to renew a lease which had been specifically devised was held, in *Abney v. Miller*, 2 Atk. 593, not to constitute an ademption, where the renewal was not consummated in the testator's lifetime.

And where the variation in the testator's interest in the subject of the bequest is by operation of law, and is as to form only, the legacy is not adeemed. *Walton v. Walton*, 7 Johns. Ch. 258, 11 An. Dec. 456 (holding that where the charter of a bank, some of the stock of which had been specifically bequeathed, expired, and all its funds were conveyed to trustees, and the testator received the dividends, but did not sell the shares, the legatee, after testator's death, was entitled to the dividends. [In connection with this case, see *Re Howard*, supra]); *idem* (holding that where shares of stock which has been specifically bequeathed under an act of legislature became vested in the state during the testator's lifetime, and a certain compensation therefor was to be paid to the stockholders, the legacy was not adeemed, and that the legatee was entitled to such compensation); *Maynard v. Mechanics' Nat. Bank*, 1 Brewst. (Pa.) 483 holding that a specific legacy of shares

in a state bank was not adeemed by act of Congress, changing the bank to a national one); *Bronsdon v. Winter*, 1 Ambl. 57 (holding a legacy of stock not adeemed by the fact that by act of Parliament it was turned into annuities); *Oakes v. Oakes*, 9 Hare, 666 (holding that consolidated stock into which stock specifically bequeathed had been converted by resolution of the company, under the authority of an act of Parliament, passed under the bequest); *Browne v. M'Guire, Beatty, Ir.* Ch. Rep. 358 (holding that a specific legacy of government stock, converted by the state into other government stock, was not adeemed by the conversion, and that the new stock passed under the bequest. And this is especially true where the act itself provides that the change shall "not revoke any testamentary dispositions"); *Re Loveman*, 48 L. J. Ch. N. S. 565. And the same conclusion was reached as to property sold under authority of an act of Parliament, where the act provided in effect that the proceeds of the sale should be treated as if they were still land. *Re Spragge*, 13 Ont. Week. Rep. 741, affirmed in 15 Ont. Week. Rep. 49. But see *Frewen v. Frewen*, L. R. 10 Ch. 610, 33 L. T. N. S. 43, 23 Week. Rep. 864, as set out supra. See also *Skipwith v. Cabell*, 19 Gratt. 758, as set out supra, and *Partridge v. Partridge*, Cas. t. Talb. 226, 9 Mod. 269.

And the specific devise of an interest in a certain partnership is not adeemed by a renewal of the articles of partnership upon the expiration of the original articles. *Backwell v. Child*, 1 Ambl. 260.

But it has been held that the actual renewal of a lease which had been specifically devised constituted an ademption which would prevent the devisee taking the new lease in lieu of the one devised, the ground being that the original lease was utterly annihilated by the purchase of the new one. *Abney v. Miller*, 2 Atk. 593; *Hone v. Medcraft*, 1 Bro. Ch. 261; *Coppin v. Fernyhough*, 2 Bro. Ch. 291; *Colegrave v. Manby*, 6 Madd. Ch. 72, affirmed in 2 Russ. Ch. 238; *Marwood v. Turner*, 3 P. Wms. 163, 2 Eq. Cas. Abr. 469; *Rudstone v. Anderson*, 2 Ves. Sr. 418.

to Mary Finnegan) to her brother, and certain articles of personal jewelry to named friends. It appears from the agreed statement of facts that this comprised her entire estate at the time, with the exception of a few pieces of furniture and some minor articles of personal adornment. The second paper evidently intended to make a complete disposition of her property no less

than the first, and, the legatees being entirely different persons, the inconsistency was as great as was possible. But one conclusion can be reached,—the will of 1899 was revoked by that of 1905, and was therefore without any force or effect at the time of her death, and the learned judge below was correct in his decree to this effect.

And where the terms of the devise indicate that it was not the testator's intention to include any interest subsequently acquired, a renewal of the lease works an ademption of the devise. *Slatyer v. Noton*, 16 Ves. Jr. 197.

But where the terms of the devise indicate that it was intended to cover renewals, as, for instance, by a devise of "all the interest I [testator] have in the lease," it has been held that the new lease passes under the devise. *Carte v. Carte*, 3 Atk. 174, 1 Ambl. 28, *Ridgeway*, 210; *Colegrave v. Manby*, 6 Madd. Ch. 72, affirmed in 2 Russ. Ch. 238; *James v. Dean*, 11 Ves. Jr. 383, affirmed on rehearing in 15 Ves. Jr. 236.

So, where it clearly appears to have been the intention of the testator to devise all his right, title, and interest in the property, the devisee has been held entitled to the proceeds of a sale of the property after the testator's death, upon the successful culmination of a suit to establish a claim of right to purchase such property, which existed before the testator's death. *Rue v. Connell*, 148 N. C. 302, 62 S. E. 306.

In *Digby v. Legard*, 2 Dick. 500, a distinction was drawn between leaseholds held for a term of years and freehold leases for life, it being held that the surrender of a lease of the latter class and the taking of a new one adeemed a devise of the original lease, but that a bequest of a leasehold for a term of years was not adeemed by a surrender thereof and the taking of new leases for further terms.

Intent as affecting question.

The general rule that a specific legacy is adeemed by a material change in the subject-matter, and that the property into which it was converted cannot be substituted so as to pass under the legacy, has been said to be due to reasons paramount to considerations of intention. *Georgia Infirmary v. Jones*, 37 Fed. 750 (appeal dismissed in 149 U. S. 774, 37 L. ed. 966, 13 Sup. Ct. Rep. 1047); *Harrison v. Jackson*, L. R. 7 Ch. Div. 339, 47 L. J. Ch. N. S. 142.

But, on the other hand, it has been held that where it appears to have been the clear intention of the testator that the change should not adeem the legacy or devise, and that the property in its new form should pass under the legacy, force will be given to such manifest intent. *Joynes v. Hamilton*, 98 Md. 665, 57 Atl. 25 (holding that the proceeds of a ground rent which had been specifically devised should be substituted therefor and pass to the devisee); *Gardner* 40 L.R.A. (N.S.)

v. Gardner, 72 N. H. 257, 56 Atl. 316 (holding that stock of a corporation into which the corporation which issued the bequeathed stock had merged should be substituted for such bequeathed stock); *Thomond v. Suffolk*, 1 P. Wms. 461 (holding that the amount of a claim which had been released by testator should be made up to the legatee); *Drant v. Vause*, 1 Younge & C. Ch. Cas. 580, 11 L. J. Ch. N. S. 170, 6 Jur. 313 (holding that the proceeds of the sale of the fee of the lands specifically devised passed to the devisee where the sale was made under an option given in a lease, and the lease and option so referred to in the will as to indicate an intention to substitute the proceeds in lieu of the lands in case the lessee exercised the option to purchase). See also *Rue v. Connell*, 148 N. C. 302, 63 S. E. 306, as set out supra. But a mere unexecuted intention to change the state of the subject of the legacy cannot be considered an ademption. *Basan v. Brandon*, 8 Sim. 171.

In Georgia it is provided by statute (Code 1910, § 3908) that "if the testator exchanges the property bequeathed for other of the like character, or merely changes the investment of a fund bequeathed, the law deems the intention to be to substitute the one for the other, and the legacy shall not fail." *Lang v. Vaughn*, ante, 542, holding that an absolute sale of land devised constituted an ademption of the devise, and that the personalty in which the testatrix invested the proceeds did not pass to the legatee.

In connection with the foregoing cases, see also *Slatyer v. Noton*, *Carte v. Carte*, *Colegrave v. Manby*, and *James v. Dean*, as set out supra.

Admissibility of extrinsic evidence of testator's intent.

Under the principle that extrinsic evidence is not admissible to show that the testator intended by his will to refer to a thing which the will does not describe, it cannot be shown that a thing wholly different from that bequeathed was believed and intended by the testator to be held in substitution of the thing bequeathed. *Rogers v. Rogers*, 67 S. C. 168, 100 Am. St. Rep. 721, 45 S. E. 176, holding that evidence was not admissible to show that testator intended and believed that a bond and mortgage of land sold by order of court to pay debts, taken by him, would go the legatees of such debts, in lieu thereof. See also *Lang v. Vaughn*, ante, 542 G. J. C.

The proceedings in the case make necessary a consideration of the various legacies contained in the will of 1905.

The agreed statement shows that the articles given by the will to Marie McNeal had been actually given to her before the death of the testatrix, and therefore constituted no part of her estate at her death, and, so far as the legacy was concerned, it had been anticipated by the testatrix in a manner which had the same effect as an ademption. *Gallagher v. Martin*, 102 Md. 115, 62 Atl. 247.

The legacies to Stella McNeal and Mary A. Fenwick were, specific legacies, and no reason exists why the articles given these ladies should not be delivered to them by the administrators, and the circuit court was correct in so directing.

The legacy of "my diamond rings and earrings to the church (St. Ignatius)," presents a different question. So far as the articles are concerned, the legacy is specific, but St. Ignatius Church is not a body corporate. But the agreed statement of facts embodies the following: "That St. Ignatius Church, mentioned in said will of June 6, 1905, is situated at the corner of Calvert and Madison streets, Baltimore, and adjoins and communicates on the south with and is physically a part of Loyola College building, which said college building occupies (including said church) the entire block on the west side of Calvert street, from Madison street to Monument street; that the rector or president of said college is, by virtue of his office, the rector or pastor of said church, the priests attached to said college being also attached to said church, and that said church and college are integral parts of the same management; that the title to said property embracing the church and college building is vested in the Associated Professors of Loyola College, in the city of Baltimore, a corporation duly incorporated under the laws of Maryland, and that by an act of the general assembly of Maryland (Laws of 1888, chapter 208) said corporation was duly authorized to take and receive bequests on behalf of said church." The act of 1888 referred to was one to enlarge the powers of "the Associated Professors of Loyola College in the City of Baltimore," and as a portion of said enlarged powers the corporation was specifically authorized, for the purposes of said church, to take, hold, and receive any gift, grant, devise, or bequest of any property, real, personal, and mixed, as fully and to the same extent as it is authorized to do as an educational institution. This legacy, therefore, presents clearly the case of misnomer of a legatee, and a mere misnomer will not

operate to defeat the intent of a testatrix, where the beneficiary of the intended bounty is perfectly certain. This legacy is analogous to the one contained in the will of Melissa Baker to "the Woman's College located at the city of Lynchburg," which was held to be a valid bequest to "the trustees of the Randolph-Macon College," in *Trinity M. E. Church v. Baker*, 91 Md. 539, 46 Atl. 1020, and to the legacy which was sustained in *Woman's Foreign Missionary Soc. v. Mitchell*, 93 Md. 199, 53 L.R.A. 711, 48 Atl. 737, and to the devise which was held good in *Doan v. Ascension Parish*, 103 Md. 662, 7 L.R.A. (N.S.) 1119, 115 Am. St. Rep. 379, 64 Atl. 314.

By the decree in this case the legacy now being considered was sustained, and the administrators were directed to make distribution of it to the Associated Professors of Loyola College. In so decreeing either the court below had evidence before it which is not in the record, or else it fell into a partial error. The legacy was one manifestly intended for the benefit of the church known as St. Ignatius Church, not for the educational purposes included within the powers of the Associated Professors of Loyola College. It was therefore a legacy of the class coming within the provisions of article 38 of the Declaration of Rights; and, before it can be treated as valid and effectual, it must receive the sanction of the general assembly of the state. It nowhere appears in the record that this sanction has ever been given, and there is nothing in the terms of the act of 1888 which can properly be construed as giving a sanction by anticipation to all devises or legacies which may thereafter be made to that corporation for its religious purposes. The will now under consideration was admitted to probate on the 4th of October, 1910, and there has been no meeting of the general assembly since that date; but an executor is always entitled to a reasonable time in which to obtain legislative approval, where such sanction is required. When such approval is given, the legacy will become payable, and not before. Accordingly the decree below should be so far modified as to provide that the said bequest should be distributed to the Associated Professors of Loyola College upon the production to the executor of satisfactory evidence that the sanction of the general assembly of the state had been given to it, and not before.

With regard to the legacy to Mary Finnegan, it appears that at the time when Mrs. Gardner executed her will in 1905, she had on deposit to her credit a sum of money more than sufficient to have paid this legacy, but that between that time and

the time of her death she had withdrawn from bank all, except the sum of \$12, and the contention is that the legacy to Mary Finnegan was adeemed except as to said amount of \$12. Whether the decree of the lower court was correct in this regard depends upon whether the legacy in question was or was not a specific legacy. If specific, the ruling was undoubtedly correct; on the other hand, if the legacy was demonstrative, it was incorrect. To reach a satisfactory determination in this regard, it is necessary to understand with precision the distinction between the different kinds of legacies. The language of the will, "I, Ellen Gardner, devise and bequeath to my brother, James McNeal, my railroad stock and all money remaining in bank, excepting the sum of \$300, which I leave to Mary Finnegan," shows clearly that it was the purpose of the testatrix that the \$300 bequeathed to Mary Finnegan was to be paid out of moneys remaining in bank, and, if the testatrix had at the time of her death \$1,000 to her credit in bank, it would have been perfectly easy to discharge the legacy by paying over to her any \$300, so to the credit of said testatrix, and not otherwise disposed of. The inclination of the courts is against construing a legacy to be specific, because "specific legacies are not liable to contribution in case of a deficiency of assets, and inasmuch as the legacy fails entirely, if the testator parts with the property or thing specifically bequeathed" (*Dryden v. Owings*, 49 Md. 356; *Kunkel v. Macgill*, 56 Md. 120); and when, under the language of a will, a legacy is susceptible of being construed either as a specific or as a demonstrative legacy, courts lean to the construction which will regard it as demonstrative. A demonstrative legacy is defined in *Kunkel v. Macgill*, supra, as "a legacy in the nature of a general legacy, with a certain fund pointed out for its payment;" and that, in our view, is precisely the character of legacy here given to Mary Finnegan. It is a bequest of \$300, to be paid out of the money remaining in bank, and the fact that there was not that amount remaining in bank at the time of her death, entitles her, in addition to the \$12 which was in bank, to the payment of the balance out of the general assets belonging to the estate, if such general assets existed and, if not, then *pro rata* with general legatees, if any. In the present case there were assets, which, as will be seen in a moment, were adequate, out of which to pay this balance, and this portion of the decree of the lower court which held the legacy as specific, and that it had been adeemed as to all above the sum of \$12, must be reversed.

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The remaining legacy which this appeal brings before us for construction is as follows: "I, Ellen Gardner, devise and bequeath to my brother, James V. McNeal, my railroad stock and all money remaining in bank excepting," etc. It appears from the agreed statement of facts that at the time when Mrs. Gardner executed her will she was the owner of 12 shares of the common stock of the Baltimore & Ohio Railroad Company, and 60 shares of the preferred stock of the same corporation, and that she had a cash balance in bank of \$436.03. It further appears that the preferred stock was sold about October 1, 1909, by her brother and agent, Joshua V. McNeal, and the proceeds of that sale, together with some of the money in bank, reinvested in the purchase of bonds of various corporations. The bequest of the stock was undoubtedly a specific legacy. Bonds and shares of stock of corporations may be specifically bequeathed, and the word "my," "in my possession," or "standing in my name," and other like expressions referring to the corpus of the fund, have generally been relied on as showing the intent of the testator that the bequest of such stock was specific. *Kunkel v. Macgill*, supra. The effect of the language of the testatrix is therefore to give to her brother, Joshua V. McNeal, the 12 shares of the common stock of the Baltimore & Ohio Railroad as a specific legacy. With regard to the 60 shares of preferred stock, the same result by no means necessarily follows.

The nonexistence of property at the time of the death of a testatrix which has been specifically bequeathed by will is the familiar and almost typical form of ademption. This may result from a variety of causes, such as a gift during the lifetime of the testatrix, of the particular article which was the subject-matter of the legacy, its consumption, loss, or sale, and in each of such instances the courts have held a legacy to be adeemed. A case of almost exact parallelism with the one under consideration was in the case of the Unitarian Soc. v. Tufts, 151 Mass. 76, 7 L.R.A. 390, 23 N. E. 1006, in which a testatrix by her will gave to a legatee certain railroad stocks, which she subsequently sold and reinvested the proceeds, and this was held to have adeemed the legacy; the court saying: The general rule is that, when the chattel specifically bequeathed by a testator is sold or conveyed by him during his life, the legacy is adeemed. And in *Weston v. Johnson*, 48 Ind. 1, after the statement of the same rule, the court adds: "If the proceeds from such sale or disposition were to be substituted and permitted to pass, the effect would be . . . to convert a

specific into a general legacy." The same principle will be found stated in *Cowles v. Cowles*, 56 Conn. 240, 13 Atl. 414, and has been recognized in this state in *Brady v. Brady*, 78 Md. 461, 28 Atl. 515.

In that case the testator gave to his son certain cows and farming implements, with a life estate in the same chattels to his widow. When the life estate terminated, none of the cows which were in the possession of the testator when he made the will were living, and the legacy of these animals was held to be adeemed, while in the case of the farming implements, a portion only of which had disappeared through use, the legacy was held to have been adeemed only in part.

Applying these cases to the one under consideration, we must hold the legacy of 12 shares of common stock to be valid, and that of the 60 shares of preferred stock to have been adeemed, and that the reinvestments which had been made cannot be substituted as a specific legacy in favor of *Joshua V. McNeal*.

It was earnestly argued that this change of investment was made by *Joshua V. McNeal*, the brother of the testatrix, without any special sanction from the testatrix, and it may be without her knowledge, and that by reason of these facts the legal result which would follow a sale of the property by the testatrix were avoided. In this view we are unable to concur. Whatever *Mr. McNeal* may have done was done as agent of *Mrs. Gardner*, and his acts as such agent were practically ratified in advance when she delivered to him the certificates of the preferred stock, indorsed for transfer, and there is no suggestion or imputation that *Mr. McNeal* violated or in any way exceeded the powers conferred upon him, or that his acts in disposing of the stock for her, and otherwise reinvesting the proceeds, were ever in any manner disavowed by her. The will of June 6, 1905, did not contain any residuary clause, and, under the construction which we have felt compelled to put upon it, it necessarily follows that, as to a considerable portion of her estate, *Mrs. Ellen M. Gardner* died intestate. That she had no intent to die thus intestate is undoubtedly true, and in that respect again the present case is in exact parallel with the case of *Unitarian Soc. v. Tufts*, supra. But that fact cannot alter the legal result, and the balance of her estate after the payment of specific and demonstrative legacies, is distributable to her brother, *Joshua V. McNeal*, and her half-brother, *James H. McNeal*.

The decree of the Circuit Court will therefore be affirmed in part and reversed in part, and the case remanded, to the end 40 L.R.A. (N.S.)

that a decree may be entered in accordance with this opinion, and the administration of the estate completed accordingly.

Decree affirmed in part and reversed in part, and case remanded, costs to be paid out of the estate.

PENNSYLVANIA SUPREME COURT.

RE ESTATE OF E. J. PRUNER, Deceased.

BEN. J. HILTNER, Admr., etc., of Clara
R. Moyer, Deceased, Appt.

(222 Pa. 179, 70 Atl. 1000.)

Will — legacy of insurance policy — ademption.

1. A bequest of insurance policies which testator holds on another's life as security for a debt is adeemed by collection of the policies by testator and investment of the proceeds in other securities, upon death of the insured within his lifetime.

Same — specific legacy — appended condition.

2. A provision after a bequest of life insurance policies which testator holds on another's life as security for his debt, that legatee "pay the premiums on the same till they mature," does not destroy the specific character of the legacy.

(June 23, 1908.)

APPEAL by the administrator of *Clara R. Moyer*, deceased, from a decree of the Orphan's Court for Centre County dismissing exceptions to the report of the auditor distributing the funds in the hands of the executor of the estate of *E. J. Pruner*, deceased. Affirmed.

The facts are stated in the opinion.

Mr. O. H. Hewitt, for appellant:

The character of a legacy, whether specific or demonstrative, is essentially a question of intention.

Note. — Collection of insurance policy during lifetime of testator as ademption of specific legacy thereof.

RE PRUNER is directly supported by the few cases which have passed upon the specific question therein involved.

Thus in *Davidson v. Davidson*, 4 F. 107— Ct. of Sess. as set out in 2 Mews, Eng. Case Law Dig. Supp. of 1898-1907, col. 2814, a case on all fours with the PRUNER CASE, where a testator insured the life of his wife and specifically bequeathed the proceeds thereof, and she died during his lifetime and the proceeds were collected and merged in the testator's general estate, the legacy was held adeemed thereby.

So, the collection by the testator of an insurance policy the proceeds of which he had

Hoke v. Herman, 21 Pa. 301; Smith's Appeal, 103 Pa. 559; Snyder's Estate, 217 Pa. 71, 11 L.R.A.(N.S.) 49, 118 Am. St. Rep. 900, 66 Atl. 157, 10 Ann. Cas. 488.

The doctrine of ademption by acquisition applies to specific legacies only, and does not obtain in the cases of general, demonstrative, or pecuniary bequests.

Smith's Appeal, 103 Pa. 559; Fryer v. Morris, 9 Ves. Jr. 360, 7 Revised Rep. 222; Ives v. Canby, 48 Fed. 718; Corbin v. Mills, 19 Gratt. 438; 1 Am. & Eng. Enc. Law, 2d ed. 630; Collins v. Wakeman, 2 Ves. Jr. 683; Nooe v. Vannoy, 59 N. C. (6 Jones, Eq.) 185; Coleman v. Coleman, 2 Ves. Jr. 639, Doughty v. Stillwell, 1 Bradf. 300; Georgia Infirmary v. Jones, 37 Fed. 750.

Messrs. John G. Love, P. J. Little, and Harry Keller, for appellee:

The bequest is specific, and there being no life insurance policies, such as specifically described, at the date of the death of the testator, the bequest was adeemed.

Walls v. Stewart, 16 Pa. 281; Blackstone v. Blackstone, 3 Watts, 335, 27 Am. Dec. 359; Ludlam's Estate, 13 Pa. 188; Hoke v. Herman, 21 Pa. 301; Pleasants's Appeal, 77 Pa. 356; Smith's Appeal, 103 Pa. 559; Fidelity Ins. Trust & S. D. Cos. Appeal, 108 Pa. 492, 1 Atl. 233; Donaldson's Estate, 1 Pa. Dist. R. 235.

Fell, J., delivered the opinion of the court:

The question presented by this appeal arises under the following clause of the testator's will: "I also give to my niece Clara R. Moyer, the life insurance policies which I hold on the life of A. C. Moyer, she to pay the premiums on the same till they mature." A. C. Moyer was the husband of Clara R. Moyer; and the testator held by absolute assignments two policies of insurance on his life. The testator paid the premiums for a number of years and charged them in ledger accounts headed, "A. C. Moyer Life Insurance Policy, New York Life," and "Mutual Life Insurance Co., N. Y., Investment in Policy on A. C.

Moyer's Life." The insured died before the testator, who received the proceeds of the policies and deposited them in his account in the bank of which he was president. He used the money received from the insurance, with other money, in the purchase of bonds, which he placed in a safe-deposit box where he kept his securities. The auditor found that at the time of the assignment of the policies the testator was a creditor of the insured and had an insurable interest in his life, that there was nothing to indicate that the bonds purchased in part with the money received from the insurance companies were not the absolute property of the testator, and that the legacy was specific, and was adeemed by the maturity and payment of the policies before the death of the testator. These findings were affirmed by the orphans' court.

It is conceded that, under the findings of fact, the appellant can succeed only on the ground that the legacy was not specific and adeemed by the payment of the policies. It is argued with much earnestness and ability that the words in the bequest, "she to pay the premiums on the same till they mature," disclose an intention on the part of the testator not to give his niece the insurance policies freed of any charge upon them, but to give her the proceeds of the policies less the amount of the premiums paid by him, and that the legacy was a bequest of a sum of money payable out of a particular fund, and was demonstrative, and not adeemed by the payment of the policies. In order to guard a legatee against the risk of ademption, and in order that the legacy may be liable to contribution and abatement in case of a deficiency of assets, courts incline against construing legacies as specific. But this well-recognized doctrine must not be allowed to contravene the plain import of the will. Notes to Ashburner v. Macguire, 2 White & T. Lead. Cas. in Eq. 267. The bequest of the "life insurance policies which I hold on the life of A. C. Moyer" is clear-

specifically bequeathed, and the commingling of such proceeds with his other funds, was held in Nusly v. Curtis, 36 Colo. 464, 7 L.R.A.(N.S.) 592, 118 Am. St. Rep. 113, 85 Pac. 846, 10 Ann. Cas. 1134, to constitute an ademption of the legacy. And the same conclusion was reached in Barker v. Rayner, 5 Madd. Ch. 208, affirmed in 2 Russ. Ch. 122, the court saying that the only inquiry was whether the specific thing remained at the death of the testator, and that it could not enter into a consideration of the testator's intention.

As to bequest of policy of insurance or proceeds thereof as specific legacy, see note to Nusly v. Curtis, 7 L.R.A.(N.S.) 592, 40 L.R.A.(N.S.)

The general question of ademption of a specific legacy or devise by disposal, loss, or destruction of the property bequeathed, is treated in the note to Lang v. Vaughn, ante, 542, and the general question of ademption of specific legacy or devise by change in or substitution of other property for that bequeathed is annotated in connection with Gardner v. McNeal, ante, 553. And as to gift by testator as ademption of general legacy to donee, see the note to Johnson v. McDowell, 38 L.R.A.(N.S.) 588, and as to gift to one spouse by parent of the other as advancement or ademption, see note to Ireland v. Dyer, 26 L.R.A.(N.S.) 1050.

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ly specific. The added words, "she to pay the premiums on the same till they mature," refer to payments that might become due after the policies passed by the will to the legatee. If they had been in force at the death of the testator, his niece would have received them free of any charge for premiums paid by him. We think the conclusion expressed by the learned judge of the orphans' court, that it was "the intention of the testator to give the policies to his niece on the condition and understanding that after his death his estate should no longer be chargeable with the maintenance of the same," is correct.

The decree is affirmed, at the cost of the appellant.

NEW YORK COURT OF APPEALS.

THOMAS GRIMSHAW, Admr., etc., of
Thomas Cole, Deceased, Respnt.,
v.

LAKE SHORE & MICHIGAN SOUTHERN
RAILWAY COMPANY, Appt.

(205 N. Y. 371, 98 N. E. 762.)

Railroad — employee on engine — licensee.

1. A railroad employee permitted by the engineer to ride on an engine, contrary to the rules of the company, of which he is ignorant, is a licensee toward whom the company must exercise ordinary care.

Same — riding on engine — statutory prohibition — permission.

2. The statutory prohibition against riding on any railroad engine or freight or wood car without authority or permission of the proper officers of the company does not extend to one to whom permission has been given by the person in charge of the engine or car.

Same — track crossing — negligence.

3. A railroad company is bound, in the operation of its trains at a crossing of another road, to exercise ordinary care not to injure a person riding upon an engine on the other road, whose presence thereon was not of such a character as to constitute him a wrongdoer.

Same — negligence of employee — riding on engine.

4. A railroad employee cannot be said to be negligent as a matter of law in riding on a locomotive which has no cars attached,

Note. — As to liability of railroad company for injury to person wrongfully on train by collusion with a train employee, see notes to *Indianapolis Traction & Terminal Co. v. Lawson*, 5 L.R.A.(N.S.) 721, and *St. Louis, I. M. & S. R. Co. v. Jones* 37 L.R.A.(N.S.) 419.

See also later note for references to annotation on analogous points.
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so as to prevent his holding another company liable for injury to him due to a collision of its train with the engine at a point where the tracks of the two companies crossed.

(May 7, 1912.)

APPPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Erie County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. **Affirmed.**

The facts are stated in the opinion.

Mr. Thomas D. Powell with Messrs. Hoyt & Spratt, for appellant:

Plaintiff's intestate was a trespasser upon both the Wabash engine and the tracks of defendant. And the defendant, in the absence of evidence that it wilfully or wantonly injured him, is not liable.

Van Alstine v. Standard Light, Heat & P. Co. 116 App. Div. 100, 101 N. Y. Supp. 696; *Streets v. Grand Trunk R. Co.* 76 App. Div. 480, 78 N. Y. Supp. 729, affirmed in 178 N. Y. 553, 70 N. E. 1109; *Robertson v. New York & E. R. Co.* 22 Barb. 91; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513; *Waterbury v. New York C. & H. R. R. Co.* 21 Blatchf. 314, 17 Fed. 671; *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875; *Pittsburgh, C. C. & St. L. R. Co. v. Hall*, 46 Ind. App. 219, 90 N. E. 498, 91 N. E. 743; *Darwin v. Charlotte, C. & A. R. Co.* 23 S. C. 531, 55 Am. Rep. 32; 4 Elliott, Railroads, 2d ed. § 1581; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Duff v. Allegheny Valley R. Co.* 91 Pa. 458, 36 Am. Rep. 675; *Burns v. Southern R. Co.* 63 S. C. 46, 40 S. E. 1018; *Wickenburg v. Minneapolis, St. P. & S. Ste. M. R. Co.* 94 Minn. 276, 102 N. W. 713; 3 Elliott, Railroads, 2d ed. § 1252; *Keller v. Erie R. Co.* 183 N. Y. 67, 75 N. E. 965; *Grunet v. Chicago & W. M. R. Co.* 109 Mich. 342, 67 N. W. 335; *Dilas v. Chesapeake & O. R. Co.* 24 Ky. L. Rep. 1347, 71 S. W. 492; *Eastern Kentucky R. Co. v. Powell*, 17 Ky. L. Rep. 1051, 33 S. W. 629; *Dillon v. Connecticut River R. Co.* 154 Mass. 478, 28 N. E. 899; *Magar v. Hammond*, 183 N. Y. 387, 3 L.R.A.(N.S.) 1038, 76 N. E. 474; *Johnson v. New York C. & H. R. R. Co.* 173 N. Y. 79, 65 N. E. 946; *Lagerman v. New York C. & H. R. R. Co.* 53 App. Div. 283, 65 N. Y. Supp. 764; *Gunther v. New York C. & H. R. R. Co.* 81 App. Div. 606, 81 N. Y. Supp. 395.

If the defendant is to be held liable for negligence, then plaintiff's intestate, having violated the rules of the Erie and Wabash

companies provided for his protection, was guilty of contributory negligence as a matter of law.

Dickescheid v. Betz, 80 App. Div. 8, 80 N. Y. Supp. 175, affirmed in 176 N. Y. 611, 68 N. E. 1115; *Shannon v. New York C. & H. R. R. Co.* 88 App. Div. 349, 84 N. Y. Supp. 646; *Flanagan v. Atlantic Alcatraz Asphalt Co.* 37 App. Div. 476, 56 N. Y. Supp. 18; *Clark v. Colorado & N. W. R. Co.* 19 L.R.A. (N.S.) 988, 91 C. C. A. 358, 165 Fed. 408; *Files v. Boston & A. R. Co.* 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311; *Doggett v. Illinois C. R. Co.* 34 Iowa, 284; *Radley v. Columbia Southern R. Co.* 44 Or. 332, 75 Pac. 212, 1 Ann. Cas. 447.

Messrs. White & Sayles, for respondent:

Defendant is in no position to raise the defense that deceased was not rightfully on the Wabash locomotive.

Knight v. Lanier, 69 App. Div. 454, 74 N. Y. Supp. 999; *Wilson v. American Bridge Co.* 74 App. Div. 596, 77 N. Y. Supp. 820.

Willard Bartlett, J., delivered the opinion of the court:

The tracks of the Erie Railroad Company cross the tracks of the defendant, the Lake Shore & Michigan Southern Railway Company, at a point in the city of Buffalo. At the time of the accident which gave rise to this action, in December, 1907, the Wabash Railroad Company operated some of its trains over these tracks of the Erie. A Wabash engine thereon attempted to cross the point of intersection when it was struck by one of the defendant's freight trains running along one of the intersecting tracks. The collision resulted in the death of the plaintiff's intestate, Thomas Cole, an employee in the office of the master mechanic of the Erie Railroad Company at East Buffalo, who was riding on the locomotive. This action was brought to charge the defendant with liability for negligence in the operation of its freight train at the crossing. The answer was a general denial. The plaintiff recovered a small verdict, the judgment upon which has been affirmed by the appellate division, one of the justices dissenting on the ground that the plaintiff's intestate was a trespasser upon the Wabash engine at the time of the accident, and the defendant could be held liable only in case it caused his death wilfully, wantonly, or recklessly, of which there was no evidence. The trial judge charged the jury that the defendant owed to every one on that engine ordinary care to keep him from being injured, and it must be assumed that the verdict was based upon

a finding of the absence of such ordinary care.

The plaintiff's intestate was evidently on the locomotive with the sanction of the engineer in charge. He had been in the habit of riding on it once or twice a week for a couple of months prior to the accident. It is true that there were rules both of the Wabash and of the Erie Company to the effect that unauthorized persons would not be permitted to ride on the engine; but it did not appear that Cole had ever had notice or possessed any knowledge of these rules. He was a licensee, rather than a trespasser in the same sense that one is a trespasser who boards a train forcibly or gets on secretly to obtain transportation furtively. In the absence of authority on the part of the engineer to permit him to ride on the engine, he did not become a passenger, but the permission relieved him from the imputation of being a wrongful intruder, and obligated the Wabash Company to the exercise of ordinary care not to injure him. See 4 Elliott, Railroads, 2d ed. § 1581. His presence on the engine, being thus lawful as to the Wabash, was equally lawful as to the defendant; and it was also bound to exercise ordinary care not to injure him. There was evidence that it failed in its duty in this respect.

We are referred to the case of *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 395, 15 Am. Rep. 513, as an authority precisely in point to show that the plaintiff's intestate was not lawfully upon the engine at the time when he was killed. That case was decided by the commission of appeals in 1874, and the decision was not unanimous. There was an able dissenting opinion by Commissioner Earl, afterward chief judge of this court. The plaintiff had been invited by the conductor of a coal train belonging to the defendant to ride thereon. The conductor informed him that the company was in want of brakemen, and invited him to ride back to a specified station with a view to obtaining employment as a brakeman. There was a printed regulation of the company forbidding passengers to ride upon coal trains, but it did not appear that the plaintiff knew of this regulation or had any reason to suppose that the conductor was doing an unauthorized act in inviting him to get upon the train. A majority of the commission of appeals held that, inasmuch as the conductor of a freight train has no power whatever as to the transportation of passengers, notice to the plaintiff of his limited authority in this respect would be implied, and hence that the plaintiff's presence on the freight train was unlawful. From this view Commissioner Earl dissented, saying: "I think no

authority can be found holding that a person, under such circumstances, is unlawfully or wrongfully upon a train, but there are numerous authorities in this and other states holding otherwise. This being so, there is abundant authority for holding that he was entitled to protection against the wilful or negligent acts of the defendant or its agents." In view of this dissent, I think that the Eaton Case should be regarded as a controlling precedent only in cases where the circumstances are precisely similar, and that the doctrine of the prevailing opinion should not in any wise be extended. Thus limited, it is applicable only to cases where the party injured is chargeable with notice that the railroad employee who permits him to ride on a particular train has no authority to do so.

It cannot fairly be contended in the present case that the plaintiff's intestate must be presumed as matter of law to have known that the engineer had no authority to allow him to ride upon the engine.

It may also be observed in regard to the Eaton Case that the members of the commission of appeals who united in the prevailing opinion expressly refrained from declaring that the plaintiff was a trespasser. *Eaton v. Delaware, L. & W. R. Co.* supra, 57 N. Y. 394, 15 Am. Rep. 513.

While permission to ride on a freight train or locomotive given by subordinate agents such as the conductor or engineer will not ordinarily suffice to constitute a person to whom permission is thus given a passenger, yet the weight of authority is in favor of the proposition that the consent of such employee is sufficient to require the exercise of ordinary care by the employer even though it does not demand the highest practicable degree of care such as a carrier owes to a passenger.

The tendency of the courts is to hold that a person riding upon a train other than a passenger train with the consent of those in charge, although against the rules of the company of which he is ignorant, is to be deemed a licensee, rather than a trespasser. See *Lemasters v. Southern P. Co.* 131 Cal. 105, 63 Pac. 128.

The case upon which the appellant chiefly relies is *Wickenburg v. Minneapolis, St. P. & S. Ste. M. R. Co.* 94 Minn. 276, 102 N. W. 713. There it appeared that the tracks of the defendant company and the Chicago, St. Paul, Minneapolis, & Omaha Railroad Company intersect at Turtle lake, in the state of Wisconsin. In consequence of the negligence of the defendant, one of its trains collided at the crossing with a train on the Omaha road, seriously injuring the plaintiff, who was a boy twelve years old, and who had boarded the Omaha

train when it stopped, before passing the crossing, for the purpose of riding to a neighboring station. He was riding upon one of the cars or clinging to its steps in violation of a Wisconsin statute. His presence was unknown to the Omaha Company or any of its employees in charge of the train. The supreme court of Minnesota held that the obligation of the defendant to exercise reasonable care to avoid a collision with the Omaha train, or not to injure persons lawfully riding thereon, did not extend to the plaintiff, and that he could not recover. It is to be observed that this was the case of a trespasser, pure and simple, and not a licensee, for, as has been said, no one on the Omaha train sanctioned the plaintiff's presence thereon or was aware of it. The Omaha Company therefore owed him no duty until it discovered him in a position of peril, and was only liable to him for a wilful or wanton injury. That this decision, however, was not intended to go so far as to pass upon the rights of a licensee under similar conditions, as distinguished from a mere trespasser, is apparent from the following paragraph in the opinion: "We need not indulge in a discussion of the question whether persons upon a train with which another negligently collides, who are there with the knowledge and consent of the company, riding without payment of fare with the consent of the employees, or upon forged passes or other unlawful or fraudulent means, would be entitled to recover. There is a marked distinction between persons riding on a train with the knowledge and consent of its employees, and persons situated as plaintiff was,—upon the steps of one of the cars attached to the train, without right, in violation of express law, and without the knowledge or consent of the company."

The suggestion is made in behalf of the appellant that the deceased was on the engine in violation of express laws, and was even guilty of a crime in being there at the time when he was killed in consequence of the defendant's negligence. Penal law (Consol. Laws 1909, chap. 40), § 1990. The prohibition of the penal law, however, against riding on any railroad company's engine or freight or wood car, without authority or permission of the proper officers of the company, does not extend to a case where permission is given by "the person in charge of said car or engine." It is manifestly unreasonable to assume that Cole was on the engine without the permission of the engineer, in view of the evidence which has been mentioned as to his practice of riding thereon for two months before his death.

The concrete rule of law which we deem

applicable to such a collision as occurred in this case is that the defendant whose freight train ran into the Wabash engine at the crossing was bound to exercise ordinary care not to injure any person riding upon that engine whose presence thereon was not of such a character as to constitute him a wrongdoer. Further than that, the status of the injured person toward the corporation on whose locomotive he was riding was immaterial to the company operating the train which caused the injury. If the collision had happened between the defendant's train and a passenger train of the Wabash, and had resulted in injury to passengers on the latter train, the Wabash Company would have owed such passengers the duty to exercise the very highest degree of care in the management and operation of its train, whereas the defendant would have been bound only to exercise ordinary care toward such Wabash passengers to avert a collision. See *Loudoun v. Eighth Ave. R. Co.* 162 N. Y. 380, 56 N. E. 988. It does not follow that because the Wabash Company may not have owed any duty to the plaintiff's intestate as a passenger that the defendant owed him no duty at all.

It may be conceded that if the decedent had been a trespasser upon the Wabash engine in the true sense of the term,—that is to say, a person who had forcibly introduced himself upon the engine against the will or without the knowledge of those in control,—neither the Wabash Company nor the defendant would have owed him any duty except to avoid the infliction of a wilful or wanton injury. As to all persons, however, whose presence upon the Wabash engine was sanctioned by those in charge of its operation, such presence is to be deemed lawful so far as third parties are concerned, and it was no concern of the defendant just what legal relation the plaintiff's intestate occupied toward the Wabash Company, so long as he was not a forcible or secret trespasser.

It cannot be held that the deceased was guilty of contributory negligence as matter of law. The cases which impute contributory negligence to one who takes a comparatively perilous place upon a locomotive, instead of riding in a car provided for passengers, have no application here, where there is nothing to show that the peril to the deceased was in any wise augmented by any act of his in choosing a dangerous, rather than a safe, place in which to ride. The locomotive on the occasion of the collision was proceeding alone.

There is no other feature of the case which requires discussion. It was tried without any substantial error affecting the 40 L.R.A.(N.S.)

result, and the judgment should therefore be affirmed, with costs.

Cullen, Ch. J., and Gray, Haight, Vann, Werner, and Chase, JJ., concur.

NORTH DAKOTA SUPREME COURT.

ABE GOLDSTEIN et al., Resp'ts.,

v.

PETER FOX SONS COMPANY, a partnership, App'ts.

(— N. D. —, 135 N. W. 180.)

Writ — service on partner — supposed corporation.

1. Where a summons wherein a defendant company was erroneously named as a corporation, when in fact it was a copartnership, was personally served within the state on a partner as the managing agent of the alleged corporation, it constitutes a valid service upon the partner and copartnership, sufficient to vest jurisdiction in the court to permit, on proper showing made, an amendment of the summons and complaint served, that the defendant company may be designated therein as a partnership with partners named.

Same — amendment.

2. Such service was not void, and the amendment so permitted did not thereby bring new parties defendant into the suit; but, instead, it was merely descriptive of the entity against whom the action was brought and upon whom service was made.

Same — jurisdiction — extent.

3. Such personal service upon a partner confers jurisdiction upon the court to enter judgment under § 6847, Rev. Codes, 1905,

Headnotes by Goss, J.

Note. — Effect of erroneously describing defendant in process as a corporation instead of an individual or partnership, or vice versa.

This note does not discuss the question as to what is an erroneous description, but only sets out the effect of those descriptions that are clearly or admittedly erroneous. Cases of mere misnomer, without any mistake as to the character of the defendant, and cases merely involving the sufficiency of a description of defendant as a "company," without indicating whether it is a partnership or a corporation, are also excluded.

The question as to whether a partnership may sue or be sued in the firm name is discussed in the note to *Spaulding Mfg. Co. v. Godbold*, 29 L.R.A.(N.S.) 282; and the question of the validity of constructive service upon a partnership in the firm name is treated in the note to *Ord v. Neiswanger*, 29 L.R.A.(N.S.) 287.

Inquiry as to the effect of such misde-

jointly against the partner served and all members of the partnership named; and, where property is *in custodia legis* by virtue of the levy of an attachment in the action, the court has authority under said statute to order that the property held be sold and applied in satisfaction of the judgment.

Jurisdiction — special appearance — effect.

4. Where the jurisdiction of the court over the person of the defendant is challenged, under a special appearance made pending the action and before judgment, the same is not a general appearance, and a judgment entered by default is valid.

Appeal — jurisdiction of trial court — review.

5. The question here presented going only to the jurisdiction of the court to enter the

judgment sought to be vacated under a special appearance, this court will consider only the jurisdictional questions raised, and, on determining that the trial court had jurisdiction to enter the judgment, the decision of the trial court refusing to vacate the same is affirmed.

(Spalding, Ch. J., dissents.)

(March 1, 1912.)

APPEAL by defendants from a judgment of the District Court for Richland County in plaintiffs' favor in an action brought to recover damages for breach of contract to pay for a carload of potatoes which was entitled as against and the proc-

scription of defendant as will be here considered necessarily leads to the question whether process carrying on its face such misdescription may be amended and corrected, since, if not amendable, it is null and void; but if amendable, the defect may be cured upon discovery of the true character of the defendant.

The effect given to such a misdescription usually depends upon the question whether it is interpreted as merely a misnomer or defect in the description, or whether it is deemed a substitution or entire change of party; in the former case an amendment will be allowed, in the latter it will not be allowed.

Describing defendant as corporation instead of partnership.

Generally, in the furtherance of justice, courts will permit the plaintiff to amend his process so as to charge defendant as a partnership instead of corporation, when the latter designation is erroneously given in the first instance, and when there is no corporation of that name; the error in such case is not that the wrong party is sued, but that he is misdescribed, the firm name being equally suited either to a corporation or to a partnership. There is no change of party, but the same individuals are still before the court. *Anglo-American Packing & Provision Co. v. Turner Casing Co.* 34 Kan. 340, 8 Pac. 403; *Farmers' & M. Bank v. Bank of Glen Elder*, 46 Kan. 376, 26 Pac. 680; *Teets v. Snider Heading Mfg. Co.* 120 Ky. 653, 87 S. W. 803; *Standard Hay & Grain Co. v. Ratliff Bros.* 144 Ky. 161, 137 S. W. 1035; *Munzinger v. Courier Co.* 82 Hun, 575, 31 N. Y. Supp. 737; *Evoy v. Expressman's Aid Soc.* 51 N. Y. S. R. 38, 21 N. Y. Supp. 641; *Skoog v. New York Novelty Co.* 4 N. Y. Civ. Proc. Rep. 144; *Newton v. Milleville Mfg. Co.* 17 Abb. Pr. 318, note; *GOLDSTEIN v. PETER FOX SONS CO.*

Especially will such an amendment be allowed where the defendant has appeared and filed an answer to the merits. *Anglo-American Packing & Provision Co. v. Turner Casing Co.* supra. 40 L.R.A. (N.S.)

Or when the amended process is offered before an answer interposing a defense on the merits is filed. *Teets v. Snider Heading Mfg. Co.* 120 Ky. 653, 87 S. W. 803.

Or where such an erroneous summons is personally served within the state upon one of the partners as managing officer of the defendant. *GOLDSTEIN v. PETER FOX SONS CO.*

Or where the defendant answers and sets up a counterclaim. *Standard Hay & Grain Co. v. Ratliff Bros.* 144 Ky. 161, 137 S. W. 1035.

And in such a case, when the defendant sets up a counterclaim, judgment may properly be entered against it as a partnership, even though plaintiff fails to file an amended petition. *Ibid.*

And the application of this rule is not affected by the fact that the plaintiff might bring another action if the defective process were declared null and void; nor by the fact that another summons against the persons named as partners will be necessary. *Teets v. Snider Heading Mfg. Co.* supra.

And in case of such amendment, the names of the individual partners may be added. *Anglo-American Packing & Provision Co. v. Turner Casing Co.* 34 Kan. 340, 8 Pac. 403; *Teets v. Snider Heading Mfg. Co.* 120 Ky. 653, 87 S. W. 803; *Evoy v. Expressmen's Aid Soc.* 51 N. Y. S. R. 38, 21 N. Y. Supp. 641; *Skoog v. New York Novelty Co.* 4 N. Y. Civ. Proc. Rep. 144; *Newton v. Milleville Mfg. Co.* 17 Abb. Pr. 318, note; *Blue Grass Canning Co. v. Wardman*, 103 Tenn. 179, 52 S. W. 137.

But in some courts such a misdescription is interpreted not as bringing the right defendant into court under a wrong name, but as suing the wrong party, and in those jurisdictions an amendment to correct the defect is deemed as bringing in new parties, and is therefore not allowed. *White Co. v. Fayette Automobile Co.* 43 Pa. Super. Ct. 532.

And it has been said that a writ describing defendant as a corporation, when in fact it is a partnership, although it uses the correct firm name, runs against nobody,

cess served upon defendants as a corporation. Affirmed.

The facts are stated in the opinion.

Messrs. Purcell & Divet, for appellants:

A copartnership is not considered a person, and must sue and be sued by its members.

30 Cyc. 560, 561, note 20; 30 Cyc. 99, note 18; Monteith v. Hogg, 17 Or. 270, 20 Pac. 327; Frank v. Tatum, 87 Tex. 204, 25 S. W. 409.

All partners must be joined as defendants in an action on a partnership obligation.

30 Cyc. 565, note 39; Rev. Codes, § 5842.

When new parties are brought in by amendment, it is as necessary to serve the

amended process as it is to serve original process.

White v. Johnson, 27 Or. 282, 50 Am. St. Rep. 726, 40 Pac. 511; Shaw v. Cook, 78 N. Y. 194; Plemmons v. Southern Improv. Co. 108 N. C. 614, 13 S. E. 188; Powers v. Braly, 75 Cal. 237, 17 Pac. 197; Thompson v. Allen, 86 Mo. 85; Tom Boy Gold Mines Co. v. Green, 11 Colo. App. 447, 53 Pac. 845.

Service must be made in the manner prescribed, and failing in that, the fact that the process may actually come to the hands of the defendant, or he became possessed of full knowledge thereof, does not give jurisdiction.

Rhode Island Hospital Trust Co. v. Keen-

since there is no such defendant as the writ describes. Halbert v. Soule, 57 Vt. 358.

And in such a case, since there is no defendant, the writ cannot be amended by substituting a partnership with names of partners. Sawyer v. New York State Clothing Co. 58 Vt. 588, 2 Atl. 483.

Nor can it be amended by describing the defendant as an unincorporated society organized under the laws of the state, and composed of certain individuals named. Maisch v. Order of Americus, 223 Pa. 199, 72 Atl. 528.

The members of a company cannot be held liable as partners under a summons directed against the company as a corporation. Bartram H. & Co. v. Collins Mfg. Co. 69 Ga. 751.

Process directed against a company as a corporation, upon which a writ of garnishment issues, cannot later be amended so as to charge individuals as partners doing business under the firm name; this would be substituting new parties defendant; the amended complaint must be deemed the commencement of a new suit. Schiele v. Dillard, 94 Ark. 277, 126 S. W. 835.

And where a suit for libel is brought against a publishing company as a corporation, and after answer the pleadings lie dormant for more than the limitation period, and later, upon discovering that the defendant is unincorporated, plaintiff files an amended petition setting up the mistake and charging individuals as partners doing business under the firm name, those individuals may take advantage of the statute of limitations, for they were not brought into court by the original process, but are new parties to the action. Leatherman v. Times Co. 88 Ky. 291, 3 L.R.A. 324, 21 Am. St. Rep. 342, 11 S. W. 12.

Describing defendant as corporation instead of individual.

When a milling company is the entity being sued, the question whether its appellation in the complaint is that of a corporation, a partnership, or a name assumed by an individual, is a matter merely of description, and if the complaint originally de-

scribes defendant as a corporation, it may be amended by adding the name of an individual doing business under the company name, without changing parties to the suit, especially where the Code fixes the only limit to amendments which relate back to the commencement of the suit, "that they shall refer to the same transaction, property, and parties as the original," and adding that where this is not apparent on the averments of the pleading, it shall be a question for the jury. Manatee Mill. Co. v. Hobdy, 165 Ala. 411, 138 Am. St. Rep. 73, 51 So. 871.

Under a statute requiring the allowance of amendments to cure any defect of form or substance in attachment affidavits, bonds, and writs, a plaintiff is entitled to an amendment of those papers which originally erroneously described defendant as a corporation, so as to make them designate defendant as an individual doing business under that name and style; and if the court refuses to allow such amendments, a mandamus will issue directing their allowance; the mistake sought to be corrected is not as to the entity of the defendant, but merely as to the designation of the kind of entity; it is not a question of name, but of designation, the amendment serving only to give accuracy and certainty to it. Ex parte Nicrosi, 103 Ala. 104, 15 So. 507.

Process misdescribing defendant as a company, supposing it to be a corporation, may be amended by striking out the supposed corporate name, which represents no legal entity, and substituting the name of an individual already served as defendant; this is no substitution of parties, but simply a correction of a misnomer. Butler Hard Rubber Co. v. Solomon Toubé Co. 38 N. Y. Civ. Proc. Rep. 23, 2 N. Y. City Ct. Rep. 41.

But an amendment generally by striking out the name of the defendant importing a corporate character, and inserting in lieu thereof the names of individuals as defendants, is not authorized either by the Code or by adjudged cases; such an amendment would result in the continuance of the action against other and different parties, and is not allowable. New York State Monitor

ey, 1 N. D. 411, 48 N. W. 341; Williams v. Van Valkenburg, 16 How. Pr. 144; Savings Bank v. Authier, 52 Minn. 98, 18 L.R.A. 498, 53 N. W. 812; Kline v. Kline, 104 Ill. App. 274.

The individuals are the defendants, and must be served, to bind them by judgment.

White v. Johnson, 27 Or. 282, 50 Am. St. Rep. 732, 40 Pac. 511; Leach v. Milburn Wagon Co. 14 Neb. 106, 15 N. W. 232; Frank v. Tatum, 87 Tex. 204, 25 S. W. 409; Likens v. McCormick, 39 Wis. 313; Brown v. Gorsuch, 50 W. Va. 514, 40 S. E. 376; Donnell v. Williams, 59 How. Pr. 68; Shaw v. Cock, 78 N. Y. 194; Anglo-American Packing & Provision Co. v. Turner Casing Co. 34 Kan. 340, 8 Pac. 403.

Milk Pan Asso. v. Remington Agri. Works, 89 N. Y. 22.

And on general demurrer to a declaration against a defendant as a corporation, the court cannot intend that the defendant is an association of individuals trading under such a designation, and personally chargeable so that judgment may be taken against such individuals. Tompkins v. Branch Bank, 11 Leigh, 372.

Filing, and going to trial upon, a complaint which names as party defendant three individuals constituting a corporation, which is also named, operate as a discontinuance of the suit against the individuals, and convert it into an action against the corporation as sole defendant; the naming of the individuals is merely *descriptio personarum*. White v. Equitable Nuptial Benefit Union, 76 Ala. 251, 52 Am. Rep. 325.

A petition against a corporation and a summons issued against its president cannot form the basis of a judgment against the president individually. Macbean v. Irvine, 4 Bibb, 17.

Describing defendant as partnership instead of corporation.

Erroneously describing defendant as a partnership, when in fact it is a corporation, is fatal to the action when the error is urged by defendant by way of exception. Welton v. Genesee Lumber Co. 114 La. 842, 38 So. 580.

When a petition directed against individuals named, doing business as a partnership under a firm name, is amended so as to be directed against a corporation, in order to obtain valid judgment against it, such corporation must first be brought into court either by summons or by voluntary appearance, even though the firm's name is the same in both cases, and although the incorporators and the alleged partners are the same individuals. Thompson v. Allen, 86 Mo. 85.

Describing defendant as individual instead of corporation.

A petition directed against individuals may, by leave of court, be amended to read 40 L.R.A. (N.S.)

A complete change of parties cannot be made under the guise of an amendment.

31 Cyc. 481, 484; Gans v. Beasley, 4 N. D. 140, 59 N. W. 714; Atwood v. Landis, 22 Minn. 558; Jordan v. Chicago & A. R. Co. 105 Mo. App. 446, 79 S. W. 1155; Rarden Mercantile Co. v. Whitehead, 145 Ala. 617, 39 So. 576; New York State Monitor Milk Pan Asso. v. Remington Agri. Works, 89 N. Y. 22; Shaw v. Cock, 78 N. Y. 194; Bassett v. Fish, 75 N. Y. 304.

Messrs. J. A. Dwyer and Wolfe & Schneller, for respondents:

The appearance was general,

Coad v. Coad, 41 Wis. 23.

The amendment was proper.

Teets v. Snider Heading Mfg. Co. 120

against them as trustees of a corporation or against the corporation itself. Harper v. Hendricks, 49 Kan. 718, 31 Pac. 734.

Where a suit is brought against individual directors of a school district, naming them, but also describing them as a body politic and corporate, and giving the corporate name, their individual names will be considered as surplusage, and the suit is well brought against the corporation, and is not bad as being brought against the individual directors. Botkin v. Osborne, 39 Ill. 101.

But in Illinois State Hospital v. Higgins, 15 Ill. 185, it is said that a suit against a corporate body should be brought against the corporation, and not against the individuals incorporated by the common appellation.

A complaint against "the X Lumber Company, a firm composed of A & B, individually," may be amended to read against "the X Lumber Company, a corporation organized, etc.," for the party sued is the X Lumber Company, and the words stricken out and those added are merely descriptive. Lewis Lumber Co. v. Camody, 137 Ala. 578, 35 So. 126.

But a summons and complaint naming as party defendant individuals as doing business under a firm name cannot be amended by striking out their names and substituting the firm as a corporation; such an amendment would in effect strike out the only parties sued, and add an entirely new party defendant, for, as originally written, the words "doing business as" a firm are merely *descriptio personarum*, and therefore immaterial. Steiner Bros. v. Stewart, 134 Ala. 568, 33 So. 343.

Section 723 of the New York Code does not authorize an amendment of a summons and complaint by changing the defendant from an individual to a corporation, even though that individual be the president and owner of the corporation, the original intention being not to sue any company, but only an individual. Licausi v. Ashworth, 78 App. Div. 486, 79 N. Y. Supp. 631.

And a complaint directed against individuals may not be amended to charge them as officers of a corporation in their cor-

Ky. 653, 87 S. W. 803; *Durkee v. Conklin*, 13 Colo. App. 313, 57 Pac. 486; *Newton v. Mellville Mfg. Co.* 17 Abb. Pr. 318, note; *Nisbet v. Clio Min. Co.* 2 Cal. App. 436, 83 Pac. 1077; *Maddox v. Central of Georgia R. Co.* 110 Ga. 301, 34 S. E. 1036; *Haggarty v. Strong*, 10 S. D. 585, 74 N. W. 1037; *Lillie v. Modern Woodmen*, 89 Neb. 1, 130 N. W. 1004.

Goss, J., delivered the opinion of the court:

The summons and complaint was issued November 6, 1908, with an attachment, in an action by these plaintiffs against the defendant company, designated as the Peter Fox Sons Company, a corporation, instead of against a copartnership with members named, as now entitled. A car of poultry was attached November 9th, and personal service of summons, complaint, warrant of attachment, and notice of levy was then made at Hankinson upon Anthony Fox, one of the copartners. The defendant company was named as a corporation, and service upon it was attempted to be made by such personal service upon Anthony Fox as its managing officer, then within the state, and alleged to be in charge of the poultry attached. The provisional remedy was issued; and no question of the regularity of the levy or attachment proceedings is raised other than the right of the court to permit the amendment made to all the pleadings and files, so the action is now entitled against a partnership, defendant, with copartners named. On the thirtieth day

after such levy and personal service upon Anthony Fox, and while the action was pending against the company named as a corporation, the many Foxes as members of the partnership entered, by their attorneys, a special appearance in the action brought against the alleged corporation. Therein they recited that they are "appearing specially for the purpose of objecting to the jurisdiction of the court, and for no other purpose, and move the court for an order setting aside the service of summons herein and dismissing this action." With the motion as a part thereof, made under special appearance, was a notice of hearing thereon set for January 5, 1909; supporting the motion were affidavits of Frank Fox and Joseph Fox, wherein they aver that the Peter Fox Sons Company is not a corporation, but a partnership, consisting of eight partners named Fox; and that no service has been made upon them, except the service of the summons upon Anthony Fox as an officer, agent, or representative of the Peter Fox Sons Company charged as a corporation; and that all members of said partnership are residents of Chicago, and there engaged in the commission business. A continuance of the hearing on the motion was had under agreement between counsel and the court until January 19th, when it was further continued to be taken up at the convenience of the court and counsel. To that date no general appearance had been made by the attorneys for these appellants.

On December 19th, without notice, upon

porate capacity; such an amendment would change entirely the nature of the action. *Shuler v. Meyers*, 5 Lans. 170.

Miscellaneous.

Where an account is against a corporation, but the summons in the action upon the account runs against the superintendent of the corporation, and the judgment first rendered against him is on motion amended so as to be against the corporation, on appeal the amendment will be presumed to be correct, especially when it is shown that the corporation appeared, and the objection that it was not the real defendant was not raised until after verdict. *Shorter University v. Franklin*, 75 Ark. 571, 88 S. W. 587, opinion on rehearing 75 Ark. 573, 88 S. W. 974.

When suit is brought by one corporation against another corporation, it is error for the magistrate to issue the summons in the names of the individual members composing the corporations; and to render judgment against the individual members of the defendant corporation; but the individual names may be stricken out of the record and the cause may proceed in the corporate names. *Campbell v. Brunk*, 25 Ill. 225. 40 L.R.A. (N.S.)

Where a state brought action for franchise taxes against a waterworks company as a corporation, and defendant demurred for want of jurisdiction, and set up that it was never incorporated, and where the city owned the company and chose the officers who made the report upon which the tax was based, it was proper for the state to amend its petition by making the city a party defendant, and the original petition and the amendment may be considered together as an original petition against the city, since the latter appeared without reservation; the mistake was in the name of the party upon whom liability rested as the owner of the property. *Newport v. Com.* 106 Ky. 434, 45 L.R.A. 518, 50 S. W. 845, 51 S. W. 433.

Where a petition describes defendant as a corporation, and the answer denies the fact of incorporation, and there is no proof offered on that issue, plaintiff should not recover, for if defendant is a partnership the proceeding is defective, and the burden is on the plaintiff to prove defendant a corporation. *Pike, M. & Co. v. Wathen*, 25 Ky. L. Rep. 1264, 78 S. W. 137.

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a showing by affidavits, plaintiffs moved the court to amend all the pleadings *nunc pro tunc* to read as now entitled. And on December 21st, and while the motion to set aside the service was pending, the motion to amend *nunc pro tunc* was granted, and all pleadings and files amended accordingly, as of the date of the commencement of the suit, November 6, 1908; and a new complaint was filed so entitled, wherein the copartnership relation of defendants was pleaded. All this was without notice to opposing counsel, who had appeared on the motion to dismiss made under special appearance. Thereafter, and on January 19th, seventy-four days after this issuance of the attachment, and more than sixty days from its levy, defendants being in default in general appearance, on proof thereof by affidavit and on proof on the merits submitted, the court entered findings of fact and conclusions of law under which, on January 20, 1909, a judgment was entered in favor of plaintiffs and against defendants jointly, adjudging the sale of the personal property levied upon; that its proceeds should be applied in satisfaction of such judgment and costs.

Immediately after the entry of this judgment, on affidavits and under a special appearance, an order to show cause was applied for and issued. It briefly recited the proceedings had and the pendency of the prior motion under special appearance, and cited plaintiffs to show cause forthwith why the service of the summons, the judgment entered, and all other proceedings had, should not be vacated and set aside and the action be dismissed. In applying for this order to show cause, defendants endeavored to avoid making a general appearance. Their motion was: "Come now the above-named defendants, appearing specially for the purpose of this motion and none other, objecting to the jurisdiction of the court, and move the court for an order setting aside and vacating the service of summons herein, and vacating and setting aside the judgment heretofore entered herein against the defendants, and vacating and setting aside all proceedings heretofore had herein." On the return of the order to show cause the court, on February 10, 1909, denied the motion, thereby refusing to vacate the judgment or dismiss the action. Appellants appeal therefrom, assigning error sufficient to require a review of these entire proceedings.

A discussion of jurisdictional principles is now in order. Jurisdiction to issue the provisional remedy of attachment upon compliance with the statutory requisites was vested in the court by statute. A summons was issued, regular on its face, accom-

panied with a verified complaint and affidavit and undertaking for attachment, and upon their presentation the clerk issued from the court a warrant of attachment for service by levy thereunder, as provided by law, and the property of the defendant, the Peter Fox Sons Company, was levied upon under the supposition that such company was in fact, as designated, a corporation. Whether the defendant was a corporate entity, existing as such by law, or whether instead it was a contractual entity, a partnership made up of various natural persons, is, so far as the validity of the provisional remedy is concerned, of no consequence. The warrant and proceedings had thereon, being regular, were valid until set aside. The court had jurisdiction of the general subject-matter, and had acquired, under a valid levy, possession of property upon which it could proceed *in rem*, regardless of whether it ever procured personal service upon the defendant named in the process, it having power to proceed against such defendant by substitute service by the publication of summons. This power existed by virtue of the property so obtained under the levy. To that extent for sixty days after the issuance of the warrant of attachment, by force of statute (§ 6950, Rev. Codes 1905), a quasi or conditional jurisdiction remained in the court, for which purpose, under § 6850, Rev. Codes, 1905, from the time of "the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings." The proceedings had, then, even though designated as against a corporation which in fact was nonexistent, were valid, and clothed the court with jurisdiction to such an extent as might be necessary for it to control subsequent proceedings, including the property levied upon. And the writ, being valid, likewise protected the officer in his levy. While life was remaining in the proceedings had by provisional remedy, jurisdiction was thereby conferred upon the court to amend any process or pleadings by changing as it did the designation of the defendant from a corporation to a copartnership with individual members named. Such amendment could be made, subject, of course, to attack by motion for any irregularity existing. But until so attacked, the warrant and proceedings had thereon were valid, and thereby kept in the court the jurisdiction it possessed by virtue of the warrant of attachment issued and the levy had, pending the service of the summons. But such authority failed before entry of judgment and on the expiration of the sixty-day period prescribed by § 6940, Rev. Codes 1905, without service of sum-

mons or a first publication thereof, unless it be that the service attempted by the delivery of the summons and other papers to Anthony Fox was a valid service, conferring thereby jurisdiction upon the court of the person served, be it corporation or members of partnership.

What, then, was the effect of such service where the summons was directed against the Peter Fox Sons Company, a corporation, as defendant, when in fact the Peter Fox Sons Company existed, not as a corporation, but as a partnership, and the person upon whom such summons was served, instead of being the supposed managing agent of the corporation, was a member of such copartnership? Was such service a valid service, or was it void? If void, it was no service, and the court could thereon base no jurisdiction. But if the service was merely defective, and as such subject to some attack thereon, it was valid until attacked, and necessarily conferred jurisdiction upon the court of the person served. And who was served? Certainly not something having no existence. Nor was it a corporation that was sought to be reached and brought before the court, but instead it was "the Peter Fox Sons Company," who had dealt with and had become liable to these plaintiffs. And in this connection, under the affidavits filed against the granting of the order to show cause, it appears that this Peter Fox Sons Company had placed in circulation cards describing their business, carefully refraining from stating what they were, and, upon inquiry made to Anthony Fox by the attorney of record for plaintiffs, prior to suit, that he might know whether to sue it as a partnership or corporation, this party, bearing the appropriate cognomen of Fox, informed him that the Peter Fox Sons Company was a corporation. Taking the moving affidavits of this company as true, such statement must have been false, and whether it was made to enable defendant company to urge the contention now before us, or on the contrary made without reference to any action to be brought, it is unnecessary to ascertain. Granting the falsity of such statement and plaintiffs' reliance thereon, it is unnecessary to determine the real intent underlying the falsehood. This managing officer of the company, when served with summons, knew it was the Peter Fox Sons Company, a partnership, that was served, as he well did the impossibility of serving a nonexistent corporation, by mistake or misapprehension so designated. As is well said in *Ex parte Nicrosi*, 103 Ala. 104, 15 So. 507, an action wherein a person doing business under a company name was served with a summons designating the company

name as a corporation, the court holds the term "corporation" to be merely descriptive of a named defendant, and not a part of the name itself. The reasoning of the court is as conclusive as it is unanswerable on the question before us. We quote from the opinion: "It is clear that the Roswald Grocery Company, whatever it was, whether a partnership, a corporation, or an individual, assuming the name for the purposes of trade, was the party against whom or which suit was instituted, has all along been prosecuted, and will be continued if and after the amendments moved for are allowed. There is, in other words, no question here as to the identity of the defendant throughout all the proceedings which have been or may, in any proposed event, be had, being originally and at all times the same in the mind of the plaintiff. The entity which entered into the original contract, which has enjoyed the shelter of plaintiff's house, which has failed to pay the agreed price therefor, and which is sought, in this action, to be coerced into payment thereof, is one and the same, whether it be a contractual entity (a partnership), an artificial entity (a corporation), or a personal entity (an individual); and, whether one or another of these entities, its name is the same,—the Roswald Grocery Company,—and its liability is the same and enforceable by the same remedies. That entity, whatever its character or the source or manner of its being, was proceeded against originally in this case, and brought before the court by attachment of its property. Once there, it was found that a mistake had been made not as to the entity itself,—not as to the party sued,—but merely in respect of describing what kind of an entity the party defendant was. The motion to amend stated and confessed this mistake of description. The plaintiff averred and showed this mistake, and he asked to correct it. He, in effect, said to the court that, while he had sued the proper party, and had levied on the goods of the proper party, he had misdescribed that party, not, indeed, in respect even of the name of the defendant, but in respect solely of the status of that proper party as being an artificial, instead of a personal, entity; for surely the averment that the Roswald Grocery Company was a corporation is no part of the name of that company. It might as well be said that to aver that Jones & Smith is a partnership is to make the averment of partnership a part of the name 'Jones & Smith;' or that to sue 'John Smith, a man,' is to make the defendant's name not 'John Smith only, but 'John Smith a man.' And to omit such averments, no more

changes the name of the corporation than of the partnership or the individual. It is not a question of name; . . . but it is a matter of description, a change of which does not affect the identity of the party sought to be described, but only gives accuracy and certainty to it. The case of *Western R. Co. v. Sistrunk*, 85 Ala. 356, 5 So. 79, is, on principle, in point. The averment that a defendant is a corporation is there held to be descriptive of a named defendant, and not a part of the name itself; and that, where this description had been omitted, it might be added without offense to the limitations upon our very broad statutes of amendments. Its addition did not change the party sued. Being merely descriptive when it is at first stated by mistake, it is not conceivable how its elimination could make of that thing which it was incorrectly supposed to describe a different thing. To add it does not change the name, being no part of the name; and, it being already stated, to strike it out cannot. Being stricken out in this case, the suit is against the *Roswald Grocery Company*. The further amendment is that this company is *Esther Roswald*, and that she is engaged in business, rented this house, executed these notes, and owes this debt under the name, and style of 'the *Roswald Grocery Company*.' . . . The amendments should have been allowed. We feel that a different conclusion would be to emasculate our very liberal and to be liberally construed statute on the subject, which requires the allowance of amendments to cure 'any defect of form or substance.'"

And in this connection we have, in § 6883, Rev. Codes 1905, a similar statute, reading: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

The foregoing leaves but little to add. Defendant will contend that such an amendment is in reality bringing in new parties to the suit, and therefore, if permissible, service of summons upon such new parties is necessary, citing thereunder *White v. Johnson*, 27 Or. 282, 40 Pac. 511, 50 Am. St. Rep. 726, and note thereto, and similar holdings. If the amendment here permitted amounted to the bringing in of new parties, counsel's contention would be support-

ed by the weight of authority, but it does not substitute a new for the old party. It merely makes definite the character of the real party sued, the necessity for the knowledge concerning which, besides being proper for the sake of certainty, is that the court may order the appropriate judgment in form and comply with the statute in such respect. See *Western R. Co. v. Sistrunk*, 85 Ala. 352, 5 So. 79, above referred to, holding: "An amendment to a complaint and summons, showing that the defendant is a body corporate and is sued in its corporate capacity, does not operate to substitute a new party defendant." Consult also *Nisbet v. Clio Min. Co.* 2 Cal. App. 436, 83 Pac. 1077, wherein defendant was sued as the *Clio Mining & Milling Company*, a corporation. Two corporations existed; one the *Clio Mining Company*, and the other the *Clio Mining & Milling Company* as named, which latter company attempted to defend because of misnomer for the mining company intended to be sued and upon whom service of summons was made. An amendment was permitted, and the action continued as against the real company concerned, although erroneously named as the other corporation. Thereon the court says: "Under the circumstances disclosed by this record, it would be sticking in the bark, and sacrificing substance for shadow, to lay down the technical rule that the plaintiff was stripped of the privilege or right to amend his pleading by the voluntary appearance of the *Clio Mining & Milling Company* in an action plainly brought against another corporation of a similar name, but different residence. . . .

In the case at bar the body of the complaint clearly indicated that the intention was to sue the *Clio Mining Company* and recover upon its debt, and parties appearing in that action could not close their eyes to substantial facts and rely upon mere technical omissions in the caption or title of the cause,"—citing *Anglo-American Packing & Provision Co. v. Turner Casing Co.* 34 Kan. 340, 8 Pac. 403. In *Stowers Furniture Co. v. Brake*, 158 Ala. 639, 48 So. 89, it is held that "where the complaint did not show whether the defendant company was a partnership or a corporation, it was properly amended to show that it was a corporation,"—in line with *Gans v. Beasley*, 4 N. D. 140, 59 N. W. 714, where, as in this case, service was attacked under a special appearance. But the opposite contention was urged in *Gans v. Beasley*, that the summons was addressed to no person, and that no person was required to answer, and that the court obtained jurisdiction of no person by the service. Amendment *nunc pro tunc* was

had as in this case. The court says: "An attempt was made to describe the defendants in the original summons, but such description was imperfect inasmuch as it gave only their firm name, and did not give the full Christian and surnames of the individual members of the firm, as good practice requires." The amendment was held proper, that the right to amend "as to names of parties exists where the amendment does not operate to the prejudice of the parties, and does operate in furtherance of justice. But the right to amend must be qualified so as to forbid an amendment which effects an actual change of parties." This decision in 1894 placed our state in line with the more recent authorities, that the service of a summons containing a misnomer, but where served upon the party to the suit, confers jurisdiction; and, having the right, the court may, in its discretion, permit an amendment in the designation of the party litigant. *Newton v. Melville Mfg. Co.* 17 Abb. Pr. 318, note, and *Skoog v. New York Novelty Co.* 4 N. Y. Civ. Proc. Rep. 144, hold that where persons doing business under the name of the New York Novelty Company, were served with summons in that name, a motion to amend the summons by inserting the names of such persons as defendants should be granted, if there was no corporation by that name, though the complaint alleged that it was such corporation.

See also *Hathaway v. Sabin*, 61 Vt. 608, 18 Atl. 188; *Messler v. Schwarzkopf*, 35 Misc. 72, 71 N. Y. Supp. 241; *York v. Nash*, 42 Or. 321, 71 Pac. 59; and *Baldock v. Atwood*, 21 Or. 73, 26 Pac. 1058. See also 30 Cyc. 144: "Under the Codes and practice acts of the several states, much latitude is now permitted with regard to amendments affecting parties, and it is usual that the court be permitted, on motion of either party at any time, in furtherance of justice and on such terms as may be proper, to permit an amendment adding or striking out the name of a party, or correcting a mistake in the name of a party, or changing the character in which he is sued." And 31 Cyc. 487, that "as a general rule, under the statutes, a misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect an entire change of parties. But where the right corporation has been sued by the wrong name, and service has been made upon the right party, although by a wrong name, an amendment substituting the true name of the corporation may be permitted." And the same authority, on page 489, that "an amendment charging defendant as a partnership instead of as a corporation may be allowed, and the con-

verse, has been held. Likewise it has been held that, where an action is brought by plaintiffs as copartners instead of as a corporation, through a mistake of facts concerning their incorporation, they may be permitted to amend by making the corporation plaintiff,"—citing *Farmers' & M. Bank v. Bank of Glen Elder*, 46 Kan. 376, 28 Pac. 680; *Anglo-American Packing & Provision Co. v. Turner Casing Co.* 34 Kan. 340, 8 Pac. 403; *Teets v. Snider Heading Mfg. Co.* 120 Ky. 653, 87 S. W. 803; *Haggarty v. Strong*, 10 S. D. 585, 74 N. W. 1037. See also 38 Century Dig. cols. 1177 et seq., and 40 Century Dig. cols. 2789 et seq.; 15 Dec. Dig. secs. 94, 95, et seq. See 19 Enc. Pl. & Pr. 573, where it is stated that "it is the general rule that, where parties have been once brought under the jurisdiction of the court, such jurisdiction can be lost only by actual dismissal of the action, and amendments of the pleadings will not require a new service of process."

In many of the foregoing cited cases, the defendant, misnamed, has appeared generally and sought an advantage because of such misnomer, by answer, plea in abatement, or motion invoking the jurisdiction generally of the court; and, to such extent, the additional reason why jurisdiction should be sustained, that the defendant submitted to the jurisdiction of the court, existed over that here found. But authorities hold that under a statute similar to § 6883, Rev. Codes 1905, once jurisdiction attaches, the authority of the court is ample to correct a mistake in name or designation of the party sued. The authorities are practically unanimous in holding with the Alabama case quoted, that the designation of the defendant as a corporation or partnership does not thereby conclude the court from permitting an amendment to the process or pleading that the same shall describe the legal entity of the real party, whether person, partnership, or corporation. Where the correct person, either natural or artificial, is served in an action brought against it on a cause of action existing, when it is erroneously named, jurisdiction is conferred upon service made upon it, and, having jurisdiction, power exists to amend in furtherance of justice to conform to the fact.

Defendants contend that the service made upon Anthony Fox was under a supposition that a corporation was being served, and that he served as an officer of a corporation, and knowing that such substitute service was made for such purpose, and that no corporation existed, and that no valid proceeding could be had against it, he had the right to ignore, as he did, such service: and that plaintiff could not there-

under, to his prejudice, change by amendment the action to constitute one against a partnership of which he was a member, and thereby bind him or any members of the partnership individually by such service. This reasoning overlooks the fact that the Peter Fox Sons Company is the defendant, by whatever name it may exist, and Anthony Fox, personally, and through him his copartners, were charged with notice of the pendency of this suit and the knowledge of the law; and that thereunder an amendment was permissible that the suit might continue against the members of the partnership jointly, obedient to § 6847, Rev. Codes 1905, that, "when the action is against two or more defendants, and the summons is served on one or more, but not on all, of them, the plaintiff may proceed as follows: (1) If the action is against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise directs; and if he recovers judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served; and if they are subject to arrest, against the persons of the defendants served; or (2) if the action is against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants." Under this statute the court, having had power to amend after personal service upon one member of the partnership, had jurisdiction to order a joint or joint and several judgment against such person; and where the property in *custodia legis* was the joint property of the several partners, one of whom was served, the court properly ordered a joint judgment in so far as it was necessary to enforce the same against the joint property.

In reaching our conclusions we have not overlooked the following cases, in part holding the contrary, and to that extent against what we believe to be the weight of authority. *Leatherman v. Times Co.* 88 Ky. 291, 3 L.R.A. 324, 21 Am. St. Rep. 342, 11 S. W. 12; *Basett v. Fish*, 75 N. Y. 303; *New York State Monitor Milk Pan Assn. v. Remington Agri. Works*, 89 N. Y. 22; which last case, in an unsatisfactory *per curiam* opinion, without citation of authority, reverses the same case in 25 Hun, 475. The Kentucky case tries to discriminate its holding from *Heckman v. Louisville & N. R. Co.* 9 Ky. L. Rep. 297, 4 S. W. 342, supporting our conclusions herein.

Nor do the following, cited in appellants' brief, apply or announce any rule inconsistent with our holding: *Powers v. Braly*, 40 L.R.A. (N.S.)

75 Cal. 237, 17 Pac. 197; *Plemmons v. Southern Improv. Co.* 108 N. C. 614, 13 S. E. 188, and *Thompson v. Allen*, 86 Mo. 85, to the effect that, on the bringing in of a new defendant, service must be had upon him before further proceedings be taken. As heretofore stated, the amendment permitted brought in no new party, but merely permitted a change in description of the entity of the Peter Fox Sons Company, the defendant. While said partnership could not at common law be proceeded against as a legal entity without the partners being named, yet it was sued under its firm name with service upon one partner, and jurisdiction was thereby conferred upon the court of the Peter Fox Sons Company, in whatever capacity it might exist; and, having such jurisdiction of it, the amendment allowed, designating its individual members, was not in fact bringing in new defendants. Had it been sued as a partnership, with partners named, and service been made upon Anthony Fox, one of them, no question could be raised but that the court could render the judgment entered. With the same facts existing, but without designation of corporate entity or naming of partners, under *Gans v. Beasley*, 4 N. D. 140, 59 N. W. 714, the same thing here done, and the same judgment here entered, would necessarily have to be sustained. The erroneous designation of the defendant company as a corporation certainly could not defeat jurisdiction when under such holding a failure to characterize the entity sued does not.

The appellants, throughout this proceeding, have acted on the theory that no general appearance has been made. Their every act has been performed under a special appearance, although they have thereunder procured by the issuance of an order to show cause by the court, and, upon the service thereof and appearance of opposing parties thereunder, have participated in the hearing called by the court. Whether so doing would be considered as an appearance generally, or an appearance under the special appearance made to invoke the court to issue the order, we do not determine, as it is not necessary to do so. We have assumed that no general appearance herein has been made in law. The order to show cause is general in its terms, and the party is cited to respond to proceedings other than those sought under the special appearance. Whether the participation in the determination of these matters, on the return of the order, is a waiver of the special appearance made, we do not decide. The weight of authority is that the invoking of the power of the court to determine more than the question of the jurisdiction of the

person is a submission of the person to the jurisdiction; or, in other words, one cannot, by motion under special appearance, challenge, in effect, as by demurrer, the right of the court to entertain the subject-matter or act thereon, without submitting jurisdiction of the person as fully as though the same matter had been challenged by demurrer, even though the whole proceeding be attempted under a special appearance.

Following appellant's theory of the case and consonant with his assignments of error, we do not pass upon whether the court abused its discretion in entering this judgment with the motion pending before it; nor do we treat the application other than as one solely of jurisdiction in the lower court to enter the judgment. As defendant there challenged only the jurisdiction, and that was there, as here, determined adversely to him, it was in no sense there, and is not here, to be treated as an application to vacate the judgment on other than strictly jurisdictional grounds.

Therefore our conclusion is that the service of this summons was not a void act, but instead clothed the court with jurisdiction over the Peter Fox Sons Company, whatever its legal status was; and possessing jurisdiction by attachment of the property, and with the personal service on Anthony Fox, having jurisdiction of the person and subject-matter, the court could permit the amendment as made, the defendant being wholly in default; that the effect of such amendment was not to substitute or bring in new parties defendant, but merely to establish the identity of the true party sued and served; and hence service of the amended or a new summons and amended pleadings was unnecessary, the court retaining jurisdiction by the service had, and with authority, under § 6847, Rev. Codes 1905, thereunder to enter judgment, as it did, and which judgment was and is valid; and vacation of the judgment being sought on jurisdictional grounds only, the findings of its validity is the equivalent to a denial of the application to vacate it.

Accordingly, the judgment appealed from is affirmed, with costs.

Spalding, Ch. J., dissents.

OKLAHOMA SUPREME COURT.

CITY COUNCIL OF THE CITY OF MC-
ALESTER et al., Plffs. in Err.

v.

TAL MILLWEE et al.

(31 Okla. 620, 122 Pac. 173.)

Voter—restraining election.

1. A court of equity has no jurisdiction

Headnotes by KANE, J.
40 L.R.A. (N.S.)

to restrain the holding of an election, since the right involved is a political one.

Party—restraining election—interest of taxpayers.

2. A taxpayer has not such an interest in a suit to enjoin the holding of an election to recall the mayor of a city of the first class in pursuance to the provisions of its charter, as will entitle him to prosecute such suit as a complainant.

(March 12, 1912.)

Note.—Interference by equity with matters preceding election.

This note supplements the earlier note appended to *Shoemaker v. Des Moines*, 3 L.R.A. (N.S.) 382.

As to the right of a taxpayer in the absence of statute to enjoin the payment of election expenses by a municipality, see subdivision VII. of the note in 36 L.R.A. (N.S.) 1.

As to mandamus to compel election officers to act after they have met and adjourned, see the note in 36 L.R.A. (N.S.) 1089.

Political matters—generally.

The later cases, like those in the earlier note, take the position that equity will not interfere in matters preceding elections where the controversy is merely a political one, there being no property rights involved. One case, however, makes a distinction between enjoining the election itself, and merely interfering with its preliminary steps.

The Kansas supreme court points out that many of the decisions holding that courts of equity will not enjoin an election are from courts where the distinction between courts of law and equity are still preserved, and that they proceed upon the theory that equity has no jurisdiction of matters which do not affect rights of property, and therefore will take no cognizance of injuries affecting mere political rights. *Duggan v. Emporia*, 84 Kan. 429, 114 Pac. 235, Ann. Cas. 1912 A. 719. The court, however, says *arguendo* that since the distinction between courts of law and equity no longer exist in Kansas, and since the courts would not hesitate to compel by mandamus a county clerk to place the name of a candidate upon a ballot, no good reason appears why the same court should not, at the suit of proper parties and upon sufficient grounds, enjoin the clerk from placing the name of the candidate thereon. However, with respect to enjoining the election itself, the court said that it could conceive of no condition where a court of equity would be justified in enjoining the calling and holding of an election, and that certainly it should never do so because of mere irregularities. The specific holding in the case was that a city should not, at the suit of a taxpayer, be enjoined from submitting to its electors, under an initiative and referendum statute, a proposed ordi-

ERROR to the District Court for Pittsburg County to review a judgment in plaintiffs' favor in an action brought to enjoin the holding of an election for the recall of the mayor. Reversed.

The facts are stated in the opinion.

Messrs. T. D. Davis, Harley & Miller, and James H. Gordon for plaintiffs in error.

Messrs. Andrews & Day, for defendants in error:

Before any elective officer in this state can be removed from office, it must be done under some provision of law specifying, first, the manner of his removal and, second, the causes of his removal.

State ex rel. Lee v. Chaney, 23 Okla. 788, 102 Pac. 133; Christy v. Kingfisher,

13 Okla. 586, 76 Pac. 135; Ex parte Farnsworth, — Tex. Crim. Rep. —, 33 L.R.A. (N.S.) 968, 135 S. W. 535; State ex rel. Henson v. Sheppard, 192 Mo. 497, 91 S. W. 477; 29 Cyc. 1409; Benson v. People, 10 Colo. App. 175, 50 Pac. 212; State ex rel. Denison v. St. Louis, 90 Mo. 19, 1 S. W. 757; Denver v. Darrow, 13 Colo. 460, 16 Am. St. Rep. 215, 22 Pac. 784; People ex rel. Murphy v. McAllister, 10 Utah, 357, 37 Pac. 578; Shurtleff v. United States, 189 U. S. 311, 47 L. ed. 828, 23 Sup. Ct. Rep. 535; Straw v. Harris, 54 Or. 424, 103 Pac. 777.

Kane, J., delivered the opinion of the court:

This was a suit in equity commenced by

nance authorizing the city to lease or sell its electric light plant, either because such leasing or selling was *ultra vires*, or because the ordinance was void for noncompliance with prescribed formalities, or because it was contended that the proposed consideration for the lease or sale was inadequate. The reasons were, among others, that it did not appear that the taxpayer would suffer injuries as a consequence of holding the election; that to grant the relief would be to enjoin legislation which the court had no power to do; and that the court would not anticipate that the city would attempt to lease or sell the plant.

—enjoining election.

Equity will not enjoin the holding of an election in response to the petition of an elector who is a mere volunteer, upon the ground that the act under which the election is proposed to be held is unconstitutional, at least where he fails to show that the election, if held, will result in damage to himself. Jones v. Black, 48 Ala. 540. The controlling reason of the court is that while courts have the undoubted power to declare a statute unconstitutional, it is a delicate power which should be exercised only when the exigencies of a particular case require it, and that equity will not take jurisdiction for the sole purpose of determining the constitutional question, and especially at the suit of one whose rights it does not especially affect.

Coincidentally with a statement in Dugan v. Emporia, supra, the Louisiana court holds that the possibility of an affirmative vote in an election to decide upon whether a certain tax shall be levied, is too remote and contingent to form the basis of a taxpayer's suit to enjoin the holding of the election upon the alleged ground that the act authorizing it is unconstitutional. Roudanez v. New Orleans, 29 La. Ann. 271. This decision was approved in a subsequent case holding that in view of the possibility of a negative vote in an election on the question of the creation of a new parish, equity will not enjoin the election upon the ground

that the statute authorizing it is unconstitutional because the constitutional limit of representation has already been reached, and because the statute provides that the result should be determined by a majority of the votes cast, whereas the state Constitution requires a two-thirds vote. Dubuisson v. Election Supers. 123 La. 443, 49 So. 15, following Roudanez v. New Orleans.

In Mann v. County Ct. 58 W. Va. 651, 52 S. E. 776, an injunction at the suit of a citizen against an election was denied, where the petitioner showed no special interest in respect of which he would suffer a special injury, it being held insufficient that the community in which he resided might be injuriously affected thereby. In reaching this conclusion, the court said not only that the power to call a special election was legislative or governmental in its nature, so as to preclude equity from interfering unless there was special injury, but also that it was of a political nature, which was entirely foreign to the ordinary jurisdiction of equity.

Inclining to the view that elections are not to be subjected to judicial interference, the court in Gibbs v. McIntosh, 78 Miss. 648, 29 So. 465, held it error for the chancellor to interfere, by a writ of supersedeas, with a local option election upon the ground that there was illegality in the preliminary proceeding, and that the election if held would be invalid. While approving the statement in this case that it is not the policy of the state to have elections and other political matters of government reserved to legislative discretion, interfered with by the judicial department, the Mississippi court intimates that the rule is not absolute, by declaring in Conner v. Gray, 88 Miss. 489, 41 So. 186, 9 Ann. Cas. 120, that the judiciary will interfere only where the legislature has not the power to authorize the holding of an election under the Constitution, or where, having the power, it has exercised it in a way which is in plain violation of the state Constitution; but that in both instances it must appear from the act itself that it is unconstitutional. Applying this rule, the court holds that an

the defendants in error, plaintiffs below, against the plaintiffs in error, defendants below, for the purpose of enjoining the proper officer or officers of the city of McAlester from calling an election for the purpose of submitting to the electors of said city the question whether the mayor of said city should be recalled. Plaintiffs alleged that they are voters and taxpayers of said city, and that they and each of them are owners of property in said city, and the same has been assessed for taxation for the year 1911; that they are liable for their proportionate share of all public expenses incurred by said city; that the sections of the charter of said city which provide for the recall of city officers are unconstitutional and void, for several reasons,

which are fully set out, and for said reasons said defendants are without authority to call said election; that, if same is called, it will be illegal, void, and without any effect whatever; that to hold same would occasion a great expense and outlay of public money of the city of McAlester, their due proportion of which plaintiffs would be compelled to pay. All of which would occasion plaintiffs an irreparable injury, for which they are without an adequate remedy at law. Wherefore they pray that the election shall be enjoined. Upon final hearing, the peremptory writ of injunction was issued by the court below upon the ground that the contention of the plaintiffs as to the unconstitutionality of said charter

election proposed to be held in a new county formed by the legislature will not be enjoined at the suit of a taxpayer upon the ground that the holding of the election will create additional expense on taxpayers; nor at the suit of an officeholder in one of the old counties, upon the ground that his term of office will be shortened by reason of his residence in the territory which formed the new county.

An election (on the matter of building a new schoolhouse) will not be enjoined at the suit of residents, voters and taxpayers, because such election may be void, the remedy in the case of a void election being an injunction to restrain the carrying out of any propositions voted for. *Thompson v. Mahoney*, 136 Ill. App. 403. In this case the court said: "The attempt to check the free expression of opinion, to forbid the peaceable assemblage of the people, to obstruct the freedom of elections, if successful, would result in the overthrow of all liberty regulated by law. The mere effort to assume such power is dangerous to the rights of the citizen. . . . The principle which would authorize the mighty mandate of a court of chancery in this case would justify it in every election to be held by the people, and thus the whole administration of the government might be obstructed and all power and authority placed at the footstool of the judge." See, however, *De Kalb County v. Atlanta*, 132 Ga. 727, 65 S. E. 72, *infra*.

So, an injunction will not issue against an election to determine whether a part of a county shall be incorporated as a town, after all of the statutory prerequisites have been complied with,—either upon the assumption that the incorporation will result in unbearable financial burdens, since equity will not interpose to prevent an individual from doing a foolish act at his own expense, or upon the contention that there will be illegal voting, for equity does not interfere to prevent the perpetration of a crime, the remedy being by punishment after it has been committed. *Guebelle v. Epley*, 1 Colo. App. 199, 28 Pac. 89.

It was declared in *Re Receiver of Taxes* 40 L.R.A. (N.S.)

Election, 4 Pa. Dist. R. 71, that equity should not intervene under extraordinary power to prevent an election, unless the public interests involved were of the most serious character and when its failure to act promptly would be attended with the greatest injury to the public, and that therefore an injunction against an election to fill a vacancy would not be granted upon an *ex parte* application, upon the ground merely that the proposed election was premature.

It is held in *Meacham v. Young*, 115 Ky. 246, 72 S. W. 1094, that the calling of a primary is a party matter to be determined by the party authorities, and that the court has no more power to interfere with their action than it would have to enjoin a regular election.

Citing *McALESTER v. MILLWEE*, the Oklahoma court subsequently held that equity has no jurisdiction to restrain the holding of an election, since the right involved is a political one. *Copeland v. Olamith*, — Okla. —, 124 Pac. 33.

[Attention is also directed to *Cozart v. Fleming*, 123 N. C. 547, 31 S. E. 822, holding that, incidentally to a proceeding in the nature of quo warranto between candidates who received a tie vote for an office, an injunction against declaring the office vacant and holding a new election will be granted pending a trial of the issue.]

Where, however, a proposed election is wholly unauthorized, and it appears that if held it may result in a multiplicity of suits, or unlawfully subject the taxpayers to expense without their consent, equity will interfere.

But, thus it is held in Georgia that a county (and one of its taxpayers) a part of whose territory has been added to a city, which was previously located entirely in an adjoining county, may have an injunction against an election to determine in which of the two counties the city shall have its situs, where such election is proposed to be held under an ordinance which is invalid because enacted under the erroneous supposition that it was authorized by statute. *DeKalb County v. Atlanta*, *supra*. The

was well taken, to reverse which this proceeding in error was commenced.

Counsel for the respective parties seem to have refrained from presenting to this court the question whether the parties plaintiff below as taxpayers had such an interest in the subject-matter of the suit as to entitle them to prosecute the same, and whether a suit in equity will lie to enjoin the calling of an election. They say that, whilst the first of these contentions may be made upon authority, they are so anxious to have this court pass upon the case upon its merits that they do not wish to urge that question in this court. The court does not take that view of the matter; we think it is time enough to pass upon such important questions when they are reached

in due course, with proper parties, in a proper proceeding. Many applications have been made to this court to interfere with the holding of elections of one kind or another by the exercise of some of the high prerogative writs over which original jurisdiction has been vested in this court by the Constitution; so far as we are aware, relief of that kind has been consistently refused, and whilst the applications have never reached the stage where it became necessary to hand down a written opinion. As the question is jurisdictional, we cannot overlook the uniform practice merely because counsel do not wish to make that point. Courts of equity are only conversant with matters of property and the maintenance of civil rights, and will not

court recognized that, generally speaking, the holding of an election is a political matter, and will not be enjoined, but said that an election of the character involved in this case presented quite a different question. "If the city of Atlanta," said the court, "and its officers, have no lawful authority to call or hold an election for the purpose of changing a county line; and if the result of the election, when held, cannot lawfully be enforced; and if the only method of preventing an attempted enforcement, save by resisting each act separately after the illegal change has been put into effect, is by injunction, it is difficult to see why the entire proceeding cannot be stopped *in limine*. Why should a municipality or its officers be permitted to go to the expense of holding an election for the purpose of annexing territory or changing a county line, and pay such expenses, or others consequent thereon, out of money raised by taxation, when the declaration or announcement of its result, or the surveying of the line, under the Constitution and laws of this state, cannot have the slightest effect, or be put into execution? If the whole action is *ultra vires*, and calculated to impose burdens upon the individual citizen and taxpayer, or to unlawfully interfere with the rights of another county, why should it be allowed to proceed, merely to be enjoined later when sought to be put into effect? Indeed, if the plaintiffs had remained quiescent and had permitted the election to be held, the notices given, and the line between the two counties to be changed, and dominion over territory taken from one county to be exercised by the other, and perhaps expense incurred, and had then for the first time asserted that the entire proceeding was unconstitutional, would they not have been met with the contention that they were estopped, or that equity would not grant them relief because of laches in applying for its aid?" Thus it is seen that the principles which governed the court were: (1) That equity will interfere to prevent multiplicity of suits, (2) to prevent unlawful interference with the rights of a county, and (3) to prevent the imposition, by *ultra*

vires acts, of burdens upon the individual citizen and taxpayer. See, however, *Thompson v. Mahoney*, *supra*.

And an election for the organization of a new county was enjoined at the suit of taxpayers in *Oden v. Barbee*, 103 Tex. 449, 129 S. W. 602, where it appeared that the petition for the election was fraudulent because the persons whose names appeared thereon were not qualified voters, being women, children, and nonresidents. The court said that the objection that this was purely a political question, and not cognizable by the court, could not prevail in a case where it is proposed to organize a new county without the consent of the inhabitants, and thus subject them to the expense of erecting county buildings and of organization.

—interfering with preliminaries.

No other decision has been found to make the distinction discussed in *Duggan v. Emporia*, *supra*, and the courts seem as reluctant to interfere with preliminary matters as to enjoin the election itself.

There is no right on the part of voters and taxpayers to injunctive relief against the use of voting machines at elections, and therefore the court has no jurisdiction of suits seeking such relief. *United States Standard Voting Mach. Co. v. Hobson*, 132 Iowa, 38, 7 L.R.A.(N.S.) 512, 119 Am. St. Rep. 539, 109 N. W. 458, 10 Ann. Cas. 972.

And the courts are without power to direct what instructions shall be given to voters as to marking ballots, and to issue a restraining order prohibiting the commissioners from giving instructions inconsistent with those directed. *Com. ex rel. Howley v. Mercer*, 190 Pa. 134, 42 Atl. 525.

So, an injunction against adding names to a political committee or striking names therefrom will not be granted when the committee does not own or pretend to own or derive any benefit from anything of value held by them in common, although the committee is elected at primary elections and the law recognizes political parties so far as to prescribe the duties of officers at such

interfere to enforce or protect purely political rights. This doctrine has been universally applied in other jurisdictions where equity has been invoked to interfere in matters preceding an election. In *Fletcher v. Tuttle*, 151 Ill. 41, 25 L.R.A. 143, 42 Am. St. Rep. 220, 37 N. E. 683, the supreme court of that state, after a review of the authorities, reaffirmed the doctrine previously adopted that chancery has no jurisdiction to protect purely political rights such as those in respect to public elections, and held specifically that an injunction could not be granted to prevent the giving of election notices or the certifying of nominees for districts created by an apportionment act claimed to be unconstitutional, because such rights were purely political and enforceable only at law.

It had been previously held in that state that a court of equity has no jurisdiction to restrain the holding of an election, since the right involved is a political one. *People ex rel. Fitnan v. Galesburg*, 48 Ill. 485; *Walton v. Develing*, 61 Ill. 201; *Darst v. People*, 62 Ill. 306; *Harris v. Schryock*, 82 Ill. 119. This question is fully annotated in a note to *Shoemaker v. Des Moines*, 3 L.R.A.(N.S.) 382. These cases seem to sustain the conclusion here reached.

Moreover, in *Hilzinger v. Gillman*, 56 Wash. 228, 105 Pac. 471, 21 Ann. Cas. 305, it was held that, in an action by a council-

man to enjoin the city clerk from certifying to an elector's petition for his recall, a taxpayer has no interest entitling him to intervene under *Ballinger*, Anno. Codes & Statutes, § 4846, it not being alleged that the clerk would not defend the action. The section of the statute above referred to provides: "Any person may before the trial intervene in an action or proceeding, who has an interest in the matter in litigation in the success of either party, or an interest against both." Our statute provides that all actions must be prosecuted in the name of the real party in interest. In view of the similar qualifications required of a suitor by the two statutes, there can be no doubt that the *Washington* case, although the taxpayer sought to come in as an intervener, is an authority sustaining the conclusion that a taxpayer has not such an interest in a suit to enjoin the holding of an election to recall the mayor of a city of the first class in pursuance to the provisions of its charter as will entitle him to prosecute such suit as a complainant. *Thompson v. Haskell*, 24 Okla. 70, 102 Pac. 700.

For the reasons herein stated, the judgment of the court below is reversed, and the cause remanded with directions to dismiss the same.

All the Justices concur.

primaries. *Kearns v. Howley*, 188 Pa. 116, 42 L.R.A. 235, 68 Am. St. Rep. 852, 41 Atl. 273.

So, in *Sherlock v. District Ct.* 39 Colo. 41, 88 Pac. 396, it was held improper for the district court to enjoin, upon the ground that there was no vacancy to be filled, a county clerk from printing upon the official ballot nominees of the various parties for an office, no protests having been filed within the time allowed therefor by statute. The court declared that the candidates were duly nominated, and that it was the duty of the county clerk to have their names printed upon the ballot, and that "under the facts disclosed by this record it was not proper, or in accordance with the practice hitherto prevailing in this jurisdiction, to have litigated before the election, as was attempted below, or in an injunction action, the important question therein presented." The court cited as supporting this conclusion *Mills v. Newell*, 30 Colo. 377, 70 Pac. 405; *Mannix v. Selbach*, 31 Colo. 502, 74 Pac. 460; and *Beach v. Berdel*, 31 Colo. 505, 74 Pac. 1129, which, however, do not pass upon the specific point.

In *State ex rel. Rinder v. Goff*, 129 Wis. 668, 9 L.R.A.(N.S.) 916, 109 N. W. 628, involving an application for leave to commence an action to enjoin the printing of a certain name on an official ballot, or for a writ of mandamus to compel the printing 40 L.R.A.(N.S.)

of the relator's name thereon, it was held that the supreme court would not exercise its original jurisdiction merely to determine which of two candidates for a county office received the greater number of votes at a nominating election.

State ex rel. Sligh v. Reek, 18 Mont. 561, 46 Pac. 442, holds merely that where, because of laches in filing the application, the court has but a few hours to consider the question, it will not, by enjoining the placing of names upon an official ballot, undertake to determine which of two rival conventions of a political party nominating candidates for the same offices, is the regular convention.

Effect of other remedy.

A few cases afford an additional ground for denying equitable relief, in the fact that there is another adequate remedy.

Thus, it is declared in *Parlor v. Fogle*, 78 S. C. 570, 59 S. E. 707, that the right to vote at an election is a mere political right, and, as a general rule, is not within equitable cognizance; and that the right of equitable interference, if it exists, should be exercised with the greatest caution and only where there is no other adequate legal remedy and it appears that an irreparable wrong will result from holding the election. It was held in this case that no in-

junction would be granted against the holding of an election upon the formation of a new county, either upon the ground that some of the petitioning electors would be unconstitutionally deprived of their votes, or because the election officers had not registered the voters. The argument of the court was with respect to the first ground, that, assuming a threatened denial of the right of certain electors to cast their ballot, still the election might result in favor of the side in which such complaining electors would have voted, or the result might be so overwhelmingly against that side that the votes of all whose rights were threatened would have no practical effect, and that if it should turn out that a denial of their rights had affected the result, there would be an adequate remedy by certiorari to test the validity of the election. With respect to the second ground, the court said in effect there was no reason for asking equity to enjoin an election which could not be held if there were no registered voters.

So, an election for the removal of a county seat will not be enjoined where the statute providing a mode for contesting elections furnishes a full remedy should the election be held. *Weber v. Timlin*, 37 Minn. 274, 34 N. W. 29.

So, it was held that an injunction restraining election officers from registering voters and holding an election was not warranted merely because an amended city charter apportioned the municipal districts unequally with respect to population, although they were accorded the same representation; nor because such charter prescribed other qualifications for voters than were prescribed in the Constitution of the state, and was thus particularly oppressive to colored people. *Holmes v. Oldham*, 1 Hughes, 76, Fed. Cas. No. 6,643. The court said that whatever might be the propriety or impropriety of the legislation, the remedy sought was not a proper one, since there was no special wrong or irreparable damage done or threatened. It was declared that in case of confusion with respect to who were to be deemed elected, the remedy would be by quo warranto brought by those out of possession of the office against those in possession. In short, it was said that if the election should prove to be illegal and unconstitutional, the remedy by quo warranto would be complete, and that if it was legal, and any of the complainants or other citizens were deprived of their rights under the Federal Constitution, there was ample remedy in the courts of law, by indictment and otherwise.

In *Little v. Barksdale*, 81 S. C. 392, 63 S. E. 308, an injunction against holding a special election, sought upon the ground that the supervisor was in error in holding that the petition for the election was signed by one fourth of the qualified electors, was 40 L.R.A. (N.S.)

denied upon the ground that the petitioners had a plain and adequate remedy at law, and that no property rights justifying equitable interference were involved.

Effect of property rights.

It was declared in *Murfreesboro R. Co. v. Hertford County*, 108 N. C. 56, 12 S. E. 952, that conceding that equity has no power to restrain the municipal authorities from ordering an election in pursuance of any provision of law, for the purpose of selecting officers or determining any question that may be settled by the result of such election, a different rule prevails where, though the election may be lawfully held, it is apparent that no possible benefit will accrue from holding it, to the person at whose instance it is ordered, and where irreparable injury may be done to others who cannot be compensated in damages. Applying this rule, the court upheld a preliminary injunction granted at the suit of a railroad about to be constructed and the contractor for its construction, against the holding of an election to determine whether a specific application of county bonds, whose issuance had already been authorized, should be made in the construction of the road, where the election would be of no benefit to the people of the township, and would occasion a temporary depreciation of the bonds, and thus embarrass and delay the construction of the road.

And a state political committee will be enjoined from interfering with the holding of a primary election by the local committee, where such attempted interference took place on the eve of such primary and after the candidates had obtained vested rights by paying their fees and incurring other expenses. *Neal v. Young*, 25 Ky. L. Rep. 183, 75 S. W. 1082. The court said that if this were a controversy between the old local committee which the state committee sought to dismiss, and a new committee appointed by the latter, and no question was involved except as to which committee should be considered the regular one, then it would be a purely political question, to settle which the courts would not take jurisdiction; but that since the candidates must be deemed to have acquired vested rights, there was something more than a mere political question, and equity would take jurisdiction.

The owner of property within an area proposed to be annexed to a municipality may enjoin the execution of an ordinance directing an election to vote upon the annexation, where such ordinance is *ultra vires* because of noncompliance with statutory prerequisites. *Layton v. Monroe*, 50 La. Ann. 121, 23 So. 99, distinguishing *Roudanez v. New Orleans*, 29 La. Ann. 271, supra.

See also *Oden v. Barbee*, 103 Tex. 449, 129 S. W. 602, supra. L. A. W.

RHODE ISLAND SUPREME COURT.

GEORGE H. MARSH

v.

GEORGE E. BOYDEN.

(33 R. I. 519, '82 Atl. 393.)

Highway — rule of road — passenger leaving street car — applicability.

1. A passenger injured by an automobile when alighting from a street car cannot rely on the violation by the driver of the automobile, of his statutory duty to pass to the left of the car, to establish negligence on his part.

Same — degree of care necessary.

2. That the driver of an automobile passes an overtaken vehicle on the wrong side does not impose upon him a greater degree of care to avoid injury to pedestrians than would rest upon him had he been on the proper side.

Trial — verdict — special finding — inconsistency.

3. A finding that an automobile which injured a passenger as he stepped from a street car was between the car and the point to which the passenger claims to have looked back before leaving the car is not inconsistent with a general verdict against the driver of the automobile, as indicating negligence on the part of the passenger, if there is nothing to show on which side of the street it was, or that a view of it was not shut off by the car.

Highway — leaving car — approaching automobile — negligence.

4. A passenger is not negligent in alighting from a street car, knowing that an automobile is following the car, if it is not so close that it could not have been stopped by the exercise of ordinary care and prudence on the part of the driver before it reached him.

(March 15, 1912.)

EXCEPTIONS by defendant to rulings of the Superior Court for Providence and Bristol Counties, made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict for plaintiff. Sustained.

The facts are stated in the opinion.

Messrs. Vincent, Boss, & Barnefield, for defendant:

The statutory law of the road, as to the side of the road on which vehicles shall pass, does not apply when one of the vehicles is an electric car on fixed tracks.

Note. — For reciprocal duty of operator of automobile and pedestrian to use care, see note to *Baker v. Close*, 38 L.R.A. (N.S.) 487; and see especially pages 493 et seq., as to the duty near street cars. 40 L.R.A. (N.S.)

Nelson v. Narragansett Electric Lighting Co. 26 R. I. 258, 67 L.R.A. 116, 106 Am. St. Rep. 711, 58 Atl. 802; *Com. v. Temple*, 14 Gray, 69; *Hegan v. Eighth Ave. R. Co.* 15 N. Y. 380; *Spurrier v. Front Street Cable R. Co.* 3 Wash. 659, 29 Pac. 346; *Culbertson v. Metropolitan Street R. Co.* 140 Mo. 35, 36 S. W. 834; 2 *Thomp. Neg.* § 1467; *Hinchey v. Rhode Island Co.* 30 R. I. 520, 76 Atl. 350.

Plaintiff was guilty of such carelessness as to require the setting aside of a verdict in his favor.

O'Reilly v. Davis, 136 App. Div. 386, 120 N. Y. Supp. 883; *Lieberman v. Stanley*, 88 N. Y. Supp. 360; *Russo v. Charles S. Brown Co.* 198 Mass. 473, 84 N. E. 840; *Birch v. Athol & O. Street R. Co.* 198 Mass. 257, 84 N. E. 310.

Messrs. Frank Healy and George T. Marsh for plaintiff.

Dubois, Ch. J., delivered the opinion of the court:

This is an action of trespass on the case for personal injuries sustained by the plaintiff through an accident wherein he was thrown down and run over by the automobile of the defendant shortly after leaving an electric car whereon he had been a passenger. A trial of the case in the superior court resulted in a verdict for the plaintiff, whereupon the defendant made his motion for a new trial, which was denied by the justice of said court who presided at the trial. To the denial of his motion for a new trial the defendant duly excepted, and has prosecuted in this court his bill of exceptions, including said exception and others taken in the course of said trial, and now relies upon the four following:

"Seventh. To the ruling of the trial justice refusing to instruct the jury in accordance with the defendant's second request, which said request is to be found on page 478 of said transcript, which ruling was erroneous, in that the defendant was entitled to have the jury so instructed, to which ruling the defendant duly excepted, as appears on pages 476 and 478 of said transcript.

"Eighth. To the following portion of the court's charge to the jury: 'Now, gentlemen, we will take up the count which claims that this defendant should have driven his car on the opposite side of the electric car. Under the law of this state, "every person traveling with any carriage or other vehicle, who shall meet any other person so traveling on the highway or bridge, shall seasonably drive his carriage or vehicle to the right of the center of the traveled part of the road, so as to enable

such person to pass with his carriage or vehicle without interference. Every person traveling with a carriage or other vehicle, who shall overtake any other person so traveling on any highway or bridge, shall pass on the left side thereof, and the person overtaken shall, as soon as practicable, drive to the right, so as to allow free passage on the left." And under § 12 of the automobile laws there is this provision: "When two vehicles meet on a public highway, the operator of each vehicle shall seasonably keep to the right to pass without interference, and when a vehicle overtakes another, the one in the rear shall give timely warning as aforesaid, and shall pass on the left." That applies, in my opinion, to a vehicle or automobile approaching an electric car. If they desire to pass the electric car, it is my opinion, and I so charge you, that it is their duty to pass upon the left of that car, having due regard to the people who may be coming on the right-hand side in an opposite direction. If they fail to do that, it does not follow, as a matter of law, that they are guilty of negligence. If they fail to do that, and go on the right-hand side of the car, they are held to a greater degree of care than they would be if they had gone on the left-hand side of the car, as the law provides—which said charge was erroneous, in that there was no requirement of law which required the defendant's automobile, at this time and place, to pass to the left of the electric car from which the plaintiff alighted, to which said portion of said charge the defendant duly excepted, as appears on page 476 of said transcript.

"Ninth. To the following portion of the court's charge to the jury: 'If you should find that this was a closely built-up section, from the evidence, if by reason of the fact that the houses on one or both sides were devoted to business purposes, or there were dwelling houses averaging less than 100 feet apart, why, the rate of speed allowable or permissible there would not be greater than 15 miles per hour'—which said charge was erroneous, in that there was no testimony which showed that the statute therein referred to was applicable to this case, to which said portion of said charge the defendant duly excepted, as appears on pages 476 and 477 of said transcript.

"Tenth. To the denial by the trial judge of the defendant's motion for new trial, which denial was clearly and plainly erroneous, in that, under the special findings of the jury, taken in connection with the evidence, the plaintiff was not in the exercise of due care, and assumed the risk of injury, to which denial the defendant duly excepted."

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The seventh exception aforesaid was taken to the refusal of the court to instruct the jury as follows: "There is no requirement of law which required the defendant's automobile at this time and place, to pass to the left of the electric car from which the plaintiff alighted." In the third count of his declaration the plaintiff avers, *inter alia*, that on the 8th day of September, 1909, the defendant, by his agent and servant, operated a certain automobile in the city of Providence; that on said day the plaintiff was a passenger upon a street car proceeding along Union avenue, which car stopped for him to alight therefrom at a white post near Webster avenue; that he did alight from said car, and that, while he was crossing Union avenue toward its northerly sidewalk, the defendant's automobile, managed by his agent, overtook said car; and that it became and was the duty of the defendant, his agents and servants, to pass said street car on the left side thereof, as he safely could, so that the plaintiff would not be run into while he was in the exercise of due care, yet the defendant attempted to and passed said street car on the right-hand side thereof, instead of the left, and then and there ran into the plaintiff while crossing said street in the exercise of due care. This allegation is based upon the assumption that the law of the road and the statute relating to automobiles impose upon persons operating automobiles, when overtaking and desiring to pass electric cars, the duty of passing the overtaken car upon the left side thereof. This construction of the statutes was adopted by the justice of the superior court, who presided at the trial, and was included in that portion of his charge to the jury which forms the basis of the defendant's eighth exception, hereinbefore set forth. The law or rule of the road, above alluded to, is contained in Gen. Laws (R. I.) 1909, chap. 87, § 1, and reads as follows: "Section 1. Every person traveling with any carriage or other vehicle, who shall meet any other person so traveling on any highway or bridge, shall seasonably drive his carriage or vehicles to the right of the center of the traveled part of the road, so as to enable such person to pass with his carriage or vehicle without interference or interruption. Every person traveling with any carriage or other vehicle, who shall overtake any other person so traveling on any highway or bridge, shall pass on the left side thereof, and the person so overtaken shall, as soon as practicable, drive to the right, so as to allow free passage on the left." And the law prescribing the duty of operators of motor vehicles in the premises is contained in said Gen. Laws, chap.

86, and in that portion of § 12 thereof which reads as follows: "Whenever two vehicles meet on a public highway, the operator of each vehicle shall seasonably keep to the right, so as to pass without interference. Whenever one vehicle overtakes another, the one in the rear shall give timely signal as aforesaid," with his bell, horn, or other device for signaling, "and shall pass on the left, and the operator of the one in front shall seasonably bear to the right, so as to allow free passage on the left."

The seventh and eighth exceptions may well be considered together, for they relate to a refusal to charge the jury in a certain definite manner, and to a charge which not only did not include the instruction prayed for, but was diametrically opposed to it. In our opinion the prayer for instruction should have been granted, and the charge given is objectionable, because the rule of the road could not properly be invoked in the case at bar. If the rule of the road had any application at all, it must have been with reference to the street car or the people thereon; but the plaintiff at the time of the accident had ceased to be a passenger on the car, and there was no interference with the car, or collision in which it and the automobile of the defendant were involved. The plaintiff was not injured in consequence of the neglect of any duty which the defendant owed to the car or its occupants. Of course, the defendant was bound to take notice of the fact that a street car had stopped to allow passengers to alight, and to so conduct his vehicle as not to run down persons who had so alighted; but that is not a duty imposed by the statutes hereinbefore referred to as prescribing the rule of the road. If a duty was violated, it is the duty of using due care under all the circumstances of the case. The duty of using due care is not of statutory origin. The duty of using due care for one's self arises out of one of the first laws of nature, that of self-preservation. The duty of using due care not to injure another or his property arises out of the exigencies of society, and its observance is necessary for the preservation thereof. The maxim, *Sic utere tuo ut alienum non laedas*, expresses it, and to the enforcement of the maxim much of the police power of the state is exercised.

The charge of the court was that the statutes aforesaid, in his opinion, applied to a vehicle or automobile approaching an electric car, and that if they desired to pass the electric car (which they had overtaken), it was their duty to pass upon the left of that car, having due regard to the people who may be coming on that side in 40 L.R.A. (N.S.)

an opposite direction. He qualified the above to this extent: "If they fail to do that, it does not follow, as a matter of law, that they are guilty of negligence. If they fail to do that, and go on the right-hand side of the car they are held to a greater degree of care than they would be if they had gone on the left-hand side of the car, as the law provides. In other words, the one who violates the law of the road by driving on the wrong side assumes the risk of such experiment, and is required to use greater care than if he were on the right side." The qualification was also erroneous. They would not be held to a greater degree of care as being upon the wrong side of the road; in fact, the degree of care required was exactly the same on the one side of the car as upon the other, and that was due care,—care proportionate to the conditions existing at that time and place.

The judge further instructed the jury as follows: "But if you should find, gentlemen, that, notwithstanding the fact that he went on the right-hand side of this car, he did exercise that care which an ordinarily careful and prudent man would exercise under all the circumstances of this case, then, gentlemen, your verdict should be for the plaintiff." This portion of the charge was correct; but, in my opinion, it was not introduced for the purpose of nullifying the instructions which had just preceded the same, and was not calculated to correct the erroneous impression that must have been conveyed to the minds of the jurors by the preceding portion of his charge. Moreover, at the conclusion of the charge the judge explicitly said: "The defendant's requests I have covered, all but No. 2, and to that I give Mr. Vincent an exception." This refusal to charge as requested by the defendant makes it evident that the judge persisted in his view of the applicability of the rule of the road to the circumstances of the case, and also shows that he did not intend to modify the instructions he had given relating to the same. We are of the opinion that the charge and refusal to charge constitute reversible error, and therefore sustain the defendant's seventh and eighth exceptions.

We do not find that the court erred in that portion of his charge which is the subject of the defendant's ninth exception. There was some testimony tending to prove that the section wherein the accident occurred was closely built up. The charge as given was correct, and left the fact to be determined by the jury from the evidence. The defendant's ninth exception is therefore overruled. The defendant's tenth exception must be also be overruled.

The defendant's motion for a new trial was based upon the following grounds: "First. Because the verdict is against the law and the evidence, and the weight thereof. Second. Because the special findings of the jury are inconsistent with the general verdict. Third. Because the second special finding of the jury, taken in connection with the first special finding, is inconsistent with the general verdict. Fourth. Because the special findings of the jury show that the plaintiff was not in the exercise of due care. Fifth. Because the special findings of the jury show that the plaintiff, in attempting to cross the street in front of the automobile, assumed the risk of injury."

The verdict referred to reads as follows: "The jury find that the defendant is guilty in manner and form as the plaintiff has in his declaration thereof complained against him, and assess damages for the plaintiff in the sum of \$7,500. The jury further find specially: (1) The plaintiff, immediately before he stepped onto the running board, did look back along Union avenue to the drug store at the corner of Union and Priscilla avenues. (2) At the time when the plaintiff was about to step down upon the running board, and when he says he looked back along Union avenue to the drug store at the corner of Union and Priscilla avenues, the automobile of the defendant was on Union avenue between Priscilla avenue and the place of the accident."

It appears from the evidence that the distance from the place where the plaintiff looked, immediately before he stepped onto the running board of the car, to the drug store, at which he then looked, is 236 feet. It also appears that Union avenue, between Priscilla and Webster avenues, is 50 feet wide. It further appears that the width of the sidewalks on the northerly and southerly sides of Union avenue, between the streets mentioned, is 10 feet; that the width of Union avenue between the southerly sidewalk and the southerly rail of the car track is 8 feet, and between the northerly sidewalk and the northerly rail of the car track is 17 feet. What the plaintiff's angle of vision was when he looked, and what obstruction the car presented to his vision, do not appear. There was testimony concerning the presence of another car following the one from which the plaintiff alighted, and that the automobile of the defendant passed that car on its left side, and proceeded on the southerly side of Union avenue for some distance, until it crossed over to pass the first car on its right side. Exactly where the second car was when the plaintiff looked towards the drug store does not appear, nor does it 40 L.R.A.(N.S.)

clearly appear where the defendant's automobile then was. We cannot say from the evidence that the special findings are inconsistent with the general verdict. The defendant's automobile may have been on the southerly side of Union avenue, between Priscilla avenue and the place of the accident, and still not have been in sight of the plaintiff. Or the plaintiff may have been mistaken when he says that he did not see the automobile.

But, even if he had seen it, unless it was then so close that it could not have been stopped by the exercise of ordinary care and prudence on the part of its manager, he would have had the right to assume that the person in charge of it would not run it over him. It is not claimed, and it cannot be inferred from the evidence, that he was desirous of committing suicide. Furthermore, as it does appear that the automobile was lighter at the time of the accident, the light should have enabled the chauffeur to have seen the plaintiff in the road, in time to stop or avoid hitting him, unless the vehicle was rounding a curve in passing the rear end of the car from which the plaintiff had alighted, in which case the light would have been of little assistance to the driver of the automobile.

As the defendant's seventh and eighth exceptions have been sustained as aforesaid, the case is remitted to the Superior Court for a new trial.

WASHINGTON SUPREME COURT.

IDA M. TRAVIS, Resp't.,

v.

ANDREW R. SCHNEBLY, Appt

(68 Wash. 1, 122 Pac. 316.)

Marriage — engagement — ill health — postponement — effect.

1. One who, having engaged to marry a woman, postpones the ceremony because of her ill health, undertakes to wait a reasonable time for her recovery.

Same — release of engagement.

2. A man is released from his promise of marriage if the other party to the contract becomes ill without fault of either party, after the promise is made, and fails to recover her health within a reasonable time thereafter.

(March 28, 1912.)

Note. — Ill health as defense to action for breach of promise to marry.

This note is supplemental to a note covering the same question, in 7 L.R.A.(N.S.) 582.

In *Waneczek v. Kratky*, 69 Neb. 770, 66

APPEAL by defendant from a judgment of the Superior Court for Garfield County in plaintiff's favor in an action brought to recover damages for an alleged breach of promise of marriage. Reversed.

The facts are stated in the opinion.

Messrs. J. L. Sharpstein and E. V. Kuykendall, for appellant:

Disease and physical disability justify withdrawal from a marriage promise.

Grover v. Zook, 44 Wash. 489, 7 L.R.A. (N.S.) 582, 120 Am. St. Rep. 1012, 87 Pac. 638, 12 Ann. Cas. 192; Blank v. Nohl, 112 Mo. 159, 18 L.R.A. 350, 20 S. W. 477; State v. Bittick, 103 Mo. 183, 11 L.R.A. 587, 23 Am. St. Rep. 869, 15 S. W. 325; Trammell v. Vaughan, 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. Rep. 309, 59 S. W. 79; Kellett v. Robie, 99 Wis. 303, 74 N. W. 781.

Messrs. Cain & Hurspool and John C. Applewhite, for respondent:

An illness or physical disability which justifies the breaking of a promise of marriage must be such a one as will almost inevitably, from the nature of the thing, result in impaired health to the parties, and lead to the bearing of children physically weak and predisposed to disease, thus making it a matter of public policy for the state to object to the marriage.

Smith v. Compton, 67 N. J. L. 548, 58 L.R.A. 480, 52 Atl. 386.

Crow, J., delivered the opinion of the court:

Action by Ida M. Travis against Andrew R. Schnebly to recover damages for an alleged breach of promise to marry. From a judgment in her favor, the defendant has appealed.

L.R.A. 798, 96 N. W. 651, there is an *obiter* statement to the effect that there is attached to every contract of marriage an implied condition that the parties to the agreement will be released by any subsequent change in the mental or physical condition of either party which renders it impossible to accomplish the object of the marriage relation, and in such an event no action will lie for breach of contract.

In *Beans v. Denny*, 141 Iowa, 52, 117 N. W. 1091, the court said that the court might well have instructed the jury that a person is always excusable for declining to carry out his promise of marriage to one afflicted with syphilis, unless the promise was made with knowledge of the condition, without qualifying the instruction by reference to unfitness for matrimony, but as there was no conflict in the evidence but that syphilis does render one unfit for matrimony, such qualification was not prejudicial.

In the above case the court, in view of the doubt entertained by the medical profession as to the curability or eradicability of syphilis, intimated that if it were confronted 40 L.R.A. (N.S.)

Respondent alleged that in October, 1904, she and appellant promised to marry each other within a reasonable time; that she has been ready and willing to marry appellant; that in December, 1907, she made preparations for their marriage; that, at appellant's request, postponements were made until the spring of 1908, and the fall of 1908, but that he failed and refused to marry her, though requested so to do. Appellant admitted the original agreement, but denied other allegations of the complaint. For his first affirmative defense he alleged that subsequently they mutually agreed that each of them should be released from the promise, that appellant might be at liberty to marry any other person, and that in reliance upon that agreement he married his present wife. For a second affirmative defense he alleged "that subsequently to the time when plaintiff and defendant became engaged to marry each other the plaintiff became afflicted or was discovered to be afflicted with a certain ailment or disease or weakened physical condition, commonly known and described as a 'floating kidney,' the tendency of which is to render a woman so afflicted therewith nervous, irritable, and weak, and to greatly increase the danger above the danger ordinarily incurred by entering into the marriage relation and becoming a mother, and that defendant is naturally of a nervous temperament and condition, and that because of the said condition of plaintiff an operation was performed upon plaintiff, which operation did not cure her, and she continued in ill health thereafter, and because of the lack of physical ability and strength on the part of the plaintiff, accruing and developing subsequently to the

ed with the situation, it would hesitate to hold that a plaintiff who has become afflicted with that disease may complain of a breach of a previous promise of marriage, at least, when made in ignorance of the malady, upon the assumption that she had been cured thereof. The point, however, was not saved, as the defendant's pleadings relied upon the allegations that the plaintiff was still suffering from the disease, and so the judgment of the lower court for the plaintiff was affirmed.

Supervening insanity is a good defense to an action for breach of marriage promise. *Liddell v. Easton* [1907] S. C. 154, Ct. of Sess. cited in 2 *Butterworths'* Dig. 141.

And in *O'Reilly v. Sweeney*, 54 Misc. 408, 105 N. Y. Supp. 1033, it was held that an action for breach of promise cannot be predicated on a promise of marriage made by one who has been judicially declared incompetent in lunacy proceedings, especially where, after restoration, there was no renewal or ratification.

For a note as to disease as defense to marriage, see 15 L.R.A. 531. J. H. B.

engagement of plaintiff and defendant, the marriage of plaintiff and defendant was from time to time postponed; and that, because thereof, the defendant in good faith requested the plaintiff to be released therefrom, and that defendant understood and was led to believe by the plaintiff that she agreed thereto; and that because of all of the aforesaid things the defendant, acting in good faith, ceased his attentions to the plaintiff, and subsequently entered into the marriage relation with his present wife." To this defense respondent replied as follows: "Replying to the matters and things set forth in defendant's second, further, and separate answer and defense herein, plaintiff admits that subsequent to her engagement with defendant she was afflicted with a certain ailment commonly known as a 'floating kidney,' and alleges that long prior to the breaking of said engagement by defendant she was operated upon for said ailment, and wholly and permanently cured, and plaintiff denies all the other allegations in said second further answer and defense contained."

On the trial it was conceded that the original promise was made in October, 1904; that respondent was then in good health; that subsequently she was afflicted as alleged, and that she was operated upon in the city of Spokane during the year 1905, and was treated for some time thereafter. Respondent introduced evidence tending to show a complete recovery; while evidence introduced by appellant tended to sustain his contentions that she had never recovered, and that she was unfit to enter the marriage relation. Appellant in substance testified that he and respondent became engaged in October, 1904; that her health was then good; that she became ill in the spring of 1905; that he learned of her illness in February or March; that she went to Spokane for an operation and treatment; that he next saw her in September, 1905; that she was then in bad health, being confined to her bed a portion of the time; that later in the fall she was suffering from nervous prostration, and stated that she had consulted a physician, who said she would have to undergo another operation; that appellant saw her five or six times during the winter of 1905 and 1906; that he next saw her in the fall of 1906; that she was then sick; that he did not see her from the fall of 1906 until the spring of 1907, at which time she was apparently better, and thought she would get well; that he then told her they might as well get married; that she said the next fall would suit her, but that no date was then fixed; that in the fall he suggested

they get married early in March, 1908; that in March, 1908, her health was not good; that he next saw her in June, 1908; that she then said her health was such they had better call the engagement off; that he said he would wait until fall; that he did so; that he talked with her in September, 1908, at which time she said she would rather he would wait until spring; that he said he would do the best he could; that he did wait until spring; that he saw her in February, 1909; that they again discussed her health, which was no better; that she thought they should wait until fall; that he then said he had waited as long as he could; and that they had better call the engagement off. Appellant thereafter married his present wife, and this suit was commenced.

This evidence, if true, shows that respondent's ill health, incurred after the engagement, was the sole cause of numerous delays, covering a period of more than three years. Appellant's contentions on this appeal are all predicated upon instructions given and refused. We only find it necessary to consider his assignment that the trial judge erred in refusing his requested instruction No. 9, which reads as follows: "If, after plaintiff and defendant became engaged, the plaintiff became too ill to enter into the marriage relation, the defendant would not be required to wait an unreasonable length of time for her to recover, and if you find from the evidence that she was thus ill, and that defendant waited as long as was reasonable under all the circumstances for her to recover, and she had not recovered, then he had a perfect right to withdraw from the engagement, and your verdict should be for the defendant." This instruction should have been given. Its refusal constituted reversible error.

When the parties first entered into their mutual agreement to marry, plaintiff, as far as known, was a strong and healthy woman, free from any physical ailments or diseases. Shortly thereafter, without fault of either of the parties, she became ill, and was compelled to submit to a surgical operation, and for a long period of time continue under medical treatment. Appellant contracted to marry a healthy woman, and not an invalid. When it became manifest that by reason of poor health she could not marry, postponements were made, awaiting her recovery. This constituted a modification of the original contract, and imposed upon appellant the duty to wait a reasonable time for her recovery. The agreement still contemplated that appellant was to marry a healthy

woman. He at no time agreed to marry an invalid, although he did agree to wait a reasonable time.

Ill health of one party, contracted without his or her fault, after the original promise to marry, is a defense available to the other party in an action for breach of promise. A man who has only agreed to marry a healthy woman should not be compelled to accept her as his wife should she become an invalid before marriage. In *Gring v. Lerch*, 112 Pa. 244, 250, 56 Am. Rep. 314, 3 Atl. 841, 843, the court said: "A man does not court and marry a woman for the mere pleasure of paying for her board and washing. He expects and is entitled to something in return; and, if the woman with whom he contracts be incapable, by reason of a natural impediment, of giving him the comfort and satisfaction to which as a married man he would be entitled, there is a failure of the moving consideration of such contract, and no court ought to enforce it by giving damages for its breach."

Appellant contended that respondent's long-continued illness unfitted her for the marriage relation; that she had become a confirmed invalid; that she never recovered her health; and that he should not be held in damages. He also introduced evidence which, although disputed, if accepted as true, was sufficient to sustain these contentions. It was for the jury to determine whether respondent's health was in fact restored, and whether appellant had waited a reasonable time for her recovery. This is not an action in which a defendant is pleading his own illness as a defense, but one in which, according to his contention, he is called upon to marry an invalid who was a healthy woman when the original contract was made. Under such a state of facts, if proven to the satisfaction of the jury, a defendant should not be held liable for damages. This case in its facts differs materially from that of *Grover v. Zook*, 44 Wash. 489, 7 L.R.A. (N.S.) 582, 120 Am. St. Rep. 1012, 87 Pac. 638, 12 Ann. Cas. 192. We have made an exhaustive examination of the authorities, but find no similar case. Here we have a plaintiff who, according to appellant's contention, was well and hearty when he agreed to marry her, but who had the misfortune to incur a serious and perhaps permanent illness which impaired her physical vigor and unfitted her for becoming a helpmeet to her husband. Yet she insists that he should either marry her or respond in damages. No court should impose any such obligation upon him. Respondent has been unfortunate, but that is not appellant's fault. It must be pre-40 L.R.A. (N.S.)

sumed that he would not have entered into the agreement could he have foreseen the unfortunate condition into which she has fallen relative to her health. To award damages for his refusal to thereafter marry her would be to make for him a contract which he himself neither made nor intended to make. If her illness had existed prior to his promise, and he had been aware of the same, a different question would be presented; but it did not then exist. Appellant was entitled to have his evidence submitted to the jury with the instruction requested.

The judgment is reversed, and the cause is remanded for a new trial.

Dunbar, Ch. J., and Chadwick, Morris, and Ellis, J.J., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

JOHN R. BENNETT, Plff. in Err.,
v.

FEDERAL COAL & COKE COMPANY.

(— W. Va. —, 74 S. E. 418.)

Interest — demand for labor and materials.

1. As a general rule, where plaintiff's demand is liquidated, or, if unliquidated, can be readily ascertained by computation, interest thereon should be allowed, if the demand be for work done or material fur-

Headnotes by MILLER, J.

Note. — *Acceptance of principal sum as affecting the right to interest.*

The right to recover interest after the payment of the principal sum due depends upon whether the interest is due by the terms of the contract, or whether it is merely implied and allowed by way of damages in an action for the principal. If interest is due by the terms of the contract, the payment of the principal is no bar to its subsequent recovery, but if it is not due by the terms of the contract, the payment of the principal sum is a bar to recovery. It will be noted that the doctrine of accord and satisfaction has entered into this question and prevented a recovery of interest even where it is due by the terms of the contract, and, on the other hand, that where there is an agreement at the time of payment that the question of interest should be afterwards settled, the payment does not prevent recovery of interest even in those cases in which it is not due by the terms of the contract.

Contracts providing for interest.

In *Canfield v. Eleventh School Dist.* 19 Conn. 529, where the principal had been

nished, from the date the labor is done or material furnished, or from the date when, by the terms of the contract, payment should have been made.

Same — implied contract.

2. When there is no express contract to pay interest, there is generally an implied contract to do so.

Same — contract liability.

3. Where the contract or obligation expressly stipulates for the payment of interest, the interest becomes an integral part of the debt, and payment and acceptance of the principal sum will not, as a general rule, defeat a subsequent action to recover the interest not paid, carried by the contract.

Same — penalty — loss.

4. But where the contract does not so specifically provide for payment of interest, but the right thereto is by an implication, interest is considered as damages, and not as forming the basis of the action, and is recoverable only along with the principal sum and as an incident thereto, and if the principal sum be accepted in settlement, the

right to the damages is lost, and no separate subsequent action can be maintained therefor.

Accord — acceptance of principal — waiver of interest.

5. The old common-law rule applied in *Nixon v. Kiddy*, 66 W. Va. 355, 66 S. E. 500, that payment by a debtor, and receipt by the creditor, of a less sum than is due upon an undisputed liquidated demand, is not satisfaction of the debt, although the creditor agrees to accept it as such, is inapplicable to a balance claimed for interest due by way of damages on an implied agreement to pay interest.

Same — protest — effect.

6. The fact that receipt of payment without interest may have been done under protest of a creditor will not change the legal effect of his act on his right to maintain a subsequent separate suit to recover the interest.

(March 5, 1912.)

paid and accepted after suit had been begun, the rule is stated, as in *BENNETT v. FEDERAL COAL & COKE Co.*, that if there was an express agreement to pay interest, the payment of the principal would not prevent recovery of the interest, but if it was claimed merely as damages for the delay in paying the principal, there could be no recovery. As to whether or not there was an express agreement is not decided in this case, as there was another ground on which the court allowed a recovery of the interest.

Where the interest is payable by the terms of the contract, it becomes an integral part of the debt, and the payment of the principal sum does not prevent a subsequent recovery of the interest. This rule has been applied and a recovery of interest allowed after the payment of the principal,

—where the principal of an interest-bearing note was paid by the maker. *Robbins v. Cheek*, 32 Ind. 328, 2 Am. Rep. 348, overruling *Compant v. Ewing*, 8 Blackf. 328, an action to recover interest after the payment of a promissory note, in which recovery was denied. It does not appear from the report of the latter case whether the note did or did not bear interest;

—where a county order which the treasurer refused to pay or indorse, so that it would bear interest, was afterwards paid by him without interest in obedience to the order of the court in a mandamus proceeding. *Marks v. Purdue University*, 56 Ind. 288. The action in this case was one for damages, in which the interest was sought to be recovered as an element of such damage;

—where a merchant sought to recover interest after the payment of the principal on an account for goods sold and delivered, there being an express agreement to pay interest. *Froment v. Oltarsh*, 60 Misc. 89, 11 N. Y. Supp. 657;

—where recovery of interest on the principal sum due on a bond was sought after 40 L.R.A. (N.S.)

the payment of the principal sum. *King v. Phillips*, 95 N. C. 245, 59 Am. Rep. 238.

There is *dictum* of like effect in *Leighton v. Leighton Lea Asso.* 122 N. Y. Supp. 139. See also *McKay v. Fee*, 20 U. C. Q. B. 268, and *Darlow v. Cooper*, 34 Beav. 281.

There is *dictum* in *Williams v. Houghtaling*, 3 Cow. 86, an action on a bond expressly bearing interest, and on which a payment had been made, to the effect that if the whole of such payment had been applied to the extinguishment of the principal, no interest could be recovered. This *dictum* is referred to in *Fake v. Eddy*, 15 Wend. 76, as having been misapplied in this case. In the latter case, the rule is laid down that where there is an express agreement to pay interest as well as the principal of the demand, the payment of the principal is no bar to an action for the interest.

In *Valentine v. Donohoe-Kelly Bkg. Co.* 133 Cal. 191, 65 Pac. 381, where it was the custom of a bank which held the note of a partnership indorsed by one of the partners, to charge the interest to the partnership account, it was held that such bank could not, after it had surrendered the note to the individual partner upon payment of the principal and a small amount of current interest, collect any further interest of such individual, under a Code provision that accepting payment of the whole principal as such waived all claim to interest.

In *Hall v. King*, 2 Colo. 711, where the payee of an interest-bearing note accepted the payment of the principal and surrendered the note, on the express promise of the maker subsequently to pay the interest, it was held that the payee might maintain an action upon such promise to recover the interest.

In *Chase v. Manhardt*, 1 Bland, Ch. 333, there is *dictum* to the effect that if a creditor receive or recover his principal debt in any manner so as not thereby, either ex-

ERROR to the Circuit Court for Marion County to review a judgment setting aside a verdict in plaintiff's favor in an action brought to recover interest on a principal sum for building certain coke ovens, audited and credited by defendant to plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. M. Powell, C. Powell, and Scott O. Lowe, for plaintiff in error:

Plaintiff, on settlement, was entitled to interest on the principal sum due him, from the time it became due and payable up to the time the notes were given, December 4, 1906.

22 Cyc. 1513, 1514, 1540; Becker v. New York, 77 App. Div. 635, 78 N. Y. Supp. 1064.

pressly or tacitly, to relinquish his claim to the interest then due, he may sue for and recover such interest.

In Emmittsburg R. Co. v. Donoghue, 67 Md. 383, 1 Am. St. Rep. 396, 10 Atl. 233, a promise to relinquish the interest upon the receipt of the principal of a bill was held to be without consideration, and a recovery of the interest was allowed in a separate action, although the bill was surrendered at the time of payment. Generally, as to payment of part of a liquidated and undisputed indebtedness as a consideration for discharge of the whole, see notes in 20 L.R.A. 785; 11 L.R.A.(N.S.) 1018; and 21 L.R.A.(N.S.) 1005, and specifically, as to payment less interest, see p. 789 of the note in 20 L.R.A.

In Eames v. Cushman, 135 Mass. 573, where new notes were given in renewal of notes on which the interest was overdue, such notes not including this interest, nor being received in satisfaction thereof, but leaving this question an open one, the maker of the note saying that he would make it all right and acknowledging that he was legally liable for the interest, it was held that such interest could be recovered either upon the theory that the original note remained in force, or upon the theory that the defendant made a new oral promise in consideration of the surrender of the note. The former theory was adhered to in this case and recovery allowed.

In Lumley v. Musgrave, 4 Bing. N. C. 9, 3 Hodges, 247, 1 Jur. 799, 5 Scott. 230, 7 L. J. C. P. N. S. 49, where a new bill was given for an old, the new one being for the same amount as the old, and the old was left in the hands of the holder, it was held that the inference from these facts was that the old bill was left in the hands of the holder as security for the interest which had become due upon it, and which might become due, until the second bill was paid; and a recovery of interest thereon was allowed after the second bill was paid. The same holding appears in Lumley v. Hudson, 4 Bing. N. C. 15, 5 Scott. 238.

The court does not decide this question in Helier v. Franklin, 1 Starkie, 291, but 40 L.R.A.(N.S.)

The giving of a receipt, though in full, did not bar plaintiff from afterwards collecting interest.

1 Cyc. 322; Maslin v. Hiatt, 37 W. Va. 15, 16 S. E. 439; Standard Sewing Mach. Co. v. Gunter, 102 Va. 568, 46 S. E. 690; Lee v. Harlow, 75 Va. 22; Smith v. Phillips, 77 Va. 548; Nixon v. Kiddy, 66 W. Va. 355, 66 S. E. 500.

The interest due plaintiff at the time of the transaction of December 4, 1906, was contractual interest; it should be regarded as interest due by implied contract, if, indeed, it was not due by express contract.

22 Cyc. 1570-1572; 16 Am. & Eng. Enc. Law, 2d ed. 1032; McVeigh v. Howard, 87 Va. 599, 13 S. E. 31; Shipman v. Bailey,

in that case a recovery of interest was allowed after the payment of the principal of a bond.

In Watts v. Garcia, 40 Barb. 656, where a decedent had in his lifetime made an agreement with a firm to make deposits with them subject to his drafts, the firm to allow interest on the deposits and to charge interest on the drafts, and such arrangement continued during the lifetime of the decedent, and the money was held several years after his death, when it was paid to the administrator, together with interest thereon to the time of death, it was held that, in the absence of a showing that the firm had terminated the agreement at death, interest on such deposits from the date of death till the time of payment, being due at the time of payment, might be collected in a separate action, and was not affected by the payment of the principal.

In East v. Thornbury, 3 P. Wms. 126, a legatee who had settled with the personal representative of the estate under the mistaken belief that her legacy was to bear interest from a year after her marriage, instead of from a year after the death of the testator, as provided in the will, was held to have the right to recover interest, although the legacy had been paid.

In Stone v. Bennett, 8 Mo. 41, where there was an express agreement in a bond to pay interest, it was held that the interest might be recovered after the principal sum had been paid.

No question seems to have been raised as to the effect of the payment of the principal and the interest provided thereby, upon the right to maintain an action for the recovery of an additional amount of interest provided by a collateral contract, in Greenwood v. Fenton, 54 Neb. 573, 74 N. W. 843.

—effect of accord and satisfaction.

Where there are circumstances of doubt about recovery, or uncertainty about the amount of recovery, and an agreement is entered into to accept the principal sum in satisfaction of the debt, there is an accord

20 W. Va. 140; Cecil v. Hicks, 29 Gratt, 1, 26 Am. Rep. 391.

Mr. W. S. Meredith, for defendant in error:

There being no contract to pay interest, and no definite time fixed when the payments became due, it is clear that if interest ever attached, it was merely by way of a damage for withholding payment after it was due.

Farmers' Bank v. Reynolds, 4 Rand. (Va.) 188; Brewster v. Wakefield, 1 Minn. 352, Gil. 260, 69 Am. Dec. 343; 22 Cyc. 1572; Graves v. Saline County, 43 C. C. A. 414, 104 Fed. 61; Southern R. Co. v. Dunlop Mills, 22 C. C. A. 302, 42 U. S. App. 169, 76 Fed. 505; Smith v. Buffalo, 39 N. Y. Supp. 881; Fake v. Eddy, 15 Wend. 76; Stewart

v. Barnes, 153 U. S. 456, 38 L. ed. 781, 14 Sup. Ct. Rep. 849; Moore v. Fuller, 47 N. C. (2 Jones, L.) 205; Middaugh v. Elmira, 23 Hun, 79.

Interest is not to be allowed antecedent to the time appointed for the payment of the money, without an express stipulation to that effect, mere implication not being sufficient.

Buchanan v. Leeright, 1 Hen. & M. 211; Booth v. Pittsburgh, 154 Pa. 482, 25 Atl. 803.

The receipt given by plaintiff is a complete bar to his recovery.

Scott v. Norfolk & W. R. Co. 90 Va. 241, 17 S. E. 882; Lee v. Virginia & M. Bridge Co. 18 W. Va. 299; Ruby v. Chesapeake & O. R. Co. 8 W. Va. 269; Tate v. Jones, 98

and satisfaction, and recovery of the interest is denied. Thus, in Storch v. Dewey, 57 Kan. 370, 46 Pac. 698, where there was a bona fide dispute as to the date from which interest on the promissory note in question should be computed, and an agreement was finally reached as to the amount to be paid in full satisfaction thereof, there was held to be a valid accord and satisfaction, preventing a recovery of a balance of interest claimed due.

In Tuttle v. Tuttle, 12 Met. 551, 46 Am. Dec. 701, where a note was given by one son to another, payable at the decease of the father, and the payee of the note was away, his whereabouts being unknown to the maker for a number of years after the death of the father, and when he returned the principal sum was paid without interest, it was held that a recovery on the note presented a question of so much doubt and uncertainty that, if the payee received the principal sum with the understanding that the same was to be in full discharge of all claim on his part upon the note, it would constitute a good defense to the action.

In Westcott v. Waller, 47 Ala. 492, where the principal and a part of the interest on a judgment obtained in the court of a state which was in rebellion was paid, a recovery of the balance of the interest was denied, on the theory that a valid accord and satisfaction had been effected. The action for the interest was one against a surety on the original debt, the principal and a cosurety having become insolvent, and the defendant in the action having been brought to the verge of insolvency, and there was held to be sufficient doubt as to the recovery of the amount of the judgment as to present a situation in which an accord and satisfaction might be had.

In Johnson v. Brannan, 5 Johns. 268, it was held that the general rule that payment of a less sum after the debt is due, in satisfaction of the debt, is not good by way of accord and satisfaction, should not be applied to an action on a promissory note, where the payment which was accepted in satisfaction exceeded the principal sum of 40 L.R.A.(N.S.)

the note, and fell short only about \$2 of the interest.

In State v. Crutchfield, 3 Head, 113, where the state refunded to one who entered state land the title to which failed, the amount paid by such enterer, it was held that, assuming that there was a legal obligation on the state to refund the money with accruing interest, the terms of adjustment proposed by the state to refund the amount paid, and the acceptance by the enterer of such proposition, constituted an accord and satisfaction, which prevented the maintenance of an action to recover the interest thereafter. The decision in this case, however, rests more strongly on the proposition that the state was not bound to refund any of the money, and the voluntary payment of the principal imposed no obligation to pay interest.

In Bidder v. Bridges, 57 L. J. Ch. N. S. 300, L. R. 37 Ch. Div. 406, 58 L. T. N. S. 656, 1 Eng. Rul. Cas. 393, where the solicitor of plaintiff, against whom the costs were taxed in an action, paid the amount of such costs by his personal check to the defendant's solicitor, who thereupon surrendered the final certificate with a receipt of the costs indorsed thereon, and such action was intended to settle the claim, it was held that there could be no subsequent recovery of interest, although under the law the costs bear interest. The decision in this case is placed upon the ground of valid accord and satisfaction. In discussing the question of consideration, Cotton, L. J., states that the fact that the solicitor gave his check, and thereby became personally liable for the amount of the costs, was a sufficient consideration to support the agreement.

See also Henry v. Flagg, 13 Met. 64, on theory of waiver.

But if there is not a valid accord and satisfaction, there may be a recovery of the interest. Thus in Beer v. Foakes, L. R. 11 Q. B. Div. 221, s. c. on appeal, L. R. 9 App. Cas. 605, 54 L. J. Q. B. N. S. 130, 51 L. T. N. S. 833, 33 Week. Rep. 233, 1 Eng. Rul. Cas. 370, where a judgment debtor

Va. 544, 36 S. E. 984; Fuller v. Crittenden, 9 Conn. 401, 23 Am. Dec. 364.

Miller, J., delivered the opinion of the court:

Plaintiff brings error to the judgment below, setting aside the verdict in his favor and awarding defendant a new trial.

The suit was in assumpsit, and except one item, "to one dump cart, \$50," the purpose of the suit is to recover interest on the principal sum, \$21,085.00, for building certain coke ovens, during the year 1905-06, audited and credited by defendant to plaintiff, some months prior to payment.

The correctness of the judgment below and the rulings of the court on the trial, and in the giving and refusing of instruc-

tions to the jury, for the most part, depend upon the effect of a settlement made, December 4, 1906, and the following receipt, then executed and delivered by plaintiff to defendant, as follows:

Pittsburg, Pa., Dec. 4th, 1906.

Received of Federal Coal & Coke Company twenty-one thousand six hundred ninety-five dollars in form of 2-6 mo. notes for \$10,000, each, and check for \$1,695 in settlement of account. \$21,695.

John R. Bennett.

It is conceded that the notes and the check receipted for cover the exact amount of the principal, and \$610 included in the check for interest on the notes from their

entered into an agreement with his creditor to pay a certain sum on the judgment, and the balance by instalments, the creditor agreeing not to take any action on the judgment, it was held that the creditor might, after the principal sum had been paid, recover interest and issue execution therefor on his judgment, as there was no consideration for the agreement not to do so.

In *Barron v. Vandvert*, 13 Ala. 232, where a part of the principal of a promissory note was paid on the express promise of the payee to release the maker thereof from payment of interest, there was held not to be a sufficient consideration for such promise, and recovery of the interest was allowed.

—effect of statute providing for interest.

Where the obligation is one that by statute bears interest, some courts regard this as an equivalent of contractual interest, and therefore allow a recovery, even though the principal sum has been paid, while others regard it in the nature of damages, and refuse recovery after the payment of the principal sum. Thus, in *Devlin v. New York*, 131 N. Y. 123, 30 N. E. 45, recovery of interest was allowed after the payment of an award for land taken in eminent domain proceedings, where the statute provided for interest.

And in *Smith v. Buffalo*, 39 N. Y. Supp. 881, where the payment of claims for sewer repairs was delayed and finally paid without interest, and the city charter provided for interest in such cases, it was held that there might be a recovery of the interest.

In *Hobbs v. United States*, 19 Ct. Cl. 220, a statute providing for interest in certain cases of appeal from decisions on claims against the United States was held to be so far contractual as to authorize a recovery of interest by such a claimant after the payment of the principal sum. In this case the claimant demanded the whole sum due, including interest, but when he was informed that the appropriation was short, he took the amount of the principal.

In *Rowen v. Minneapolis*, 47 Minn. 115, 40 L.R.A. (N.S.)

28 Am. St. Rep. 333, 49 N. W. 683, where certain claims against a city, invalid because of the failure regularly to enter into a contract, were legalized by an act of the legislature, and the city authorized and empowered to pay the same with interest thereon, and the city council, believing it within its discretion to pay or refuse to pay the claims, when in fact the statute was mandatory, ordered the principal paid, the acceptance of this principal by the contractor did not preclude the maintenance of a separate action by him for the recovery of the interest.

On the contrary, in *Ludington v. Miller*, 6 Jones & S. 478, where a statute gave interest on the amount of a recovery in an action for death, to be computed from the date of death, the statute was held to declare a rule of damages by which the amount of a verdict might be increased, and did not present an element of contract with reference to such interest; therefore recovery of the interest was denied after payment of the principal sum by way of compromise to the suit.

The same view is taken in *Brady v. New York*, 14 App. Div. 152, 43 N. Y. Supp. 452, where it is stated that interest provided by statute is recoverable, not by virtue of a contract, but in the nature of damages for nonpayment of the debt, hence there can be no recovery after the judgment has been satisfied in full and a satisfaction under seal given.

A statute fixing the legal rate of interest and providing what obligations shall bear interest does not make interest contractual, so that it may be recovered after payment of the principal. *Graveson v. Odd Fellows' Temple Co.* 6 Ohio S. & C. P. Dec. 287.

Under a statute providing that if a bank refuses to pay a deposit on demand, the depositor is entitled to receive and recover interest on the same at the rate of 12 per cent per annum, it was held, in *Potomac Co. v. Union Bank*, 3 Cranch, C. C. 101, Fed. Cas. No. 11,318, where a bank had so refused to pay a deposit and suit was thereupon begun, whereupon the bank paid the deposit with 6 per cent interest, which

date to date of maturity, and that nothing was included, or intended to be included, for interest prior to the date of the receipt and settlement. The interest which the plaintiff sues for in this action is the interest which he claims accrued to him on the principal sum from April 1, 1906, when he alleges the principal sum should have been paid, and the date of his receipt and settlement, claiming to have accepted the notes and check under protest, and with the understanding on his part that the prior interest was to be adjusted between him and the president of the defendant company, when he should recover from his then illness, and be able to attend to business. The president died a few days afterwards,

and the interest was never adjusted, wherefore this suit.

Refusing plaintiff's two instructions embodying the contrary proposition, the court below on the trial, at the instance of defendant and over the objection of plaintiff, instructed the jury, in substance, that if they believed from the evidence that plaintiff and defendant made a settlement on December 4th, 1906, and that the plaintiff accepted from the defendant the two notes for \$10,000 each, and the check or voucher for \$1,695, and thereupon signed and delivered to the defendant the receipt above mentioned, plaintiff was not entitled in this action to recover any interest theretofore accrued on the items and amount therein settled, and that he was estopped from re-

amount was accepted by the depositor, that such payment and acceptance prevented a recovery of the remainder of the interest.

See also *National Bank v. Mechanics' Nat. Bank*, 84 U. S. 437, 24 L. ed. 176; see *Re John Osborn's Sons & Co.* 29 L.R.A. (N.S.) 887, 100 C. C. A. 392, 177 Fed. 184; *Johnson v. Tuttle*, 17 Abb. Pr. 315.

Contracts not expressly providing for interest.

The distinction between interest in the nature of damages, and interest due by implied agreement based on the presumed intention of the parties, for which plaintiff's counsel argued in *BENNETT v. FEDERAL COAL & COKE Co.*, and which as a logical proposition apparently met the approval of two members of the court, has received little or no sanction from the cases within the scope of the present note. But for the sake of its possible value in the future consideration of the subject, an attempt has been made to indicate the nature of the claims in the individual cases sufficiently to indicate to what extent the actual results may be harmonized with the suggested distinction, and to what extent they necessarily involve the repudiation, or at least the ignoring, thereof.

Where the contract is silent as to interest, so that if it can be recovered at all, it is as an incident of such debt and only as damages to make the creditor good for the loss he has sustained by reason of the breach or default, an action to recover it cannot be maintained after payment of the principal, as such interest cannot exist without the debt, and, the debt being extinguished, the right to claim interest must necessarily be extinguished also.

This rule has been applied, and recovery of the interest denied after payment of the principal,

—where a shipper was seeking to recover interest on the amount of a claim which had been paid him by a carrier for loss of goods. *Louisville & N. R. Co. v. Alford & Co.* 5 Ga. App. 428, 63 S. E. 524;

—where a legatee was seeking to recover

interest from and after a year from the date of the testatrix's death, on a legacy which had previously been paid. *American Bible Soc. v. Wells*, 68 Me. 572, 28 Am. Rep. 82. Compare with *East v. Thornbury*, 3 P. Wms. 126, where interest was provided in the will;

—where a widow was claiming interest on a legacy left her by the will of her late husband, after such legacy had been paid. *Re Hodgman*, 140 N. Y. 421, 35 N. E. 660;

—where a person was seeking to recover interest on an unliquidated demand for board, which had been paid after suit begun. *Simmons v. Almy*, 103 Mass. 33;

—where a lessor was seeking to recover interest on a claim for rent, the principal of which had been paid him after suit was begun. *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771. A similar holding appears in *Crane v. Brooks*, 189 Mass. 228, 75 N. E. 710, an action on an account;

—where a depositor was seeking to recover interest on a deposit which had previously been paid him. *Forschirm v. Mechanics' & T. Bank*, 137 App. Div. 149, 122 N. Y. Supp. 168;

—where a depositor was seeking to recover interest on a deposit made with a bank in the usual manner, payment of which on the first presentation of check and demand of payment was refused on account of the bank having been summoned as garnishee in an action against the depositor, but which was subsequently paid and accepted by him without demand for interest. *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474, 74 S. W. 1038;

—where a county was seeking to recover interest of the county treasurer, who had defaulted in the payment of the county funds to his successor, but who had finally paid the principal amount and received a receipt. *Maloy v. Bernalillo County*, 10 N. M. 638, 52 L.R.A. 126, 62 Pac. 1106. The court, in this case, notes that there is no specific provision of the statute making the funds bear interest;

—where the board of freeholders of a county were seeking to recover interest on a sum of money which the county collector

covering any such interest in the absence of an express contract on the part of the defendant to pay the same, made before or at the time of said settlement.

It is not pretended or proven that there was any such express contract. Plaintiff relies solely on an implied promise to pay interest from April 1st, 1906, the latest date when, by the terms of his contract as he claims it, estimates were to have been furnished him, and the estimates or principal sums paid.

The general rule of law in this, as in other jurisdictions, undoubtedly is that where the demand of the plaintiff is liquidated, or, if unliquidated, can be readily ascertained by computation, as in this case, interest thereon will be allowed, if the de-

mand is for work done or material furnished, from the time the material is furnished or work completed, or from the time when, by the terms of the contract, payment should have been made. 22 Cyc. 1513, 1514, 1540, 1543; *Becker v. New York*, 77 App. Div. 635, 78 N. Y. Supp. 1064. It is equally well settled, as shown by the authorities cited, that when there is no express contract to pay interest, there is an implied contract to do so. *Chapman v. Shepherd*, 24 Gratt. 377; *Roberts v. Cocke*, 28 Gratt. 207; *Cecil v. Deyerle*, 28 Gratt. 775; *McVeigh v. Howard*, 87 Va. 603, 13 S. E. 31; *Kent v. Kent*, 28 Gratt. 840; *Cecil v. Hicks*, 29 Gratt. 1, 26 Am. Rep. 391:

But what is the relationship of the interest to the principal? Is the interest a part

had used and afterwards repaid. *Somerset County v. Veghte*, 7 N. J. L. J. 145;

—where an action for wrongful death had been settled and the amount of the settlement paid after suit begun, and subsequently the plaintiff's counsel became aware of a statutory provision allowing interest from the time of death, and were seeking to have judgment entered for the amount of the settlement and interest, and execution issued for the interest. *Ludington v. Miller*, 6 Jones & S. 478;

—where a creditor was seeking to recover of a city interest on a debt contracted by the commissioner of charity of such city, which debt had been paid by the city with the understanding that the sum was to be paid as principal and in full of all claims, and that the claim for interest should be waived. *Tenth Nat. Bank v. New York*, 4 Hun, 429;

—where a railroad company was seeking to recover interest on a subscription to its stock which had been paid by the subscriber after default, without anything being said as to interest. *Southern C. R. Co. v. Moravia*, 61 Barb. 180;

—where property owners who had been paid an amount awarded them for premises taken in opening a street were seeking to recover interest. *Gillespie v. New York*, 3 Edw. Ch. 512. It was further held in this case that the defendants were not liable for interest in any event on account of pending litigation;

—where the personal representative of a deceased property owner was seeking to recover interest on an award for damages incurred by reason of the widening of the street, which had been paid the decedent in her lifetime as in full payment of the account. *Cutter v. New York*, 92 N. Y. 166. This case is followed in *McCreery v. Day*, 119 N. Y. 1, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198 (interest claimed after payment of a sum of money due under a contract);

—where the executors of the lessor of a coal mine were seeking to recover interest on quarterly instalments of royalties for an amount of coal mined in excess of an agreed 40 L.R.A. (N.S.)

amount, which were not always promptly paid, but which had been paid in full and without interest and accepted by the lessor. *Waller v. Kingston Coal Co.* 191 Pa. 193, 43 Atl. 235;

—where a city was seeking to recover interest on quarterly instalments of rent due it on the lease of a railroad, such instalments having been paid, but not at the time due. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 81 Fed. 911. The construction put upon this lease in the subsequent part of the opinion, however, is that no interest was due, so it is doubtful if the above is more than *dictum*;

—where, in an action to recover of the city for electric lighting, judgment was entered for the part admitted by the answer of the city to be due, and this sum afterwards paid, and the electric light company was seeking to recover interest on this amount in the action for the balance. *Bronx Gas & Electric Co. v. New York*, 29 Misc. 402, 60 N. Y. Supp. 548;

—where it was sought to recover interest on an account after payment of principal sum. *Tillotson v. Preston*, 3 Johns. 229;

—where a person was seeking to recover interest on money due on account of chattels sold, which money had been paid him after some delay. *Abbott v. Wilmot*, 22 Vt. 437;

—where a wife was seeking to recover of her husband's estate interest on a sum of money belonging to her, which had been in possession of her husband during his lifetime and had been repaid without interest. *Re Smith*, 1 Misc. 253, 22 N. Y. Supp. 1085;

—where a contractor was attempting to secure interest in a sum of money retained by a city to secure the performance of a contract, after such sum had been paid him and a release given. *O'Rourke v. New York*, 130 App. Div. 673, 115 N. Y. Supp. 398;

—where a contractor was seeking to recover interest on instalments, the payment of which was delayed after they were due, but which was finally made. *Graveson v. Odd Fellows Temple Co.* 6 Ohio S. & C. P. Dec. 287;

of the debt, or only an incident to it, recoverable along with the debt, or by way of damages for the wrongful detention thereof? On the proper answer to these questions depends the answer to the question above propounded, What is the legal effect of the receipt given in December, 1906?

The authorities we believe to be uniform in holding that where the contract or obligation to pay money bears interest on its face by express stipulation, the interest becomes an integral part of the debt, as much so as the principal itself. 16 Am. & Eng. Enc. Law, 1032; 22 Cyc. 1570, and authorities cited in note 78, and the Virginia authorities above cited. At least payment of the principal sum will not defeat a subsequent action to recover the balance for in-

terest carried by the contract. 22 Cyc. 570, 571, and notes; 16 Am. & Eng. Enc. Law, 1033.

But the contract we have here is one which does not bear interest on its face; there is only an implied contract to pay interest. What is the relationship of interest to principal in such cases? It is a mere incident to the demand, and recoverable only in an action on the demand itself, and by way of damages for the wrongful detention of the money, as counsel for defendant contend; or is it, as in the case of an express contract, an integral part of the debt, recoverable by separate action after payment of the principal, as is argued by counsel for plaintiff? This is the pivotal question.

For the proposition that interest on an

—where the holder of interest coupons on county bonds was seeking to recover interest after the coupons had been paid and surrendered. *Graves v. Saline County*, 43 C. C. A. 414, 104 Fed. 61;

—where a person who had furnished supplies to a railroad was seeking to intervene in an action to foreclose a mortgage on the railroad property, and recover interest on the amount due for such supplies, after the same had been paid in full by the receiver. *Southern R. Co. v. Dunlop Mills*, 22 C. C. A. 302, 42 U. S. App. 169, 76 Fed. 505;

—where an importer was seeking to recover interest on a sum of money which had been illegally exacted of him for duties, after the same had been repaid to him and accepted without interest, although he claimed interest at the time of the payment, but the government authorities took the position that there was no appropriation available for the payment of interest in such cases. *Bidwell v. Preston*, 88 C. C. A. 19, 160 Fed. 653; *Riley v. Maxwell*, 4 Blatchf. 237, Fed. Cas. No. 11,838;

—where a person was seeking to recover interest on an amount of money illegally exacted of him by the government for internal revenue taxes, after the amount had been refunded. *Stewart v. Barnes*, 153 U. S. 456, 38 L. ed. 781, 14 Sup. Ct. Rep. 849;

—where a railroad company was seeking to recover interest on a judgment against the United States, after it had accepted payment of the principal due on such judgment, under an act of Congress appropriating a sum equal to the principal and declaring that sum was to be in full satisfaction of such judgment. *Pacific R. Co. v. United States*, 158 U. S. 118, 39 L. ed. 918, 15 Sup. Ct. Rep. 766;

—where interest was sought in a bond which had been paid some time after it was due. *Dixon v. Parkes*, 1 Esp. 110;

—where the obligee in a bond was seeking to recover interest on the principal sum, which had been paid him, the obligor refusing to pay interest and agreeing to leave his liability for interest to arbitration. *Moore v. Fuller*, 47 N. C. (2 Jones, L.) 205.

There are *dicta* of like effect in *Hamilton* 40 L.R.A. (N.S.)

v. Van Rensselaer, 43 N. Y. 244; *Roberts v. Brandies*, 44 Hun, 468; *Hedden Constr. Co. v. Proctor & G. Co.* 62 Misc. 129, 114 N. Y. Supp. 1103.

In *Chandler v. People's Sav. Bank*, 61 Cal. 401, where parties had settled mutual accounts without charging interest, and the one to whom a balance was found due had accepted payment by note and mortgage, it was held that the court would not go behind such settlement for the purpose of allowing interest to the party who gave the note, in order to reduce the amount thereof.

In *Vider v. Chicago*, 164 Ill. 354, 45 N. E. 720, affirming 60 Ill. App. 595, recovery of interest was denied after the payment of the principal sum to a contractor who was to be paid from special assessments, which the city delayed in collecting for a year. There was no discussion in this case, however, as to the effect of payment, but the decision is placed on other grounds. In the opinion of the appellate court, there is a statement to the effect that the majority of that court were of the opinion that the reception by the contractor of the principal sum precluded the recovery of anything more.

In *Milliken v. Southgate*, 26 Me. 424, where a person received a certain sum of money on agreement to repay it if it was found, upon the settlement of a concern, that he was not entitled to hold the sum, and on such settlement, such sum was repaid without any statement as to interest, it was held that there could be no recovery of interest, since there had been no express promise to pay interest and no breach of contract that could authorize an award by way of damages. A parol promise to pay interest which was set up in this case was held to be without consideration, and therefore ineffectual.

In *Robbins Cordage Co. v. Brewer*, 48 Me. 481, where an account between the parties had been settled by giving in payment a promissory note, it was held that there could be no recovery of interest thereafter. It is further stated in the opinion in this case that there was not sufficient evidence to authorize a recovery of interest on the

implied contract is a mere incident to the debt, and that after payment of the principal interest cannot be recovered by separate action, defendant's counsel rely upon the following authorities: *Brewster v. Wakefield*, 1 Minn. 352, Gil. 260, 69 Am. Dec. 343; *Graves v. Saline County*, 43 C. C. A. 414, 104 Fed. 61; *Southern R. Co. v. Dunlop Mills*, 22 C. C. A. 302, 42 U. S. App. 169, 76 Fed. 505; *Smith v. Buffalo* (Sup.) 39 N. Y. Supp. 881; *Fake v. Eddy*, 15 Wend. 76; *Stewart v. Barnes*, 153 U. S. 456, 38 L. ed. 781, 14 Sup. Ct. Rep. 849, and the leading case of *Moore v. Fuller*, 47 N. C. (2 Jones, L.) 205, a North Carolina case, and 22 Cyc. 1572, 1573.

These authorities fully support the proposition contended for. In *Stewart v.*

Barnes, 153 U. S. 456, 38 L. ed. 781, 14 Sup. Ct. Rep. 849, Judge Shiras says: "Interest in such cases is considered as damages, and does not form the basis of the action, but is an incident to the recovery of the principal debt. The right of action is the right to compel the payment of the money which is being retained. When he who has the right commences an action for its enforcement, he at the same time acquires a subordinate right, incident to the relief which he may obtain, to demand and receive interest. If, however, the principal sum has been paid, so that, as to it, an action brought cannot be maintained, the opportunity to acquire a right to damages is lost."

Plaintiff's counsel reply that in the ap-

account, even if there had been no settlement. There is *dixtum* of like effect in *Howe v. Bradley*, 19 Me. 31.

In *Talbot v. Bay City*, 71 Mich. 118, 38 N. W. 890, a writ of mandamus to compel a city to pay interest on certain orders given for paving work, after the orders had been paid without interest and accepted by the relators, was refused, where there was no promise to pay interest in the orders or no statutory authority authorizing the payment of such interest.

In *Consequa v. Fanning*, 3 Johns. Ch. 587, it was held that an account between parties which had been settled and the balance paid would not be opened up in the absence of evidence warranting a contrary finding, since the receipt of the balance is good proof that no interest was due by the course of dealing, or that it was received or waived.

In *Middaugh v. Elmira*, 23 Hun, 79, it was held that there could be no recovery of interest on an order drawn on a city treasurer, after payment of the principal, notwithstanding the holder expressly reserved the right to claim interest, and would not have surrendered the order if he had known that he was thus losing his right to claim interest.

In *Re Smith*, 1 Misc. 253, 22 N. Y. Supp. 1085, it was held that a wife could not recover interest from her husband's estate on a sum of money which had been in possession of the husband, but which had been repaid to the wife, in absence of an express agreement to pay interest.

In *Bronner Brick Co. v. M. M. Canda Co.* 18 Misc. 681, 42 N. Y. Supp. 14, an action on account for goods sold and delivered, where the balance of the account was paid after action was begun, the rule is stated that such payment extinguishes all claims for interest unless there is an agreement that it should not so bar the claim.

In *Bloodgood v. United States*, 39 Ct. Cl. 69, where part of a judgment obtained against the United States was stated by the attorney general in his report of the same to Congress as being invalid, and thereupon Congress made an appropriation for the payment of the balance, which was 40 L.R.A. (N.S.)

paid and received by the judgment creditor in satisfaction thereof, it was held that such judgment creditor could not, after a subsequent payment of the invalid part of such judgment, recover interest on such invalid part, as the payment thereof was a gratuity, and, in the absence of express authority therefor, no interest could be recovered.

Recovery of interest was denied in *Churcher v. Stringer*, 2 Barn. & Ad. 777, 1 Dowl. P. C. 332, 9 L. J. K. B. 318, where the principal sum due on an award was paid sometime after the same became due, but the decision in this case was placed expressly on the manner in which it was sought to recover the interest, the action being one by motion for an attachment. In the course of the opinion, the court states that interest as well as principal may be recovered in an action, but on motion the principal only.

The rule that payment of the principal sum extinguishes the claim for interest was applied in *Johnson v. District of Columbia*, 31 Ct. Cl. 395, where Congress changed a rule by which the compensation of contractors was estimated, thereby extinguishing a counterclaim which the District of Columbia was seeking to exercise against a claim of a contractor, and it was held that interest on the counterclaim up to the passage of the act by which it was extinguished could not be allowed.

In *Bond v. Cutler*, 10 Mass. 419, it was held that no action could be maintained on an appeal bond after the satisfaction of the judgment appealed from, by execution thereon, for interest from the rendition of such judgment to its discharge, where there was no stipulation in the bond requiring interest to be paid. A similar holding appears in *Gage v. Gannett*, 11 Mass. 217, an action on the bond of a county officer conditioned on payment of money received by him.

In *Snowden v. Thomas*, 4 Harr. & J. 335, where a debt due from a partnership to the heirs of a deceased partner was paid without interest, and a receipt in full of all claims taken, it was held that there could be a recovery of the interest in equity, in the absence of a showing that the receipt

plication of the rules of law concerning interest to this case, interest should not be classified, as defendant's counsel does, as (1) interest in the nature of damages; (2) interest due by express contract; that a proper classification would be, (a) interest in the nature of damages for the detention of money; (b) contractual interest, subdivided into, (1) interest due by express contract, (2) interest due by implied agreement, based on the presumed intention of the parties. They say the authorities are divided as to whether interest by way of damages may be recovered after acceptance by the creditor of the principal sum due. They admit, however, that the weight of authority is against its collection. They might have gone farther, we think, and ad-

mitted that there is no authority to the contrary.

The principal proposition, and the one on which they rely, is that in Virginia and in this state at least, and according to the decisions they rely upon, interest due by implied contract has the same relation to the principal debt as interest due by express contract; that interest due by implied contract is as much an integral part of the debt, and as recoverable by separate action, as if borne on the face of the contract, and by express provision thereof, and recoverable by separate action.

Can this position be supported by authority? It is conceded that no Virginia or West Virginia decision can be found exactly in point, and none are cited, nor have

had been given with an intention or agreement to give up the interest. The court in this case treats the interest as due at the time of payment of the principal sum, although it does not appear that it was due by virtue of any contract, or in any other manner than on an implied obligation to pay interest on money which one has belonging to another.

Where a person furnished supplies to a mining company, under a contract by which he was to be paid for the supplies furnished during each month on the 15th of following month, and in accordance therewith presented his bill and was paid after some delay and without interest, and continued this arrangement for some time, but finally brought an action for a balance of the account and interest, and in such action sought to recover the interest on the monthly payments for the time such payments were delayed, it was held in *Bassick Gold Mine Co. v. Beardsley*, 49 Colo. 275, 33 L.R.A. (N.S.) 852, 112 Pac. 770, that there could be no recovery of interest.

In *Ryan Drug Co. v. Hvambzahl*, 92 Wis. 62, 65 N. W. 873, where, on an open account between the parties, statements of the account were sent from time to time and drafts drawn on the debtor, such statements were held to constitute an account stated, and in an action for the balance of the account, interest could not be allowed except from the commencement of the action. It is not clear from the report of this case, however, that the decision is based upon the fact that payment of the principal sum due prevented the recovery of the interest.

Doctrine of waiver.

Some courts treat the acceptance of the principal sum in the nature of a waiver of the claim for interest, and deny recovery on this theory.

Thus, in *Henry v. Flag*, 13 Met. 64, where the holder of promissory notes which bore simple interest on their face, but which the holder claimed were to bear annual interest, indorsed them, and at the same time entered into a collateral agreement with the

indorsee to pay annual interest in case the makers of the notes failed to do so, the court in holding that no action could be maintained against such indorser for the annual interest, after the amount of such notes, together with simple interest, had been paid by the makers and received by the indorsee, states that the payment of interest on the whole sum might have been enforced by action to enforce the payment of the same at the end of each year, if the indorsee had seen fit to do so, but not having done so, it is to be presumed in this, as in the cases of annual interest stipulated for in the note itself, that the party waived such claim for annual interest.

So, in *Jacot v. Emmett*, 11 Paige, 142, it was held that the receipt of a balance due on an account, without any reservation of the right to claim interest afterwards, was a waiver of such claim. The doctrine of waiver entered somewhat into the decision in *Bronx Gas & Electric Co. v. New York*, 29 Misc. 402, 60 N. Y. Supp. 548, and also in *Abbott v. Wilmot*, 22 Vt. 437, and in *Bidwell v. Preston*, 88 C. C. A. 19, 160 Fed. 653, supra. See also *Valentine v. Donohoe-Kelly Bkg. Co.* 133 Cal. 191, 65 Pac. 381; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Tenth Nat. Bank v. New York*, 4 Hun, 429.

In *Childs v. Millville Mut. M. & F. Ins. Co.* 56 Vt. 609, a recovery of interest was denied an insurance agent who had paid a loss on a policy issued by his company, and had been repaid by the company the amount so paid by him, he at the time surrendering the policy duly receipted, to the company. This decision is based on the doctrine that the receipt of the money and the surrender of the policy constituted a release which effectually discharged the claim, although it is assumed by the court that the agent was entitled to interest.

—payment after suit begun.

Where the payment of the principal sum is not made until after suit is brought thereon, the additional question of the effect of the failure to adjudicate the entire cause

we found any decision from any state supporting counsel to the extent claimed. Nor are any authorities cited by counsel illustrating the application of the law to their classification of interest. If their classification be the correct one, in what kind of cases would interest be allowed by way of damages for the detention of money? They would say, perhaps, in actions for torts. But without statute interest is not usually recoverable in such actions. 16 Am. & Eng. Enc. Law, 1031. What the books generally mean when they refer to interest recoverable by way of damages is interest recoverable, not by express contract, but by implied contract and as damages for the unlawful detention of the money. The Supreme Court of the United States, in *Stew-*

art v. Barnes, *supra*, affirms this proposition in language already quoted: "Interest in such cases is considered as damages, and does not form the basis of the action, but is an incident to the recovery of the principal debt." So, in *Graves v. Saline County*, 43 C. C. A. 414, 104 Fed. 61, it is held that where interest is not stipulated for in the contract, and is recoverable merely as damages, or as an incident to the debt, it may not be recovered after acceptance by the creditor of full payment of the principal of the obligation. Citing numerous cases supporting the proposition, some of which have already been cited. To the same effect is 22 Cyc. 1572. In *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771, Justice Knowlton says: "But interest

of action is involved. By some courts, payment, even under such circumstances, is regarded as the important fact preventing recovery, and that it was not made until after suit was begun is not regarded as making any difference. Such was the view taken in *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771, *infra*, and other cases referred to below. Other courts regard the splitting of the cause of action as the principal objection to recovery.

Thus, in *Hayes v. Chicago, M. & St. P. R. Co.* 64 Iowa, 753, 19 N. W. 245, where a railway company paid the amount of an appraisal for taking property to the sheriff, and took possession of the property, then took an appeal thus preventing payment to the landowner, and thereafter, when the appraisal was increased by the appellate court, paid the increased amount, which was then paid to the landowner, and no question of interest raised, it was held that such landowner could not thereafter recover the interest.

And in *Jamison v. Burlington & W. R. Co.* 87 Iowa, 265, 54 N. W. 242, where the landowner had accepted the amount of an award for the taking of a right of way across his farm, it was held that he could not, a year and a half after such adjudication, open up the case and have it redocketed and the question of interest decided.

In *Mann's Succession*, 4 La. Ann. 28, where, on a hearing in opposition to an account of an administrator, the account was settled and judgment given for the amount due the state, it was held that a rule would not thereafter be granted to recover interest in the nature of a penalty, since such interest should have been claimed in the original action. A similar decision appears in *Anderson's Succession*, 12 La. Ann. 95.

In *Wickersham v. Whedon*, 33 Mo. 561, it was held that no action could be maintained for interest from the date to maturity of a note, where a former suit on this note had been brought, in which, under a mistake of law, interest had been asked from the maturity instead of from the date thereof, and a judgment obtained and satisfied on this theory.

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And where a police judge compelled the payment of his salary without interest, by mandamus against the mayor and council, requiring them to perform the acts necessary to such payment, it was held that no subsequent action was maintainable for such interest. *Gordon v. Omaha*, 71 Neb. 570, 99 N. W. 242.

See also *Marks v. Purdue University*, 56 Ind. 283, *supra*; *Bronner Brick Co. v. M. M. Canda Co.* 18 Misc. 681, 42 N. Y. Supp. 14 *supra*; *Fishburne v. Sanders*, 1 Nott & M'C. 242 *infra*; *Pinckney v. Singleton*, 2 Hill, L. 343 *infra*; *Darlow v. Cooper*, 34 Beav. 281, *infra*; *Simmons v. Almy*, 103 Mass. 33 *supra*; *Ludington v. Miller*, 6 Jones & S. 478, *supra*.

—payment of principal sum due on judgments.

Where the principal sum due on a judgment had been paid and accepted by the judgment creditor, such payment does not prevent execution issuing for the interest, where a statute makes the judgment bear interest. *Johnson v. Tuttle*, 17 Abb. Pr. 315.

And in *Fishburne v. Sanders*, 1 Nott & M'C. 242, an action of debt on a former judgment, where the balance due on such judgment was paid into court after action begun, but not accepted by creditor, it was held that the plaintiff could, notwithstanding the payment of the principal sum, maintain the action for interest. A similar holding appears in *Pinckney v. Singleton*, 2 Hill, L. 343.

Claims filed in insolvency proceedings have been likened to judgments, and the rule as to judgments which bear interest by virtue of a statute has been applied. Thus, in *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. ed. 176, the creditor of a defaulting bank who had been paid the full amount of his claim by the receiver was held entitled thereafter to maintain an action for interest. The proving of the claim to the satisfaction of the comptroller was held in this case to be of the same efficacy as if it had been reduced to judgment, and

which is allowed by way of damages and for the neglect to pay promptly is a mere incident of the debt, which falls when the debt itself is extinguished. It is well settled that in such a case, if the debt is paid, there can be no recovery afterward for the interest which might have been collected." Citing numerous cases. In *Southern C. R. Co. v. Moravia*, 61 Barb. 180, it is distinctly held that where there "is no agreement to pay interest, interest, when allowable, is allowed not as a part of the contract, but as an incident and by way of damages for the default, to make the creditor good for the loss he has sustained by reason of the breach or default." This case also holds that after the principal of the debt has been paid and received for in full, no action

can be maintained to recover interest, for the reason that the interest, being a mere incident to the debt, cannot exist without it, and the debt being extinguished, the interest must necessarily be extinguished also. This case also makes a clear distinction between those cases where interest is made payable by the terms of the contract, and the case we have here, and holds in the former case that the interest is as much a part of the contract as the principal, and not a mere incident to it. In support of these principles, see also *Fake v. Eddy*, 15 Wend. 76, and *Milliken v. Southgate*, 26 Me. 424. Interest, therefore, according to these decisions and many others, which may properly be said to be due by contract, and recoverable by separate and independent ac-

in case it had been reduced to judgment, it would by statute have borne interest. The court treats the interest recoverable in such cases as damages for the detention of the debt, and holds, without a very extended discussion, that such damages may be recovered. On this theory, the case is in direct conflict with the later decision of the Supreme Court in the case of *Stewart v. Barnes*, 153 U. S. 456, 38 L. ed. 781, 14 Sup. Ct. Rep. 849.

And in *Re John Osborn's Sons & Co. 29 L.R.A.(N.S.) 887*, 100 C. C. A. 392, 177 Fed. 184, an action by trustees in liquidation of a bankrupt corporation to require the trustee in bankruptcy to pay over to such trustees a balance of funds in his hands after the payment of the indebtedness in full, in which the trustee based his refusal to pay over the funds on the ground that he intended to collect enough out of the bankrupt's estate to pay interest on the said indebtedness, it was held that the claims, although arising out of ordinary debts for the purchase of goods, were entitled to be pleaded as judgments, and therefore interest might be collected upon them notwithstanding the principal sum had been paid.

But where the judgment creditor accepts payment of the principal of the judgment without interest, in full satisfaction of the judgment, and a satisfaction is executed under seal, there can be no separate action maintainable to recover the interest, although, a statute provides that the judgment shall bear interest from the time it is entered precisely as a debt bears interest from the time it is due. *Brady v. New York*, 14 App. Div. 152, 43 N. Y. Supp. 452.

And where a wife recovered judgment against her husband's estate for money held by him in trust for her, the amount of which judgment with simple interest thereon was paid to her, it was held that she could not recover the difference between such simple interest and annual interest in a subsequent action. *Price v. Holman*, 135 N. Y. 124, 32 N. E. 124, reversing a contrary holding in the same case on a former 40 L.R.A.(N.S.)

hearing in the lower court, 17 N. Y. S. R. 572, 2 N. Y. Supp. 184.

In *Florence v. Jennings*, 3 Jur. N. S. 772, 2 C. B. N. S. 454, 26 L. J. C. P. N. S. 274, a recovery of interest was allowed after a judgment had been obtained on the principal sum for that amount alone, the judgment, however, in this case, does not appear to have been paid.

In *McKay v. Fee*, 20 U. C. Q. B. 268, recovery of interest due under a collateral agreement entered into in consideration of an extension of time on some promissory notes was denied after the payment of a judgment rendered in a suit on such notes, in which the payee sought to recover the additional interest, but abandoned the claim and took judgment merely for the amount of the notes and the interest provided for therein.

So, where the holder of a promissory note secured by mortgage brought an action thereon, but by mistake claimed less interest than was due, and recovered judgment, which judgment was paid, it was held in *Darlow v. Cooper*, 34 Beav. 281, that he could not thereafter maintain an action in equity to foreclose the mortgage, and thus collect the balance of the interest. See also *Beer v. Foakes*, L. R. 11 Q. B. Div. 221, s. c. on appeal L. R. 9 App. Cas. 605, 54 L. J. Q. B. N. S. 130, 51 L. T. N. S. 833, 33 Week. Rep. 233, 1 Eng. Rul. Cas. 370, and *Pacific R. Co. v. United States*, 158 U. S. 118, 39 L. ed. 918, 15 Sup. Ct. Rep. 766.

—effect of demanding interest or protesting at its nonpayment.

In some cases, a demand has been made for the interest, or a protest offered at its nonpayment. Such a demand or protest does not change the rule that payment of the principal sum due prevents recovery of the interest, if the obligee afterwards accepts the principal. The courts take the view that where there is no legal compulsion, the fact of protest can amount to nothing, in view of the other fact that the person knowingly accepts the principal sum without interest. *Forschirm v. Mechanics'*

tion, even after payment of principal, and as an integral part of the debt, is interest due by the specific terms of the contract. In that class of cases, as is said in 16 Am. & Eng. Enc. Law, 2d ed. 1033, "there would be no more reason for holding that the payment of the original principal extinguished the claim for interest than that a part payment of such principal destroyed the right to the remainder."

But can the position of plaintiff's counsel be supported by the principles enunciated or the reasonings applied in the Virginia and West Virginia cases relied upon? The cases referred to are those already cited, of *McVeigh v. Howard*, 87 Va. 603, 13 S. E. 31; *Roberts v. Cocke*, 28 Gratt. 207; *Kent v. Kent*, 28 Gratt. 840, and *Shipman v. Bailey*, 20 W. Va. 140. It is argued that these cases regard interest, where the promise to pay interest is either express or implied, not in the nature of damages, but as an integral part of the debt. The proposition, so far as it is applicable to express promises, is correct, but we do not regard the language of the decisions, by implication or otherwise, as supporting the proposition respecting interest recoverable on an

implied promise. *McVeigh v. Howard* was an action on the following contract:

\$10,000. Richmond, Va., Jan'y 9th, 1878.

In consideration of professional services rendered to me by John Howard, Esq., I owe, and hereby promise to pay to him, ten thousand dollars. Witness my hand and seal this day, and year above written.

[Seal.]

W. N. McVeigh.

The only point for decision in that case was, from what time interest on the bond sued on should be allowed? It was held that the court below properly instructed the jury that interest should go from its date predicated its judgment on the decisions of *Chapman v. Shepherd*, 24 Gratt. 377; *Roberts v. Cocke*, 28 Gratt. 207, *Cecil v. Hicks*, 29 Gratt. 1, 26 Am. Rep. 391; *Cecil v. Deyerle*, 28 Gratt. 775, and *Kent v. Kent*, 28 Gratt. 840. The language of Judge Burks in *Roberts v. Cocke*, and of Moncure, President, in *Kent v. Kent*, quoted in that case, is especially relied on here. Judge Burks said: "It has always been lawful in Virginia for parties to contract for the payment of interest for the use and for-

& T. Bank, 137 App. Div. 149, 122 N. Y. Supp. 168; *Graveson v. Odd Fellows' Temple Co.* 6 Ohio S. & C. P. Dec. 287; *Tuttle v. Tuttle*, 12 Met. 551, 46 Am. Dec. 701.

And even though the obligee claimed to have reserved his legal right, it was held not to change the rule, in *Riley v. Maxwell*, 4 Blatchf. 237, Fed. Cas. No. 11,838.

And in *Graves v. Saline County*, 43 C. C. A. 414, 104 Fed. 61, the fact that the principal of interest coupons was accepted under protest was held not to change the rule that the payment of the principal extinguishes the claim for interest.

So, in *Cutter v. New York*, 92 N. Y. 166, the fact that a protest was made at the time of accepting the principal was held to make no difference in the rule.

In *Hobbs v. United States*, 19 Ct. Cl. 220, where the claimant demanded interest, and was told that the appropriation was short, and then took the principal, he was allowed to recover, but on the ground that the interest provided by statute is contractual. So, in *Devlin v. New York*, 131 N. Y. 123, 30 N. E. 45, where there was a protest made at not receiving the interest, a recovery of the interest was afterwards allowed, but on the ground that it was contractual. And in *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. ed. 176, demand was made, but recovery of interest allowed on other grounds.

See also *Middaugh v. Elmira*, 23 Hun, 79, supra; *Bidwell v. Preston*, 88 C. C. A. 19, 160 Fed. 653, supra; *Chase v. Manhardt*, 1 Bland, Ch. 333, supra, and *Snowden v. Thomas*, 4 Harr. & J. 335, supra. See also *Lumley v. Musgrave*, 4 Bing. N. C. 9, 3 Hodges, 247, 1 Jur. 799, 5 Scott. 230, 7 L. 40 L.R.A. (N.S.)

J. C. P. N. S. 49, and *Lumley v. Hudson*, 4 Bing. N. C. 15, 5 Scott, 238, where the fact was mentioned at the time of receiving payment, that the interest was due.

—effect of an express reservation as to interest.

But where there has been an express agreement between the parties that the question as to the right to recover interest should be reserved and determined by an action to be brought by the plaintiff therefor, the receipt of the principal sum does not bar the right to recover interest. *Grote v. New York*, 190 N. Y. 235, 82 N. E. 1088, reversing 117 App. Div. 768, 102 N. Y. Supp. 977.

Where the question of interest is expressly reserved for future litigation at the time of the receipt of the principal, such receipt is no bar to the recovery of the interest. *Burr v. Burch*, 5 Cranch, C. C. 506, Fed. Cas. No. 2,187 (payment of a legacy).

In *Eames v. Cushman*, 135 Mass. 573, the question of interest was agreed to be left open, and a recovery was allowed.

So, the court in *Bronner Brick Co. v. M. M. Canda Co.* 18 Misc. 681, 42 N. Y. Supp. 14, holds that if an express agreement is made reserving the question of interest, payment of principal does not bar right to recover interest.

However, in *Moore v. Fuller*, 47 N. C. (2 Jones, L.) 205, an agreement to submit the question of liability for interest on a bond to arbitration was held not to save the obligee's right to recover interest thereon, but it is suggested that there might be a remedy on the award.

W. A. E.

bearance of money within the limits prescribed by statute; and in the absence of any express agreement for the payment of interest, in obligations for the payment of a certain sum of money on demand or on a given day, interest on the principal sum from the time it becomes payable is 'a legal incident of the debt, and the right to it is founded on the presumed intention of the parties.'" Judge Moncure said: "A bond payable on demand, . . . or on a certain day, bears interest from the time it is payable, according to the well-settled law of this state, unless there be some contract, express or implied, between the parties, or some extraordinary or peculiar circumstances, showing that such interest was not to be paid; and the burden of proving such contract or circumstances devolves on the party who seeks to avoid such payment. In the absence of such proof, the obligation for the payment of interest is as much a matter of contract in the case as the obligation for the payment of the principal." We see little in the language of either of these judges to support the contentions of counsel. Of course, interest is a legal incident of the debt; the text-books and decisions from other states, cited, so treat it. And it is true also, as said by Judge Moncure, absolutely, that when the contract is express, as it was in the case he then had under consideration, and in a certain sense when the contract to pay interest is implied, that "the obligation for the payment of interest is as much a matter of contract in the case as the obligation for the payment of the principal." But to say that the interest is a legal incident of the debt in either case, or is a matter of contract, is not equivalent to saying that the interest, where the contract is implied, is an integral part of the debt, recoverable by separate action after payment of principal. None of the Virginia decisions justify this conclusion. Quite the contrary we think.

We have only found one line of decisions noting any exceptions to the general rule. One instance is where interest is given by statute for delay in paying money for land taken by condemnation, as in *Devlin v. New York*, 131 N. Y. 123, 30 N. E. 45. Another instance is where a charter law of a city provided that warrants issued for repairing sewers should bear interest, supplemented by a resolution of council, as in *Smith v. Buffalo* (Sup.) 39 N. Y. Supp. 881, where it was held that the interest became thereby ingrafted in the debt itself. Another instance is where, pursuant to an act of the legislature, a railroad company by resolution ordered that subscribers to stock be allowed interest on instalments as paid, to be payable in stock, the interest to be

carried to the credit of the stockholder annually, as in *Ohio v. Cleveland & T. R. Co.* 6 Ohio St. 489. A pertinent point of the syllabus in that case is: "Interest follows the principal as an incident to it, so long as it remains an incident; but where it is separated and set apart from the principal by actual payment, or by being carried, when due, to the credit of the owner of the principal, in his account with the debtor, and this in pursuance of a provision in the contract creating and defining the principal debt, it is so separated and disjoined from the principal as to cease to be an incident to, and does not follow, it." The case here cannot be brought within the principles of either of these exceptional cases.

Lastly, as to the effect of the receipt. On the theory that the interest sought to be recovered here, supposed to be due by the implied agreement to pay interest, is an integral part of the principal debt, and recoverable by separate action, plaintiff's counsel have argued that the receipt for the principal without interest, under protest, does not estop the plaintiff from recovery of the interest sued for in this action. They rely especially upon our recent case of *Nixon v. Kiddy*, 66 W. Va. 355, 66 S. E. 500, and cases there cited. This case holds that "payment by a debtor, and receipt by the creditor, of a less sum than is due upon an undisputed liquidated demand, is not satisfaction of the debt, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given as to the part left unpaid." Of course, if counsel's premises were well founded, their conclusion would follow and this decision would apply. But if, as we hold, interest on an implied promise to pay is only an incident to the debt, following it, as was said in *Hatcher v. Lewis*, 4 Rand. (Va.) 162, as the shadow the substance, and not an integral part of the debt, the argument wholly fails. The old common-law rule followed in *Nixon v. Kiddy*, long since abolished in Virginia (Va. Code, 1887, chap. 134, § 2858 [Code 1904, p. 1499]), has always been regarded a harsh one, and one that ought not to be extended by judicial interpretation beyond its present limits. Quoting from *Brooks v. White*, 2 Met. 283, 37 Am. Dec. 95, and other cases, Peck, Ch. J., in *Wescott v. Waller*, 47 Ala. 492, says: "This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, the rule itself is not to be applied." And in the case of *Johnson v. Brannan*, 5 Johns. 268, the court speaks of it as 'that rigid and rather unreasonable rule of the old law.' Being a rigid rule,

and the reasons for it not altogether satisfactory, it might be expected that cases would arise that would constrain the courts, to prevent injustice and a violation of good faith, to treat as exceptions to it. This we find to be the case."

For these reasons we are not disposed to apply the rule to interest due by implied agreement, and where it is not carried in the contract as an integral part of the debt.

Does the fact that plaintiff may have received and receipted for the principal under protest, change the effect of his action? The authorities say, no. 22 Cyc. 1573, and cases cited in note 90.

We see no merit in the point that the item, "to one dump cart, \$50," sued for, left a part of the principal of the debt unpaid, entitling plaintiff to sue for it, and for interest on the whole debt. At the time of the settlement defendant owed plaintiff nothing for the cart. He had not sold it to defendant; defendant had not bought it from him. The item was then no part of any debt defendant then owed plaintiff. Plaintiff had left the cart on defendant's premises; the latter was at most a mere bailee. No demand was ever made for the cart; if plaintiff had wanted it, he could have gone and gotten it no doubt, as he had gotten other carts left by him on the premises. It is plainly evident that the purpose of adding the item to the account sued for was to avoid the effect of the settlement and receipt of December 4, 1906. This is no such case as was presented in *Walker v. Norfolk & W. R. Co.* 67 W. Va. 273, 67 S. E. 722.

Our conclusion is to affirm the judgment.

Brannon, P., absent.

Poffenbarger, J., concurring:

Yielding to the weight of authority, I concur in this decision; but, to my mind, it involves a contradiction. An implied contract to pay money as interest or upon any other valid consideration is just as binding as an express contract. There is or is not an implied contract to pay interest for the use of money retained after it has become due and payable. Our decisions say there is, and money due is not satisfied by anything short of payment or a release in some form. The receipt is not conclusive, and the parol evidence shows the amount received was not accepted as payment in full. If the interest was due by contract, it could not be satisfied or its existence negatived by mere conduct affording ground for a contrary inference.

The rule here adopted will often work injustice, as it has done here. A debtor may refuse payment and threaten defenses, as a means of forcing a creditor who is not in

a situation to suffer delay without great hardship, to accept the principal sum without the interest, and thus escape payment of a part of what he justly owes. Legal rules should make provision against such results.

Williams, J., unites in this criticism.

WEST VIRGINIA SUPREME COURT OF APPEALS.

PITTSBURG HYDRO-ELECTRIC COMPANY

v.

ELIZABETH LISTON, Plff. in Err.

(— W. Va. —, 73 S. E. 86.)

Eminent domain — electric companies — constitutionality.

1. The legislature may authorize the taking of private property for public use, upon making provision for just compensation therefor, by electric power, heat, light, and traction companies. Clause 6 of chapter 13, Acts (Ex. Sess.) 1907 (Code Supp. 1909, chap. 42, § 2, cl. 6), amending and re-enacting § 2, cl. 6, chap. 42, Code 1899 (Code 1906, chap. 42, § 2, cl. 6), is not an un-

Headnotes by **WILLIAMS, P.**

Note. — As to whether the generation of electricity for sale to the public for purposes of power is a public use for which the power of eminent domain may be exercised, see notes to *State ex rel. Tacoma Industrial Co. v. White River Power Co.* 2 L.R.A. (N.S.) 842, and *Walker v. Shasta Power Co.* 19 L.R.A. (N.S.) 725. And see also later cases, *State ex rel. Dominick v. Superior Ct.* 21 L.R.A. (N.S.) 448, and *Wisconsin River Improv. Co. v. Pier*, 21 L.R.A. (N.S.) 538.

Whether the furnishing of water and water power to the public for manufacturing purposes is such a public purpose, see note to *Jacobs v. Clearview Water Supply Co.* 21 L.R.A. (N.S.) 410, and subsequent case, *State ex rel. Wausau Street R. Co. v. Bancroft*, 38 L.R.A. (N.S.) 526.

For effect of offer to serve public on right to resort to eminent domain in aid of attempt to transmute water power into electricity for sale, see note to *Jones v. North Georgia Electric Co.* 6 L.R.A. (N.S.) 122.

As to exercise of power by one corporation for a public purpose to be served by another, see note to *State ex rel. Dominick v. Superior Ct.* 21 L.R.A. (N.S.) 448; and as to combination of public and private uses, see note to *Wisconsin River Improv. Co. v. Pier*, 21 L.R.A. (N.S.) 538.

Generally, as to judicial power over the right of eminent domain, see note to *Grafton v. St. Paul, M. & M. R. Co.* 22 L.R.A. (N.S.) 1.

warranted exercise by the legislature of the power of eminent domain.

Same — necessity — legislative question — public service.

2. Whether it is expedient, appropriate, or necessary to provide for a public service of a particular kind or character is a legislative, not a judicial, question.

Same — courts — scope of inquiry.

3. Courts are limited in their inquiry to the question whether the particular service provided for is a public service.

Same — power to confer — foreign corporations.

4. The legislature may select the agencies through which it will exercise the right of eminent domain, including foreign corporations.

Same — statutes — construction.

5. Section 30, chap. 54, Code 1906, confers upon foreign electric power, light, heat, and traction companies that have complied with the conditions of law entitling them to do business in this state, and that propose to serve the public, equal right of eminent domain with like domestic companies, and subjects them to the same regulations, restrictions, and liabilities.

(December 5, 1911.)

ERROR to the Circuit Court for Preston County to review an order affirming a report of the Commissioners in a condemnation proceeding, fixing the compensation to be paid to defendant for land owned by her, and investing plaintiffs with the title to said land. Affirmed.

The facts are stated in the opinion.

Mr. J. R. Trotter for plaintiff in error.

Messrs. P. J. Crogan and A. Bliss McCrum, for defendant in error:

The sovereign right and power of eminent domain can be delegated to corporations or other agencies of the state; and when private corporations are so authorized to do, then private pecuniary interests do not preclude their being regarded as public agencies in respect to the public good sought to be accomplished.

Alexandria & F. R. Co. v. Alexandria & W. R. Co. 75 Va. 780, 40 Am. Rep. 743; Charleston & S. Bridge Co. v. Comstock, 36 W. Va. 263, 15 S. E. 69; Brannon, 14th Amend. 163.

It is the province of the legislature to declare the public uses for which private property may be taken. This power is only limited by constitutional provisions, and of these the courts take cognizance and eventually decide as to the constitutionality of the law.

Painter v. St. Clair, 98 Va. 85, 34 S. E. 989; Alexandria & F. R. Co. v. Alexandria & W. R. Co. 75 Va. 780, 40 Am. Rep. 743; Charleston Natural Gas Co. v. Lowe, 52 W. Va. 664, 44 S. E. 410. 40 L.R.A.(N.S.)

Laws giving electric light, heat, and power companies the power of eminent domain are constitutional.

Griffin v. Goldsboro Water Co. 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319; Cincinnati, H. & D. R. Co. v. Bowling Green, 57 Ohio St. 336, 41 L.R.A. 422, 49 N. E. 121; Rockingham County Light & P. Co. v. Hobbs, 72 N. H. 531, 66 L.R.A. 581, 58 Atl. 46; Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429, 5 L.R.A. (N.S.) 638, 107 N. W. 405, 7 Ann. Cas. 1182; Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 11 L.R.A.(N.S.) 105, 112 N. W. 395; Cooley, Const. Lim. 7th ed. 766-769; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Jones v. North Georgia Electric Co. 125 Ga. 618, 6 L.R.A.(N.S.) 122, 54 S. E. 86, 5 Ann. Cas. 526; Nolan v. Central Georgia Power Co. 134 Ga. 201, 67 S. E. 656; Walker v. Shasta Power Co. 19 L.R.A.(N.S.) 725, 87 C. C. A. 660, 160 Fed. 856; Hollister v. State, 9 Idaho, 8, 71 Pac. 541; Grande Ronde Electrical Co. v. Drake, 46 Or. 243, 78 Pac. 1031; Re Niagara, L. & O. Power Co. 111 App. Div. 686, 97 N. Y. Supp. 853; Jacobs v. Clearview Water Supply Co. 220 Pa. 388, 21 L.R.A.(N.S.) 410, 69 Atl. 870; State ex rel. Dominick v. Superior Ct. 52 Wash. 196, 21 L.R.A.(N.S.) 448, 100 Pac. 317; Wisconsin River Improv. Co. v. Pier, 137 Wis. 325, 21 L.R.A.(N.S.) 538, 118 N. W. 857.

Williams, P., delivered the opinion of the court:

Elizabeth Liston has obtained a writ of error to an order of the circuit court of Preston county, made in a condemnation proceeding against her by the Pittsburgh Hydro Electric Company, investing said company with the title to 15.45 acres of her land at the fork of Cheat river and Big Sandy creek, in Preston county, West Virginia, upon payment to her, by it, of the sum of \$500, ascertained by commissioners appointed in the manner provided by law to be a just compensation therefor.

Condemnation proceedings were instituted by virtue of chapter 13, Acts [Ex Sess.] 1907, amending and re-enacting § 2 of chapter 42, Code 1899. That portion of the act applicable to this case is as follows, *viz.*: "Sec. 2. The public uses for which private property may be taken or damaged are as follows: . . . Sixth. For telegraph and telephone companies and electric power, heat, light, and traction companies, when for public use. That telephone and electric light, heat, traction, and power companies desiring to extend their lines in this state may place poles and wires along any county road, by and with

the consent of the county court through which such lines may pass; provided, that all such poles and wires shall be placed and erected so as not in anyway to interfere with the public use of such road, or with any fruit or shade trees, or with any private property; and provided, further, that when any such company desires to erect its poles along any street of any incorporated city, town, or village, the consent of the council of such city, town, or village shall first be obtained. Provided, that any power company using or occupying any highway under this act shall furnish to any person, company, or corporation, along, upon, or near its line or lines, desiring the same, every kind of service at the minimum charge for like services charged to any other person, company, or corporation for like service, and upon the same terms, if amount of power consumed and conditions and expenses to such power company be the same; should at any time the power generated by any power company be insufficient to furnish all persons, companies, and corporations the amount of power desired, such power company shall first serve municipal corporations having contract therefor; second, persons, companies, or corporations engaged in manufacture or transportation; and third, individual customers. Any violation of any provisions of this clause shall work a forfeiture of all rights acquired under it."

The constitutionality of this statute is assailed by counsel for Mrs. Liston, on the ground that it authorizes the taking of private property for private use, which is in violation of the spirit of the Constitution. The authorities uniformly hold that the eminent domain exists only for the public welfare, and that private property cannot be lawfully taken for private uses. The exercise of the sovereign power for such a purpose would be a usurpation of power never delegated to the state by the people, an unwarranted invasion of the rights of private property, which has always been a right sacred in the eyes of the English common law, and still held sacred by the laws of all the states of the Union. An owner of property can only be compelled to surrender it to subserve the public good; and even then only when just compensation is paid to him, or secured to be paid. No court, so far as we know, has ever held that private property can be taken for private use. And, on the contrary, none of them hold that a state cannot lawfully take private property for public use.

Lewis, in his excellent work on Eminent Domain (§ 1), defines "eminent domain" to be "the right or power of a sovereign state to appropriate private property to

particular uses, for the purpose of promoting the general welfare." It is an inherent, inalienable, sovereign right, and lies dormant in the state until the legislature sees fit to exercise it, either directly, or by investing some corporation or individual with the power to exercise it. It is interesting to note the various purposes for which the legislatures of the states have successively exercised the power of eminent domain, as discovery and invention would bring about new social and economic conditions calling for its exercise in relation to some matter not theretofore thought of. In the early history of our country the needs of the public were few, and the eminent domain was exercised in respect to a very limited number of subjects. Gristmills and highways were about the first, and for some time the only, material things in which the public had a common use. But since the advent of steam and electric power, many water mills which once flourished, served large communities, have passed into disuse. And while the old mill acts are still retained as part of the law of this state, they are seldom, if ever, invoked in condemnation proceedings. At first public roads, turnpikes, canals, and navigable streams furnished the only means for travel and commerce; but later on, when steam began to be used as a motive power, the eminent domain was applied in the promotion of railroad development, as another means of serving the public. The following are some of the many subjects which the legislatures of many of the states have deemed of sufficient public utility to justify the taking of private property, viz.: Gristmills, public roads and turnpikes, steam and street railroads, canals, pipe lines for carrying water, oil, and gas, sewers and drains, public buildings, including schoolhouses, mining privileges, irrigation of arid lands, and drainage of swamp lands. And the courts have uniformly held that the taking of private property for such purposes was a lawful exercise of the state's power. In more recent years the discovery of that hidden, magic force known as electricity, and all the varied uses to which it has been applied to serve the wants and conveniences of mankind, have again called forth the exercise, by the state, of the right of eminent domain, for a purpose not theretofore contemplated. Until the discovery of this new force, and the invention of means by which it could be transmitted, controlled, and applied, so as to give light, heat, and power, only a limited use could be made of the natural waterfalls which abound in this state. It is not practicable to transmit water power a very great dis-

tance, and, in order to utilize the waterfalls as a direct motive power at all, mills and factories would have to be erected near by, and very many of such waterfalls are found in sections remote from railroads. But these waterfalls, however remote from railroad development, may be utilized to develop electricity, and electricity possesses the quality of being separated and transmitted by means of wire over hill and valley for a long distance, without a very great diminution of its force. By this means water power can be converted into electric power, and transmitted over a wide area, and be made to serve the uses of a greater number of people, than any other physical force yet discovered. Moreover, electricity possesses the combined qualities of heat, light, and power, and is therefore capable of supplying more of man's wants and needs than any other natural force now known. For some, or all, of these different purposes, it is now in almost universal use in every civilized country on the globe. But electricity is not self-generating; some other force or power is necessary to produce it. Either steam or water power must be employed in the first instance before this subtle and indescribable force, known as electricity is developed. And the legislature, realizing that the numerous natural waterfalls in the state could be made to serve the public through the means of "electric power, heat, light, and traction companies," invested them with the right of eminent domain. They are authorized to take the lands of private persons upon making just compensation therefor, when their purpose is to serve the public. Is there such a general demand for electricity, for heating and lighting, and as a motive power, as to warrant the legislature in extending the right of eminent domain to companies created for the purpose of supplying it? This is a legislative, not a judicial, question, and the legislature has answered it affirmatively by the passage of the act in question. Its answer is conclusive on the court.

The expediency, or propriety, of extending the right of eminent domain to any particular subject, provided each member of the community is given equal right and privilege with respect thereto, is a question for the legislature only, and with it the courts have nothing to do. *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 812; *Varner v. Martin*, 21 W. Va. 534.

The only question which the courts are authorized to determine is whether or not the use intended is, in effect, a public use. This is conceded to be a judicial ques-

tion. 1 Lewis, *Em. Dom.* 2d ed. § 251; *Varner v. Martin*, supra. But it is often a perplexing question. A public use has been variously described, but never comprehensively defined, by the courts and by text writers. Judge Cooley, in his excellent work on *Constitutional Limitations*, 7th ed. p. 766, says: "We find ourselves somewhat at sea, however, when we undertake to define, in the light of the judicial decisions, what constitutes a public use." It is not every kind of benefit that a community may derive from an enterprise which is proposed to be located in its midst that will justify the taking of private property. A merely indirect and collateral benefit is not sufficient. The public must have some direct and certain right or interest in it, or control over it. Each case, however, must be determined by the application of certain general and well-recognized principles.

Light, heat, and power are essential to the comfort and convenience of the people of a community, and electricity is capable of supplying them. It can be distributed to each member of a community in such quantity as he may need. It may not only be applied in operating street railways, and in the running of large factories, but the farmer can, if he wants to, utilize it in lighting his house, and in operating machinery to saw wood and grind grain for his family and cattle. He could also relieve his wife of much labor by using it to operate the washing machine, the sewing machine, and the churn. But it is not necessary that all the people of a community should take a portion of the electric current in order to constitute the use of a public one. It is sufficient if each member of the community has an equal right to a portion of it on equal terms with every other member. That some of the residents of a city do not use gas for lighting or heating, or that some elect not to have their houses supplied with water from the public reservoir, or that some refuse to avail themselves of the general convenience afforded by the telephone, affords no reason for holding telephone, gas, water, and electric power and light companies not to be public-service corporations. All the residents of the city have the right to these conveniences, on the same terms with those citizens who do enjoy them, and that is sufficient to determine the service to be a public, and not a private, use.

Many states have passed statutes similar to our own, conferring the right of eminent domain upon electric companies chartered for the purpose of furnishing light, heat, and power to the public, and these statutes have been generally upheld by the courts

as constituting a proper exercise of the right of eminent domain. 1 Lewis, Em. Dom. § 268, and numerous cases cited in note 70. We have examined nearly all of those cases, and cite the following specially as supporting the constitutionality of such statutes: *Jones v. North Georgia Electric Co.* 125 Ga. 618, 6 L.R.A.(N.S.) 122, 54 S. E. 85, 5 Ann. Cas. 526; *Rockingham County Light & P. Co. v. Hobbs*, 72 N. H. 531, 66 L.R.A. 581, 58 Atl. 46; *McMeekin v. Central Carolina Power Co.* 80 S. C. 512, 128 Am. St. Rep. 885, 61 S. E. 1020; *Ingleside Mfg. Co. v. Charleston Light & Water Co.* 76 S. C. 95, 56 S. E. 664; *Stoy v. Indiana Hydraulic Power Co.* 166 Ind. 316, 76 N. E. 1057; *Wisconsin River Improv. Co. v. Pier*, 137 Wis. 325, 21 L.R.A.(N.S.) 538, 118 N. W. 857; *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 11 L.R.A.(N.S.) 105, 112 N. W. 395; *Re Niagara, L. & O. Power Co.* 111 App. Div. 686, 97 N. Y. Supp. 853; *Helena Power Transmission Co. v. Spratt*, 35 Mont. 108, 8 L.R.A.(N.S.) 567, 88 Pac. 773, 10 Ann. Cas. 1055; *Grande Ronde Electrical Co. v. Drake*, 46 Or. 243, 78 Pac. 1031; *Walker v. Shasta Power Co.* 19 L.R.A.(N.S.) 725, 87 C. C. A. 660, 160 Fed. 857. This last case involved the constitutionality of an act of California.

The provision in our statute granting electric power, heat, light, and traction companies, when for public use, the right to erect their poles and stretch their wires along public roads, by and with the consent of the county court, and if in a city, town, or village, by and with the consent of the authorities thereof, does not invalidate the act. Neither is the act invalidated by the provision which requires such companies to furnish service to persons along and near its line, when it occupies a public highway, and which classifies the public to be served into three classes, giving the preference: First, to municipal corporations; second, persons, companies, and corporations engaged in manufacture or transportation; and, third, individual customers, in the event there is not sufficient current developed to supply all. Such classification is clearly within the legislative jurisdiction, and does not constitute the use a private one.

We think the statute is constitutional, and shows wisdom on the part of the legislature. The recent discoveries and inventions by means of which electricity has been made to serve the wants of man have created a demand for much of the water power of this state, which heretofore could be of little use, was of comparatively small value, and which for ages past has been allowed to go to waste. It requires more

capital to build electric plants and string wires for distributing the current to supply the needs of the people than is generally possessed by the individuals who happen to be the owners of much of the water power, now made valuable because of its new possible use, and, in order that it may be utilized to serve the public, the legislature has seen fit to clothe such corporations as are chartered for the purpose of supplying such current to the public with the right of eminent domain. A heretofore wasted natural power can thus be made to supply a public need, and the state still retain the right to prescribe reasonable regulations for the protection of the public. For no public-service corporation or company can escape this inherent sovereign power which is always reserved to the state. 1 Lewis, Em. Dom. § 246; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410.

That there is now no statute regulating the charges which such companies may make for services to be rendered is immaterial. It is time to prescribe regulations when the company is ready to perform the services. Moreover, it would not be possible to determine, correctly, in advance of the erection of the company's plant, and the ascertainment of the cost of furnishing the light, power, heat, etc., what would be a fair and reasonable charge therefor to the public.

It is insisted that condemnor's petition is bad because it does not aver that it has a contract to supply any municipality or company. This omission is immaterial. It would certainly be reversing the usual order of things to require a company to obtain a franchise, or contract, to supply the public at a certain fixed rate, before it acquired the land on which to erect its plant, and before it could know whether it would ever be in a position to comply with its agreement. After the company obtains the necessary land on which to build its plant, and the easements necessary for erecting its poles, or towers, and stringing its wire, it may then be able to know at what price it will be able to serve the public. Before this is accomplished a contract as to price would be much a matter of speculation, and one in which the public would likely be the loser. *State ex rel. Harlan v. Centralia-Chehalis Electric R. Power Co.* 42 Wash. 634, 7 L.R.A.(N.S.) 198, 85 Pac. 344. The condemnor's right depends, not upon contract to supply at a certain price, made in advance, but upon the law, and the provisions of its charter. It is bound by law, being a public-service corporation invested with the

right of eminent domain, to use the property taken for the purposes set forth in its petition, and the order of the court; any other use, when the public needs and demands the service, would be a perversion of its privilege and a violation of its right.

There is nothing in the condemnor's petition which would indicate that it desires to make private use of the electricity which it proposes to generate. It alleges that it wants the land "for the purpose of the supply, storage, and transportation of water and water power and electric power for commercial and manufacturing purposes, and for public purposes and public uses, for cities, towns, counties, and other municipal corporations, and for electric street and interurban railways, to be operated for public purposes, and for other internal improvement companies in Preston county and elsewhere in the state of West Virginia, and for all public purposes and public uses." And further, that it desires to proceed at once in Pleasant district in Preston county to erect and construct reservoirs and water power and electric power plants, for the storage and transportation and supply of water and water power and electric power for the aforesaid purposes. All of these purposes are certainly consistent with the public uses declared by the statute. It should not be presumed that it wants the land for a private use when it alleges that its purpose is to serve the public. It will be time enough for the state to interpose for the protection of the rights of the public when the company begins to pervert the use, if it should ever do so, to the neglect of the public which it proposes to serve. That the petition denominates one of the uses a commercial use does not necessarily mean that the commerce is private. A sale of electric light or power to the public, whether sold to the individual members composing it, or to a municipality for their benefit, is commerce.

The order shows that evidence was produced at the hearing, but the record contains none of it, not even a copy of condemnor's charter. We must therefore assume that the allegations of the petition were properly proven, and that the company is duly authorized by its charter to engage in the business proposed. It was chartered under the laws of the state of Pennsylvania; but the law of this state (§ 30, chap. 54, Code 1906) extends to it the same rights, powers, and privileges that are conferred upon a domestic corporation created for the same purpose, on compliance with the provisions of law relating to foreign corporations desiring to do busi-

ness in this state, and subjects it to the same regulations, restrictions, and liabilities that are imposed upon like corporations created by this state. This gives it the right of eminent domain, to be exercised, however, for the public use of the citizens of West Virginia. 1 Lewis, Em. Dom. § 310. The legislature may confer the power of eminent domain upon a foreign public-service corporation. 1 Lewis, Em. Dom. § 374, and numerous cases cited under note 52.

It is insisted in brief of counsel for plaintiff in error that no general public necessity is shown to exist for exercising the eminent domain for the purpose in question. This is not a judicial question, but a legislative one. 1 Lewis, Em. Dom. §§ 255, 596. In undertaking to pass on this question is where a few of the courts of the country have fallen into error.

Whether the necessity for taking the land in question exists in favor of the condemnor is largely a matter for its own determination. Id. § 597.

The order of the lower court will be affirmed.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN

v.

WADHAMS OIL COMPANY.

(— Wis. —, 134 N. W. 1121.)

Criminal law — injunction against enforcement of statute — effect.

The existence of a preliminary order enjoining the enforcement of a statute relating to the inspection of oil pending a suit to test the constitutionality of the statute does not relieve one who makes sales in violation of the terms of the statute from prosecution thereunder, if the statute is ultimately held to be valid.

(March 12, 1912.)

CERTIFICATION by the Circuit Court for Sheboygan County for the opinion of the Supreme Court of the question whether or not the pendency of a suit to test the constitutionality of an oil inspection law was a defense to the liability of one ac-

Note — STATE v. WADHAMS OIL Co. seems to be a case of first impression, as a search has disclosed no other case upon the question as to criminal responsibility for violation of a statute pending an injunction against the enforcement thereof.

As to criminal responsibility for violation of a statute after a judicial ruling that it was unconstitutional, and before that ruling had been changed, see note to State v. O'Neil, 33 L.R.A. (N.S.) 788.

cused of making sales of oil without compliance with its terms.

Statement by Siebecker, J.:

July 31, 1909, the defendant commenced an action in equity to enjoin the state supervisor of inspectors of illuminating oils from executing chapter 363 of the Laws of 1909, known as the oil inspection law. A temporary injunction was issued enjoining the state supervisor and the inspectors from executing a law as against the defendant. A demurrer to the complaint was sustained in circuit court on October 18, 1909, and the temporary injunction was dissolved. On appeal to this court, a decision was rendered, sustaining the law as constitutional, and affirming the orders of the circuit court sustaining the demurrer and dissolving the injunction.

After the decision of this court, an information containing numerous counts was filed by the district attorney of Sheboygan county, charging the defendant with repeated violations of the oil inspection law during the pendency of the injunction in the equity case. The defendant was found guilty upon twenty-six counts.

The trial court, being in doubt as to whether or not this injunctive order issued in the action by the defendant against the state supervisor of inspectors of illuminating oils constitutes a defense to this prosecution, certifies the following question to this court: "Is the injunctive order issued by court commissioner Ryan in said equity action a defense in this action to the criminal prosecution of the Wadhams Oil Company for the violation of said act, as charged in said information, for sales of petroleum products made by said company during the pendency of such injunctive order, and contrary to the provisions of said act?"

Messrs. L. H. Bancroft, Attorney General, and Russell Jackson for the State.

Mr. George P. Miller, with Messrs. Marshutz & Hoffman, for defendant.

Siebecker, J., delivered the opinion of the court:

Assuming, without deciding, that, upon the ground that the oil inspection law (chapter 363, Laws of 1909) was an invalid act, the circuit court commissioner had jurisdiction to make the injunctive order in the action brought by the defendant against Edward L. Tracy, as state supervisor of inspectors of illuminating oils, and thereby to enjoin him from enforcing the provisions of the law providing for such inspection against the defendant, and from interfering with the conduct of its business in selling

such oils without having had them inspected, we then have the question presented; Is this order a defense to the prosecution of the defendant criminally for violations of this law through sales made by it of oils, not inspected, as required by such law, during the pendency of such injunctive order, since the law was challenged as invalid legislation in the action wherein the restraining order was made?

The contention of the defendant is that the defendant is protected against the incurring of the penalties for selling oils contrary to the mandate of the law during the pendency of such preliminary order. The injunctive order here involved restrained the oil inspectors from inspecting plaintiff's oils and from instituting civil and criminal suits during its pendency. The order was unquestionably made upon the ground that the court had jurisdiction within its equity powers to enjoin such prosecutions in order to protect the plaintiff's property rights, and because it deemed that such rights would be imperiled by the execution of a void statute through wrongfully subjecting the plaintiff to a multitude of civil and criminal suits, and through harassing it to an extent that would amount to a deprivation of the right which entitles every person to a certain remedy in the law for the redress of injuries he may receive in his person or property. *Milwaukee Electric R. & Light Co. v. Bradley*, 108 Wis. 467, 84 N. W. 870; *Joseph Schlitz Brewing Co. v. Superior*, 117 Wis. 297, 93 N. W. 1120.

The argument is made that whatever protection the defendant would have under such an order, had the law been unconstitutional, must be given it during the pendency of the order, though it was finally adjudged that the legislative act was constitutional; and that it must result from this that the defendant, by force of the preliminary order, was exempted from the operation of the statute during the pendency of the order. This gives an effect to such a preliminary restraining order wholly beyond its purpose and function. It is well recognized that such orders have been used and employed to maintain the *status quo* of the rights of parties, and thus protect persons against irreparable injuries in the law. Its legal object is to preserve a person's property or rights in controversy, until a final adjudication is reached upon the merits of the controversy; but it does not, in a legal sense, conclude the rights of the parties. The very nature of the remedy suggests that it can have no other effect than to maintain the existing status of a party's personal and property rights until a court can finally adjudge whether they would be imperiled. The effect thereof is not to

exempt a person from the operation of the law, or to suspend it as to him. It does no more than postpone the enforcement of the law until the rights of the persons under the law are declared by a final judgment of a court exercising jurisdiction in the matter. As declared in *Consolidated Vinegar Works v. Brew*, 112 Wis. 610, 88 N. W. 603: "The proper function of such an order (at least in ordinary cases) is simply to restrain the commission of some act or acts during the progress of the litigation, or, as otherwise expressed, to maintain the *status quo*." See also *Milwaukee Electric R. & Light Co. v. Bradley*, 108 Wis. 467, 84 N. W. 870; *McCord v. Akeley*, 132 Wis. 195, 122 Am. St. Rep. 956, 111 N. W. 1100; *Leavenworth, L. & G. R. Co. v. Clemmans*, 14 Kan. 82; *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370, 8 Am. Rep. 185.

It necessarily follows that the defendant was subject to the legislative act during the pendency of the preliminary restraining order, and during this time it acted at its peril in committing any act violating its provisions, if the act should finally be adjudged to be a valid legislative enactment. It therefore follows that the preliminary injunctive order in the equity action is no defense in this criminal prosecution against the defendant for violations of the law, as alleged in the information filed herein, for sales of petroleum products made by it during the pendency of such injunctive order.

References in defendant's brief to the litigation embraced in the equitable action brought by it against the supervisor of inspectors of illuminating oils as a prerogative cause are erroneous. The action was manifestly an ordinary suit in equity to restrain interference with rights and property under an invalid act, and hence without authority of law. *State ex rel. Bolens v. Frear*, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164. The question submitted under the report of the case to this court, pursuant to § 4721, Stats., must be answered in the negative.

The question reported is answered: No.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, Limited,

v.

LOUIS S. OWSLEY, Exr., etc., of Charles T. Yerkes, Deceased, et al., Impleaded, etc., Appts.

(— C. C. A. —, 196 Fed. 278.)

Dower — Liability to pay accrued taxes.

1. Under a statute providing that a widow

shall be endowed of a third part of the property whereof her husband died seised, taxes which accrued prior to assignment of the dower cannot, in favor of others entitled to share in the estate, be deducted from the cash value of her dower interest, which she agrees to take in lieu of dower upon sale of the property, whether they accrued before or after the death of the husband.

Same — effect of agreement.

2. A provision in an agreement of a widow to take cash in lieu of dower upon sale of the property that the dower shall be valued as of the date of admeasurement does not subject her interest to the lien of taxes which accrued before that date.

Same — occupancy before assignment — agreement as to charges.

3. Under an agreement that, in case a widow will take her dower interest in cash, her occupancy of the property before assignment of dower shall be without charge to her, it is not chargeable with taxes even though occupancy prior to assignment might, under some circumstances, render her interest so subject.

Same — purchase money mortgage — payment of taxes — priority.

4. Under a statute making a widow's dower interest subordinate to the lien of a purchase-money mortgage, it is also subordinate to the lien which the mortgage gives the mortgagee for taxes which he is compelled to pay upon the property, and she is not entitled to reimbursement for the amount of such lien by the heirs, who are not required to protect her dower interest against such taxes.

(April 9, 1912.)

Note. — Right to consider accrued taxes in assigning dower or fixing its cash value.

Earlier cases on this subject may be found in note to *Defreeze v. Lake*, 32 L.R.A. 748.

Generally, a widow should not be required to pay taxes assessed after her husband's death, and before assignment of her dower, unless she is in possession during such time, or unless it is otherwise provided by statute, 14 Cyc. 1016.

Thus taxes paid by the grantees of the husband before any demand is made by the widow for the assignment of her dower should not be taken into consideration in estimating the value of her dower estate. *Felch v. Finch*, 52 Iowa, 563, 3 N. W. 570. So, a widow's dower right is not to be diminished on account of taxes paid on her husband's real estate after his death and before setting off of dower. *Wild v. Toms*, 123 Iowa, 747, 99 N. W. 700.

Nor is the dower interest subject to be applied to payment of any part of the taxes. *Smith v. Cornell*, 19 Jones & S. 354.

And where a widow, without having dower assigned, remains in the mansion house with her infant children, whom she supports, and in order to save her estate pays the taxes, she is entitled to be subrogated to the lien

CROSS APPEALS by certain of the defendants from a decree of the Circuit Court for the United States for the Southern District of New York dividing a certain reserve fund under a prior decree directing a sale of property of Charles T. Yerkes, deceased, and a division of the proceeds; executors of the widow appealing from so much of the decree as treated the taxes which had accumulated subsequent to the death of the husband as liens superior to the widow's dower; and the executor of the husband's estate appealing from so much as decreed that the taxes accumulating during his life were to be disregarded in estimating the cash value of the widow's dower. Modified and affirmed.

Statement by Noyes, Circuit Judge:

Cross appeals by Charles Sims and others, as executors of the will of Mary Adelaide Yerkes, deceased, and by Louis S. Owsley, as executor of the will of Charles T. Yerkes, deceased, from a decree of the circuit court, southern district of New York, entered November 11, 1911, dividing

of the commonwealth, and as against the judgment creditors of her late husband, to have the amount of the taxes so paid refunded to her out of the property. *Simmons v. Lyle*, 32 Gratt. 752. It is contended in the above case that the widow is to be regarded as a tenant for life, and as such bound for the taxes, but the court regards the interest of the widow under the statute more analogous to a tenancy at will; remarking that it does not mean to say it is actually such a tenancy, because that, perhaps, could arise only under contract, but that it has most of the features of an estate at will. The court says that if, though the default of an heir, the widow, to save her estate, is compelled to pay what the law requires him to pay, she may compel him to refund the amount so paid for his benefit; that if the heir is unwilling to pay the taxes while the widow is in the occupation of the mansion house, all he has to do is to assign her dower and thus relieve himself of the taxes upon one third of the estate. Failing in this, it is fairly to be presumed he is content to bear the burden upon his inheritance, notwithstanding the widow may be in the possession and enjoyment of it. These views, says the court, are undoubtedly true as applied to an adult heir, whose duty it is to assign dower and who is delinquent in the performance of his duty. But the rule is by no means so clear as applied to an infant heir of tender years, without other guardian than the mother, and who continues to reside in the mansion house without applying for an assignment of dower. In this case, however, during all the period of the occupation of the mansion house by the widow, she has maintained and supported the two infant heirs out of her own

a certain fund reserved under a prior decree of said court in said cause.

In April, 1909, the Underground Electric Railways Company, a creditor of the estate of Charles T. Yerkes, filed a bill in the circuit court, praying, among other things, for the appointment of a receiver to take possession of certain real and personal property of said estate situated in the city of New York, and a receiver was duly appointed. The opinion of the circuit court, with respect to the appointment of a receiver, is reported in 169 Fed. 671, and that of this court in affirmance in 99 C. C. A. 500, 176 Fed. 26.

At the time of the appointment of the receiver the property was in the possession of Mary Adelaide Yerkes, widow of Charles T. Yerkes, who claimed to own the greater part of it, both the real and personal.

In January, 1910, a decree was entered by the circuit court in said cause, directing, among other things, the sale by the receiver of the real estate aforesaid and the payment to said widow of the cash

scanty means. If, therefore, they have sustained any loss by the widow's failure to have dower assigned to her by her occupation of their two thirds, they have been more than compensated by the support and maintenance furnished them.

So, a widow who, by virtue of statute, remains in the house of her husband after his death until dower is assigned, is not subject to the duties of a tenant for life to pay ordinary taxes. *Spinning v. Spinning*, 41 N. J. Eq. 427, 5 Atl. 278, affirmed in 43 N. J. Eq. 215, 10 Atl. 270.

And it is held in *Anderson v. Fitzpatrick*, 20 Ky. L. Rep. 1617, 49 S. W. 786, that a widow of a vendor of land, who did not join in the mortgage executed by her husband, can recover, as damages for nonassignment of dower, one third of the reasonable rental value of the property less her proportion of taxes, insurance, and necessary repairs, from the institution of her suit.

But it is held in *Peyton v. Jeffries*, 50 Ill. 143, that a widow is liable for taxes assessed upon one third of the premises of her deceased husband, subsequent to the time of making demand and before allotment of dower. This decision rests upon the rule that the tenant in dower stands in the same position as a tenant for life, and as such is subject to the charges, duties, and services to which the estate may be liable, in proportion to her interest.

So, where the widow, before assignment of dower, occupies by virtue of statute the land of her deceased husband free from rent and without accounting for the profits and gains made from it, she must pay the taxes thereon. *Wheeler v. Dawson*, 63 Ill. 54; *Lambert v. Hemler*, 244 Ill. 254, 91 N. E. 435.

J. D. C.

value of her dower interest therein, in accordance with the provisions of a settlement agreement theretofore entered into by the parties in interest. This agreement provided that the widow should waive any claim of ownership, and should receive the cash value of her dower in the real estate in question estimated under a rule of the supreme court of New York. This amounted to 20.18 per cent of the cash value of the real estate. The widow had also waived the provisions of the will of her husband giving her the life use in certain of the New York real estate.

The settlement agreement further provided that during the pendency of the receivership cause and until a sale thereof, the widow should continue to occupy the real estate "without rent or other charge therefor for any period since the death of said Charles T. Yerkes."

The taxes assessed against said real estate during the lifetime of Charles T. Yerkes, and which were unpaid at his decease, amounted, with interest, to \$81,266.08. The taxes assessed against said real estate after the death of Charles T. Yerkes and down to the time of the sale of the same in pursuance of said decree of January, 1910, amounted, with interest, to \$110,113.49.

The parties in interest were unable to agree whether any or all of said unpaid taxes should be deducted from the sale price of said real estate before estimating the cash value of the widow's dower under the settlement, and, consequently, said decree of January, 1910, provided that the encumbrances, including taxes, should be paid by the receiver, and that after payment of 20.18 per cent of the residue to the widow there should be reserved a "further sum of 20.18 per cent of the amount paid for taxes on said property; it being left to the further determination and order of this court what portion thereof, if any, is payable to the widow in settlement of her dower in said property."

In accordance with the foregoing provision the sum of \$38,620.40 was reserved by the receiver from the proceeds of the sale, and such sum is now in his hands.

The circuit court ruled that the taxes which had accumulated during the life of said Charles T. Yerkes were to be disregarded in estimating the cash value of the widow's dower, and, consequently, that the amount reserved as against the payment of such taxes should be paid over to the executors of the widow (she having died during the pendency of the proceedings), but that the taxes which had accumulated after the death of the husband were to be treated as liens upon the real 40 L.R.A. (N.S.)

estate superior to the dower, and that the amount reserved against such taxes should be paid over to the executor of the husband.

The executor of the husband's estate and the executors of the widow's estate have taken cross appeals to this court.

Argued before Coxe and Noyes, Circuit Judges, and Holt, District Judge.

Mr. Carroll G. Walter, with Messrs. Kearny & Dickinson, for executors Sims et al.:

The dower right of a widow is a right to a third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, and she is not chargeable with, nor is her right subject to, any deduction on account of, taxes.

Kursheedt v. Union Dime Sav. Inst. 118 N. Y. 358, 7 L.R.A. 229, 23 N. E. 473; Harrison v. Peck, 56 Barb. 251; Taylor v. Bentley, 3 Redf. 34; Vanderbeck v. Rochester, 122 N. Y. 285, 25 N. E. 408; Smith v. Cornell, 19 Jones & S. 354; Blodget v. Brent, 3 Cranch, C. C. 394, Fed. Cas. No. 1,553; Jonas v. Hunt, 40 N. J. Eq. 660, 5 Atl. 148; Graves v. Cochran, 68 Mo. 74; Branson v. Yancy, 16 N. C. (1 Dev. Eq.) 77; Feleh v. Finch, 52 Iowa, 563, 3 N. W. 570.

The lower court was plainly right in awarding to the widow's executors the reserved percentage of the taxes assessed prior to her husband's death.

Re Gill, 199 N. Y. 155, 92 N. E. 390; Re Babcock, 115 N. Y. 450, 22 N. E. 263; Re Hun, 144 N. Y. 472, 39 N. E. 376.

The lower court erred in holding that the widow's dower interest was subject to the lien of the taxes assessed after her husband's death, and in awarding the percentage reserved on account of such taxes to the husband's executor.

Lawrence v. Miller, 2 N. Y. 245; 14 Cyc. 925; Mutual L. Ins. Co. v. Shipman, 119 N. Y. 324, 24 N. E. 177; Blodget v. Brent, 3 Cranch, C. C. 394, Fed. Cas. No. 1,553.

Mr. Arthur H. Van Brunt, with Messrs. W. Orison Underwood and Joline, Larkin, & Rathbone, for executor Owsley:

The executor has no right to pay the taxes for the years 1907, 1908, and 1909, from personal assets.

Re Mansfield, 10 Misc. 296, 31 N. Y. Supp. 684; Deraismes v. Deraismes, 72 N. Y. 154; Re Selleck, 111 N. Y. 284, 19 N. E. 66; Re Babcock, 115 N. Y. 450, 22 N. E. 263.

The executor has no title to the real estate under the will, and therefore no right or duty as such to pay such taxes.

Re Woodard, 13 N. Y. S. R. 161; Cham-

berlain v. Taylor, 105 N. Y. 185, 11 N. E. 625; Robert v. Corning, 89 N. Y. 225; Manice v. Manice, 43 N. Y. 304; Re Tompkins, 154 N. Y. 634, 49 N. E. 135; Tiffany, Real Prop. § 119.

Mary Adelaide Yerkes, lawfully occupying the premises as life tenant, was bound to pay the entire tax assessed during the year 1906.

Deraismes v. Deraismes, 72 N. Y. 154; Re Babcock, 115 N. Y. 450, 22 N. E. 263; Jonas v. Hunt, 40 N. J. Eq. 662, 5 Atl. 148; Bidwell v. Greenshield, 2 Abb. N. C. 427; 2 Scribner, Dower, 783, § 28; Whiting v. Edmunds, 94 N. Y. 309; Bradt v. Church, 110 N. Y. 537, 18 N. E. 357; Bedlow v. New York Floating Dry Dock Co. 112 N. Y. 263, 2 L.R.A. 629, 19 N. E. 800; Bradshaw v. Ashley, 180 U. S. 59, 45 L. ed. 423, 21 Sup. Ct. Rep. 297; Reuter v. Stuckart, 181 Ill. 529, 54 N. E. 1014; Gosselin v. Smith, 154 Ill. 74, 39 N. E. 980; Westmeyer v. Gallenkamp, 154 Mo. 28, 77 Am. St. Rep. 747, 55 S. W. 231; Richards v. Richards, 75 Mich. 408, 42 N. E. 954.

Noyes, Circuit Judge, delivered the opinion of the court:

The widow was entitled to dower. Both the settlement agreement and the decree recognized her right. The former stated that it existed and provided for the sale of the lands so that she should "receive the cash value of her dower." The latter provided for payments to the widow out of the proceeds of the sale "for her dower." The case is one of dower, and nothing else. The inquiry is whether the widow took her share free from, or burdened with, unpaid taxes.

Lord Bacon said as early as 1641¹ that it was then "the common byword in the law that the law favored three things,—(1) life, (2) liberty, (3) dower" (Bacon, *Uses*, p. 37). The Year Books and other early reports show the vigilance of the courts in watching over widows' interests. And from those times to these the right of dower has always been highly esteemed in the law. We must start with the proposition that the law will not favor deductions from the widow's thirds.

Upon the death of the husband the widow's right of dower in his realty becomes consummate. It has ceased to be a contingency. But still it remains a mere right in the nature of a chose in action. The widow has the right to have a freehold estate assigned to her, but she has no estate until it is assigned.

Presumably the tenant of the freehold is bound to pay the taxes until he assigns the dower. Heirs and devisees have the vested, existing estate. The widow, before dower assignment, is without estate. The law must be clear to prefer heirs or devisees to the widow, and to charge a tax on real estate upon her mere right of action. And if an heir or devisee will not be preferred, a creditor or a representative of creditors will stand in no better position. The claims of creditors, heirs, devisees, and legatees are subordinate to the widow's right of dower, and, with respect to it, they all stand upon the same plane.

We must, then, regard as settled as preliminary principles that the law will not look with favor upon deductions from the widow's dower, and that, before assignment, a widow has no interest to be taxed as an estate in the lands. And so we recur to the inquiry whether this widow was properly burdened with any of these taxes which all accrued before her dower was assigned. Stated more precisely, the question is whether under the laws of New York, in awarding to a widow a share of the proceeds of real estate in lieu of dower therein, unpaid taxes upon such real estate should first be deducted, or whether such share should be in the proceeds without deduction. But it must be observed that this inquiry does not involve any right of state or municipality, because the taxes have been paid. It is altogether between the widow and the other persons entitled to share in her husband's estate.

The right of dower in this state is fixed by statute, which provides (New York real property law, § 190): "A widow shall be endowed of the third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage."

This was the right which—as we have seen—the agreement and the decree recognized, and it was not changed in its essential nature by the provision for dividing the proceeds of the real estate, instead of the real estate itself. If the widow were entitled to a third part of the lands, and were not chargeable—as between the parties interested in the estate—with unpaid taxes, she was entitled to her agreed dower share in the proceeds of the real estate without deduction on account of such taxes.

Now, there is nothing in the language of the statute to indicate that a widow's right of dower is subject to any deductions whatsoever, and the underlying principles which we have examined tend to the conclusion that it is not so subject. If, in addition, we find the authorities in the

¹ The first edition of Bacon on *Uses* was published fifteen years after the death of Lord Bacon.
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state of New York, as well as those elsewhere, pointing in the same direction, there will be little difficulty in disposing of the case.

In *Harrison v. Peck*, 56 Barb. 251 (decided in 1870) the question was very similar to that arising here. In that case the contest was between a devisee and a doweress; the inquiry was whether the latter was bound to pay the taxes which had accrued upon the land assigned to her as dower before such assignment was made, and embracing taxes assessed both before and after the death of the husband. The New York supreme court held that the widow was not bound to pay the taxes, and, after quoting the dower statutes, said: "There is no qualification or condition in this section, and the sections of the statute relating to it and the admeasurement of dower indicate a clear intention of the legislature that, as between the widow and the heir or devisee, this provision shall be enforced unburthened, . . . if that may be, except from the time an assignment of the dower has been made."

In *Taylor v. Bentley*, 3 Redf. 34, 41 (decided by the New York surrogate's court in 1877), the decision in *Harrison v. Peck*, supra, was followed.

In *Smith v. Cornell*, 19 Jones & S. 354 (decided by the New York superior court in 1885), the court said: "The dower interest was, in law, not subject to be applied to payment of any part of the taxes." Citing *Harrison v. Peck*, supra.

In *Vanderbeck v. Rochester*, 122 N. Y. 285, 25 N. E. 408 (1890) the court of appeals, in considering whether an assessment paid by a wife upon land belonging to her husband could be recovered, said, in holding that the payment was voluntary: "The only interest she had in the lands was that of dower. And that interest was not in jeopardy, because, first, no steps had been taken by the respondent looking to a sale of the lands, and, second, as widow she was entitled to have her dower assigned to her unburthened with taxes and assessments payable out of her husband's estate." Citing *Harrison v. Peck*, supra.

The conclusions reached by the New York courts are those reached generally by the courts in this country.

Thus in *Graves v. Cochran*, 68 Mo. 74, the supreme court of Missouri said that a dower interest was not "to be diminished by the taxes, or any portion of the taxes assessed against the land, either in her husband's lifetime or in her quarantine."

In *Branson v. Yancy*, 16 N. C. (1 Dev. Eq.) 77, it was held that a widow who, after the death of her husband, occupies 40 L.R.A. (N.S.)

his residence, is under no obligation to pay the taxes accruing thereon between his death and the assignment of dower.

In *Blodget v. Brent*, 3 Cranch, C. C. 394, Fed. Cas. No. 1,553, it was held that a widow has no right to pay taxes assessed upon her husband's lands before the assignment of dower. The court said: "Before assignment of dower the widow has no right to pay the taxes or redeem. She looks to the tenant of the freehold, whoever he may be, and he is bound to pay the taxes until he assigns her dower."

In *Felch v. Finch*, 52 Iowa, 563, 3 N. W. 570, it was held that a widow was under no obligation to pay any portion of the taxes levied on the lands of her deceased husband before her dower had been assigned. And see *Jonas v. Hunt*, 40 N. J. Eq. 660, 5 Atl. 148; *Spinning v. Spinning*, 41 N. J. Eq. 427, 5 Atl. 278.

The rule thus well established by the authorities in this state and elsewhere, that a widow is under no obligation to pay taxes assessed against her husband's realty before the assignment of dower, seems decisive of the present case. The taxes in question were assessed before the dower was assigned, and, consequently, unless we find some special considerations controlling this case, no other conclusion is possible than that it was improper to hold back anything from the widow's share on account of taxes.

There is no distinction going to the result between the taxes assessed during the husband's lifetime and those assessed after his death but before the assignment of dower. In neither case was there any obligation to pay upon the part of the widow, and that is the question here. It is immaterial that as between executor and devisees or heirs, the statutes may specifically impose a duty in one case, and not in the other. Such statutes, by requiring the payment of taxes assessed during a decedent's lifetime out of personalty, may constitute an additional reason why such taxes should not be charged against the widow, but do not weaken her contention, upon the principles stated, that she is under no obligation to pay taxes accruing between the husband's death and the assignment of dower.

Some stress is laid in the opinion of the circuit court upon the provision in the settlement agreement that the dower should be valued as of the date of admeasurement which was after a lien for the taxes had come into existence in favor of the municipality. We think, however, that this provision merely gave the widow the right—which she would probably have had without it—to share in any increase in the

value of the property after the husband's death. But it did not make—as between the persons interested in the estate—a claim for moneys paid to discharge the tax liens a charge against the widow's share. A provision for valuing property at a particular time has no especial bearing upon the question whether discharged municipal liens can be treated as existing against the right of dower. It does not follow that liens which exist in favor of the municipality create, when they are paid off, any charge in favor of or against other interests.

It must be distinctly borne in mind that the parties did not agree that the widow should receive a stated percentage of the husband's estate subject to liens existing at a particular time. As already pointed out, they agreed that she should have dower, which carried with it the rights and obligations attaching to dower. The right became consummate upon the husband's death. She had the right to share in the property then existing, which was in no way limited by the agreement that it should be valued as of the date when ad-measured.

The contention is made by the executor of the husband's estate, that it is "equitable" that, as this widow had the use of the real estate after the husband's death and before the assignment of dower, she should bear her share of the taxes assessed during such time. It would, perhaps, be a sufficient answer to this contention to say that the widow was entitled to dower as a matter of law, and that the amount of dower is determinable by law, and not by equitable considerations. Let us assume, however, that the amount of dower may depend upon equities, and that a widow who occupies lands of her husband's estate before assignment of dower should, as a matter of justice, pay the taxes assessed against such lands during her occupancy. Such obligation, if it exist, is obviously based upon those principles of fair dealing which would require the payment of compensation for value received. But if a widow relinquishes claims to the ownership of lands, and thereupon it is agreed that her occupancy thereof before assignment of dower shall be without charge to her, there is no more reason why she should pay the taxes assessed against the premises than that she should pay rent or any other consideration for the use. And we think that is substantially what was done in this case. The settlement agreement provided, as we have seen, that the widow should occupy the premises "without rent or other charge therefor for any period since the death of said Charles T. Yerkes." We fail to see

how language could be better framed to absolve the widow from any obligation to meet the taxes or any other charge. In view of this provision, the widow's right of dower was unaffected by the fact of her occupancy. In view of this provision, also, the question whether, in case the widow occupied for a time as life tenant under the will and subsequently renounced the will, she would be liable for use and occupation, is unimportant. Any such liability was discharged in the settlement agreement, and affords no basis for a diminution of dower.

We have thus far considered the case as relating to lands to which the general dower statute is applicable. It appears, however, that a portion of the real estate was subject to a mortgage executed by the husband, Charles T. Yerkes, to the grantor for unpaid purchase money. This purchase-money mortgage contained a provision authorizing, upon default, the mortgagee to pay taxes and assessments, and providing that the obligation to repay the same should constitute a lien upon the premises and be secured by the mortgage. The mortgagee in fact paid \$35,574.66 for taxes, and, in accordance with an express provision of the decree of January, 1910, such amount, with interest, was repaid by the receiver as a part of the mortgage debt.

This land, subject to the purchase-money mortgage, stood, with respect to dower, in a position very different from the other lands of the husband's estate. A purchase-money mortgage is always superior to the wife's right of dower. Indeed, it is generally stated that a purchaser who executes a mortgage for the purchase money acquires no such seisin, as against the holder of the mortgage, as will entitle his widow to dower. And this is substantially that which is provided by statutory enactment in New York. There is a statute here which particularly relates to dower in lands mortgaged for purchase money, and which provides, in substance, that a widow is not entitled to dower in such lands "as against the mortgagee or those claiming under him," but is entitled to dower in such lands as against every other person. New York real property law, § 193.

Under this statute the only dower interest which this widow obtained in the land mortgaged for the purchase money was in the equity of redemption. The lien of the mortgage was paramount to the dower, and we think it the better view that the amounts paid for taxes secured by the mortgage were paramount also. The statute says, in effect, that a purchase-money mortgage takes precedence of dower, and we perceive no ground upon which a dis-

inction can be drawn between the demand for the purchase money itself which is secured by the mortgage, and the demand for the incident thereto—the amount paid for taxes to protect the mortgage debt—which was likewise secured by the mortgage.

Of course it does not necessarily follow from the fact that the mortgagee's right to reimbursement for taxes paid was paramount to dower, that the amount paid to the mortgagee must be charged against the dower interest in favor of heir, devisee, or creditor. If the persons interested in the estate owed the widow an obligation to keep down the amount secured by the purchase-money mortgage, there would be ground for claiming that her dower in the equity of redemption should not be diminished by the taxes. But no such obligation is pointed out to us. Indeed it is held in the state of New York, with respect to mortgages in general, that a husband owes the wife "no duty enforced in law or equity to pay mortgages to relieve her dower." *Dunharr v. Rau*, 135 N. Y. 219, 222, 32 N. E. 49, 50. See also *Hawley v. Bradford*, 9 Paige, 200, 37 Am. Dec. 390.

Upon the whole we think it the better view that the widow was entitled to dower in the proceeds of this particular land only to the extent that the sale price thereof exceeded the amount paid to the mortgagee for the mortgage debt and for reimbursement of taxes paid. In other words, the widow's estate is not entitled to the moneys reserved as representing a percentage of the taxes paid to the holder of the purchase-money mortgage.

The decree appealed from must be modified—but without costs—so as to provide that the entire amount in the hands of the receiver, with the exception stated in the preceding paragraph, shall be paid to the executors of the will of the widow, Mary Adelaide Yerkes, and that the remainder only shall be paid to the executors of the will of the husband, Charles T. Yerkes. And it is so ordered.

IOWA SUPREME COURT.

STATE OF IOWA, Appt.,

v.

C. A. MORGAN.

(— Iowa, —, 136 N. W. 521.)

Criminal law — refusal to maintain wife — former jeopardy.

Conviction of failure to maintain one's wife, contrary to the provisions of the statute, is not a bar to a prosecution for con-

tinued failure to maintain her after serving the sentence on the former conviction.

(June 6, 1912.)

A PPEAL by the State from a judgment of the District Court for Polk County

Note. — Conviction or acquittal of marital offense as bar to a subsequent prosecution.

The question whether a conviction or acquittal of a marital offense is a bar to a subsequent prosecution depends upon the act or acts which, under the statute involved, constitute the offense. Where the gist of the offense is abandonment or desertion of one's wife, the offense is complete with the act of separation by the husband from the wife, and a conviction or acquittal is a bar to a subsequent prosecution. But where, as in Iowa, the statute is against failure to maintain one's wife, such failure for distinct periods of time constitutes distinct offenses, and a conviction is no bar to a subsequent prosecution for the same failure to provide during a distinct period of time.

Thus, under a statute denouncing as an offense the neglect of a person to provide for the support of his wife and minor children, in necessitous circumstances, a conviction is no bar to a subsequent prosecution for a like neglect and failure during a period of time not covered by the prior conviction, as the neglect and failure during each of the two distinct periods constitute distinct offenses under the statute. *Re Baurens*, 117 La. 136, 41 So. 442.

And where one has been convicted, under a statute, of being a disorderly person, in that he neglected to provide support for his wife according to his means, and, upon giving an undertaking, has been discharged from imprisonment pending an appeal from the conviction, such proceedings are no bar to a subsequent prosecution, pending the appeal, upon a new complaint for the same cause, as the defendant's continued neglect to provide for his wife's support according to his means constitutes a new offense,—though "if he had been imprisoned in pursuance of the first conviction, or had given an undertaking for the support of his wife, as was required by the statute and the decision of the police justice, he could not, during the pendency of his imprisonment, or the life of the undertaking, have been proceeded against again for not supporting his wife." *People ex rel. Lichtenstein v. Hodgson*, 126 N. Y. 647, 27 N. E. 378.

On the other hand, under a statute against wife abandonment or desertion, and neglect or refusal to provide for her, which makes the gist of the offense the act of separation by the husband from the wife, and his refusal, in connection therewith, to provide for her, and not merely his remaining away, a conviction of abandonment of one's wife is a bar to a subsequent prosecution for the same offense, alleged to have been committed at a subsequent period,

acquitting defendant of the charge of failure to furnish support for his wife. Reversed.

The facts are stated in the opinion.

Messrs. George Cosson, Attorney General, and John Fletcher, Assistant Attorney General, for the State:

One conviction is not a bar.

State v. Dvoracek, 140 Iowa, 266, 118 N. W. 399; State v. Witham, 70 Wis. 473, 35 N. W. 934.

Mr. W. T. Maxey for appellee.

Sherwin, J., delivered the opinion of the court:

The defendant is now, and has been since January, 1906, the husband of Martha E. Morgan. In May, 1909, he was indicted for refusing and neglecting to maintain and provide for his wife; and he was later convicted under said indictment and sentenced to the penitentiary, where he served his term. After his discharge therefrom,

where the defendant has never returned to his wife since the filing of the original complaint against him, but merely continues to refuse to live with her or to furnish her means to live on. State v. Miller, 90 Mo. App. 131.

And under a statute making it a misdemeanor for any husband to "wilfully abandon his wife without providing adequate support for such wife and the child or children which he has begotten upon her," a conviction of a husband abandoning his wife is a bar to a subsequent prosecution, where he has not lived with her since the first abandonment, but has simply continued to fail to provide adequate support for her and their child,—the gist of the offense being the act of separation, and not merely its continuance without providing adequate support. State v. Dunston, 78 N. C. 418.

So, a conviction of wife desertion and a subsequent conviction of deserting one's wife and child are a bar to a third prosecution for a desertion of wife and child which was a complete offense before either of the former convictions was had. Com. v. Bowman, 6 Kulp, 176.

And a conviction of desertion and non-support of one's wife is a bar to a subsequent prosecution for the same desertion after the expiration of the defendant's sentence, where nothing has occurred since the former trial to change the situation and to make the defendant's subsequent refusal to live with and support his wife a new offense as desertion is a single act and a complete offense when it takes place. Com. v. Markley, 17 Pa. Co. Ct. 254.

And likewise, the dismissal of a prosecution for wife desertion, after a full hearing, is a bar to a subsequent prosecution for a desertion alleged to have taken place prior to the first prosecution, where nothing has occurred since the dismissal of that case to change the situation and make the de-

he returned to Des Moines, his former home, and the home of his wife, and has since said time, without good cause, wilfully neglected and refused to maintain and provide for his wife, although she has been and is in a destitute condition. On the 20th day of March, 1911, the indictment in this case was returned against the defendant, charging that on or about the 1st day of May, 1910, and up to the time of filing the indictment, the defendant did wilfully, and without good cause, desert and refuse to maintain and provide for his said wife; she being then in a destitute condition. Pleas of not guilty and of a former adjudication were entered by the defendant, and at the close of the evidence the court, on the defendant's motion, directed a verdict of not guilty, on the ground alone of former conviction. The state appeals.

The only question presented on this appeal is whether a person, who has once been convicted and punished for wilfully neg-

defendant's subsequent refusal to live with and support his wife a new offense. Com. v. Cawley, 4 Pa. Dist. R. 69.

But the dismissal of a prosecution for wife desertion, without a hearing upon the merits, on account of the failure of the wife to appear in court to sustain her charge, which failure was induced by defendant's promise to maintain and live with her, is not a bar to a subsequent prosecution for the same offense. Com. v. Pickett, 10 Kulp, 68.

In this case, the court also said that, further, the defendant, by his promises, at the time his wife promised not to appear and prosecute, assumed his marital relations with her, and that thereafter a new offense began, for which the wife would be justified in maintaining a prosecution for desertion. Ibid.

As said, also, in Com. v. Bowman, 6 Kulp, 176: "The former convictions and imprisonment of the defendant did not dissolve the marriage tie, and we can conceive of a case where they would not be bar to a subsequent prosecution. For example, if after his release the defendant and his wife had come together, and he had subsequently deserted her again, it would seem that he might be prosecuted again for the new offense."

And in State v. Vollenweider, 94 Mo. App. 158, 67 S. W. 942, it was held that a conviction, under the Missouri statute, of abandonment of one's wife, is no bar to a subsequent prosecution for a repetition of the offense after the defendant has resumed conjugal relations with his wife; and a plea of former conviction of abandonment of one's wife at a date prior to the alleged date of the abandonment subsequently charged is demurrable, unless the defendant negatives the fact that he has resumed conjugal relations with his wife since the prior conviction. A. C. W.

lecting and refusing to maintain and provide for his wife, under § 4775a of the Code Supplement, can be again tried and punished for refusing and neglecting to maintain and provide for her, after the expiration of his former sentence. The question is not entirely free from doubt; but we reach the conclusion that the finding of the trial court is not in accord with the legislative intent, as the same is expressed in the entire act under consideration, nor in accord with the construction which this court has, in effect, heretofore given the statute.

So far as material here, § 4775a reads as follows: "Every person who shall, without good cause, wilfully neglect or refuse to maintain or provide for his wife, she being in a destitute condition, or who shall, without good cause, abandon his or her legitimate or legally adopted child or children under the age of sixteen years, leaving such child or children in a destitute condition, or shall, without good cause, wilfully neglect or refuse to provide for such child or children, they being in a destitute condition, shall be deemed guilty of desertion." This section clearly makes it a crime to neglect or refuse to maintain or provide for the wife, or to abandon the child or children, or to neglect or refuse to provide for such child or children. By neglecting or refusing to provide for or maintain his wife, the husband incurs the penalty; and by abandoning the child or children, or by neglecting to provide for such child or children, either the husband or wife, or both, incur the penalty. Three distinct cases are thus provided for and punished; and they are all named as "desertion" in the statute.

But this designation is not controlling in construing such statutes. The court should, and does, go beyond the mere name, and determine the acts that are made offenses against the statute and that incur the penalty. Mere desertion, or abandonment, the words being synonymous, of the wife, incurs no penalty. It is the wilful neglect or refusal, without good cause, to maintain or provide for her in her destitution that incurs the penalty. A husband, without any cause, and with ample means, may desert or abandon his wife, without bringing upon himself the punishment provided in this statute, unless it be shown that he left his wife in a destitute condition. In other words, a rich husband may desert a rich wife without violating this statute; and, if that be true, it is the neglect or refusal to maintain or provide for the wife that the statute punishes, and not the mere act of desertion; and as long as the condition named in the statute exists the husband

band is, in our opinion, subject to the penalty. He cannot, of course, be twice punished for the same offense; but his neglect and refusal to provide for his wife, after he had served his former sentence, constitutes a new, separate, and distinct violation of this statute, for which he may be punished. Our conclusion as to the proper construction to be given the section under consideration is strengthened by § 4775c of the same act, which provides, in substance, that the defendant may be released upon giving a continuing bond, conditioned that he will furnish his wife with a "necessary and proper home, food, care, and clothing."

In *State v. Dvoracek*, 140 Iowa, 266, 118 N. W. 399, the defendant deserted his wife and children before § 4775a became a law, which was on the 28th day of March, 1907. In September, 1907, he was indicted for neglecting to maintain and provide for his wife and children, and we sustained the conviction that followed. The question presented in this case was not considered in that opinion; but it is manifest that the judgment could not have been sustained if this defendant's contention is right; for, if the statute punishes for mere desertion, that crime had been completed long before this statute was enacted.

There was a statute in Wisconsin that provided a penalty for abandoning the wife, or for the refusal or neglect to provide for her. And in *State v. Witham*, 70 Wis. 473, 35 N. W. 934, the court held that, while the abandonment occurred before the law took effect, still the wilful refusal to provide for the wife continued to the time of the trial; and that the defendant was liable, under the statute, for the penalty imposed for such neglect. The decision supports our conclusion in this case.

The judgment should be, and it is, reversed.

KENTUCKY COURT OF APPEALS.

V. MURRAY et al., Appts.,

v.

W. T. COWHERD.

(148 Ky. 591, 147 S. W. 6.)

Master and servant — Liability of servant for nonfeasance.

1. A servant whose duty is to maintain telephone poles in safe condition cannot avoid liability for injury to a stranger through the fall of a pole, because of his

Note. — As to liability of an agent or servant to third persons for his own negligence or nonfeasance, see notes to *Mayer v. Thompson-Hutchison Bldg. Co.* 28 L.R.A.

negligence, on the theory that he was guilty merely of nonfeasance.

Trial — definiteness of verdict — sufficiency.

2. A mere finding for plaintiff for a certain amount, in an action against two to recover damages for personal injuries, is sufficiently definite if the jury were instructed that they might find against either or both, or might find one sum against one and another different one against the other, in which case they must state how much was found against each.

(May 29, 1912.)

A PPEAL by defendants from a judgment of the Circuit Court for Taylor County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs Helm Bruce, John A. Wolford, and Bruce & Bullitt for appellants.

Mr. W. M. Jackson, with W. C. McChord, for appellee:

Servant who undertakes to discharge a duty to the public for the master, and enters upon the discharge of such duty, owes the same duty to the public and stands in the same relation thereto as the master; and the servant is jointly liable with the master to an individual who is injured, while in the exercise of a legal right, by the negligence or nonfeasance of the servant as to such duty.

27 Cyc. 805; Baird v. Shipman, 132 Ill. 16, 7 L.R.A. 128, 22 Am. St. Rep. 504, 23 N. E. 384; Mayer v. Thompson-Hutchison Bldg. Co. 104 Ala. 618, 28 L.R.A. 433, 53 Am. St. Rep. 88, 16 So. 620; Ellis v. Southern R. Co. 72 S. C. 465, 2 L.R.A. (N.S.) 378, 52 S. E. 228; Cameron v. Kenyon-Connell Commercial Co. 22 Mont. 312, 44 L.R.A. 509, 74 Am. St. Rep. 602, 56 Pac. 358; Ward v. Pullman Car Corp. 131 Ky. 148, 25 L.R.A. (N.S.) 343, 114 S. W. 754; Haynes v. Cincinnati, N. O. & T. P. R. Co. 145 Ky. 216, 140 S. W. 176; Chesapeake & O. R. Co. v. Banks, 144 Ky. 137, 137 S. W. 1066.

Winn, J., delivered the opinion of the court:

The Campbellsville & Greensburg Telephone Company is a corporation with its poles and line extending along the turnpike between the two towns. G. V. Murray is its

president and general manager. On April 1, 1911, W. T. Cowherd was knocked from his farm wagon, which he was driving along the road, by a telephone pole which fell over upon him. He was partially paralyzed by the accident and suffered no little, both bodily and pecuniarily. He brought his action against the appellants for damage, and upon a trial recovered a judgment of \$2,875, from which this appeal is prosecuted.

The petition charges the negligence of the company in maintaining the decayed pole; that Murray had charge of, and direct supervision over, the construction and maintenance of these poles and wires; that it was his duty to keep and maintain them in good repair and safe condition; that the defendant's negligence permitted this particular pole to become out of repair and unsafe, and to remain so for an unreasonable length of time. There is then a specific charge that Murray inspected the pole which fell upon Cowherd, but that he was negligent and careless in his inspection, and approved the pole as being safe when it was not so. The evidence discloses that Murray customarily discharged the duties of inspection and maintenance, and when an inspection disclosed the unsound condition of a pole he would cause it to be broken out and reset. He was the president and general manager of the company, and doubtless had at command its supplies without the formality of application to any superior to furnish them. There was further evidence before the jury that he inspected that particular pole one week before it fell; that the decayed condition could have been seen had he gone to it and looked at the foot of it; that on the day when he did inspect it his presence there was occasioned by the fact that the pole next in line to it, and across the turnpike from it, had fallen, and he had gone there to reset that pole; that after resetting it he inspected the poles immediately on both sides of it in the line to see whether or not they had been affected by the falling and resetting of that pole.

No substantial complaint of the verdict and judgment is made by the telephone company. The reversal is urged in behalf of Murray. He takes the position that at the most his negligence was that of nonfeasance, the failure to inspect the pole properly; and that a servant is not liable for an injury resulting alone from his non-

433, and Ward v. Pullman Co. 25 L.R.A. (N.S.) 343, and later case of Patry v. Northern P. R. Co. 34 L.R.A. (N.S.) 586. See also references in note in 25 L.R.A. (N.S.) 343, for annotation on analogous points.
40 L.R.A. (N.S.)

As to effect of verdict for servant in an action against master and servant for the servant's negligence or misfeasance, see notes to McGinnis v. Chicago, R. I. & P. R. Co. 9 L.R.A. (N.S.) 880, and Southern R. Co. v. Harbin, 30 L.R.A. (N.S.) 404.

activity; that his duty was a duty which he owed alone to his employer, the telephone company; and that if he failed to perform this duty of inspection he is answerable alone to the company, his superior and employer.

The distinction sought to be drawn between a servant's acts of misfeasance and those of nonfeasance, resulting in an injury to another, with his consequent liability in the one case and his nonliability in the other, does not obtain in Kentucky, when the negligence, whether of misfeasance or nonfeasance, involves some breach of the servant's duty. It is not his position of service, but his relation as an individual wrongdoer to the party injured, which fixes his liability. *Haynes v. Cincinnati, N. O. & T. P. R. Co.* 145 Ky. 209, 140 S. W. 176. Certainly under the particular facts of the case at bar the distinction is immaterial; for, under the evidence, *supra*, the pole was decayed and a menace to the travelers upon the highway. The defect could have been discovered by an inspection. It was the duty of Murray to inspect and maintain the line. He owed such travelers an affirmative duty in the exercise of reasonable care to inspect and maintain this pole in safety. For his negligent failure to discharge this duty, whether it be called misfeasance or nonfeasance, liability attaches to him in favor of one injured by it.

While, as remarked above, the doctrine is settled in this state that the servant is personally liable, whether his act be that of misfeasance or nonfeasance, when the injury flows from some breach of a duty owed by him, there are none the less certain points made in the able brief for the appellants which need to be answered, and certain authorities cited which need to be discussed and differentiated, in order that no misapprehension of our position may grow up.

The first case cited by appellants is that of *Cincinnati, N. O. & T. P. R. Co. v. Robertson*, 115 Ky. 858, 74 S. W. 1061, a removal case. In this case Brown, the resident defendant, according to the allegation of the petition, was required by the railway company to see that mechanical appliances of a certain nature were supplied on the engines. Those supplied were not of that nature. It was not charged that the master had supplied Brown with different or better appliances. The engineer was injured by a defect in such an appliance. Upon the trial it was developed that Brown furnished to the engineer precisely the same appliances that were supplied to him by the railway company; and the case turned upon the question as to whether a servant

can be made liable to an inferior servant because of the master's failure to provide safe and suitable machinery, although it was the superior servant's duty to look after the machinery. It was answered that such a liability would attach; but that where the injury resulted to some third person because the servant failed to act, the servant, upon general authority, was not personally liable. The court added, as to this general doctrine, that it was not prepared to say that it could be sustained in sound reason to its fullest extent, and that the facts in that case relieved the court from considering whether mere nonfeasance upon the part of Brown would have rendered him liable. When the court came at a later time to try the *Haynes* Case, it departed from the suggestion made in the *Robertson* Case, and held that where the injury resulted from a failure to discharge a duty, whether of misfeasance or nonfeasance, the servant himself would be liable. In the *Robertson* Case it is to be noted that Brown was an inferior servant of the company, and though charged with the duty of inspection, was supplied with no other or different or better appliances than those which caused the injury; while in the case at bar there is a pregnant difference, in that Murray himself testifies that whenever his inspection disclosed a bad pole, he would have it taken out and the pole reset. In other words, he had good appliances at command to supplant the defective ones which his inspection might discover.

The next case cited is that of *Dudley v. Illinois C. R. Co.* 127 Ky. 221, 13 L.R.A. (N.S.) 1186, 128 Am. St. Rep. 335, 96 S. W. 835, another removal case. A brakeman on the railroad was struck by a waterspout leading from a supply tank out over the track to supply locomotives with water. He sued the company and joined with it as a defendant one Mitchell, charging that he was its superintendent or supervisor of pumps, tanks, and water appliances, and that he was directly in charge and control of the particular tank and spout which caused the injury. This court held that the petition stated a good cause of action against him, and that the trial court properly overruled the petition for removal at the beginning of the action. The evidence, however, disclosed that Mitchell was a subordinate employee of the railroad company, working under the superintendent, who had charge of the pumps and tanks. The court remarked that though it be assumed that it was Mitchell's duty to keep the tanks and appliances in repair, he could not be held liable, unless such a servant as he was is liable for nonfeasance, or for his failure

affirmatively to take some action to remedy defects or dangerous appliances to which his attention might be called. This language is misleading, standing alone; and it must be read in connection with the further facts in the case, that Mitchell had nothing to do with erecting the tank, or adjusting any of the parts or appliances thereon, and that the evidence wholly failed to make out any case against Mitchell. We undertake to say that the case would have been ruled otherwise had the evidence disclosed that it was Mitchell's duty to inspect and maintain these appliances, and to take out defective, and from a store at his command supply sound, apparatus. Undoubtedly, had he failed in such a duty, though his failure were purely nonfeasance, he would have been personally liable—just as, in the case at bar, it was the duty of Murray to maintain sound poles and to take out defective ones, replacing them with sound ones, as he was in the habit of doing.

The next case is that of *Ward v. Pullman Car Corp.* 131 Ky. 142, 25 L.R.A. (N.S.) 343, 114 S. W. 754, which is cited by the appellants, not by way of sustaining their position, but for the purpose of endeavoring to explain away statements in its text which are against their position. This case, as well, was a removal case. In it we have before us alone the allegations of the petition. The lower court sustained the removal petition and removed the case to the Federal court; and the case that came to us was on appeal from that order. The case was decided here upon the allegations of the petition as to the individual defendants, Drayman and Glenn. It was charged that they were car inspectors in the employment of the Cincinnati, New Orleans, & Texas Pacific Railway Company, and that as such it was their duty to examine and inspect freight cars to ascertain whether, they were safe to be operated by the train men in the employment of the railroad. It was further charged that they had carelessly inspected a particular car and approved it, when, as a matter of fact, it was defective, and injured the plaintiff. The question was whether a cause of action was stated against the individuals. The opinion remarks the above set-out excerpt from the case of *Cincinnati, N. O. & T. P. R. Co. v. Robertson*, 115 Ky. 861, 74 S. W. 1061, and that from *Dudley v. Illinois C. R. Co.* 127 Ky. 221, 13 L.R.A. (N.S.) 1186, 128 Am. St. Rep. 335, 96 S. W. 835. The opinion then added that "there is a sharp conflict in the authorities as to whether a servant is liable to a third person for non-

feasance, and as to what is nonfeasance within the meaning of the rule." It was added that it was not necessary in the *Ward Case* to decide the true rule, because the acts of Drayman and Glenn were more than those of mere nonfeasance; that their approval sent the car out on the road, an affirmative act for which they were liable, as the car was defective in a way which could have been discovered by ordinary care.

The cases of *Illinois C. R. Co. v. Coley*, 121 Ky. 385, 1 L.R.A. (N.S.) 370, 89 S. W. 234, and *Chesapeake & O. R. Co. v. Banks*, 144 Ky. 137, 137 S. W. 1066, were both cases of affirmative or active negligence wherein servants of the railroad company were operating their engines without the due precaution to the traveling public. Both of these cases are cited by the appellants, but they are not especially in point here.

The next case cited by appellants is that of *Haynes v. Cincinnati, N. O. & T. P. R. Co.* 145 Ky. 209, 140 S. W. 176. This also was a removal case. In it, for the first time, this court met and answered directly the supposed distinction between negligence of misfeasance and negligence of nonfeasance of a servant in the discharge of an imposed duty, as affecting his liability for injury resulting from his negligence. We quote at length from the opinion in the *Haynes Case*, because it is a clear statement of an established view of the court to which we desire to adhere: "Misfeasance is the performance of an act which might lawfully be done in an improper manner, by which another person receives an injury," while 'nonfeasance is the nonperformance of some act which ought to be performed.'—*Bouvier's Law Dict.* If the accident had been caused by either misfeasance or nonfeasance amounting to a breach of duty on the part of the engineer, we would hold him liable. In some jurisdictions the servant is not held accountable to third persons for nonfeasance, but is for misfeasance; but a contrary rule and one that is in accord with the weight of modern authority prevails in this state. We do not recognize any distinction so far as the accountability of the servant is concerned between acts of misfeasance and nonfeasance. *Ward v. Pullman Car Corp.* 131 Ky. 142, 25 L.R.A. (N.S.) 343, 114 S. W. 754; *Chesapeake & O. R. Co. v. Banks*, 144 Ky. 137, 137 S. W. 1066; *Illinois C. R. Co. v. Coley*, 121 Ky. 385, 1 L.R.A. (N.S.) 370, 89 S. W. 234. If a servant performs in an unlawful manner an act that results in injury to a third person, or if a servant

fails to observe a duty that he owes to third persons, and injury results from his fault of commission or omission, he is liable in damages. There is no reason for making a distinction between acts of commission and omission, when each involves a breach of duty. The servant is not personally liable in either case because the breach of duty was committed by him while acting in the capacity of servant; but responsibility attaches to him as an individual wrongdoer without respect to the position in which he acts or the relation he bears to some other person. It is the fact that the servant is guilty of a wrongful or negligent act amounting to a breach of duty that he owes to the injured person that makes him liable. It is not at all material whether his wrongful or negligent act is committed in an affirmative or wilful manner, or results from mere nonattention to a duty that he owes to third persons, and that it is entirely within his power to perform or omit to perform. There are innumerable situations and conditions presented in the everyday affairs of life that make it the duty of persons to so act as not to harm others, and when any person, whatever his position or relation in life may be, fails, from negligence, inattention, or wilfulness to perform the duty imposed, he will be liable."

It is true that in the Haynes Case the engineer was held not liable; but it was because the injury there was the result of defective machinery supplied by the master, in the selection of which the engineer had neither the right nor the duty to dictate to the master. It was very well said that when such things are furnished by the master and prove defective or unsafe, the liability attaches to the master, and not to the servant; and that it would be a most unreasonable doctrine to hold a person responsible for defects in machinery that he was merely employed to use under the direction of a superior, who possessed the exclusive right to furnish the tools or machinery used by him. This is a just and wise statement of what reason and justice would suggest as the fair rule. The negro man, for instance, who accompanied Murray in his inspection trips and assisted in taking out and putting in poles and other repair work with material and tools furnished alone by the master, would not be liable, because of defects in either, for injuries occurring because of the defects. Murray, however, stands in an altogether different position. He was the president and general manager of the telephone com-

pany. He therefore had control of its supplies. It was his duty to inspect and to maintain the poles in a sound condition, a duty which, according to some of the evidence, he did not discharge in this particular instance. He says as well that when he found a pole unsafe he would break it off and reset it, a course which he undoubtedly could have followed with this particular pole, whether or not he had a new one at command to replace it. Under the facts stated, the quotation from the Haynes Case clearly fixes the personal liability of Murray.

Some effort is made in the brief of appellants to weaken as authority here these removal cases, because their discussion of the servant's liability is only in their aspect toward the right of removal to the Federal court. It is difficult to conceive any manner of case which would present a more clear-cut opportunity to pass on such liability. If there was such liability of the resident servant, there was no right of removal in the nonresident corporations. If the resident servant were not liable, the nonresident corporation had the right of removal. In the determination, therefore, of the right of removal, it was necessary to consider in each case most carefully the rules fixing or denying the servant's liability; and these removal cases are therefore entitled to the highest consideration.

The only other point suggested by the appellants is that the verdict of the jury is not sufficiently definite and certain, in that it merely found for the plaintiff, without stating as to whether it found against both or some particular one of the defendants. There is not much force, we think, in this position. The court instructed the jury that they might find against either or both the defendants, and that if they found against both they might find one sum against one and a different sum against the other, "in which event they must state in their verdict how much they find against one and how much against the other." The jury obviously did not find in favor of one and against the other, nor a part of the damage against the one and a part against the other, because they made no such statement in their verdict. Interpreted in the light of the record, there is no difficulty in ascertaining what the jury meant.

The judgment of the trial court is affirmed.

Petition for rehearing denied, September 27, 1912.

MISSOURI SUPREME COURT.
(Division No. 2.)

EX PARTE FORREST E. KNEEDLER.

(— Mo. —, 147 S. W. 983.)

Witness — incriminating evidence — motor car accident — leaving identification.

Making it a felony for one who has caused injury by the operation of a motor vehicle, to leave the place of accident without leaving his name, address, and license number, does not violate the constitutional protection against giving self-incriminating evidence.

(June 1, 1912.)

Note. — Power to require one who has caused an injury to identify himself.

The point involved in *EX PARTE KNEEDLER* is another example of the new questions constantly arising from the use and operation of motor vehicles, which the courts are called upon to decide. In that case it was held that an act making it a felony for one who had caused an injury by the operation of a motor vehicle, to leave the place of accident without leaving his name, address, and license number, did not violate the constitutional provision against giving self-incriminating evidence. A search has disclosed but one other case in which this point has been considered, and the result there reached is in conflict with the decision in *EX PARTE KNEEDLER*.

In the case referred to, *People v. Rosenheimer*, 70 Misc. 433, 128 N. Y. Supp. 1093, affirmed by appellate division on opinion below, in 146 App. Div. 875, 130 N. Y. Supp. 544, Ingraham, P. J., dissenting, a statute providing that "any person operating a motor vehicle who, knowing that injury has been caused to a person or property due to the culpability of the said operator, or to accident, leaves the place of said injury or accident without stopping and giving his name, residence, including street and street number, and operator's license number, to the injured party or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station or judicial officer, shall be guilty of a felony," was held violative of the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself. The court said: "As a test of the constitutionality of a law requiring a person to save or produce something, considered in the light of the provision exempting from self-accusation, is whether that something required to be said or produced is receivable in evidence, it is immaterial whether that demanded is an oral statement provable as an admission against interest, or a document

PETITION for a writ of habeas corpus to secure petitioner's release from the custody of the sheriff of the city of St. Louis, to which he had been committed under an information charging him with the commission of felony, in violation of an act in relation to motor vehicles. Denied.

The facts are stated in the opinion.

Messrs. Kent Koerner and Glendy B. Arnold, for petitioner:

Section 12 of the motor vehicle act of 1911 is unconstitutional and void, because it requires the operator of an automobile, in violation of § 23 of article 2 of our Constitution, to give information which may lead to his being charged with or convicted of a crime.

State ex rel. Atty. Gen. v. Simmons Hard-

receivable in evidence for like reason. In the statute now under consideration, a person, after the happening of an event, is required, as stated, to make an oral unsworn statement. The event is one upon which the criminal liability of such person may be predicated. Such person is one in whose presence and under whose observation a fact occurred. He is therefore prima facie competent to testify to the same, and for this reason one described by the word 'witness' as used in the Constitution. The statement is required to be made in either one of two contingencies, namely, (a) where the occurrence is due to the culpability of the one required to make the statement; and (b), contrastively where it is due to accident. It not being required when the injury is unconsciously, as distinguished from knowingly, inflicted, the making of it imports knowledge of the occurrence and consciousness of its culpability where culpable, and, but for the provision requiring such statement to be made as well when the injury is accidental as when culpable, the mere making of the statement would import an admission of culpability. The circumstance that the statute also requires the statement to be made where the injury inflicted is due to accident,—that is to say, without conscious culpability,—and that, therefore, it may conceivably be required where no criminal liability attaches to the defendant from the occurrence, does not make the statute constitutional, for it is sufficient to render it obnoxious to the constitutional provision that the statement required to be made may under some circumstances be self-accusatory, or tend to establish a criminal liability, or subject the maker to criminal prosecution. It is not necessary to its unconstitutionality that it should inevitably have this effect. The first count in the indictment alleges that the injuries inflicted by the occurrence respecting which the defendant's statement was required were occasioned by the defendant's culpability. As the demurrer admits this, among other facts competently alleged, it follows that in the case at bar the state-

ware Co. 109 Mo. 118, 15 L.R.A. 676, 18 S. W. 1125; *People v. Rosenheimer*, 70 Misc. 433, 128 N. Y. Supp. 1095, 146 App. Div. 875, 130 N. Y. Supp. 544.

The phrase "that no person shall be compelled to testify against himself in a criminal cause," as used in article 2, § 23, of our Constitution, "means that no person shall be compelled to give utterance to any fact, by word or pen, which utterance might then or afterwards be used as evidence against him in a proceeding then pending or afterwards to be brought."

State ex rel. Atty. Gen. v. Simmons Hardware Co. supra; *People v. Rosenheimer*, 70 Misc. 433, 128 N. Y. Supp. 1095.

The legislature has no power to pass a law which requires a person to disclose

evidence which might lead to his being charged with or convicted of a crime.

State ex rel. Atty. Gen. v. Simmons Hardware Co. supra.

Messrs. Seebert G. Jones and Forrest G. Ferris, for respondent:

The chief purposes of the statute is to protect those using the streets and highways of the state,—to prevent and ameliorate accidents; and it is a valid exercise of the police power of the state.

People v. Rosenheimer, 146 App. Div. 875, 130 N. Y. Supp. 544 (dissenting opinion).

Statutes regulating the registration, licensing, operating, and speed of motor vehicles, constitute a proper exercise of the police power of the state. One purpose of

ment would have been required from the defendant because of his conscious culpability, and therefore the making of the statement would have furnished, not merely evidence of the defendant's identity with the operator of the vehicle, and in that connection a link in the chain of evidence against him in the event of his criminal prosecution, but also evidence of admitted culpability. It is elementary that, when a person is injured in person or property, and such injury appears to have been caused by the act or omission of another, the circumstances as ascertained attending the infliction of such injury may indicate a civil, and possibly also a criminal, liability on the part of such other, because of such other's apparent connection with its infliction. Where, for the reason that they indicate criminal liability, a criminal action is begun, the public prosecutor must prove as prerequisites to a lawful conviction, first, the identity of the person prosecuted with the person causing the injury; and, second, the latter's criminal culpability with respect to the same. The first, like any other relevant fact, may be proved by the admission of the person prosecuted. When so proved, such fact becomes a link in the chain of evidence against him. Thus, a person is injured upon a public highway, and thereafter dies from the effects of such injury. The injury causing death results from the violent contact of a motor vehicle, either directly or indirectly, with the body of the person killed. The circumstances discovered by the public authorities indicate that such contact was due either to some act or some culpable negligence on the part of the person operating the motor vehicle. The question arises, Who was that person? and it thereupon transpires that, under the penalties of the challenged statute, such person has said to a police officer in the vicinity of the place where the injury was inflicted, not an eyewitness to the occurrence: 'I am the man. I operated the motor vehicle which caused the injury. My address is such a street and such a number, and this is my operator's license number.' The admission so

made as an evidentiary fact is testified to by such officer before a grand jury, and, in conjunction with other evidence, it produces an indictment. That indictment conceivably charges murder in the first degree (*People v. Darragh*, 141 App. Div. 408, 126 N. Y. Supp. 522), possibly manslaughter in its first degree, and, if not, manslaughter in its second degree. A trial of the one indicted follows, and there again such person's statement to the officer, to the effect that he was the man who operated the motor vehicle upon the occasion stated in the indictment, becomes a link in the chain of evidence against him, connecting him with the occurrence as therein alleged. It follows that the man making the statement, whether such statement import conscious culpability or merely his connection with the occurrence, has been compelled, in the absence of any statutory immunity against prosecution, to be a witness against himself in a criminal case. Such was the nature of the statement required from this demurrant under penalty of conviction of felony should he omit to make it. He has omitted to accuse himself, and the indictment assailed is the pleading initiating the criminal action for his conviction of felony for such omission. These considerations lead to the conclusion that, while the facts in the case at bar are dissimilar from those in the cases cited, they show, if anything, a more obvious infraction of the constitutional provision. In reaching this conclusion, the extent of the police power of the state is recognized. The right under it to enact, as well-considered regulations for the public safety in connection with the operation of motor vehicles upon public highways, license and other requirements which have for their object the identification of those violating the motor vehicle law, is conceded. *People v. MacWilliams*, 91 App. Div. 176, 86 N. Y. Supp. 357. It is one thing to require operators of motor vehicles to carry identifying *indicia* before such persons have broken the law, and quite another to demand either that they make self-accusation in case of infringement, or furnish in such case a link in a chain of crimina-

such regulations is to make known the identity of the operator in case of his failure to observe the statutory regulations.

28 Cyc. 32, 34; *State v. Swagerty*, 203 Mo. 517, 10 L.R.A. (N.S.) 601, 120 Am. St. Rep. 671, 102 S. W. 483, 11 Ann. Cas. 755; *People v. Schneider*, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 Ann. Cas. 790.

Whoever accepts the privilege of operating an automobile assumes the obligation imposed by the state, of either remaining at

the place of accident or reporting the accident.

State v. Davis, 108 Mo. 666, 32 Am. St. Rep. 640, 18 S. W. 894.

Ferriss, J., delivered the opinion of the court:

Habeas corpus to discharge petitioner from the custody of the sheriff of the city of St. Louis who holds petitioner under a capias issued on an information based up-

on the evidence against themselves. The former can be lawfully done. The latter violates the Constitution."

In his dissenting opinion in the appellate division, Ingraham, P. J., said: "The court below held that this statute violated § 6 of article 1 of the Constitution of this state, which provides that no person shall be compelled in any criminal case to be a witness against himself. With that conclusion I do not agree. The statute does not relate to a criminal prosecution. It does not make it a crime for a person operating an automobile to cause an injury to person or property, nor does it make the declaration of the person operating the automobile admissible in evidence in any criminal proceeding which may follow the happening of the accident. Whether a person causing an injury to person or property is guilty of crime depends upon other provisions of law, and they have no connection with the statute under review. If no crime was committed when the accident occurred,—and it is not alleged that there was,—the constitutional provision could have no application, and the defendant's constitutional privilege was not infringed. A general provision of law compelling a party to be a witness generally would not violate this provision of the Constitution, because, if a crime was committed, it would be a violation of the Constitution to apply the statute to a criminal prosecution. In the recent development of motor vehicles, it appears that they have largely increased the danger to persons using the streets and highways; that it has become necessary in many cases, to save life, to provide prompt assistance to those injured; and, if such a vehicle at once leaves the place of the accident without waiting to see the result of the injury, it is impossible to ascertain the identity of the person causing the injury. It was to meet this condition that the act was passed. It was for the protection of those using the streets and highways of the state, and it seems to me a valid exercise of the police power of the state to protect its citizens. If, as before stated, no crime has been committed, then the constitutional provision did not apply. If a crime had been committed, and the defendant was justified in refusing to give his name and address or any information which could be used to identify him, it was for the defendant to assert his privilege, and show that his compliance with the statute would compel him to give testimony against

himself. . . . The use of these motor vehicles has created a new condition in which those using the streets and highways in the state are subjected to serious damage. The legislature, to protect the citizens of the state, and to insure that prompt relief be supplied to those injured, and that those causing the injuries could be ascertained, has made it the duty of the one causing the accident to remain and notify the police or a judicial officer. He is not required to give evidence or be a witness, but to stay at the place of the accident or give notice of the accident to the police. Certainly common humanity would impose such a duty, and I cannot believe that a statute which imposes and enforces it would violate the Constitution of this state."

In *Rex v. Hankey*, 93 L. T. N. S. 107, an act similar to those under consideration was involved, but its validity was not questioned or passed upon. In that case one section of the act provided: "If the driver of any car who commits an offense under this section refuses to give his name or address, or gives a false name or address, he shall be guilty of an offense under this act," and another section provided: "And it shall be the duty of the owner of the car, if required, to give any information which it is within his power to give, and which may lead to the identification and apprehension of the driver, and if the owner fails to do so, he also shall be guilty of an offense under this act." In construing these provisions it was held that the owner might be convicted, although the driver had not first been asked to give his name and address. It was held, however, that no conviction could be had unless the complaint alleged that an offense had been committed by the driver; and it was held that the allegations in that case were insufficient.

In *State v. Smith*, 29 R. I. 513, 72 Atl. 710, a statute provided that "every driver of a motor vehicle, after knowingly causing an accident by collision or otherwise, or knowingly injuring any person, horse, or vehicle, shall forthwith bring his motor vehicle to a full stop, return to the scene of the accident, and give to any proper person demanding the same, the number of his driver's license, the registration number of the motor vehicle, and the names and residences of each and every male occupant of said motor vehicle." Its validity was not passed upon, in that case, however, the question under consideration being as to the sufficiency of the complaint. J. T. W.

on the following statute: "Whoever operates a motor vehicle while in an intoxicated condition shall be guilty of a misdemeanor. Any person operating a motor vehicle who, knowing that injury has been caused to a person or property due to the culpability of the said operator, or to accident, leaves the place of said injury or accident without stopping and giving his name, residence, including street and street number, and operator's license number, to the injured party or to a police officer, or in case no police officer is in the vicinity of place of said injury or accident, then reporting the same to the nearest police station or judicial officer, shall be guilty of a felony punishable by a fine of not more than \$500, or by imprisonment for a term of two years, or by both such fine and imprisonment; and if any person be convicted a second time of either of the foregoing offenses, he shall be guilty of a felony punishable by imprisonment for a term of not less than two years and not more than five years. A conviction of a violation of this subdivision shall be reported forthwith by the trial court or the clerk thereof to the secretary of state, who shall, upon recommendation of the trial court, suspend the license of the person so convicted, or if he be an owner, the certificate of registration of his motor vehicle; and, if no appeal therefrom be taken, or if an appeal duly taken be dismissed, or the judgment affirmed, and upon notice thereof by said clerk, the secretary of state shall revoke such license, or in the case of an owner the certificate of registration of his motor vehicle, and shall order the license or certificate of registration delivered to the secretary of state, and shall not reissue to him said license or certificate of registration, or any other license or certificate of registration, unless the secretary of state in his discretion, after an investigation or upon a hearing, decides to reissue or issue such license or certificate." Laws 1911, p. 328, § 12.

The information charges in the first count that one Ernest Combs was in charge and control of, and operating and managing, an automobile upon a street in the city of St. Louis, and then and there, by accident, struck, run, over, injured, and killed one Frank Farrar with such automobile, and that he, knowing that such injury had been caused, did then and there unlawfully and feloniously leave the place of such accident without stopping and giving his name, residence, and license number; and, further, that the petitioner, before said Combs left the place of the accident, did unlawfully, feloniously, and knowingly incite, procure, aid, counsel, hire, and command the said Combs to do and commit said felony of

feloniously leaving the place of said accident in the manner and form aforesaid. The second count of the information contains the same charge, except that, instead of charging the injury to have been accidental, the information charges that said Combs did then and there "feloniously, carelessly, recklessly, and with culpable negligence," throw and cast the said Farrar to the pavement, and drive the automobile over him, causing his death, making the same charge against the petitioner as to inciting Combs to leave the place of injury. A demurrer was filed to this information in the circuit court and overruled, whereupon petitioner applied in this court for a writ of prohibition against Hon. James E. Withrow, judge of the circuit court before whom the cause was pending, which application was denied. He then sued out this writ of habeas corpus.

The only question involved is whether or not the act in question is constitutional. It is claimed by the petitioner that the statute violates § 23 of article 2 of the state Constitution, which provides that "no person shall be compelled to testify against himself in a criminal cause."

The statute in question is § 12 of an act of the legislature approved March 9, 1911 (Session Acts 1911, p. 322), and comprising in all sixteen sections, containing minute regulations and restrictions upon the use of motor vehicles on public streets and highways. Under the provisions of the act, every automobile must be registered with the secretary of state, with the name and address of its manufacturer and owner and the number of such vehicle. Such number must be conspicuously displayed on the vehicle. The character of the brakes, signaling devices, and lights is specified. The statute prescribes the rate of speed and other rules of the road. Every chauffeur must be licensed, and must also register his name and address. The highest degree of care is exacted in operating the vehicle. No such vehicle can be lawfully operated without a license from the state. The section in controversy was enacted for the purpose, doubtless, of preventing those controlling and operating automobiles from concealing their identity by immediate flight from the scene of accident, and also to secure necessary aid for the injured. Therefore it requires those in charge of the vehicle to remain at the place of accident, or give their names and addresses before leaving.

There can be no question but that this act, including § 12, is a reasonable exercise of the police power. The petitioner does not contend otherwise. His contention is that, whether reasonable or not as a police

measure, it is invalid, because it violates the constitutional provision that "no person shall be compelled to testify against himself in a criminal cause." The argument is that the driver may be charged with the crime of culpable negligence, and that the information exacted by the statute in question may be used as evidence to establish his connection with the injury.

The statute is a simple police regulation. It does not make the accident a crime. If a crime is involved, it arises from some other statute. It does not attempt in terms to authorize the admission of the information as evidence in a criminal proceeding. The mere fact that the driver discloses his identity is no evidence of guilt, but rather of innocence. *State v. Davis*, 108 Mo. 666, 32 Am. St. Rep. 640, 18 S. W. 894. On the contrary, flight is regarded as evidence of guilt. In the large majority of cases, such accidents are free from culpability. If this objection to the statute is valid, it may as well be urged against the other provisions, which require the owner and chauffeur to register their names and number, and to display the number of the vehicle in a conspicuous place thereon, thus giving evidence of identity, which is the obvious purpose of the provisions. *St. Louis v. Williams*, 235 Mo. 503, 139 S. W. 340. We have several statutes which require persons to give information which would tend to support possible subsequent criminal charges, if introduced in evidence. Persons in charge are required to report accidents in mines and factories. Physicians must report deaths and their causes, giving their own names and addresses. Druggists must show their prescription lists. Dealers must deliver for inspection foods carried in stock. We held a law valid which required a pawnbroker to exhibit to an officer his book wherein were registered articles received by him, against his objection based on this same constitutional provision. We held this to be a mere police regulation, not invalid because there might be a possible criminal prosecution in which it might be attempted to use this evidence to show him to be a receiver of stolen goods. *St. Joseph v. Levin*, 128 Mo. 588, 49 Am. St. Rep. 577, 31 S. W. 101. If the law which exacts this information is invalid, because such information, although in itself no evidence of guilt, might possibly lead to a charge of crime against the informant, then all police regulations which involve identification may be questioned on the same ground. We are not aware of any constitutional provision designed to protect a man's conduct from judicial inquiry, or 40 L.R.A.(N.S.)

aid him in fleeing from justice. But, even if a constitutional right be involved, it is not necessary to invalidate the statute to secure its protection. If, in this particular case, the constitutional privilege justified the refusal to give the information exacted by the statute, that question can be raised in the defense to the pending prosecution. Whether it would avail, we are not called upon to decide in this proceeding.

The petitioner relies upon *State ex rel. Atty. Gen. v. Simmons Hardware Co.* 109 Mo. 118, 15 L.R.A. 676, 18 S. W. 1125, wherein we held a statute invalid which required an officer of a corporation to answer, under oath, whether the corporation had violated the statute concerning trusts and combinations, and where the statute further made a violation of such trust statute a crime. The distinction between that case and this is obvious. There the information relates directly to a crime created by the same statute, and is necessarily incriminatory, if the answer is in the affirmative. *Re Conrades*, 112 Mo. App. loc. cit. 41, 85 S. W. 150. This distinction was pointed out, also, in the *Levin Case*, supra.

Our attention is called to the case of *People v. Rosenheimer*, 70 Misc. 433, 128 N. Y. Supp. 1093, wherein the court of general sessions held a similar act invalid. This decision was affirmed by a divided court, three to two, in the appellate division. 146 App. Div. 875, 130 N. Y. Supp. 544. We regard the dissenting opinion by Ingraham, P. J. as sustained by the better reasoning.

Similar statutes have been passed in Maine, New Jersey, Michigan, Florida, California, and other states. Our attention is called to no decision upon the question involved here by any court of last resort.

Common observation and experience show that unrestricted use of motor vehicles on public streets would be extremely dangerous to life and limb and the property of the public. Their use thus becomes a fit subject for state regulation. Every person who operates or uses a motor vehicle must be regarded as exercising a privilege, and not an unrestricted right. It being a privilege granted by the legislature, a person enjoying such privilege must take it subject to all proper restrictions.

We cannot hold invalid this statute imposing a proper restriction, because of its suggested possible relation to a possible criminal prosecution.

It is ordered that the petitioner be remanded.

Brown, P. J., and Kennish, J., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

NATHANIEL LIPSOHN, Appt.,
v.

SAMUEL L. GOLDSTEIN et al., Respts.

(212 Mass. 144, 98 N. E. 703.)

Mortgage — foreclosure sale — insisting on cash — effect.

A sale under a power in a mortgage will not be set aside because the mortgagee insisted on cash and furnished the money to the buyer to comply with his bid, if he acted in good faith, the bid was reasonable, and the mortgagee did nothing to prevent the mortgagor from raising the money or bidding at the sale.

(May 24, 1912.)

APPEAL by plaintiff from a decree of the Superior Court for Suffolk County dismissing a bill filed to set aside a foreclosure sale. Affirmed.

The facts are stated in the opinion.

Mr. James H. Duffy for appellant.

Mr. M. F. Cunningham for respondents.

Braley, J., delivered the opinion of the court:

The defendant Goldstein, when as mortgagee he attempted to execute the power of sale upon default of the plaintiff, was bound to act in good faith, and to use every reasonable means to obtain the full value of the mortgaged personal property, and to protect the interests of the plaintiff, who was mortgagor. *Montague v. Dawes*, 14 Allen, 369; *Clark v. Simmons*, 150 Mass. 357, 23 N. E. 108. The master was not directed to report the evidence, and his findings of fact being final, it appears from the first report and the supplemental report, which are to be read together, that the sale was advertised in a local newspaper published in the place of the plaintiff's residence, who received notice of the time and place, and, if the record is silent as to the terms of the power of sale, no question is raised that they were not followed. The plaintiff did not request an adjournment of the sale, although there were few bidders, and the master finds that the price obtained was not disproportionate to the real value of the property.

Note. — Insisting on cash sale under a chattel mortgage.

There seems to be no case squarely in point with *LIPSOHN v. GOLDSTEIN* on the point indicated in the title, but it is held in *Williams v. Hatch*, 38 Ala. 338, that a provision in a chattel mortgage that the property should be sold for cash, being for the benefit of the mortgagee, may be waived by him; and where he sells and delivers the 40 L.R.A.(N.S.)

It is conceded that the notice contained no reference to the terms of payment, and the plaintiff, who, up to the last moment, endeavored to raise enough money to prevent the sale of his household goods, was unable to obtain the money.

The power of sale, however, must be assumed to have been in the ordinary form, and the mortgagee could have sold, and arranged with the purchaser to give credit for the purchase money, and if the property had brought more than the sum secured by the mortgage, he would have been answerable to the plaintiff for the surplus. *Bailey v. Aetna Ins. Co.* 10 Allen, 286. The plaintiff's financial inability undoubtedly influenced the terms of sale, but if so, the master reports that under the circumstances the requirement that the purchaser must pay cash was not unreasonable, or insisted upon by the mortgagee in order to get the property at less than its value, or to deprive the plaintiff of further opportunity to redeem. The purchaser, who is joined as a defendant, was present during the negotiations, and when the property was struck off the mortgagee furnished the money to pay for it. If the mortgagee had previously hindered the plaintiff from raising the money, or sought to prevent him from bidding, the vendee would not have been an innocent purchaser for value and without notice of his conduct, and the foreclosure would have been invalid. *Gilson v. Nesson*, 208 Mass. 368, 371, 94 N. E. 471; *Wenz v. Pastene*, 209 Mass. 359, — L.R.A.(N.S.) —, 95 N. E. 793. But the master having found that the mortgagee did nothing to hinder or delay the plaintiff, who had a reasonable opportunity to arise the money, the sale cannot be vitiated on this ground. The price not having been grossly inadequate, and the mortgagee not being chargeable with bad faith, the plaintiff has failed to sustain the essential averments upon which he relied for relief, and the decrees of the superior court overruling the plaintiff's exceptions to the supplemental report, and confirming the report, and the final decree dismissing the bill, should be affirmed. *Fennyery v. Ransom*, 170 Mass. 303, 306, 307, 49 N. E. 620, and cases cited.

Ordered accordingly.

property to the purchaser without demanding payment, he waives that condition, and the title to the property passes to the purchaser as completely as if he had paid the price.

But it is held in *Edwards v. Cottrell*, 43 Iowa, 194, that a chattel mortgage with power of sale upon default in payment confers upon the mortgagee no right to dispose of the property otherwise than for cash.

J. D. C.

TENNESSEE SUPREME COURT.

AMANDA ELDRIDGE et al.

v.

T. B. HUNTER, Appt.

('— Tenn. —, 143 S. W. 892.')

Deed — privy examination of wife — revocation of authority.

If, after a wife has been privily examined as to her signature to a deed which has not been signed by her husband, and before the certificate of examination has been indorsed on the instrument, she obtains possession of it and erases her signature, the authority to attach the certificate is terminated, and the deed will be void if the husband subsequently affixes her signature and his own to the instrument, and causes the certificate of acknowledgment to be attached thereto.

(September 27, 1911.)

APPEAL by defendant from a decree of the Chancery Court for Overton County in plaintiffs' favor in a suit to set aside a deed of trust. Affirmed.

The facts are stated in the opinion.

Messrs. W. R. Officer and E. A. Qualls for appellant.

Mr. E. C. Knight, for appellees:

The homestead cannot be alienated without the "joint consent" of husband and wife.

Hoge v. Hollister, 2 Tenn. Ch. 611; Cope v. Meeks, 3 Head, 388; Mount v. Kesterson, 6 Coldw. 461.

The execution of the deed to pass the married woman's estate and title is imperfect and incomplete until the official act of the clerk or other officer is made perfect and complete by meeting, in letter and spirit, every requirement of the statute.

Rhea v. Iseley, 1 Shannon, Cas. 228; Friedenwald v. Mullan, 10 Heisk. 231; Wester v. Hurt, 123 Tenn. 508, 30 L.R.A. (N.S.) 358, 130 S. W. 842, Ann. Cas. 1912 c, 329.

Shields, Ch. J., delivered the opinion of the court:

Complainants, J. T. Eldridge and Aman-

da Eldridge, husband and wife, bring this bill to have a deed in trust upon their homestead, purporting to have been jointly executed by them, declared void for want of valid privy examination of Mrs. Eldridge, and the foreclosure of the same perpetually enjoined.

Complainants occupied the land in controversy as a homestead, the title being in the husband, worth less than \$1,000, and the only real estate owned by them.

J. T. Eldridge purchased of the defendant certain personal property and agreed to pay therefor \$400, for which he executed his note with personal security, and further agreed that he and his wife would secure the same by a deed in trust upon his land. The conveyance was prepared by a notary public and presented to Mrs. Eldridge at her home, in the absence of her husband, and she there signed it and was properly examined touching its execution for a valid privy examination. On the next day Mrs. Eldridge went to the home of the notary public, and upon request the conveyance was given to her that she might consult her brother concerning it, and while in her possession she erased her signature. Afterwards the notary public came to the home of J. T. Eldridge, and the latter, in the presence of Mrs. Eldridge, executed and acknowledged the conveyance, and also resigned the name of Mrs. Eldridge thereto. No privy examination of Mrs. Eldridge was then made. After this the notary public indorsed the acknowledgment of J. T. Eldridge and the privy examination of Mrs. Eldridge upon the conveyance, and it was delivered.

These facts are conceded. There is some controversy whether Mrs. Eldridge authorized her husband to resign the conveyance for her; but the preponderance of the evidence is that she refused to again sign it herself, or authorize her husband to do so for her.

We think that upon these facts there was no valid privy examination of Mrs. Eldridge, and that the certificate and deed in trust in question are fraudulent and void.

Note.—No other case has been found involving the withdrawal of one's signature to an instrument after acknowledgment on privy examination, but before the certificate of acknowledgment or examination has been indorsed on the instrument or attached thereto. It seems clear, however, as stated in *ELDRIDGE v. HUNTER*, that before the instrument has been completed or become binding on any of the parties thereto, any one of them has the right to withdraw, and decline to proceed with the execution of the instrument, and that the indorsement or at-

tachment, after he has withdrawn his signature, of a certificate of his acknowledgment or examination, would be unauthorized and void.

As to the right to attach or correct a certificate of acknowledgment after the date of the acknowledgment, see note to *Alford v. Doe*, 22 L.R.A. (N.S.) 216.

As to the sufficiency of evidence to impeach a certificate of acknowledgment of a deed, see note to *Ford v. Ford*, 6 L.R.A. (N.S.) 442.

The homestead of the husband and wife can only be conveyed by their joint deed. They need not execute it at the same time, but it is not complete until executed by both of them, and there can be no delivery until this is done.

Married women cannot make a valid conveyance of real estate without privy examination, completed in the form and manner prescribed by the statutes. Signature is the least important part of the execution of a deed by them. Privy examination is the essential part, and until it is made and perfected, the deed is of no force. *Mount v. Kesterson*, 6 Coldw. 463; *Wester v. Hurt*, 123 Tenn. 508, 30 L.R.A. (N.S.) 358, 130 S. W. 842, Ann. Cas. 1912 c, 329.

The statutes providing for the privy examination of married women to conveyances of real estate require the officer taking the examination to examine them separately and apart from the husband in regard to the free execution of the conveyance, as there prescribed, and to make a certificate in a form also prescribed, showing the result of his examination, and to indorse on, annex, or attach the certificate to the conveyance, and contemplate that this shall be done contemporaneously with the manual execution by the married woman. The privy examination is not complete until these mandatory provisions of the statutes are complied with, and the certificate, so indorsed, attached, or annexed, is the only competent evidence of compliance. Code, §§ 2076-2078 (*Shannon's ed.* §§ 3753-3755); *Rhea v. Iseley*, 1 Shannon, Cas. 228; *Mount v. Kesterson*, 6 Coldw. 463; *Currie v. Kerr*, 11 Lea, 142.

The action of the officer taking the privy examination is quasi judicial, and can only be impeached for fraud, as is done in this case. *Shields v. Netherland*, 5 Lea, 193.

When Mrs. Eldridge obtained possession of the conveyance from the notary public, the privy examination had not been reduced to writing and indorsed on or attached to it. It had not been executed by her husband. It was not complete or binding upon either of them. Mrs. Eldridge then had the right to refuse to proceed with the execution of the conveyance, and she did so, and erased her signature. When it was executed by the husband, and her name signed thereto by him, no further privy examination was taken, and if she had authorized her husband's action, which she did not, this attempted execution would be imperfect and invalid for this reason.

It results that the certificate showing proper execution by Mrs. Eldridge is untrue and fraudulent, and the deed in trust void, in so far as it affects the homestead of the complainants in the land in contro-

versy, and its foreclosure to that extent will be perpetually enjoined.

MISSOURI SUPREME COURT. (Division No. 2.)

ARTHUR B. MOLER, Appt.,

v.

C. T. WHISMAN et al., Respts.

(— Mo. —, 147 S. W. 985.)

Barber — prescribing period of instruction — constitutionality.

1. Requiring a two-year period of instruction before practising the barber's trade does not unconstitutionally deprive one of his liberty or property, or the gains of his own industry, without due process of law, confer special privileges or immunities, abridge the privileges of citizenship, or deny him the equal protection of the laws.

Statute — regulation of barber college — sufficiency of title.

2. A title, An Act To Establish a Board of Examiners for Barbers, and To Regulate

Note. — Constitutionality and effect of restrictions on right to practise trade of barber.

As to the validity and effect of an attempted imposition of license taxes or fees upon barbers, see note to *Louisville v. Schnell*, post, 637.

Questions relating to the closing of barber shops on Sunday are included in the notes in 14 L.R.A. (N.S.) 1259, and 32 L.R.A. (N.S.) 1190, on the validity of classification in Sunday laws; and the note in 15 L.R.A. (N.S.) 646, relating to special penalties for the violation of Sunday closing act.

Constitutionality—generally.

It is said in 8 Cyc. 872, that the power to regulate business does not in all cases rest upon the existence of a nuisance, as many kinds of business so peculiarly and intimately affect the public interest that whoever engages in any one of them in effect grants to the public an interest in the methods and instrumentalities employed therein.

Prohibiting any person from following the occupation of a barber, without first obtaining a certificate of registration, is a valid exercise of legislative power in the interest of the public health and welfare (*State v. Zeno*, 79 Minn. 80, 48 L.R.A. 88, 79 Am. St. Rep. 422, 81 N. W. 748; *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218); and being such, it effects no unconstitutional abridgement of the liberty and natural rights of the citizens (*State v. Walker*, 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257).

No unconstitutional delegation of legislative authority is effected by the provision of a statute regulating barbers, which leaves its application to towns to be determined by

the Occupation of Barbers, and To Prevent the Spreading of Contagious Diseases, is sufficient to cover matters regulating barber colleges and apprentices in barber shops.

Barber — apprentice — forbidding charge — constitutionality.

3. Prohibiting students in barber colleges from charging for their work during the two-year period which the instruction is required to cover violates a constitutional provision that all persons shall have a right to the enjoyment and gains of their own industry.

Same — regulation of sign — special legislation.

4. Forbidding a barber school or college to display any other sign than a mere announcement of "barber school" or "college" is invalid as a special law applying to an

institution which is not a proper subject for classification.

Same — special privilege — monopoly.

5. So far as a statute regulating barber colleges forbids them to charge for the work of students and to display any sign except the mere announcement of the fact that it is a barber college tends to discourage persons from learning the trade, and creates a monopoly, it violates the constitutional prohibition of the granting of special rights, privileges, and immunities.

(May 9, 1912.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in defendants' favor in a suit to restrain revocation of a barber's license. Affirmed.

town councils, and not by the vote of electors. *State v. Armeno*, 29 R. I. 431, 72 Atl. 216.

And vesting authority in a state board of barber examiners to determine the qualifications of a barber does not render a statute making the board's authorization a prerequisite to the exercise of the trade, unconstitutional as a delegation of legislative authority, and as vesting in the board power to issue and withhold licenses arbitrarily, in that although the statute defines what shall constitute a barber, it does not prescribe the standard or degree of knowledge, learning, and experience which applicants must possess. *State v. Briggs*, 45 Or. 366, 77 Pac. 750, 78 Pac. 361, 2 Ann. Cas. 424.

A state statute which provides in one section that an unsanitary barber shop is a common nuisance, for which the proprietor is subject to prosecution and punishment, and, in another section, that the penalty for maintaining such a nuisance shall be a fine, is not open to the objection that it imposes two different punishments for the same offense in violation of the Federal Constitution. *State v. Armeno*, supra. The court placed its decision not only upon the ground that the 5th Amendment of the Federal Constitution did not apply to state government, but also upon the broader ground that the two sections in fact did not impose two different punishments.

And there is no interference with any constitutional right to a jury trial in a statute providing that the remedy of one aggrieved by the state board's revocation of his barber certificate shall be by an appeal to the state supreme court. *Ibid*. The court declared that the decision of the board to revoke a certificate was not a criminal prosecution within the constitutional provision that in all criminal prosecutions the accused shall enjoy the right to a speedy trial by an impartial jury; and it also declared that the constitutional provision that the right of trial by jury shall remain inviolate had no application to a case of this kind, and announced this conclusion upon the authority of *State Bd. of Health v. Roy*, 22 R. I. 40 L.R.A.(N.S.)

538, 48 Atl. 802, which involved the issuance and revocation of a physician's certificate by the state board of health, and held that the constitutional provision last referred to applied only to such cases as were required to be tried by jury before the adoption of the Constitution, and that it therefore did not apply to cases of this kind which arose subsequently thereto.

The constitutional inhibition against unreasonable searches and seizures is not violated by a statute authorizing any member of the state board to enter and make reasonable examination of any barber shop during business hours, for the purpose of ascertaining the sanitary condition thereof, and with the ultimate purpose of revoking the offender's certificate of registration if the conditions are found to be unsanitary. *State v. Armeno*, supra.

No violation of the constitutional provision that no bill shall embrace more than one subject, and that that shall be expressed in the title, results from the enactment of provisions relating to the appointment of a board of examiners, or prescribing the duties of the board or the compensation of its members, and referring to apprentices of barbers, and to the subject of license fees, under the title: "An Act To Regulate the Practice of Barbering and Licensing of Persons To Carry on Such Practice, and Providing Punishment for Its Violation." *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737.

So, the matter of licensing a barber school is germane to and properly incorporated under the title: "An Act To Regulate the Pursuit, Business, Art, and Avocation of a Barber, the Licensing of Persons To Carry on Such Business, and To Insure the Better Qualification of Persons Following Such Business." *State v. Briggs*, supra.

—classification, generally.

As to classification with reference to barbers, in Sunday laws, see notes in 14 L.R.A.(N.S.) 1259, and 32 L.R.A.(N.S.) 1190.

One case hold that there is an unconstitutional denial of equal privileges and immu-

Statement by Brown, J.:

Bill in equity in the circuit court of Jackson county to restrain the revocation of a barber's license. From a judgment for defendants, plaintiff appeals.

The plaintiff is proprietor of a barber college in Kansas City, Missouri, and has in his employ as manager and instructor one P. R. Hackney, a registered barber. The defendants compose the state board of barber examiners, and are threatening to revoke the license of plaintiff's said instructor, Hackney, for the alleged reason that he has displayed on plaintiff's said barber college the sign, "Free shaving and hair cutting;" that he has collected and permitted the students under his control to collect money for their services in the

practice of the trade therein taught; and that he graduates students after a course of study of less than two years; all contrary to the provisions of § 1187, Rev. Stat. 1909.

The evidence shows that plaintiff's barber college is equipped with forty six chairs and other paraphernalia necessary for conducting a barber shop and teaching the barber's trade; that his instructor, Hackney, has caused to be displayed on said college the said sign, "Free shaving and hair cutting;" that, when students begin work in said college they charge nothing for their services, but after a few weeks' instruction they are permitted to charge for their services; and that the amount they receive is paid one half to the plain-

nities in a classification of persons who are subjected to the operation of a statute requiring the registration of barbers, and the payment of a fee of \$2 for a registration certificate, where the act excepts from its operation students of the state university and other schools who are making their way by serving as barbers, persons who are serving as barbers in an eleemosynary institutions, and persons following the occupation of a barber in towns of 1,000 or less. Jackson v. State, 55 Tex. Crim. Rep. 557, 117 S. W. 818. The ground of this decision, however, is that the exaction of the fee for a registration certificate is to be regarded as a tax, and that there is not the required equality and uniformity. And while the court uses some language which may fairly be regarded as meaning that the classification cannot be upheld as a health measure, especially so far as regards schools and eleemosynary institutions—the apparent ground of the decision is, as before stated, that the rules governing taxation apply. However, in a dissenting opinion in this case, Ramsey, J., has this to say: "I am unable to agree to the opinion or judgment of the majority of the court. If it be conceded that the small sum required to be paid for certificates is a 'tax' in the sense in which that word is used in the Constitution, then it would follow logically that the law is invalid, since it contains numerous exceptions, not based on any reasonable or rational classification. However, I do not believe the \$2 required to be paid under the terms of this act is, in any proper sense, a tax or any part or portion of the taxing system."

But in the cases hereinafter set out, statutes like that involved in the last case have been upheld as health measures; and it seems not to have been urged in such cases that the small registration fee constituted a tax; and the cases in no way involve the rules relating to taxation.

—classification on basis of experience or citizenship.

See Jackson v. State, supra.

No unconstitutional discrimination in a 40 L.R.A. (N.S.)

statute providing for the examination and registration of barbers upon the payment of a registration fee results from excepting merely from the requirement of examination such barbers as are engaged in the trade at the time the act becomes effective (State v. Sharpless, and Ex parte Lucas, supra, or those who have been engaged in the business for three years (Com. v. Ward, 136 Ky. 146, 123 S. W. 673)).

But a provision making it a prerequisite to obtaining a certificate of registration that the applicant "has studied the trade for two years as an apprentice, under, or as a qualified and taxing barber," not being subject to justification as a health measure, is void as tending to create a monopoly in that it tends to destroy barber schools, and thus permits practising barbers to limit the number of applicants by refusing to receive apprentices. State v. Walker, 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257. The court held, however, that the invalidity of this provision did not pervade the whole act.

And a clause in a statute requiring the examination and licensing of barbers, which provides that no alien shall receive a certificate, violates the "due process of law" and "equal protection of the laws" clauses of the Constitution. Templar v. State Examiners, 131 Mich. 254, 100 Am. St. Rep. 610, 90 N. W. 1058.

—classification according to municipalities.

See Jackson v. State, supra.

A statute forbidding persons to exercise the calling of a barber without obtaining a certificate of registration from the state board, and annual renewal cards thereafter, is not rendered obnoxious as special legislation, merely because its operation is confined to cities of 50,000 or more inhabitants. Ex parte Lucas, 160 Mo. 218, 61 S. W. 218.

So, limiting the operation of a statute in respect of the examination and registration of barbers to cities of the first, second, and third class, does not offend the constitutional inhibition against class legislation (Com. v. Ward, supra); and this being so, the court will not inquire into the rea-

tiff and one half to the student performing the service. It is also proven that the plaintiff graduates his students after a course of study of less than two years. The evidence also shows that the barber's trade can only be taught by having the students shave and cut the hair of other persons under the supervision of an instructor; that plaintiff, through his students, furnishes free shaves to about 1,500 persons per week. No evidence was introduced by either side to prove the length of time required to properly teach the barber's trade, nor was any proof offered to show the danger of spreading infectious or contagious disease by the operation of public barber shops.

Plaintiff does not deny the acts charged against him by defendants, but contends that the judgment ought to be reversed and a decree entered for him because chapter 13, Rev. Stat. 1909, entitled "Barbers," is in conflict with the following provisions of the Constitution of Missouri; Section 4 of article 2 of the Constitution of the state of Missouri, as follows: "That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when govern-

ment does not confer this security, it fails of its chief design." Section 30 of article 2, as follows: "That no person shall be deprived of life, liberty, or property without due process of law." Section 1 of article 4 as follows: "The legislative power, subject to the limitations herein contained, shall be vested in a senate and house of representatives, to be styled, 'the general assembly of the state of Missouri.'" Section 53 of article 4, as follows: "The general assembly shall not pass any local or special law, . . . granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity." Section 28 of article 4, as follows: "No bill . . . shall contain more than one subject which shall be clearly expressed in its title." That it is also in conflict with § 1 of the 14th Amendment of the Constitution of the United States, as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Messrs. Gage, Ladd, & Small, for appellant:

The barber law in question (amendment

sons which govern the legislature in passing the act (*State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737).

There is no unconstitutional denial to the citizens of cities of the equal protection of the laws with the citizens of towns, by a statute which makes the application of its provisions prescribing the prerequisites to the exercise of the trade of barber compulsory in cities and optional in towns. *State v. Armeno*, 29 R. I. 431, 72 Atl. 216.

And there is no unconstitutional denial to the people of towns of the equal protection of the laws with the people of cities, by a provision in a statute prescribing the prerequisites to the exercise of the trade of barber, which provides that its provisions shall govern the cities of the state, and only such towns as shall, by their councils, adopt the provisions of the act. *Ibid.*

And a statute providing for the examination and registration of barbers upon the payment of the fee is not unconstitutional as local and class legislation, because it does not apply to barbers in unincorporated cities and towns; or because the conditions to the issuance of a certificate imposed upon barbers of municipalities ranking below cities of the third class are greater than those imposed upon barbers in cities of the first, second, and third class; or because the provision making it an offense to use soiled linen or unsterilized tools, or to practise without having obtained a certifi-

cate of registration, or to falsely pretend to practise under the statute, is confined to barbers in cities of the first, second, and third class. *State v. Sharpless*, supra.

Construction of statutes.

As to conformity of act to title, see *State v. Sharpless*, and *State v. Briggs*, supra, under "Constitutionality; generally."

An exception from a statute regulating barbers, of those persons exercising the trade in municipalities of less than 50,000 inhabitants, is not a continuing exception of all cities which come within it at the time the act goes into effect; but, on the other hand, it ceases to operate as an exception as soon as any municipality attains that population. *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218.

So, an act regulating barbers "in any incorporated city or town" in the state applies not merely to such municipalities as are incorporated at the time the act is passed, but also to those thereafter incorporated. *State v. Sharpless*, supra.

Power granted to the board to revoke "any certificate of registration" for enumerated causes applies to a "certificate" issued, without examination, to barbers engaged in the trade at the time the act went into effect, as well as "a certificate of registration" which other persons must obtain by submitting to an examination;

of 1907, Acts 1907, p. 79), is void so far as it prohibits the students of a barber college or their teachers from charging for their services.

State v. Granneman, 132 Mo. 326, 33 S. W. 784; *Woolley v. Mears*, 228 Mo. 41, 136 Am. St. Rep. 637, 125 S. W. 1112; *State v. Walsh*, 136 Mo. 403, 35 L.R.A. 231, 37 S. W. 1112; *State v. Thomas*, 138 Mo. 100, 39 S. W. 481.

The legislature has no right to select out barbers and barber's schools by themselves, and limit their right to employ and teach apprentices and students and fix the number of teachers to students or apprentices.

State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784; *Eden v. People*, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Bailey v. People*, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *State v. Julow*, 129 Mo. 163, 29 L.R.A. 275, 50 Am. St. Rep. 443, 31 S. W. 781; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; *Ex parte Dickey*, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428.

The right to employ apprentices and teach students is a fundamental right, which cannot, either by special or general legis-

lation, be taken away so long as an American citizen is entitled to the protection of due process of law or the law of the land.

State v. Missouri Tie & Timber Co. 181 Mo. 536, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 Ann. Cas. 119.

Plaintiff has no plain, adequate, or complete remedy at law, and a permanent injunction restraining the enforcement of this unconstitutional barber's act is plainly the proper and only remedy of plaintiff in order to prevent his legitimate business from being destroyed.

Merchants' Exchange v. Knot, 212 Mo. 616, 111 S. W. 573; *Robinson v. Galveston*, 51 Tex. Civ. App. 292, 111 S. W. 1078.

Messrs. Reinhardt & Schibsbey, for respondents:

Only those whose rights are directly affected by a statute can attack the constitutionality of such act.

State ex rel. Crandall v. McIntosh, 205 Mo. 589, 103 S. W. 1078; *Cunningham v. Current River R. Co.* 165 Mo. 276, 65 S. W. 556; 8 Cyc. 788, 791, 993; *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561.

A statute does not violate § 28 of article 4 of the Missouri Constitution, where all its provisions are germane to and naturally connected with the subject as stated in the title of the act.

there being no distinction between a certificate and a certificate of registration. *State v. Chaney*, 36 Wash. 350, 78 Pac. 915.

And the practice of the trade of barber after a certificate of registration has been revoked for cause is prohibited by a provision forbidding, under penalty, the practice of the occupation of barber "without first having obtained a certificate of registration." *Ibid.*

Only barbers who have conducted business in the state come within the meaning of the words "so engaged," used in a statute excepting persons "engaged in the business of a barber in this state," and who have been "so engaged" for two years, from a provision that barbers must be examined and obtain a certificate. *Wass v. Board of Examiners*, 123 Mich. 544, 82 N. W. 234.

It has been held that there is an irreconcilable conflict between a provision, on the one hand, that no person shall practise the occupation of barber in the state until he shall have obtained a certificate of qualification, and that every person "now engaged in the business of a barber in this state" shall comply with its provisions, and a proviso, on the other hand, that "this act shall not in any way apply to or affect any person who is now occupied or working as a barber in this state;" and that the statute does not apply to persons engaged in the occupation of barber at the time the act

was passed. *State v. Tag*, 100 Md. 588, 60 Atl. 465.

But it was held in *Com. v. Ward*, *supra*, that barbers who had practised three years were excepted, not from the operation of the whole act, but only from the necessity of submitting to an examination, by a proviso that the act did not apply to persons who had practised for three years, which was appended to a provision forbidding persons to follow the trade without first obtaining a certificate of registration, since the act must be deemed a reasonable health measure intended to regulate all barbers. Section 7 of this act provided that "every person now engaged in the occupation of barber" might obtain a certificate of registration merely by filing an affidavit; and § 8 provided that any person desiring to obtain a certificate of registration should make application to the board, pay a fee, and submit to an examination, etc. The court held in effect that the proviso should be regarded as applying only to § 8 and the examination therein required, and that the inconsistency between the proviso and § 7 should be resolved in favor of the latter, so as to place barbers, even though they had practised for three years, under the jurisdiction of the board, though not requiring them to take an examination.

L. A. W.

State ex rel. Equitable Life Assur. Soc. v. Vandiver, 222 Mo. 221, 121 S. W. 45; *Ferguson v. Gentry*, 206 Mo. 198, 104 S. W. 104; *State v. Doerring*, 194 Mo. 398, 92 S. W. 489; *O'Connor v. St. Louis Transit Co.* 198 Mo. 639, 115 Am. St. Rep. 495, 97 S. W. 150, 8 Ann. Cas. 703; *Coffey v. Carthage*, 200 Mo. 622, 98 S. W. 562.

The legislature may, without violating § 1 of article 4 of the state Constitution, vest boards of examiners with power to investigate and decide upon the qualifications of applicants for licenses for occupations and professions directly affecting the public welfare.

St. Louis v. Meyrose Lamp Mfg. Co. 139 Mo. 560, 61 Am. St. Rep. 474, 41 S. W. 244; *State v. Doerring*, 194 Mo. 398, 92 S. W. 489; *State ex rel. Johnston v. Lutz*, 136 Mo. 633, 38 S. W. 323; *Ex parte McManus*, 151 Cal. 331, 90 Pac. 702; *Merchants' Exchange v. Knott*, 212 Mo. 635, 111 S. W. 565.

The state may regulate the occupation of a barber.

Ex parte Lucas, 160 Mo. 218, 61 S. W. 218; *State v. Zeno*, 79 Minn. 80, 48 L.R.A. 88, 79 Am. St. Rep. 422, 81 N. W. 748; *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737; *Com. v. Ward*, 136 Ky. 146, 123 S. W. 673.

Where natural classes exist by the very nature of their inherent conditions, the legislature may treat them as different classes and follow different policies with regard to them. No legislation is obnoxious as class legislation where all persons subject to it are treated alike under similar circumstances and conditions.

White v. Missouri, K. & T. R. Co. 230 Mo. 287, 29 L.R.A.(N.S.) 874, 130 S. W. 325; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *State v. Darrah*, 152 Mo. 522, 54 S. W. 226; *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068; *State v. Swagerty*, 203 Mo. 517, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671, 102 S. W. 483, 11 Ann. Cas. 725; 8 Cyc. 1063; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; *State v. Webber*, 214 Mo. 272, 113 S. W. 1054, 15 Ann. Cas. 983.

All doubts must be solved in favor of the validity of the statute.

State v. Webber, 214 Mo. 272, 113 S. W. 1054, 15 Ann. Cas. 983; *State v. Layton*, 160 Mo. 489, 62 L.R.A. 163, 83 Am. St. Rep. 487, 61 S. W. 171; *Hamman v. Central Coal & Coke Co.* 156 Mo. 242, 56 S. W. 1091; *State ex rel. Rodes v. Warner*, 197 Mo. 656, 94 S. W. 962.
40 L.R.A.(N.S.)

Brown, J., delivered the opinion of the court:

No intention to suppress the operation of public barber shops having been expressed in the title to the bill under which chapter 13, Rev. Stat. 1909, was enacted, it will not be assumed that the general assembly deemed the continued operation of such shops so dangerous to the public health that it desired to terminate that avocation with the present generation, and make it necessary for our male posterity to shave themselves or allow their hair and whiskers to grow without let or hindrance from tonsorial artists; yet so complete is the power of the legislature to prescribe regulations affecting the public health, that it would hesitate to say it could not entirely suppress any occupation which is in fact wholly inimical to the public health.

Courts take judicial notice of those things which are common knowledge to the majority of mankind. *Hobbs v. St. Louis, M. & S. R. Co.* 113 Mo. App. 133, 87 S. W. 525; *Greenl. Ev.* 14th ed. § 6; *Grimes v. Eddy*, 126 Mo. 168, 26 L.R.A. 638, 47 Am. St. Rep. 653, 28 S. W. 756. But we do not judicially know how much time would be required to teach the average student to satisfactorily perform all the work required of a public barber in such a manner as to prevent the spread of disease.

The courts take judicial notice that some diseases are spread by diseased persons coming in contact with those who are healthy, and that barbers on account of their very close contact with their customers may contract diseases or allow their tools or soaps to become contaminated by the virus or germs of diseases, and thereby communicate such diseases to their patrons, therefore a prima facie presumption arises that barbers should be able to determine whether or not those who apply to them for shaves are afflicted with contagious or infectious diseases, particularly diseases of the skin. We have already determined that public barber shops are a proper subject of legislative control. *Ex parte Lucas*, 160 Mo. 218, loc. cit. 233, 234, 61 S. W. 218.

Therefore, as the legislature was proceeding within its proper sphere in enacting chapter 13, supra, we hold that its action in fixing the course in barber colleges at two years is not unconstitutional.

The state cannot convert to its own use the property or labor of a citizen, without compensation, under the pretext of preventing the spread of disease, but, because

a law designed to protect public health requires a student to work two years before becoming a public barber, it does not for that reason violate § 4 of article 2 of the Constitution of Missouri guarantying to all persons the enjoyment of the gains of their own industry; nor does it conflict with § 30, art. 2, of said Constitution, nor with § 1 of the 14th Amendment of the Federal Constitution, prohibiting the taking of property without due process of law. *St. Louis v. Liessing*, 190 Mo. 464, 1 L.R.A. (N.S.) 918, 109 Am. St. Rep. 774, 89 S. W. 611, 4 Ann. Cas. 112.

"The general right to engage person or property in any trade, profession, or business is subject to the power inherent in the state to make all rules and regulations respecting the use and enjoyment of property rights necessary for the preservation of the public health, morals, comfort, order, and safety; and such regulations do not deprive owners of property without due process of law." 8 Cyc. 1110.

It may be that the law under consideration, requiring a two years' course for barbers, places a needless restriction upon those who desire to learn the barber's trade (legislatures, like courts, sometimes make mistakes); if so, relief should be sought through the legislature. We have no general veto power, and cannot annul public laws simply because they are in some respects unwise or inexpedient. *State ex rel. Scotland County v. Bacon*, 107 Mo. 627, loc. cit. 633, 18 S. W. 19; *O'Connor v. St. Louis Transit Co.* 198 Mo. loc. cit. 642, 115 Am. St. Rep. 495, 8 Ann. Cas. 703, 97 S. W. 150.

2. Plaintiff assails the constitutionality of chapter 13, supra, because the title of the bill creating the law is not broad enough to embrace barber colleges, and the law therefore is obnoxious to § 28, art. 4. of the Constitution of Missouri, requiring the subject of each bill to be clearly expressed in its title. The title is as follows: "An Act to Establish a Board of Examiners for Barbers, and To Regulate the Occupation of a Barber, in This State, and To Prevent the Spreading of Contagious Disease."

The above title is amply sufficient to support that part of the law authorizing the regulation of barber colleges and apprentices in barber shops. No better way could be thought of to regulate a vocation or trade than to require those who desire to pursue the same to become learned in the trade by serving an apprenticeship or attending a school where the trade is taught. *State v. Doerring*, 194 Mo. 398, 92 S. W. 489.

3. Plaintiff further contends that said

§ 1187, supra, is class legislation in that it divides a natural class of persons into artificial classes contrary to § 53, art. 4, of our Constitution, by prohibiting students in barber colleges from charging for their services, while allowing apprentices in barber shops to charge for their work. This contention may be well founded, but, as we find that such parts of said section as prohibit apprentices receiving pay for their services are invalid on another ground, it is not necessary to consider this assignment.

4. It is earnestly insisted by plaintiff that § 1187, Rev. Stat. 1909, which prohibits students or apprentices in barber colleges from making any charge for their services while learning the barber's trade, deprives such students of the gains of their own industry, as prohibited by the aforesaid § 4, art. 2, of the Constitution of Missouri.

After twice hearing this cause and giving it most diligent consideration, we have arrived at the conclusion that this contention is correct. It is proven, and not denied, that practically everything a skilful barber should know is learned through physical labor in shaving, cutting, and dressing the hair and beard, with such observations as he may make while performing the physical labor under the suggestions and directions of a competent instructor.

Now if students of the barber's trade be compelled to labor two years without pay and without their instructor's receiving any remuneration for their services (as required by § 1187, supra), it is difficult to see why they would not thereby be deprived of the gains of their own industry, as prohibited by our organic law. If a barber college or the proprietor of a barber shop were allowed to receive pay for the labor performed by a student or apprentice, then such barber college or proprietor of a barber shop could afford to teach the barber's trade or aid the student or apprentice in learning the trade for a reasonable compensation, and the student would thereby indirectly receive some remuneration for his toil, but such is not the case under the law now in judgment.

The practice of boys or young men apprenticing themselves to skilful mechanics, artisans, or professional men in order to qualify themselves for useful trades and professions, is almost as old as civilization itself, but the barber's law is the first regulation which has ever come to our knowledge that prohibits both the apprentice and his master from receiving any remuneration whatever for services of the

apprentice, thereby compelling the apprentice to waste two years of his time while qualifying for a public barber.

It is true, as announced in *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218, that the barber trade, because of its intimate relation to the public health, is a proper subject of legislative control under the general police power of the state, but it does not follow that the legislature may impose arbitrary or capricious exactions upon the students of that occupation which have no relation to the public health. The legislature, having recognized the legitimacy of this profession, cannot destroy it under the guise of "regulation."

The learned attorney for defendants has not assigned any reason or called our attention to any fact even remotely indicating that the public health will be promoted, protected, or safeguarded by requiring students of the barber's trade to work two years without compensation. On the contrary, the simplest application of the laws of reason and common sense demonstrates that an apprentice who receives compensation for his toil will take a deeper interest in his work, and learn more thoroughly those things which he needs to know about preventing the spread of disease, than if he be required to work without pay; hence that part of the law under consideration cannot be even said to tend to promote the public health, which is the pretended purpose for which it was enacted.

5. Plaintiff also attacks the constitutionality of said § 1187, Rev. Stat. 1909, because it prohibits barber colleges from displaying any other sign than "barber school" or "barber college," and is therefore a local or special law and in conflict with § 53, art. 4, of the Constitution of Missouri, prohibiting the enactment of any special law where a general law can be made applicable. One of the defendants' grounds for attempting to revoke the license of plaintiff's instructor is because he displayed on plaintiff's college signs not authorized by law. Therefore this point is squarely at issue in this case.

The sign of the college, like the sign used by any other institution, is but a means of advertising the character of its business. We can see no connection between safe guarding the public health, and denying the right of any person conducting a moral and legitimate business to advertise the same in any manner he sees fit, so long as his advertisements speak the truth and do not deceive the public.

Chapter 13, *supra*, expressly recognizes the right of barber colleges to teach the barber's occupation, consequently, so far as the sanction of the law is concerned, 40 L.R.A.(N.S.)

they are on an exact level with every college where other useful trades and professions are taught; and we can conceive of no reason why its right to advertise its business could not have been governed by a general law prohibiting all schools and colleges from displaying any sign or advertisement except the name of the occupation therein taught. In the case of *State v. Granneman*, 132 Mo. 326, 33 S. W. 784, we held a law unconstitutional which prohibits barbers from working on Sunday, because the act was special legislation and could have been covered by a general law.

Section 1187, *supra*, in so far as it prohibits barber schools and barber colleges from advertising their business the same as other schools, and in so far as it prevents barber colleges and students therein from charging or receiving pay for their services, seems to have been intended to discourage additional persons from learning the barber's trade, thereby creating a monopoly for those who have already become skilled in that vocation, and such a purpose would also render the law invalid under § 53, art. 4, of the Missouri Constitution, which prohibits the general assembly from "granting to any . . . association or individual any special or exclusive right, privilege, or immunity."

6. The plaintiff's resourceful attorneys have in their brief assailed the constitutionality of the barber's law on other grounds not within the issues presented in this case, but we will not consider these points until they are presented on facts which render it necessary and appropriate to investigate them. Defendants also contend that, if students of the barber's trade are permitted to charge for their services, they will become active competitors of licensed barbers. Such competition as comes from the labor of apprentices is a necessary and unavoidable incident of all trades and professions. Defendants' argument is unsound for another reason. If we concede that it is lawful to teach the barber's trade at all, then the work of apprentices will be less injurious to licensed barbers, if such apprentices charge for their services, than if they work without pay, for the same reason that the convict labor is more injurious to workmen than paid labor.

Possibly some barbers, like some lawyers and other persons who have attained successful and remunerative positions in professional and commercial life, become anxious to shut out competition by "burning the bridges behind them," so to speak; but such a scheme is entirely un-American, because it is the policy of a free commonwealth to encourage thrift and industry

among its citizens, and to keep the door of opportunity ajar so that every qualified and deserving person who so desires may enter thereat.

While we find that those provisions of § 1187, *supra*, which prohibit barber colleges and barber schools from advertising their business, and prohibit such schools and students therein from charging for their services, are void because obnoxious to the Constitution, yet as we have seen that the provisions requiring a two-year course in such schools to entitle students to a barber's license is constitutional, and the plaintiff having violated the latter provision of said section by graduating or pretending to graduate students in less than two years, as charged by defendants, the judgment of the circuit court is affirmed.

Ferris, P. J., and Kennish, J., concur.

Petition for rehearing denied June 1, 1912.

KENTUCKY COURT OF APPEALS.

CITY OF LOUISVILLE, Appt.,

v.

AUGUST SCHNELL.

(131 Ky. 104, 114 S. W. 742.)

License — barber — classification — authority.

Under statutory authority to grade and classify callings and businesses and exact license fees based thereon within maximum

Note. — Validity and effect of license tax on barbers.

It is said in 25 Cyc. 598, that power to license, which, strictly speaking, is simply a power to sell a privilege, may be upheld when a special benefit is conferred at the expense of the general public, or the business imposes a special burden on the public, or where the business is injurious to or involves danger to the public.

Generally as to constitutionality and effect of restrictions on trade of barber, see the note to *Moler v. Whisman*, ante, 629. See also in that note references to notes on analogous questions. As shown in that note there are cases dealing with statutes requiring barbers to register with, and be examined by, a state board of examiners, and to obtain a certificate of registration upon the payment of a small fee. Most of these cases are not pertinent to the present inquiry, since they discuss the validity of such acts from the standpoint of police regulations, and seem not to involve any contention that the registration fee was a tax. In fact but one case has been found which was resolved upon the general principles relating to taxation. That case, *Jackson v. State*, 55 Tex. Crim. Rep. 557, 117 S. W. 818, holds that there is an unconstitu-

and minimum rates, a municipal corporation may, within these limits, fix a minimum license fee to be paid by all barbers, and an additional one for each chair used above a specified number.

Same — reasonableness.

2. A classification of barbers for the imposition of license taxes by the number of chairs in use, \$2 being added to the minimum fee for each chair above two, is not unreasonable.

Same — statutory duty — license officers — common council.

3. A statute requiring the license officers to take the oath of the applicant, or other evidence, before issuing a license to a barber, and from it determine the amount of the tax, does not prevent the common council of the municipality from fixing the classes subject to the different license fees.

Tax — property — license.

4. Grading a barber's license fee according to the chairs in use does not make it a property tax.

(December 18, 1908.)

APPEAL by the city from a judgment of the Circuit Court for Jefferson County. Criminal Division, sustaining in part a demurrer to a warrant issued for violation of a city ordinance. Reversed.

The facts are stated in the opinion.

Messrs. A. E. Richards and E. O. Underwood for appellant.

Messrs. Kohn, Baird, Sloss, & Kohn for appellee.

O'Rear, Ch. J., delivered the opinion of the court:

In November, 1906, the general council of

tional denial of equal privileges and immunities in a classification of persons who are subjected to the operation of a statute requiring the registration of barbers and the payment of a fee of \$2 for a registration certificate, where the act excepts from its operation students of the state university and other schools who are making their way by serving as barbers, persons who are serving as barbers in eleemosynary institutions, and persons following the occupation of a barber in towns of 1,000 or less.

The only further cases found on this question are decisions holding that the trade of barber is a "mechanical pursuit" within the meaning of a constitutional exemption from license taxation (*State v. Dielenschneider*, 44 La. Ann. 1116, 11 So. 823); and that this applies to a barber who employs others in his business (*State v. Hirn*, 46 La. Ann. 1443, 16 So. 403); and *La Porta v. Board of Health*, 71 N. J. L. 88, 58 Atl. 115, which holds that a municipal license fee of \$2 upon barbers is reasonable, and apparently justifies the ordinance imposing the fee, and also prescribing the rules to be observed in barber shops, under a statute giving the municipal officers authority to prevent the spreading of skin diseases.

L. A. W.

the city of Louisville passed an ordinance out of which grows the present litigation. So much of the ordinance as is material to these cases is as follows:

"An ordinance providing for certain licenses, the fees thereof to be paid into the sinking fund of the city of Louisville.

"Be it ordained by the general council of the city of Louisville:

"Section 1. That hereafter the following licenses shall be paid into the sinking fund, of the city of Louisville for the purposes of the sinking fund for doing the business following the callings, occupations, and professions, or using or holding or exhibiting the articles hereinafter named, in the city of Louisville, in addition to the ad valorem taxes heretofore levied or hereafter to be levied on any species of property in the city of Louisville."

"Sec. 8 . . . Each barber shop shall pay a license of \$5 per year and \$2 additional for each chair, where more than two chairs are used."

"Sec. 108 . . . This ordinance shall take effect from and after its publication."

This ordinance was published and took effect December 1, 1906. A large number of barbers not having paid the license prescribed by this ordinance on March 22, 1907, the city had warrants issued before the judge of the police court to show cause why they should not be fined for plying their trade without the license required by the ordinance. A demurrer to the warrants was sustained in the police court, and the warrants were dismissed. This case was appealed to the circuit court, where a demurrer was sustained to so much of the warrant as based the prosecution upon the failure to pay the license fee of \$2 for each chair where more than two chairs were used. The city refused to accept the construction thus placed upon the ordinance by the circuit court, which was in effect that the ordinance was invalid as to the \$2 license tax, and from the judgment dismissing the warrant as to that charge this appeal is prosecuted.

The Constitution allows (§ 171) the legislature to provide for the imposition of taxes by cities based upon licenses. Section 181 of the same instrument reads:

" . . . The general assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax. . . ." The legislature has exercised the privilege thus granted to it, and as to cities of the first class has empowered them to grade and classify certain callings and businesses, and to exact license fees based thereon, to be applied

within the minimum and maximum rates named by the statute conferring the power. Ky. Stat. 1903, § 3011. The keeping of barber shops is included in this section. It is the contention of appellants that the authority is lacking to grade barber shops. But we think where the authority is given to license an occupation at say from \$5 to \$500, it means not alone that all who engage in that occupation may be licensed at the same rate anywhere between the lowest and highest figures allowed, but that those engaged in the particular occupation may be graded upon any reasonable, tangible basis, and the license fees applied according to the judgment of the taxing power to each class between the extremes indicated in the grant of power. All who engage in the business of keeping barber shops do not necessarily belong to the same class or may not. The purpose was to impose the tax upon the occupation. If no more than two chairs—that is, two persons plying that trade—were employed in a shop, then all shops of that character were put into one class, and all in that class taxed the uniform fee of \$5. But, if more than two were so employed, then for each additional barber chair in use a new class was created, and all in such class were taxed \$7, and so on for each additional chair \$2 being added. This, we think, was not an unreasonable classification, and was such as was allowed by the statute. In addition, § 3017, Ky. Stat. 1903, expressly empowers the common council to grade such occupation. Appellant contends that as the statute (§ 3017, Ky. Stat. 1903) required the clerk and treasurer of the license board to take the oath of the licensee or other evidence before issuing the license, and were from it to determine the tax collectable, there was not authority for the city to directly classify this subject, but that it must be done, if at all, by these ministerial officers. The officers had nothing to do with fixing the classes. They were fixed by the common council. From the oath of the applicant, or other evidence, the clerk and treasurer were to determine whether the applicant belonged to one class or another, and exact the tax and issue the license accordingly.

Nor is this a property tax. The tax is not upon the chairs. It is upon the occupation. The chairs referred to are barber chairs, used by barbers in plying their trade. They are named not as a species of taxation, but as a basis of classification. The tax is upon the vocation, not upon the means of exercising it. The purpose for which the tax was levied was sufficiently specified when it was devoted to the use of the sinking fund of the city.

The ordinance is a valid one under the legislative grant, and the judgment holding to the contrary is reversed, and remanded for proceedings consistent herewith.

**UNITED STATES CIRCUIT COURT
OF APPEALS, SECOND CIRCUIT.**

LAWRENCE E. SEXTON, Trustee, etc., of
Alfred Kessler et al.,
v.

KESSLER & COMPANY, Limited, et al.,
Appts.

(97 C. C. A. 161, 172 Fed. 535.)

**Bankruptcy — preference — effectuating
pledge.**

The taking possession by the creditor, within four months of the bankruptcy of the debtor of securities, either negotiable by delivery or indorsed in blank, which the debtor had, prior to the four months' period, set apart at the creditor's request in a package marked "escrow" for the creditor's ac-

Note. — Voidability of transfer within four months' period, pursuant to executory agreement antedating that period.

The early cases upon the question stated, and the principles deducible therefrom, are treated in the note to *Godwin v. Murchison Nat. Bank*, 17 L.R.A.(N.S.) 935, the present annotation merely supplementing that note by collation of the authorities decided subsequent to the compilation thereof.

A case somewhat similar in reasoning to *SEXTON v. KESSLER & Co.* is *Re Automobile Livery Service Co.* 176 Fed. 792, wherein, in holding that the surrender of property to a pledgee (pledge invalid in inception because of nondelivery) within four months of bankruptcy did not constitute an illegal preference except as against intervening claimants who had proved liens on the alleged property in the meantime, where made in accordance with a prior agreement, the court said: "In the absence of the prior agreement to give the pledge, the subsequent surrender of the property would, without doubt, have constituted a voidable preference. If possession had accompanied the agreement to give the pledge, the pledge would equally without doubt have been valid, though given within four months of the filing of the petition, because of the contemporaneous consideration moving to the bankrupt for the agreement to give the pledge. The pertinent inquiry then is as to whether the subsequent delivery of possession of the pledged property to the pledgee, though without a new consideration, relates back to the original agreement and is rescued from the infirmity it would otherwise be subject to by reason thereof . . . it seems to me that the exercise of the right to take possession of the pledged
40 L.R.A.(N.S.)

count, and deposited in his safe-deposit vaults to secure his drafts upon the creditor, notifying the creditor of the transaction and sending him a list of the securities, which were approved by the creditor, is not a voidable preference under the bankruptcy law; since, after taking possession, the creditor may be regarded as holding both by way of mortgage and by way of pledge, and his possession may be regarded as relating back to the time when his right to take it was created.

(May 14, 1909.)

APPEAL by defendants from a decree of the District Court of the United States for the Southern District of New York confirming a report of the master in an action brought by a trustee in bankruptcy to set aside the transfer of certain securities given for the payment of drafts. Reversed.

The facts are stated in the opinion.

Argued before Lacombe, Ward, and Noyes, Circuit Judges.

property, within the four months, did not constitute an illegal preference, because it was done pursuant to a valid agreement to pledge for which a present consideration had moved to the bankrupt, and therefore related back to such agreement, except as against intervening claimants who had perfected liens on the pledged property in the interim, of whom there were none."

And under an agreement such as that outlined in the *SEXTON CASE* it has been held that the substitution of new for old accounts which had been paid, for the purpose of keeping the security good, did not constitute voidable preferences, although made within four months of bankruptcy proceedings. *Re Reese-Hammond Fire Brick Co.* 104 C. C. A. 371, 181 Fed. 641.

SEXTON v. KESSLER & Co. is affirmed in 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657; but the court placed the decision, not upon the ground that the creditor might be regarded as holding by way of mortgage and by way of pledge, but upon the ground that he had an equitable lien, and that taking the security was only an exercise of an equitable right created in good faith before the four months' period.

And the decisions in other recent cases have turned upon the fact that an equitable lien existed. Thus, in *Hurley v. Atchison, T. & S. F. R. Co.* 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466, it was held that advances made by the railroad company to enable a coal company under contract to supply coal, to meet its pay roll, amounted to an equitable lien or pledge, enforceable as a preferential claim against the assets of the bankrupt coal company, of such an amount of coal when mined as the moneys so advanced would pay for according to the terms of the original contract. And in *Mills v. Virginia-Carolina Lumber Co.*

Mr. Abram I. Elkus, with Messrs. McLaughlin, Russell, Coe, & Sprague, for appellants.

Messrs. John Larkin and J. Frankenhelmer for appellees.

Ward, Circuit Judge, delivered the opinion of the court:

Kessler & Company, of New York, engaged in the business of banking and foreign exchange, had for a long time drawn

upon Kessler & Company, Ltd., of Manchester, without giving any security for payment of its drafts. Early in 1903 the Manchester house wrote the New York house as follows:

"We beg to refer to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon. We understand from Mr. Edward Kessler that it would not be very convenient for you to

21 L.R.A.(N.S.) 901, 90 C. C. A. 154, 164 Fed. 168, where a lumber-mill operator contracted for the mill output and secured advance payments thereon, the purchaser was held not to have secured a preference as a creditor, which he would be required to surrender before proving a secured debt, merely by insisting on and obtaining within four months of the bankruptcy delivery of sufficient lumber to cover the advances which had been made by him. So, in *Goodnough Mercantile & Stock Co. v. Galloway*, 171 Fed. 940, where advances were made in order to permit the carrying on of a lumber business, bills of sales of lumber made within four months of bankruptcy were held valid where made in carrying into effect a prior agreement for security for such advances, the ground being that the creditor had an equitable lien upon the product of the lumber business.

In *Woods v. Klein*, 223 Pa. 256, 72 Atl. 523, it was held that the taking possession of a boat under a mortgage giving the right to do so upon default, within four months of bankruptcy, did not amount to the taking of an unlawful preference, where the mortgage lien was valid, and was taken more than four months before the filing of the petition in bankruptcy.

A few recent cases have adhered to the rule that a mortgage or transfer of his property by an insolvent debtor within the four months' period, which otherwise constitutes a voidable preference, does not lose that character or become valid by the fact that it was executed in performance of a contract to do so, made prior to the four months' period. Thus in *Vitzthum v. Large*, 162 Fed. 685, it was held,—following *Re Great Western Mfg. Co.* 81 C. C. A. 341, 152 Fed. 123, and *Long v. Farmers' State Bank*, 9 L.R.A.(N.S.) 585, 77 C. C. A. 538, 147 Fed. 360, both of which are set out in the earlier note,—that the fact that property was transferred within four months prior to bankruptcy, to a creditor, to be applied on an antecedent debt pursuant to an agreement antedating that period, did not prevent the recovery of the property by the trustee in bankruptcy. And in *Re Smith*, 176 Fed. 426,—which also quoted from and relied upon *Re Great Western Mfg. Co.*,—it was held that the fact that a mortgage executed within four months of bankruptcy, to secure an existing debt, was executed pursuant to a prior oral agreement, did not prevent the transfer from being held a preference, especially 40 L.R.A.(N.S.)

where there was no agreement to execute it at any particular time, and it was obvious that it was executed at the particular time chosen, for the purpose of giving a preference. And, relying upon the same authority, it was held in *Tilt v. Citizens' Trust Co.* 191 Fed. 441, that a transfer of assets to a creditor within the four months' period, which otherwise constituted a voidable preference, did not lose that character by the fact that it was made pursuant to an oral agreement to keep a certain amount of assets in the creditor's hands as security, made more than four months before the bankruptcy. And in *Roy v. Salisbury*, 134 N. Y. Supp. 733, the court relied upon the *Great Western Mfg. Co.* Case as authority for holding that a conveyance of real estate, although made in pursuance of an agreement made many years before, that the property should be so deeded in consideration of advancements of moneys for improvements,—constitutes an unlawful preference when made within four months of an act of bankruptcy.

And, of course, no weight is to be given to executory agreements which do not at least have the force of equitable liens. Page v. Rogers, 211 U. S. 575, 53 L. ed. 332, 29 Sup. Ct. Rep. 159, holding that the avoidance, as an unlawful preference, of a conveyance by an insolvent debtor to a creditor in satisfaction of the debts due the latter, or those for which he is liable, cannot be defeated on the theory that such conveyance was in performance of an agreement between the parties, antedating the bankruptcy proceedings by more than four months, where the contract in fact was merely an agreement on the part of the bankrupt and his co-owner to sell, and on the part of the creditor and another, to buy, at a named price, and such contract and a deed drawn in pursuance of its terms were never delivered, but were deposited in escrow, and never became operative instruments; idem holding that a trust deed never delivered as a present, valid, and subsisting obligation cannot excuse a payment by the grantor on the indebtedness covered by such deed, which payment otherwise would be invalid under the bankruptcy law as an unlawful preference; *Knapp v. Milwaukee Trust Co.* 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412, holding that the lien of a chattel mortgage cannot be established as a preference, where the mortgage under the state law was invalid for want of change of possession.

G. J. C.

provide this immediately, and as we in no way wish to incommode you, although from the altered circumstances of this firm it is a matter of some importance to us, we propose to give you until the 30th of June of this year, by which date the necessary securities should be set aside for us and a list sent to us. We do not propose to name a fixed amount of credit. Suffice it to say that what you are at present using seems large, and rather than an increase we should like to see it somewhat reduced.

"We trust that you may be able to give effect to our wishes even sooner than the date we stipulate for."

In accordance with this letter the New York house, on June 30th, wrote the Manchester house:

"In accordance with instructions from Mr. Alfred Kessler, we have to-day placed in a separate package in our safe-deposit vaults the following securities, package marked 'Escrow for account of Kessler & Co., Limited, Manchester:'"

1,484 shares Oklahoma Gas & Electric Co., at 25	\$ 37,100
2,428 shares United Lighting & Heating Co., at 12	29,136
2,352 shares Daimler Manufacturing Co., at 50	117,600
\$373,000 United Breweries Co. first 6's, at 65	242,245
	<hr/> \$406,081

"This escrow is intended as a protection against our long drawings against your good selves."

July 8th the Manchester house replied as follows:

"We are in receipt of your favor of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawings on us. We have noted the particulars as given up to us, and the matter goes in order. If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality."

December 23, 1903, the Manchester house wrote to the New York house as follows:

"For the purpose of the audit of our books for our yearly balance sheet, we should feel obliged if you would send us, in the form of a certificate, the particulars of the securities you have set aside against

your drawing credit with us. We should like this done annually on the 31st December. We do not think the matter will present any difficulty for you. Something in the form of the inclosed is what we require. . . . We certify that we have specially set aside and hold for your acct. on this, the 31st day of December, '03, as security for the drawing credit which you accord us, the following securities: . . . Name secs. and market value."

The New York house not only conformed to these directions, but, in addition, entered the securities so set aside and all substitutions of them on their loan book, and notified the Manchester house of substitutions made from time to time. The securities were always either negotiable by delivery or indorsed in blank. The two houses did business in strict conformity with the foregoing arrangement until the fall of 1907, when a financial panic occurred in the city of New York. October 25th the stability of the New York house being in doubt, it delivered to an agent of the Manchester house then in New York city the escrow securities, which he deposited in a safe deposit company in the name of the Manchester house. November 8th a petition in bankruptcy was filed against the New York house, and November 27th it was adjudicated a bankrupt.

This is an action in equity brought by the trustee in bankruptcy to set aside the transfer of the securities, because made within four months prior to the filing of the petition; the New York house being insolvent, and the Manchester house knowing, or having reason to know, that fact, and the intention being to give it a preference. The matter was referred to a master, who found in accordance with the prayer of the bill, and his report was confirmed by the district judge, from whose decree this appeal is taken.

The master and the district judge both held the transaction in question to be a pledge or an agreement to pledge the escrow securities, and that the delivery of them under the circumstances stated in the bill within four months of the filing of the petition in bankruptcy constituted a voidable preference under the bankrupt act. It may be admitted that the conclusion so reached was entirely right if the arrangement is to be regarded as a pledge or a promise to pledge; possession being essential to the existence of a pledge. This relieves us from the necessity of examining authorities relating to pledges. A word, however, may be said as to the cases of *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779, *Casey v. National Park Bank*, 96 U.

S. 492, 24 L. ed. 789, and *Casey v. Schuchardt*, 96 U. S. 494, 24 L. ed. 790, upon which the appellant especially relies. In the second case a receipt was given by the bank which might have been treated as a declaration of trust; but the defendant relied on its rights as a pledgee. What Mr. Justice Bradley said in the last case was undoubtedly true of all the cases: "As the only claim made by Schuchardt & Sons in their answer to the securities in question is by way of pledge, and as there was no such delivery and retention of possession by them or their agents or trustees as the law requires to constitute the privilege of a pledge as to third persons, their claim cannot be sustained."

The intention to secure is plain; but this could have been accomplished not only by a pledge, which is the usual course of business in case of choses in action, but by a mortgage or by a trust. It can hardly be doubted that a formally executed declaration of trust as to the specific securities by the New York house in favor of the Manchester house would have been good. The New York house, although the maker of the trust, could have properly acted as the trustee (*Locke v. Farmers' Loan & T. Co.* 140 N. Y. 135, 35 N. E. 578), to the extent of the trust, *viz.*, the protection of the Manchester house for its acceptances.

As the transaction was a perfectly honest one, a construction should be adopted to give it effect, if that is possible. In their correspondence the parties used neither the words "mortgage" nor "pledge" nor "trust," but the inapt word "escrow," which they probably did not understand. What they did, however, clearly evidences their intention. The credit to be given to the New York house was not to depend alone upon its strength, but also upon additional security to be given to the Manchester house. The New York house, being the absolute owner of certain specified securities, agreed, in accordance with the requirement of the Manchester house, to hold them for its account, and to that end both segregated them from their other securities and entered them upon their books as so appropriated. The Manchester house as the equitable owners authorized the New York house to withdraw the specified securities, from time to time, for their own purposes, not absolutely, but upon condition that they should substitute securities of equal value, which was always done. There were, accordingly, during the whole period of this credit, specified earmarked or traceable securities held by the New York house for account of the Manchester house. The use of the word "collateral" does not necessarily indicate a pledge. It is important only as showing that the

Manchester house's ownership of or interest in the securities was only for the purpose of protecting it for accepting the drafts of the New York house.

Considering the family relation and the long business dealing between the two houses, and the fact that they were dealing 3,000 miles apart, and that they had entire confidence in each other, the arrangement made was natural and reasonable. It was sufficiently precise to protect the Manchester house, and elastic enough to meet the ordinary requirements of the business of the New York house.

If the transaction had been a mortgage of the securities, the delivery of them October 25, 1907, would have been good as against the trustee in bankruptcy, because under the law of the state of New York mortgages of choses in action need not be filed. *Lien law* (Laws 1897, p. 536, chap. 418) § 90; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567. Doubtless a court of equity would not intervene to enforce or perfect an imperfect mortgage as against the other creditors of the mortgagor; but no such assistance would have been needed, the mortgagor having voluntarily carried out the purpose of the mortgage by delivering the securities to the mortgagee. This would have been legal, notwithstanding the insolvency of the mortgagor and the knowledge of that fact by the mortgagees. *Hauselt v. Harrison*, 105 U. S. 401, 26 L. ed. 1075; *Wood v. United States Fidelity & G. Co.* (D. C.) 143 Fed. 424.

So, in the case of trust receipts, the courts of New York have been astute to carry out the intention of the parties. The course of business is as follows: A banker gives a letter of credit to the purchaser of goods to enable him to pay for them upon condition that bills of lading to the banker's order for the goods shall be delivered to him, accompanied by a draft upon the purchaser. Upon arrival of the goods the banker delivers the bill of lading to the borrower; he executing a trust receipt to hold or sell the goods as the property of the banker for his benefit. Without defining exactly what the relation between the lender and the borrower is as to the goods,—that is, whether it is that of mortgagor and mortgagee or of pledgeor and pledgee, or a conditional sale,—the courts have steadily protected the right of the lender in the goods so delivered. *Farmers' & M. Nat. Bank v. Logan*, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818; *Drexel v. Pease*, 133 N. Y. 129, 30 N. E. 732.

We regard the transaction in question as a declaration of trust in respect to the escrow securities by the New York house in favor of the Manchester house. Being the

absolute owner of the securities, it declared in consideration of its right to draw, that it held and would hold the same and all securities subsequently substituted therefor for the benefit of the Manchester house. From that moment the legal title was in the New York house, but the equitable in the Manchester house; the New York house holding the securities in a fiduciary capacity. This was the condition on which the Manchester house gave the drawing credit which continued for several years, and it was because of its ownership that its authority to substitute securities was needed and was given.

We do not apprehend that this conclusion will result in the consequences foretold by the appellee. The public was not giving credit to the New York house on the strength of its apparent ownership of these securities, because it knew nothing at all about them. The visible possession of chattels apparently owned by the possessor creates a wholly different situation. In respect to such property the law prohibits secret liens as against creditors. Yet ownership of chattels where there has been no change of possession will be protected if they are set apart and marked, and in this way notice given to the public. *First Nat. Bank v. Pennsylvania Trust Co.* 60 C. C. A. 100, 124 Fed. 968. There was, however, as to the securities under consideration, no secrecy which was not inherent in their nature. The public does not know what stocks, bonds, or notes a merchant has, and therefore does not give him credit because of them. There is no evidence that any exhibition of or statement as to these securities was made to anyone by the New York house for the purpose of obtaining credit. Their books, if examined, would have shown what the real dealing between them and the Manchester house was.

If there had been no insolvency, and the New York house had withdrawn securities without substituting others, a court of equity would have compelled it to do so, or at least would have enjoined it from making such withdrawals, at the suit of the Manchester house. If, having failed to cover its drafts, the New York house had refused to deliver the securities to the Manchester house, a court of equity would have compelled it to do so. In delivering the securities to the Manchester house October 25, 1907, the New York house acted without the compulsion of a court of equity in strict accordance with the trust it had declared four years before, when entirely solvent. For the first time in that course of dealing there was an expectation that the New York house would not cover its drafts; that the Manchester house would have to pay

them and would need to realize upon the securities which the New York house held for its protection. No new right or privilege was then created voidable under the bankrupt act. The delivery of these earmarked securities was in strict pursuance of the agreement made long before on the strength of which the credit was given. *Sabin v. Camp* (C. C.) 98 Fed. 974, cited with approval in *Thompson v. Fairbanks*, 196 U. S. 516, 524, 49 L. ed. 577, 25 Sup. Ct. Rep. 306. A liberal construction should be given to these transactions in aid of the obvious intention of the parties.

The decree of the court below is reversed, with costs.

Noyes, Circuit Judge, concurring:

While I concur in the result reached by Judge Ward, I am constrained to base my conclusions upon essentially different grounds; and the case is of such importance, both on account of the amount in controversy and the principles involved, that a separate opinion seems called for.

In considering the case from any point of view, one thing is apparent from the outset, and that is the good faith of the parties. Another thing is also apparent. The New York house intended that the securities in question should afford protection to the Manchester house for their acceptances, and the latter supposed that they were obtaining protection. Both parties acted upon the assumption that that which they did accomplished something. The New York house furnished security in the form desired by the Manchester house, and the latter accepted the former's drawings upon that security. The transaction, if invalid, is only so because it contravenes some statute or positive legal principle; and it cannot be declared invalid without inflicting great hardship upon the Manchester house.

In determining the validity of the transaction, it is necessary, in the first place, to ascertain what its legal nature was. Judge Ward has held that it amounted to a declaration of trust by the New York house in favor of the Manchester house; but I cannot accept this conclusion. It is an essential element in a declaration of trust that title pass from the declarant of the trust as an individual to himself as trustee. It must be shown that he intends to divest himself of the beneficial interest in the property, and to hold it thereafter as a trustee for the benefit of another. Now it is clear from the evidence that this is just what the New York house did not intend to do. They intended to set aside the obligations only as security for their indebtedness to the Manchester house. In case this indebtedness were paid, the latter were to

have no interest in the security. The beneficial interest in the property, the equity of redemption, instead of passing to the Manchester house, as would be essential in a declaration of trust, was intended by both parties to remain in the New York house. The initial setting aside of the securities and the course of dealing between the two houses were, in my opinion, wholly inconsistent with the creation or existence of a declaration of trust. The transaction must stand, if at all, as one in which the Manchester house obtained security only.

Now security might have been afforded either by way of mortgage or pledge. The general distinction between a mortgage and a pledge is that in one the title passes, but not necessarily the possession; while in the other the title does not pass, but the possession must. A pledge is a mere lien and something less than a mortgage. As said by the master of the rolls in *Jones v. Smith*, 2 Ves. Jr. 372: "A mortgage is a pledge and more, for it is an absolute pledge to become an absolute interest if not redeemed at a certain time."

In this case, the bonds, certificates of stock, promissory notes, and other securities were duly indorsed and assigned so that when Kessler & Company, of Manchester, took possession of them shortly before the bankruptcy proceedings, the title to them passed even if it had not done so before. Under these conditions there is the highest authority for saying that, when the Manchester house received the securities so indorsed and assigned, it had a double title to them,—that of mortgagee and pledgee. In the very case principally relied upon by the defendants (*Casey v. Cavaroc*, 96 U. S. 467, 477, 24 L. ed. 779, 784), the Supreme Court of the United States, in speaking of a case where bills receivable had been both pledged and assigned to a creditor, said: "In such case they [the securities] are held by the creditor by way of mortgage as well as pledge, and a mortgage is valid notwithstanding the mortgagor has the possession. The difference ordinarily recognized between a mortgage and a pledge is that title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge (*Pothier, Nantissement*, 8); and, if possession be once given up, the pledge, as such, is extinguished. The possession need not be actual. It may be constructive, as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some

cases such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case there is a union of two distinct forms of security, that of mortgage and that of pledge; mortgage by virtue of the title, and pledge by virtue of the possession.

"This advantage exists when notes and bills are transferred to a creditor by way of collateral security. His possession of them gives them the character of a pledge. Their indorsement if payable to order, or their delivery if payable to bearer, gives him the title also, which is something more than a pledge. This double title existed in *White v. Platt*, 5 Denio, 269, and in *Clark v. Iselin*, 21 Wall. 360, 22 L. ed. 568. Hence the actual possession of the securities by the creditor was a matter of less importance in these cases."

I fully appreciate that this language of the supreme court seems in conflict with the generally accepted doctrine that a pledge of choses in action does not necessarily become a mortgage because the title is conveyed. In the case of a chose in action there cannot well be a pledge without an assignment. Thus, if negotiable paper does not require indorsement, title passes to the pledgee upon delivery; if indorsement is necessary, the fact that it is made does not, it is generally held, necessarily make the transaction a mortgage. In such a case it is necessary that the pledgee should have the title in order to obtain effectual security. Consequently, it has usually been said in the case of indorsed shares of stock and negotiable paper that whether a transaction should be regarded as a mortgage or a pledge must be determined from the agreement between the parties.

Accepting this latter view as correct, there is much to support the contention that the parties in this case intended something more than a pledge. They used the word "escrow," which has usually to do with the passing of title. The securities were delivered to the Manchester house as being its property, and they had previously been set aside and marked with its name. But I think it unnecessary to determine whether the transaction was a mortgage or a pledge. It is sufficient to say, in view of the decision of the Supreme Court, as well as in view of the facts shown in addition to the indorsements indicating a mortgage, that the Manchester house, after taking possession, may safely be regarded as hold-

ing both by way of mortgage and by way of pledge.

Indeed, the case of *Casey v. Cavaroc*, supra, would seem to afford authority for the conclusion that the transaction might be valid as a mortgage even if Kessler & Company, of Manchester, had not taken actual possession of the securities before the bankruptcy. As shown in the extract from the opinion already quoted, the matter of the physical possession of securities is of less importance when they are so indorsed that title will pass than when there is a mere attempted pledge. And in another part of the opinion the court said (96 U. S. 486): "It must not be overlooked that the *Crédit Mobilier* has no other claim to the securities in question but that of pledge. A pledge, and possession, which is its essential ingredient, must be made out, or their privilege fails. An agreement for a pledge raises no privilege. There is no mortgage, for the title of the securities was never transferred to them. The evidence of the cashier is that they were all stamped payable to the order of the bank, when discounted. They were not indorsed by the cashier until the day they were removed by Cavaroc, which was after the bank had failed."

Moreover, were the fact of taking possession absent in this case, it would probably be possible to sustain the claim of the Manchester house to the securities upon broader and more satisfactory lines than could be drawn from the distinction just referred to. The legal difference before delivery of indorsed and unindorsed securities, except in the case of special indorsements, would seem to be slight; but the equities of the case, coupled with what the parties did, aside from any technicality, make out a strong case in support of an equitable lien in the nature of a mortgage upon the securities in favor of the Manchester house, valid against the trustee in bankruptcy without a change of possession. It is unnecessary, however, to determine the case, nor to consider it at length, upon the theory that there was no change of possession, because, as we have seen, the Manchester house did take possession of the securities, and such act is a factor of importance; and, as already shown, after the Manchester house took possession it held the securities, both by way of mortgage and by way of pledge.

Now, there being no fraud in the transaction, and no rights of purchasers or attaching creditors having intervened, the taking possession of the securities by the Manchester house before the bankruptcy was, in the absence of a statute making it unlawful, entirely legal and proper. Re-40 L.R.A.(N.S.)

garded simply as a pledge, the pledgee had the right to take possession. Thus in *Parshall v. Eggert*, 54 N. Y. 18, the court said: "In the absence of any intermediate right, the parties could perfect a written contract of pledge by subsequent delivery. Even between successive pledgees, without any communication with each other, that one who lawfully obtains possession, at the time of the pledge or subsequently, is entitled to be preferred. . . . A creditor who acquires a specific right to or lien on the thing pledged may prevent the pledgee's interest in an undelivered chattel from attaching; but such is not the condition of the creditor at large. The only ground on which he can claim to prevent the perfecting of such a right in the pledgee is that it works a fraud upon him."

And in *Jones on Pledges*, 2d ed. § 38, it is said: "A pledge or contract for a pledge, ineffectual for want of delivery, may be rendered valid by a subsequent delivery, even as against an intermediate creditor at large of the pledgeor. Of course, such subsequent delivery would not prevail against a creditor who had, between the time of the making of the contract and taking possession under it, acquired a specific lien upon the thing pledged by attachment or levy of execution. The only other obstacle which could prevent such a transaction from being effectual would be the intervention of fraud."

When, therefore, the Manchester house obtained possession of the securities, it lawfully held them as pledgee and mortgagee, unless its rights were affected by some statute; and the only statute which it claimed to operate against it is the provision of the bankruptcy act (act July 1, 1898, chap. 541, § 60b, 30 Stat. at L. 562, U. S. Comp. Stat. 1901, p. 3445), making transfers of property made under certain conditions within four months of bankruptcy unlawful preferences. So the primary question whether the act applies in this case is whether, within its meaning, the securities in question were transferred within four months of the bankruptcy. If they were not so transferred, there was no preference, and the determination of the question of time will dispose of all questions concerning the securities constituting the general escrow.

Manifestly at some time there was a transfer of the securities. When did it take place? If it took place at the time the parties intended to charge the securities for the benefit and protection of the Manchester house, when they were put aside and indorsed, when the equities of the Manchester house were created, it took place more than four months prior to the

bankruptcy. If, on the other hand, it took place only when the physical possession of the securities was taken, it was within the prescribed period.

Now, as bearing upon this question of time, it is clear that the Manchester house had the right at any time to demand and take possession of the securities set aside for its benefit. While the necessity for immediately taking possession was evidently not contemplated by the parties, I think that the very fact that the securities were set aside "in escrow" shows that the right of the Manchester house to take possession was recognized at the beginning. Delivery upon condition is the very essence of an escrow, and, while that term was improperly used by the parties here to describe their transaction, I think it still carries with it the idea of delivery; and, there being no agreement otherwise, delivery would take place when required by the Manchester house. I have no doubt that after demand the Manchester house could have enforced its rights to the possession of the securities in equity if not in law.

The possession having been actually taken within four months of the bankruptcy, we now reach the decisive question whether it can be held to relate back to the time when the right to take possession was created,—whether the act of taking possession created a lien, or merely enlarged and perfected an existing lien. And, in my opinion, in view of the equities between the parties and all the circumstances, such act should relate back to the creation of the right which it perfected, and the transfer be regarded as having taken place more than four months before the bankruptcy.

The case of *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306, seems directly in point here. In that case a mortgagee took possession, with the consent of the mortgagor, of after-acquired property covered by a valid mortgage, within four months before bankruptcy proceedings against the mortgagor; but the Supreme Court held that this was done pursuant to a pre-existing right, and did not constitute a preference, and quoted with approval the following extract from *Sabin v. Camp* (C. C.) 98 Fed. 974, where it was held that a transaction which was consummated within the prescribed period was not a preference, because it had originated before: "What was done was in pursuance of the pre-existing contract, to which no objection was made. Camp furnished the money out of which the property, which is the subject of the sale to him, was created. He had good right, in equity and in law, to make provision for the security of the money so advanced, and the property

purchased by his money is a legitimate security and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals; and when, at a later date, but still prior to the filing of the petition in bankruptcy, Camp exercised his rights under this valid and equitable arrangement to possess himself of the property and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law."

The Supreme Court then went on to say: "The principle that the taking possession may sometimes be held to relate back to the time when the right so to do was created is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and, when enforced by the taking of possession, that possession, under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The supreme court of Vermont has held that such a mortgage gives an existing lien by contract, which may be enforced by the actual taking of possession, and such lien can only be avoided by an execution or attachment creditor, whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subjected to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet, if there were no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the act, by virtue of which mortgage, and because of the condition broken, the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated."

See also *Humphrey v. Tatman*, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; *Wood v. United States Fidelity & G. Co.* (D. C.) 143 Fed. 424.

I think these principles applicable here. While the Supreme Court in the cases re-

ferred to treats the validity of the mortgages and the rights of the mortgagees thereunder to be matters of local law, in my opinion it also states this underlying and controlling distinction: The exercise of a pre-existing right well founded in equity is not a preference, although occurring within the prescribed period. "The bald creation of a lien within four months" is a preference.

The application of the principle involved in this distinction is decisive here in favor of the Manchester house. It had an equitable right to the securities which were held "in escrow" for its benefit. Its rights and equities were created years before the bankruptcy. It could at any time have enforced its right to the possession of the securities. No element of fraud and no intervening rights of purchasers or attaching creditors appear. The securities were not property the possession of which would be visible to third persons and afford a basis of credit. It is my opinion that possession was taken pursuant to a pre-existing right, and that equitable principles support such right. I think that this is in no aspect a case of the bald creation of a lien within four months of bankruptcy.

The case of *Zartman v. First Nat. Bank*, 189 N. Y. 273, 12 L.R.A.(N.S.) 1083, 82 N. E. 127, relied upon by the appellee as his principal case upon this point, is not in conflict with these views. In that case there was merely a contract to give a mortgage upon after-acquired property. There was no lien which could have been enlarged or perfected by taking possession.

Finally, I think it a serious question whether a mortgagee or pledgee taking possession of property in pursuance and in the enforcement of a pre-existing right of long standing can properly be said to have reasonable cause to believe that the mortgagor, in surrendering possession, is intending to give him a preference. He takes possession in his own right of that which he looks upon as his own special property. Instead of regarding the transaction as a preference, he would, as suggested in *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306, rather take it as a recognition of his right under his mortgage or pledge. See also *Humphrey v. Tatman*, 198 U. S. 93, 49 L. ed. 956, 25 Sup. Ct. Rep. 567.

Upon principles similar to those already considered, I think that the taking of possession by the Manchester house of the securities embraced in the "special escrow" related back to its creation, and, consequently, that that transaction, although occurring within four months of the bankruptcy, was based upon a contemporaneous con-

sideration, and did not constitute a preference.

The decree of the district court should be reversed, with costs.

Lacombe, Circuit Judge:

I concur in the conclusion that the decree should be reversed, for the reasons set forth in the opinion of Judge Noyes.

Affirmed by the Supreme Court of the United States, May 27, 1912, 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657.

WASHINGTON SUPREME COURT. (Department No. 2.)

AGNES W. B. SHEPARD et al., Appts.,
v.

CITY OF SEATTLE, Resp't.

(59 Wash. 363, 109 Pac. 1067.)

Municipal corporation — power to declare nuisance — hospital.

1. Municipal authorities may declare an existing hospital within its limits for the treatment of insanity or other mental diseases to be a public nuisance, unless prop-

Note. — Insane asylum or hospital for insane as a nuisance.

The general question whether a hospital is a nuisance is treated in the note to *Stotler v. Rochelle*, 29 L.R.A.(N.S.) 49, and see later case, *Everett v. Paschall*, 31 L.R.A.(N.S.) 827. As to contagious disease hospital, see notes to *Barry v. Smith*, 5 L.R.A.(N.S.) 1028, and *Manhattan v. Hessin*, 25 L.R.A.(N.S.) 228.

As shown in the notes referred to, the general rule is well established that a hospital is not a nuisance *per se*, though it may become such by reason of its location or because of the manner in which it is conducted, which presents a question of fact to be determined by the circumstances of each case.

And the rule is the same in cases of hospitals established for the treatment of contagious and infectious diseases as those established for the treatment of ordinary diseases.

And so a hospital established for the treatment of the insane is not a nuisance *per se*. *Crawford v. Protestant Hospital*, Montreal L. Rep. 7 Q. B. 57; *Heaton v. Packer*, 131 App. Div. 812, 116 N. Y. Supp. 46.

Accordingly it has been held that the establishment of a hospital for the insane will not be enjoined even though the location selected is in a residential section of a city, since such institutions may be so constructed and managed as not to unduly interfere with the rights of others. *Heaton v. Packer* and *Crawford v. Protestant Hospital*, supra.

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erty owners situated within 200 feet of the buildings consent to its location and maintenance.

Same — requiring permit.

2. A municipal corporation may require a written permit from the city health commissioners for the location within its limits of a hospital for the treatment of insanity and other mental diseases.

Same — ordinance — power of court to consider reasons for passage.

3. The courts cannot declare invalid an ordinance prohibiting the location of a hospital within a certain distance of residences without the consent of their owners, because it was passed upon their solicitation.

(July 16, 1910.)

APPEAL by plaintiffs from a judgment of the Superior Court for King County dismissing an action brought to restrain the enforcement of a city ordinance. Affirmed.

The facts are stated in the opinion.

Messrs. Shepard & Flett, Butler & Crews, and Shepard & Daly for appellants.

Messrs. Scott Calhoun, H. D. Hughes, and Peters & Powell, for respondent:

Neither the motives of the members of a city council nor the influences under which they act, can be shown to nullify an ordinance duly passed in legal form within the scope of their corporate powers.

Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145; McQuillin, Mun. Ord. p. 257; Cooley, Const. Lim. p. 257; Meyer v. Teutopolis, 131 Ill. 552, 23 N. E. 651; Wood v. Seattle, 23 Wash. 18, 52 L.R.A. 369, 62 Pac. 135.

The city has authority to regulate the location of insane asylums within the city limits.

16 Am. & Eng. Enc. Law, 564; Cooley, Const. Lim. 7th ed. p. 829; McQuillin, Mun. Ord. §§ 429, 430; Com. v. Charity Hospital, 198 Pa. 270, 47 Atl. 980; Milne v. Davidson, 5 Mart. N. S. 409, 16 Am. Dec. 189; Ex parte Lacey, 108 Cal. 326, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411; State v. Heidenhain, 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 So. 621; Dill. Mun. Corp. § 379; Kansas City v. McAleer, 31 Mo. App. 433; Spokane v. Camp, 50 Wash. 554, 126 Am. St. Rep. 913, 97 Pac. 770.

Rudkin, Ch. J., delivered the opinion of the court:

This action was instituted by the plaintiffs, as owners and lessees of certain property in the city of Seattle, to restrain the city from enforcing, as against the plaintiffs and their property, the provisions of an ordinance entitled, "An Ordinance Reg-

ulating the Location and Maintenance of Private Hospitals and Sanatoriums, and Providing for Penalties for the Violation of the Provisions hereof, and Declaring an Emergency." Section 1 of the ordinance reads as follows: "No private hospital or sanatorium shall be established or maintained within the city of Seattle in any building in which any of the sinks or water closets or other drainage are not connected with the public sewers of the city; nor shall any private hospital or sanatorium for the treatment of inebriates or persons suffering from insanity or other mental diseases be established or maintained in any buildings situated within two hundred (200) feet of any private property the owner of which has not consented in writing to the location and maintenance of such hospital or sanatorium, nor in any building without the written permit from the commissioners of health of the city of Seattle." Seattle Ordinance, No. 20,008. Section 2 provides a penalty for any violation of the provisions of § 1; section 3 declares any hospital or sanatorium established or maintained contrary to the provisions of § 1 to be a public nuisance, and provides for its abatement; and § 4 declares an emergency. The court below made findings of fact and conclusions of law, and entered judgment dismissing the action. From the judgment of dismissal the plaintiffs have appealed, and the case is brought here for review on the findings of the court without a statement of facts or bill of exceptions. The material findings made by the trial court are the following:

"The plaintiffs Shepard for more than five years last past have been and are the owners of certain real estate in the city of Seattle, described as lots one (1), two (2), three (3), ten (10), eleven (11), and twelve (12) on block nineteen (19) of John J. McGilvra's second addition to Seattle, upon which there is being conducted by the plaintiffs Loughary and Williamson, who hold said premises under a lease from the plaintiffs Shepard, bearing date the 10th day of December, 1908, a sanatorium for the treatment of persons suffering from nervous and mental diseases, including insane persons. About the year 1902 the plaintiffs Shepard erected on said premises, for residence purposes, the building now in use under said lease as the main sanatorium building, and subsequently the other two buildings thereon, which are small cottages; and about the time of making said lease they, in compliance with its terms, commenced to make sundry valuable improvements upon said buildings and premises, involving a total expense to them of about \$4,000, but which improve-

ments were not entirely completed at the time of the passage of the ordinance giving rise to this suit.

"(2) Said premises are situated at a distance of about 3 miles from the center of business in said city, and in a region suitable for residence purposes, and in which such residences as have been erected are of good character; but there is only one house upon the remainder of the block containing said premises (the same being a residence situated on the southwest one quarter of said block, about 60 feet south of said main sanatorium building, and the grounds whereof comprise said entire quarter block),—the plaintiffs' said premises comprising the entire north half of said block,—and there is only one house upon the block next west of that containing said premises (the grounds of which residence comprise said entire block); there are no houses on the block next west or the block diagonally northwest of that containing said single residence, only three on the block diagonally northwest of that containing the plaintiffs' said premises, only three on the block next north of that containing said premises, one on the block diagonally northeast of that containing said premises (on the corner thereof most distant from the plaintiffs' said premises), two or three on the easterly side of the block next east of that containing said premises, none on the block diagonally southeast of that containing said premises, two on the block next south of that containing said premises, and one on the block diagonally southwest of that containing said premises (the grounds of which residence comprise said entire block); each of said blocks consisting of twelve full-size lots of average dimensions of about 60 by 120 feet. A great many of the lots in said region are not yet cleared up, and have original forest growth upon them; and there is a large tract of practically unoccupied ground, with very few houses upon it, lying north of Madison street, between said street and Union bay, on the same hill as the plaintiffs' said premises.

"(3) Said premises are situated on a hillside sloping toward Lake Washington, having natural adaptation for drainage. All said buildings thereon are connected with septic tanks on said premises, built of concrete; the septic tank connected with said main sanatorium building, which was the earliest built of said tanks, was built according to plans and specifications furnished therefor to the plaintiffs Shepard by the city engineer of the defendant, of ample capacity to accommodate a building of that size, long prior to the use of said premises for sanatorium purposes; and

prior to the occupation of said premises for sanatorium purposes the board of health of the defendant made an examination of the premises and found them to be in a sanitary condition.

"(4) The plaintiffs Laughary and Williamson are regularly licensed physicians and surgeons, and especially skilled in the treatment of nervous and mental diseases; and in said sanatorium they care for a number of patients who are thus afflicted, including some who are insane. It is not their purpose to harbor as inmates any violent or dangerous persons, but they claim and have the right under their said lease to harbor on said premises persons suffering from any and all kinds of insanity. The windows of said sanatorium are barred with iron screens, and there is a sufficient force of trained nurses, and attendants, and guards properly to care for the patients and inmates of said institution, and said windows are so barred for the purpose of preventing any of said patients from escaping, and attendants and guards are employed for the same purpose; but said premises are not fenced or otherwise inclosed. Said lessees have expended about \$3,000 in furnishing and equipping said sanatorium.

"(5) Said lease was in full force and effect, and said lessees were in possession of said premises thereunder and using the same for the purposes of a sanatorium, prior to the passage of ordinance No. 20,008 of the city of Seattle, the passage of which ordinance gave rise to this suit.

"(6) Said sanatorium is not connected with the public sewers of said city, and consent to the location and maintenance thereof on said premises has not been obtained from the owners of any of the private property situate within 200 feet of the buildings in which it is maintained, and no permit for its maintenance in said buildings has been granted by the commissioners of health of the defendant; but there is no public sewer of said city within one thousand (1,000) feet nor within three blocks of said buildings, and ordinance No. 16,372 of said city provides that buildings which are put to ordinary uses must be connected with the public sewers of said city only when there is a sewer within one block of such buildings. There is no block exceeding three hundred (300) feet in length among those surrounding that in which said sanatorium is situated."

In support of their assignments of error the appellants contend that "a private sanatorium for the care of persons suffering from insanity or other mental diseases is not a public nuisance *per se*, and cannot be made a public nuisance, if not such in

fact, by a mere declaration of a municipal legislature;" that "the findings of the trial court establish that the plaintiffs' sanatorium is not a public nuisance in fact," and that the ordinance deprives the appellants of their property without due process of law, and denies to them the equal protection of the law, in violation of the state and Federal Constitutions. The ordinance applies to different kinds of hospitals and sanatoriums, and prescribes different requirements with which those desiring to establish and maintain such institutions must comply. The provisions of the ordinance are severable, both as to the character of the institution and the requirements to be met or complied with. Some of these requirements may be valid and others invalid, or they may be valid as to one kind of an institution and invalid as to another. *Seattle v. Pearson*, 15 Wash. 575, 46 Pac. 1053; *Eureka City v. Wilson*, 15 Utah, 67, 62 Am. St. Rep. 904, 48 Pac. 150; *Bailey v. State*, 30 Neb. 855, 47 N. W. 208; *Birmingham v. Alabama G. S. R. Co.* 98 Ala. 134, 13 So. 141; *Ex parte Bizzell*, 112 Ala. 210, 21 So. 371; *State ex rel. Lamar v. Dillon*, 42 Fla. 95, 28 So. 781; *Baker v. Lexington*, 21 Ky. L. Rep. 809, 53 S. W. 16; *Rockville v. Merchant*, 60 Mo. App. 365.

In the discussion of this case we will therefore limit ourselves as far as practicable to hospitals or sanatoriums for the treatment of persons suffering from insanity or other mental diseases, such as the lessees propose to establish and maintain on the premises in question. "It is a proper exercise of the police power of the state to prohibit the establishment of private hospitals in localities where, by reason of the crowded condition of the neighborhood or for other reasons, such location would tend to spread contagious diseases, and in the exercise of its police power a municipality may prescribe reasonable regulations for the draining of the premises of private hospitals within the city limits, for the purification and ventilation of the buildings, for the removal therefrom of any patients having infectious or contagious diseases, and for the general management of the hospital grounds and buildings. In Pennsylvania by statutory enactment it has been made unlawful 'hereafter to establish or maintain any additional hospital . . . in the built-up portions of cities; provided, however, that nothing herein contained shall be so construed as to prevent the maintenance of any hospital . . . now lawfully established and maintained.'" 21 Cyc. 1110; *Cooley*, Const. Lim. 6th ed. 740 et seq.

Thus, in *Milne v. Davidson*, 5 Mart. N. 40 L.R.A. (N.S.)

S. 409, 16 Am. Dec. 189, an ordinance of the city of New Orleans prohibiting the erection of private hospitals within the city limits was upheld as a valid police regulation, but the decision was perhaps controlled in a measure by local sanitary conditions. In *Com. v. Charity Hospital*, 198 Pa. 270, 47 Atl. 980, an act prohibiting the establishment or maintenance of additional hospitals in the built-up portions of cities was sustained as a valid exercise of the police power.

In *Bessones v. Indianapolis*, 71 Ind. 189, cited by the appellants, it was held that an ordinance of the city of Indianapolis prohibiting the establishment or maintenance of hospitals within the city limits, without a license or a permit from the common council, was not within the powers conferred upon the city by the legislature of the state, but the power of the state itself was not involved or considered. And we might say in this connection that no question is here involved as to the power of the city of Seattle, as contradistinguished from the power of the state itself, for in all matters appertaining to the public health and public safety substantially the entire police power of the state is vested in municipal corporations of the first class. *Smith v. Spokane*, 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220. But even in the Indianapolis case the court conceded that, "under its police power, the city, by its lawmaking authority, might, perhaps, prescribe reasonable rules and regulations for the drainage of the hospital grounds, the purification and proper ventilation of the buildings, for the removal therefrom of any person afflicted with infectious or contagious disease, and for the general management and government of the hospital grounds and buildings, both internally and with relation to adjacent and surrounding property; and such reasonable rules and regulations may doubtless be enforced by proper penalties." This authority would sustain the provision of the present ordinance, requiring hospitals to connect with the public sewers of the city,—at least such hospitals as harbor persons suffering from infectious or contagious diseases. Whether reasonable as to a hospital of the character here in question, we need not inquire, for we are convinced that the second requirement of the ordinance is both reasonable and valid. The ordinance in effect declares that any private hospital or sanatorium for the treatment of inebriates, or persons suffering from insanity or other mental diseases, is a public nuisance, and shall be abated as such, unless its location and maintenance are consented to in writing by the owners of private property situ-

ated within 200 feet of the hospital buildings. This, in our opinion, is a valid and reasonable police regulation. The presence of a private insane asylum, with its barred windows, and irresponsible inmates, would annoy, injure, and endanger the comfort, safety, and repose of any person of average sensibilities if located within 200 feet of his place of abode. In other words, it is a matter of common knowledge that the presence of such an institution in a residential portion of a city would practically destroy the value of all property within its immediate vicinity for residence purposes. If so, it was proper and competent for the municipal authorities to require the assent of the injured parties to its location and maintenance. *Spokane v. Camp*, 50 Wash. 554, 126 Am. St. Rep. 913, 97 Pac. 770.

In the argument before this court much stress was laid on the case of *Ex parte Whitwell*, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870, but the two cases have little in common, aside from the fact that the two ordinances under consideration are directed against substantially the same business or occupation. The petitioner in that case had purchased 22 acres of land in San Mateo and constructed hospital buildings thereon at great expense. The ordinance directed against him and his property was extremely onerous in its terms. It prohibited the maintenance of such hospitals in any but fireproof buildings; it prohibited their location within 400 yards of any school or residence; it required the construction of a brick or stone wall, 18 inches thick and 12 feet high, around the hospital buildings and grounds, and contained other provisions of a like nature. While the supreme court of California held that the ordinance was unreasonable and void, it nevertheless conceded that "in the management of a hospital where insane persons are treated, it is necessary, and it must be presumed that there will be a sufficient number of competent attendants to prevent danger or damage from any unreasonable actions of such insane persons. Without such attendants no such asylum or hospital could be properly conducted." Again, the court said: "The board of supervisors of a county or the legislative department of any city or town, in which such an asylum is erected, may, undoubtedly, provide by ordinance that patients therein shall not be permitted to leave the grounds upon which it is erected, unless accompanied by an attendant, and may impose a proper penalty upon the superintendent or keeper of such asylum for a failure to conform to such regulation." The court here recognizes the self-evident

fact that insane persons are dangerous, and if so, may not a city protect itself against them by excluding private insane asylums from its limits? May it not refuse to intrust the safe-keeping of this dangerous class to private parties, in whose selection it has no choice, and over whose conduct it has no direct control? "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and, while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts." *Re Jacobs*, 98 N. Y. 110, 50 Am. Rep. 636. "In the exercise of this power the legislature has the right, generally, to determine what laws are needed to preserve the public health and protect the public safety." *People v. Havnor*, 149 N. Y. 200, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 542. "The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power." *Cooley*, Const. Lim. 6th ed. 201. Hospitals for the treatment of patients suffering from infectious and contagious diseases have often been adjudged nuisances, when located in the residential parts of cities and towns (*Cherry v. Williams*, 147 N. C. 452, 125 Am. St. Rep. 566, 15 Ann. Cas. 715, 61 S. E. 267; *Deaconess Home & Hospital v. Bontjes*, 207 Ill. 553, 64 L.R.A. 215, 69 N. E. 748); and danger from the immediate presence of a hospital of this kind differs in kind, rather than in degree.

The third requirement of the ordinance is a written permit from the city commissioners of health, but this requirement is apparently for the purpose of showing that the other provisions of the ordinance have been complied with. In any event the requirement is unobjectionable in itself. *Wilson v. Eureka City*, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317.

The appellants further contend that the ordinance is void because the answer admits that it was enacted "at the solicitation of persons residing in the vicinity of said premises, and solely in their behalf as a local and special regulation." We are not permitted to inquire into the motives of the city council. If the ordinance is valid on its face, the reasons or arguments that may have moved the city council to act are not pertinent here.

There are many unpleasant and annoying things that must be borne by those living in a state of organized society, in order that others may enjoy their equal rights

under the law, but the preservation of the public health and public safety is one of the chief objects of local government, and every citizen holds his property subject to a reasonable exercise of the police power of the state.

In our opinion this ordinance is a reasonable and proper application of the time-honored maxim, *Sic utere tuo ut alienum non laedas*, and is sustained by the maxim *Salus populi suprema est lex*, in which the police power of the state finds its chief support.

The judgment of the court below is therefore affirmed.

Crow, Mount, and Dunbar, JJ., concur.

Appeal dismissed by the Supreme Court of the United States, July 31, 1911, 223 U. S. 749, 56 L. ed. 641, 32 Sup. Ct. Rep. 534.

ALABAMA SUPREME COURT.

J. L. DAY, Trustee, etc., Appt.,
v.

HOME INSURANCE COMPANY.

(— Ala. —, 58 So. 549.)

Insurance — requirement of inventory — invoices.

1. The fact that a stock of merchandise has not been removed from the storehouse, and that it is covered by the original invoices, does not make inapplicable a provision in a fire insurance policy requiring an inventory.

Same — invoice and books.

2. The books of a merchant, together with the original invoices of his stock, cannot supply the requirements of a policy of insurance on the property requiring an inventory, where the policy requires both inventory and books.

Bankruptcy — insurance claim — non-waiver agreement.

3. A bankrupt and the receiver of his property may enter into a nonwaiver agreement for the purpose of securing an adjustment of a claim under an insurance policy which is claimed to have been forfeited because of failure to comply with the iron-safe clause.

Note. — As to what books and inventories are covered by the requirements of the "iron-safe clause" in an insurance policy, see *Ætna Ins. Co. v. Mount*, 15 L.R.A. (N.S.) 471.

For loss or destruction of books, inventory, etc., as excusing their nonproduction as required by policy, see notes to *Connecticut F. Ins. Co. v. Jeary*, 51 L.R.A. 706, and *German Alliance Ins. Co. v. Newbern*, 28 L.R.A. (N.S.) 337.
40 L.R.A. (N.S.)

Insurance — transfer of policy — waiver of forfeiture.

4. A transfer of an insurance policy to cover the goods at a place other than that where they were located when it was originally written, with knowledge that an inventory has not been taken, waives a provision in the policy requiring such inventory.

(Sayre, J., dissents from proposition 4.)

(February 17, 1912.)

APPPEAL by plaintiff from a judgment of the Law and Equity Court for Morgan County in defendant's favor in an action brought to recover the amount alleged to be due on an insurance policy. Reversed.

The covenant referred to in the opinion was as follows: "The following covenant and warrant is hereby made a part of this policy: (1) The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. (2) The assured will keep a set of books, which shall clearly and plainly present a complete record of the business transactions, including all purchases, sales, and shipments, both for cash and credit, from date of inventory, as provided for in the first section of this clause and during the continuance of this policy. (3) The assured will keep such books and inventory and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or, failing in this, the assured will keep such books and inventories in some place not exposed to fire which would destroy the aforesaid building. In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

Further facts sufficiently appear in the opinion.

Messrs. Tidwell & Sample, and E. W. Godbey, for appellant:

Invoices may serve as an inventory, where the invoices show a complete list of all of the goods put into a new store a few days before the issuance of the policy.

Ruffner Bros. v. Dutchess Ins. Co. 59 W.

Va. 432, 115 Am. St. Rep. 924, 53 S. E. 943, 8 Ann. Cas. 866.

The insurance company waived the provision of the policy requiring an inventory.

Mitchell v. Mississippi Home Ins. Co. 72 Miss. 53, 48 Am. St. Rep. 535, 18 So. 86; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 So. 399; *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 67 Am. St. Rep. 26, 22 So. 104.

Goods in the warehouse were not subject to this provision of the "iron-safe clause."

Traders' Ins. Co. v. Letcher, 143 Ala. 400, 39 So. 271.

The courts are not only averse to enforcing forfeitures as a penalty for breaches of conditions subsequent; but unless the breach goes to the very vitals of the consideration, they never do so.

Queen of Arkansas Ins. Co. v. Forlines, 94 Ark. 227, 126 S. W. 719; *Ruffner Bros. v. Dutchess Ins. Co.* 59 W. Va. 432, 115 Am. St. Rep. 924, 53 S. E. 943, 8 Ann. Cas. 866; *McNutt v. Virginia F. & M. Ins. Co.* — Tenn. —, 45 S. W. 61; *Arkansas Ins. Co. v. McManus*, 86 Ark. 115, 110 S. W. 797; *Western Assur. Co. v. Redding*, 15 C. A. 619, 30 U. S. App. 442, 68 Fed. 708; *Continental Ins. Co. v. Rosenberg*, 7 Penn. (Del.) 174, 74 Atl. 1073.

Messrs. Steiner, Crum, & Weil and Callahan & Harris for appellee.

Sayre, J., delivered the opinion of the court:

Day brought this action, as trustee in bankruptcy of the estate of W. C. Harmon, against the Home Insurance Company, on a policy insuring a stock of merchandise against loss by fire. Defense was interposed in the way of a plea setting up a breach of the covenant contained in the "iron-safe clause" of the policy. The covenant will be stated by the reporter. The plea was that the covenant had been broken in this: "That the insured had not taken a complete itemized inventory of stock on hand within twelve calendar months prior to the date of the policy, and failed to take such inventory thirty days after the issuance of said policy." Confessing this plea, plaintiff sought to avoid its effect in several special replications, which put forward the propositions, to state them generally in the language of appellant's brief, that where a merchant who has been in business for less than twelve months keeps a part of his stock of goods in a warehouse distant from the store in which he does business, the goods remaining unpacked and in the boxes in which they have been received from jobbers, and being removed from time to time as needed to replenish the active

stock on his shelves, the iron-safe clause in a policy of insurance on the stock in the warehouse does not require that an inventory be kept, or, if it does, the requirement is substantially met when the insured keeps all original invoices and a detailed account of all sales.

The circumstances stated as conditions of appellant's first alternative contention are not sufficient to require or permit a declaration that the covenant for an inventory has no office to perform in the policy of insurance. The clause is a perfectly reasonable condition, and is binding on the assured, in the absence of fraud. *Georgia Home Ins. Co. v. Allen*, 128 Ala. 451, 30 So. 537; *Cooley*, *Briefs on Insurance*, 1814. In general, contracts of insurance are construed most strongly against the insurer; but where there is no occasion for construction, such contracts must be enforced according to their clear and unambiguous meaning. There is no authority in the courts, on the supposition that the purposes which the parties intended to secure may have been unnecessary or as well secured by other means, to disregard the valid requirements and conditions of such contracts, or to construct, by implication or otherwise, a new agreement in place of that deliberately made by the parties. *Dwight v. Germania L. Ins. Co.* 103 N. Y. 348, 57 Am. Rep. 729, 8 N. E. 654. But appellant contends that his invoices, plus the books, constituted means of ascertaining the loss, and must be taken as a substantial compliance with the requirement of an inventory. Defendant company had stipulated for both inventory and books, and it is clear that both together constituted an important safeguard against fraud, so that the court has no authority to dispense with either. The contention amounts therefore to just this: That under the peculiar conditions the keeping of the invoices was a substantial compliance with the stipulation for an inventory. An "inventory" means a list made by a merchant of the goods in his store, and the requirement of the policy was that the insured should take a complete itemized inventory of stock on hand within thirty days. Such an inventory not only would furnish evidence of what the stock contained at the time, but provided a starting point for the estimate to be based upon the transactions shown by the inventory and the books. An "invoice" is also a list of goods, but it is prepared by the consignor at the point of shipment. It does not show that the goods therein listed have reached the consignee. Nor is it to be expected that any one invoice should ever be the equivalent of an inventory. Possibly we might con-

cede that in exceptional cases invoices may serve the purpose of an inventory. Such was the case in *Ruffner Bros. v. Dutchess Ins. Co.* 59 W. Va. 432, 115 Am. St. Rep. 924, 53 S. E. 943, 8 Ann. Cas. 866, where it was held that the bills showing a complete list of all the goods put into a new store within a few days before the issuance of the policy constituted an inventory in substance. But the court said: "Of course, the invoices would not constitute an inventory in the case of a store which has been running for a considerable time. They would not afford any basis upon which to begin the estimate, but in the case of a new store starting simultaneously with the issuance of the policy, or practically so, the first bill constitutes as good a basis for the beginning of the estimate as an inventory could possibly afford." To the same effect is *Queen v. Arkansas Ins. Co. v. Forlines*, 94 Ark. 227, 126 S. W. 719, in which the language of the court was that "the plaintiff had been in business such a short time that the invoices of the goods first bought by him constituted in effect an itemized inventory of his stock." In *McNutt v. Virginia F. & M. Ins. Co.*—Tenn.—, 45 S. W. 61, cited by appellant, a different question was presented. In that case the inventory had been taken as provided by the policy. On the day before the fire the insured had been taking a new inventory, in the same book, which was not completed. Inadvertently the book was left out of the safe and destroyed. The court held that the accidental destruction of the inventory did not forfeit the insurance. The adjudications in these cases seem to take liberties with the contracts which the parties had made for themselves; but we need neither express nor withhold approval, since the cases may be substantially differentiated on their facts from the case at bar. Other cases cited by appellant are in point only to the extent that they hold in a general way that promissory warranties are often conditions subsequent, and courts should apply to them the doctrine that obtains in adjudging forfeitures, which means, we take it, that the court will hold such conditions satisfied by substantial compliance. No case that we have seen goes to the length of holding a series of separate invoices, covering a considerable period of time during which many transactions may have been had, may, by the insured, be made to do service for the itemized inventory demanded by the insurer as a condition of liability, and yielded by the insured in the beginning as a legitimate and reasonable stipulation. Now, appellant's replications were so framed that the invoices of which they speak, and upon which

he relied as a substantial equivalent for the inventory which he agreed to take within thirty days, may have been strung along over a time largely in excess of the thirty-day period stipulated for the taking of an inventory in any event; and, if the policy sued on is to be taken as dated from the time when plaintiff's assignor began business, then the better part of a year. That was not a compliance with the contract on the part of the insured, and any liberality of construction which would dispense with its plain terms in favor of the insured would make a contract for the parties which they saw fit not to make for themselves. There was no error in sustaining demurrers to those replications going to the points discussed above. *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 52 L.R.A. 70, 78 Am. St. Rep. 216, 36 S. E. 821; *Fire Asso. of Philadelphia v. Masterson*, 25 Tex. Civ. App. 518, 61 S. W. 962; *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 19 Tex. Civ. App. 338, 48 S. W. 559; *St. Landry Wholesale Mercantile Co. v. New Hampshire F. Ins. Co.* 114 La. 146, 38 So. 87, 3 Ann. Cas. 821; 2 Cooley, *Briefs on Insurance*, 1820.

Several of the special replications set up a waiver of the alleged breach of the iron-safe clause in that defendant, after knowledge that the insured had not taken an inventory as required by the iron-safe clause of the policy, recognized and treated the policy as binding and entered into negotiations with plaintiff, as receiver in bankruptcy of the estate of the insured, for an adjustment of the loss, in consequence of which negotiations the said receiver incurred much trouble and expense. Defendant's special rejoinder as amended brought forward a nonwaiver agreement entered into between the insured and the insurer after the loss, and in view of a proposed investigation of the fire and a determination of the amount of the loss. The point taken against the rejoinder is that, after proceedings in bankruptcy have been commenced, the bankrupt can do nothing in derogation of the interests of the estate. If, at the time the nonwaiver agreement was entered into,—that is, at a time between the commencement of the bankruptcy proceedings and the appointment of a receiver,—the power to make such agreement resided anywhere, it was with the parties to this suit. The amended rejoinder makes the receiver, plaintiff here, as effectually a party as if he had joined in the paper writing which witnessed the agreement as between the insurer and the insured bankrupt. There was no necessity that the agreement should be reduced to writing. The amended rejoinder avers:

"That the said agreement was signed by Harmon in the presence of the said J. L. Day, receiver, and under the advice of the said Day, and was so signed after the defendant's adjuster had stated to the said Harmon, in the presence of the said Day, that he would not proceed in the investigation of the loss until the defendant was protected against waivers of forfeiture by agreement." The defendant company had a right to investigate the loss without waiving forfeitures; but in view of the facility with which the courts have predicated waivers on the slightest inconvenience caused to the insured, prudence required the nonwaiver agreement if in fact there was no intent to waive. On the facts stated in the rejoinder we do not perceive that the nonwaiver agreement was in derogation of any just interest of the estate. The question of forfeiture was an open one. If there had been a forfeiture, the estate had no just claim to be prejudiced. If, on the contrary, there had been no forfeiture, the agreement operated for the benefit of the estate by expediting a just estimate of the loss. Of such an agreement we think it may be safely said that it estopped the estate and those representing it to subsequently deny its force and effect in a suit brought for the benefit of the estate.

On the first decision of this case it was held that demurrers to plaintiff's several special replications had been properly sustained. On rehearing, the other members of the court are of opinion that the demurrer to special replication C should have been overruled. They put their conclusion on the averment of the replication that, at the time of the transfer of the policy, defendant's agent had notice of the fact that no inventory would be kept. This, they hold, amounted to a modification of the original policy contract, effective to eliminate therefrom the stipulation for an inventory. On this point I am unable to agree, but refrain from any statement of my reasons. It results from the prevailing opinion that the judgment must be reversed.

Reversed and remanded.

Simpson, Anderson, McClellan, Mayfield, and Somerville, JJ., concur.

Sayre, J., dissents in part.

Dowdell, Ch. J., not sitting.

Application for second rehearing denied. May 1, 1912.
40 L.R.A.(N.S.)

ARKANSAS SUPREME COURT.

LIZZIE O'KANE, Appt.,

v.

WALTER O'KANE.

(— Ark. —, 147 S. W. 73.)

Divorce — habitual drunkenness — definition.

To come within the operation of a statute allowing a divorce for habitual drunkenness, one need not be constantly drunk or incapacitated from transacting his business; it being sufficient if he has the fixed habit of frequently and repeatedly getting drunk when opportunity offers, or has lost the will power to resist temptation in that respect.

(April 29, 1912.)

A PPEAL by complainant from a decree of the Chancery Court for Franklin County dismissing a complaint filed to secure a divorce on the ground of habitual drunkenness. Reversed.

The facts are stated in the opinion.

Messrs. W. W. Cotton, R. J. White, and Sellers & Sellers, for appellant:

One may be an habitual drunkard, and still be able to attend to his usual business.

Brown v. Brown, 38 Ark. 324; Page v. Page, 43 Wash. 293, 6 L.R.A.(N.S.) 914, 117 Am. St. Rep. 1054, 86 Pac. 582; Walton v. Walton, 34 Kan. 195, 8 Pac. 110; Maga-

Note. — Who is an habitual drunkard within the meaning of divorce laws.

The earlier cases upon this question are collected in notes to Dennis v. Dennis, 34 L.R.A. 449, and Page v. Page, 6 L.R.A. (N.S.) 914.

Being occasionally under the influence of intoxicants is not habitual drunkenness. Rapp v. Rapp, 149 Mich. 218, 112 N. W. 709; Lentz v. Lentz, — Mich. —, 137 N. W. 229; Smith v. Smith, — Mich. —, 137 N. W. 644; Donley v. Donley, 150 Mo. App. 660, 131 S. W. 356.

Nor is habitual drunkenness shown by habitual, but moderate, use of intoxicating liquors. Bain v. Bain, 79 Neb. 711, 113 N. W. 141.

In Tarrant v. Tarrant, 156 Mo. App. 725, 137 S. W. 56, it is held that habitual drunkenness is established by showing that the party has by frequent indulgence lost the power or will to control his appetite for intoxicating liquors. It is not necessary to show that he is continually intoxicated or that he has a habit of getting drunk during the usual business hours of the day or that his drunkenness incapacitates him from performing the duties of his profession or business.

Garrett v. Garrett, 252 Ill. 318, 96 N. E. 882, reversing 160 Ill. App. 321, defines habitual drunkenness as "an irresistible habit of getting drunk; . . . an invol-

hay v. Magahay, 35 Mich. 210; Tarrant v. Tarrant, 156 Mo. App. 725, 137 S. W. 56; Sitton v. Grand Lodge A. O. U. W. 84 Mo. App. 208; Richards v. Richards, 19 Ill. App. 465.

Mr. Sam. R. Chew, for appellee:

One is addicted to habitual drunkenness who has a fixed habit of frequently being drunk.

Brown v. Brown, 38 Ark. 324.

Habitual drunkenness alone would not be sufficient to warrant the courts of this state in severing the conjugal ties, but the drunkenness must be habitual for a space of one year, and be or become the cause of rendering the marital state of the complaining party intolerable.

Rose v. Rose, 9 Ark. 507.

Hart, J., delivered the opinion of the court:

Plaintiff, Lizzie O'Kane, instituted this action for divorce against the defendant, Walter O'Kane, in the chancery court, and for cause charged that the defendant had been addicted to habitual drunkenness for the period of one year prior to the commencement of the action. Subsequently she filed an amendment to her complaint, in which she charged him with adultery. The defendant answered and denied the allegations of the complaint, and for grounds of cross complaint charged his wife with adultery. The chancellor dismissed both the complaint and cross complaint for want of equity. They had one child, a girl about seven years of age, and the mother was awarded her custody, with the right of the father to visit the child on all proper occasions. The case is here on appeal.

Our statute provides that where either party shall be addicted to habitual drunkenness for the space of one year, it shall be a ground for divorce. Kirby's Dig. § 2672. Bouvier in his Law Dictionary defines an habitual drunkard to be a person given to inebriety or the excessive use of intoxicating drink, who has lost the power or will, by frequent indulgences, to control his appetite for it. In regard to this question in

the case of Brown v. Brown, 38 Ark. 324, Mr. Justice Harrison, speaking for the court, said: "Habitual drunkenness or the degree or course of intemperance that amounts to it, cannot be exactly defined. We may, however, say in general terms that one is addicted to habitual drunkenness who has a fixed habit of frequently getting drunk, and he may be so addicted though he may not oftener be drunk than sober, and may be sober for weeks" (citing authorities).

In the case of Burns v. Burns, 13 Fla. 369, the court said that the charge of habitual intemperance or drunkenness within the meaning of the divorce laws evidently referred to a persistent habit of becoming intoxicated through the use of strong drinks, thus rendering the party's presence in the marital relation disgusting and intolerable. Rose v. Rose, 9 Ark. 507; Magahay v. Magahay, 35 Mich. 210.

In the latter case the court held that one who has the habit of indulging in intoxicating liquors so firmly fixed that he becomes intoxicated as often as the temptation is presented to him is an habitual drunkard within the meaning of the divorce laws. The court said: "He either makes no vigorous effort to resist and overcome the habit, or his will has become so enfeebled by indulgence that resistance is impossible."

To be an habitual drunkard within the meaning of the divorce laws, a person does not have to be constantly drunk, nor necessarily incapacitated from transacting his business. It is sufficient if he has a fixed habit of frequently and repeatedly getting drunk when the opportunity presents itself, or has lost the will power to resist temptation in that respect. The transcript in this case contains over 1,000 typewritten pages, and no useful purpose could be served by setting out the testimony in detail, and commenting at length upon it. We deem it sufficient to state that we have carefully read and considered the testimony, and have come to the conclusion that a clear preponderance of the evidence establishes the fact that the defendant was an habitual drunk-

ard, having a strong and constant tendency to become intoxicated, which is acquired by frequent repetition,—such a frequent indulgence to excess as to show a formed habit and inability to control the appetite."

And Schaub v. Schaub, 117 La. 727, 42 So. 249, defines habitual intemperance as "the custom or habit of getting drunk; the constant indulgence in such stimulants as wine, brandy, and whisky, whereby intoxication is produced; not the ordinary use, but the habitual abuse of them. The habit should be actual and confirmed,"—and holds that such habitual intemperance is not proven by evidence that the party was

a frequenter of barrooms during his leisure hours, and drank beer, but not to the degree of intoxication, though at times he was under its influence to the point of loquacity or ill humor, there being nothing to show that his usual mental condition was abnormal, or that he was incapacitated for his daily work.

In McMahon v. McMahon, 170 Ala. 338, 54 So. 165, it is held that a statute providing for divorce "for becoming addicted after marriage to habitual drunkenness" does not apply if a party overcomes the habit for a reasonable period before any steps are taken for a divorce. R. L. S.

ard, and that the chancellor erred in dismissing the complaint for want of equity.

On the question of the plaintiff's adultery, we have carefully examined and considered the evidence pertaining to that also, and are of the opinion that a preponderance of the evidence does not establish it. Hence the chancellor was right in dismissing the cross complaint for want of equity. We are also of the opinion that the chancellor did not err in awarding the custody of the little girl to the mother.

It follows that the decree of the chancellor, in so far as it dismissed the complaint of the plaintiff for want of equity, was erroneous, and the case will be remanded, with directions to grant the prayer of the complaint on the ground of drunkenness. The court will also proceed to set apart to plaintiff, in accordance with the terms of the statute governing in such cases, one third of her husband's property, and shall also allow a reasonable fee to plaintiff's solicitors for services in this cause, the same to be paid out of defendant's property before division as aforesaid. The chancellor's order for alimony will be continued until final decree is entered on remand of the cause.

In other respects the decree will be affirmed.

MICHIGAN SUPREME COURT.

CATHERINE BROWN, Appt.,
v.

PEOPLE'S NATIONAL BANK.

(— Mich. —, 136 N. W. 506.)

Bank — draft — forged indorsement by attorney.

1. A bank which cashes a draft upon indorsement of the payee's name by his attorney-at-law, who has it in his possession, is bound to make good the loss to the payee.

Note. — Delay in giving notice of forgery as estoppel of true owner to recover against party which has paid paper on a forged indorsement.

There are, of course, many cases on the duty of a depositor to notify the bank of the fact that checks paid by it and charged to his account were forgeries (as to which, see notes in 27 L.R.A. 426; 36 L.R.A. 539; 7 L.R.A. (N.S.) 744; and 20 L.R.A. (N.S.) 79); but comparatively little authority on the question presented in *Brown v. People's Nat. Bank*, as to estoppel of the true owner of paper to recover on the same against a bank which had previously paid it to another on a forged indorsement, because of delay in notifying the bank of the forgery.

In *States v. First Nat. Bank*, 203 Pa. 69, 40 L.R.A. (N.S.)

Forgery — failure to notify bank — estoppel.

2. One having notice of facts sufficient to put him on inquiry as to the forged indorsement by his attorney of a draft in his favor, at a time when the bank has assets of the attorney in its possession sufficient to protect itself, and who attempts to collect the money from the attorney, and fails to notify the bank until after it has parted with the assets, is estopped to look to the bank for reimbursement.

Principal and agent — collection by forgery — knowledge — notice.

3. The knowledge as to the forgery of an indorsement on a draft gained by an agent with authority "to try and collect" the amount of it from the one perpetrating the forgery is that of the principal so as to estop him from looking to the bank which cashed the draft, if notice of the forgery is not given it until after it has parted with the securities from which it might otherwise have protected itself.

(May 31, 1912.)

APPEAL by plaintiff on a case-made from a judgment of the Circuit Court for Jackson County in defendant's favor in an action brought to recover the proceeds of a draft which had been cashed by defendant on a forged indorsement. Affirmed.

The facts are stated in the opinion.

Mr. Grove H. Wolcott, for appellant:

Recovery in case of a forged indorsement depends upon common-law rules.

First Nat. Bank v. Bank of Windermere, 10 L.R.A. (N.S.) 49, note 1.

Defendant bank paid the money to Campbell at its peril.

5 Cyc. 548, note 44; *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 17 L.R.A. (N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617; *Central Nat. Bank v. National Metropolitan Bank*, 31 App. D. C. 391, 17 L.R.A. (N.S.) 523.

The agency of Charles J. Smith was spe-

52 Atl. 13, where a son as executor of his father's estate sent a draft to the order of his sister in payment of a legacy, believing her living when in fact she was dead, and the draft, coming into possession of deceased's sister, was cashed at a local bank on a forged indorsement, it was held that the executor could not recover from the bank the amount of the draft, where he waited nearly four years after discovering the fraud before notifying the bank that the draft had been paid on a forged indorsement, and had by his own act induced the bank to issue the draft to a dead person, thus paving the way for a perpetration of the fraud. "Both, it is of course conceded," said the court "are innocent victims; but the bank became so because it was induced to act by States [executor]. It did nothing of its own motion. . . . It is suf-

cial, and he could not go beyond it and bind the plaintiff by failing to give defendant notice of the forgery.

Mechem, Agency, § 288.

Where one of two innocent persons must suffer by the act of a third, he who has enabled such person to occasion the loss must sustain it.

2 *Herman, Estoppel, p. 1145; Peck v. Bank of America, 16 R. I. 710, 7 L.R.A. 831, 19 Atl. 369; Woods v. Colony Bank, 114 Ga. 683, 56 L.R.A. 931, 40 S. E. 720.*

The defendant did not obtain the draft in good faith. Its loss and that of plaintiff was occasioned by its own negligence. There can, therefore, be no ground of estoppel against plaintiff in the absence of deceit or misrepresentation.

16 *Cyc. 741, 747; Tolman v. American Nat. Bank, 22 R. I. 462, 52 L.R.A. 879, 84 Am. St. Rep. 850, 48 Atl. 480.*

Mr. Thomas E. Barkworth for appellee.

Steere, J., delivered the opinion of the court:

This is an action of assumpsit, in which plaintiff seeks to recover the sum of \$608.37, with interest from the 4th of June, 1907, by reason of defendant having cashed a draft on that date, payable to her order, on which her name had been forged.

This draft was for plaintiff's distributive share of her father's estate, sent from Washington, District of Columbia, to her attorney, in Jackson, Michigan, who forged her indorsement, drew the money, and appropriated it.

sufficient to know that, after she was dead, he requested the bank to issue its draft payable to her order, as if she were living, and that, having allowed himself to be deceived, he continued, though not intending to do so, the deception upon the bank. But for this deception upon it, the bank can justly be heard to complain that its draft would not have been issued and the plaintiff would not now be suing it. If there were no other reason why he should not recover, he is confronted with the rule that, as between two innocent parties, he who, by first acting, makes loss possible by inducing the other to act, must bear it." It may be observed that the superior court (17 Pa. Super. Ct. 256) placed its decision in favor of the bank on the doctrine established by *Land Title & T. Co. v. Northwestern Nat. Bank, 196 Pa. 230, 50 L.R.A. 75, 79 Am. St. Rep. 717, 46 Atl. 420*, and other cases cited in notes in 50 L.R.A. 75, 17 L.R.A. (N.S.) 514, and 38 L.R.A. (N.S.) 1111, to the effect that a bank is protected in paying paper to the person to whom it was issued, although he was an impostor, and did not bear the name by which the payee or indorsee was described. The supreme court, however, did not deem it necessary to consider that ques-

Under a plea of the general issue, notice was given of special matters of defense, as follows:

"(1) That the said plaintiff, after having received due notice, and having knowledge, on or about May 1, 1908, that the check or draft mentioned in plaintiff's declaration had been paid by defendant bank to Robert Campbell, without notice that the signature, purporting to be that of plaintiff, indorsed thereon was not her true and genuine signature, did not give to said defendant bank notice of her claim with respect thereto, or of the fact that her purported signature thereto was not genuine, and that said bank had no notice thereof until August 2, 1909, and that in the meantime said bank had surrendered to said Campbell property in its possession out of which it might have saved itself from loss, had such notice of plaintiff's claim been had by it.

"(2) That said plaintiff, having knowledge or notice that said bank had cashed said draft bearing the purported signature of said plaintiff, elected to follow her claim against Robert Campbell, the party negotiating said draft, and to look to him for repayment therefor, and did not for a long time make any claim against said bank, or seek to hold said bank liable to her on account thereof; and said bank, without notice of said plaintiff's claims or of the false character of said plaintiff's purported signature, was prejudiced thereby by the surrender by it to said Campbell of certain property of value more than enough to have satisfied said obligation, which said sur-

tion, but, as indicated, was of the opinion that the plaintiff had in any event lost his right to recover by his conduct after learning of the fraud and forgery. In *Schnabel v. Hanover Nat. Bank, 137 N. Y. Supp. 727*, an action by the owner of a check which had been paid to his employee on a forged indorsement, against the drawee for conversion, the court said that the duty to give the drawee bank notice that the plaintiffs' employee had been forging checks payable to plaintiffs' order, if it existed at all, could not under any circumstances arise until the plaintiffs had knowledge of the facts, or had been guilty of negligence so gross as to preclude them from asserting a lack of knowledge; and that the allegations in the answer, that plaintiffs had "knowledge, or means of ascertaining, or notice or knowledge of facts sufficient to put them on inquiry as to the facts," were insufficient and demurrable.

Generally, as to the right of drawee of forged check or draft to recover money paid thereon, including the question as to the effect of failure to give notice of the forgery, see notes in 10 L.R.A. (N.S.) 49; 25 L.R.A. (N.S.) 1308; and 29 L.R.A. (N.S.) 100.

J. D. C.

render was made in ignorance of any claim asserted by said plaintiff against said defendant arising therefrom."

Defendant had judgment at the circuit, and the action is removed to this court on a case-made.

From the statement of facts found by the court, it appears that Robert Campbell, an attorney of Jackson, Michigan, having succeeded to the business of the law partnership of which he had previously been a member, and which had been dissolved pending this collection, by virtue of contract relations with plaintiff, in the latter part of May, 1907, received from the administrator of her father's estate a draft reading as follows, with indorsements subsequently made by him:

\$608. Washington, D. C., May 27, 1907.

Pay to the order of Catherine Schilling \$608.37 six hundred eight and $\frac{37}{100}$ dollars.

Fred K. Echelberger, Trust Officer.

Thomas Parker, President.

To the Columbia National Bank, Washington, D. C.

Paid June 7th, 1907.

Indorsements: Catherine Schilling.

Robert Campbell.

This was for her one third of the money which said law firm had been employed to collect. Beside the plaintiff, whose name at that time was Catherine Schilling, were a brother and sister, who were each entitled to, and awarded, a like sum. By the terms of a written contract with the firm of which Campbell was a member, the attorney was entitled to retain thirty per cent as collection fees, upon the whole amount collected.

The plaintiff's brother and sister were residents of Michigan, and each duly received from Campbell the amount to which they were entitled,—\$426,—being \$608.37, less 30 per cent. The plaintiff, however, lived in North Dakota, and never received her share, although she had, in May, 1907, signed and acknowledged, before a notary, a receipt to the administrator for the same. About a year afterward, she wrote to her brother, Captain Charles J. Smith, in Jackson, that she had not yet received her share of the estate. Smith called upon Campbell for an explanation, and was assured by Campbell that the money had not yet been collected. Not satisfied with Campbell's conduct in the matter, Smith then wrote to the administrator, Washington Loan & Trust Company of Washington, District of Columbia, and learned from it that the money had been sent to Campbell by draft drawn payable to plaintiff's order. His further 40 L.R.A. (N.S.)

inquiries in Jackson developed that the draft was paid by the People's National Bank, defendant herein, to Campbell on June 4, 1907. Shortly after receiving the letter from the administrator, Smith called upon Campbell, and told him that he had learned that he (Campbell) had received plaintiff's draft. Campbell then admitted that he had received the money, and intimated that if he had indorsed Mrs. Schilling's name upon the draft he had a right, as her attorney, to do so, but at the same time promised to settle the claim with Mr. Smith, which promise he never fulfilled. On June 1, 1908, Smith wrote his sister the following letter:

Jackson, June 1, 1908.

My Dear Sister:—

Yours at hand. I have a letter from the administrator stating full facts. Campbell has drawn your money from the bank here the 4th day of last June, 1907, and he has kept it. Now, sister, I have counsel here and they say to make him pay the full amount of \$608.37. His contract calls for 30% of that amount. He has broken his contract, and we have him. Just leave that to me. Don't accept anything else. I have been under some expense and I know you will make it right with me. This man Campbell has done wrong. He wanted to bribe me this morning by offering me money, asking me how much he owed me. I will not accept anything from him. I want you to write just as soon as you get this and let me know just what you are doing. Have Winterer write me. You can make him pay the full amount, with interest. Katie, don't accept anything else. Have Winterer write him to that effect, for I have proof here to land him to prison, and he knows it. I saw him this morning, and he said he would pay over the money in one or two days. Now Katie, let me know just what you want me to do, for I am here and I will save you all the expense I can.

Your brother,

Capt. C. J. Smith,
235 E. Wesley.

P. S.—I hope you get this letter before you receive the money which he will try to settle for, about \$400.25. Don't do it. If the bar association gets hold of him, it will be all off with him.

C. J. S.

In reply, plaintiff requested her brother to try and collect her money for her, and use his own judgment as to what proceedings to take.

By a letter of May 20, 1908, Smith had learned from the Trust Company of Washington, District of Columbia, that Camp-

bell had requested the draft for Catherine Schilling's share to be made payable to his order; but the same had been previously sent to him, drawn payable to her order. On June 25, 1908, Campbell was arrested on Smith's complaint for embezzling the proceeds of said draft. While in jail, he sent for Smith, and an interview was had at which the sheriff, prosecuting attorney, and F. H. Helmer, cashier of defendant, were present. Helmer, in behalf of Campbell, offered to pay Smith the amount of the draft, less 30 per cent for attorney's fees specified in the contract for collection, proposing in that connection some kind of a paper for Smith to sign, the contents of which are not shown. Smith declined to sign the same, stating he had no counsel, and he was not paid the money. The prosecuting attorney stated at the time that Campbell would be put under bonds. The criminal prosecution is yet pending, and he is under recognizance for trial. After this interview, nothing further was done by Smith to effect a settlement with Campbell. At the time the draft was cashed, Campbell bore a fair reputation as a member of the bar and was a customer of defendant, which had in its possession, until June 27, 1908, personal property belonging to him, amounting to at least three times the amount of plaintiff's claim.

The indorsement of plaintiff's name on the draft was a careful imitation of her genuine signature, and was a forgery. No effort was made by the officers of the bank, when it was cashed, to ascertain whether or not it was genuine. Plaintiff never saw the draft until April 21, 1910, and first learned defendant had cashed it from her present attorney, Mr. Wolcott, who was employed for her by her brother, July 14, 1909. Wolcott was unable to obtain and examine desired papers, and inspect the draft, until about August 4, 1909, when he advised plaintiff of the proposed action, and made written demand on defendant for the amount of the draft, with interest, which was the first notice it received of her intent to hold it responsible on account of the forged indorsement. There was no evidence that any officer of the bank was aware the indorsement was a forgery, until that date.

So far as the record discloses, both parties to this suit were innocent of intentional wrong and honest in this matter; and both had misplaced confidence in Campbell. Plaintiff had employed and trusted him as her attorney. He was then an attorney in fair standing and a customer of the bank. When he presented to his bank the draft, fair on its face, apparently indorsed by the payee and indorsed by him-

self, the bank naturally cashed it without question on the strength of his indorsement and their acquaintance with him. As her attorney, he had no authority to indorse her name; and his letter to the administrator, requesting that it be made payable to his order, indicates that he well knew it. The power to indorse checks or bills must be expressly conferred; and his employment to collect her claim conferred no authority to indorse a check or draft received in payment of the claim, but made payable to her. *Chatham Nat. Bank v. Hochstadter*, 11 Daly, 343. The indorsement was an ingenious forgery, and conferred upon the bank no right to collect the money it represented, and no protection in cashing it for him. It was her draft, and could only be legally paid on her indorsement. The fact that Campbell was her attorney, and had it in his possession, made no difference. *Prima facie* the loss falls on defendant; for a forgery is a nullity, and no protection to anyone. It is manifest she is entitled to recover, unless she is precluded from relying upon the forgery by the defense of equitable estoppel, which is urged by defendant, based on the claim that, by delay and failure to notify the bank within a reasonable time after she knew of the fraud, and by making her claim against Campbell, and attempting to collect it from him, she has released the bank and lost her right against it.

The general rule is that estoppel arises against one who, with knowledge of the fact, fails to give notice until an opportunity of recovery on the forged instrument, which would have been available if prompt notification had been given, is lost. "If a man's name be forged, and after himself becoming aware of the fact he refrain from advising the holder of the document, and by reason of such inaction the holder's position is changed (by the death, escape, or bankruptcy of the forger, or otherwise), there will be estoppel of the man whose name was forged." *Ewart, Estoppel*, 135.

The forged draft was cashed by defendant June 4, 1907. Defendant had in its possession available personal property of Campbell, furnishing it opportunity to recover on the forged instrument, until June 27, 1908. Demand was first made upon it and notice first given, in her behalf, of the claim that the indorsement was a forgery on August 4, 1909; and it is conceded that there is no evidence that any officer of the bank knew, before that date, that the instrument was forged.

If plaintiff knew it, or her agent had knowledge of it imputable to her, before June 27, 1908, and defendant's opportunity to recover from Campbell on the forged in-

strument was lost through failure to give notice, she is estopped from asserting the forgery. She had no positive knowledge of the forgery of her indorsement until after that time, but did know of enough facts to put a reasonable person on inquiry. She knew that she had receipted to the administrator for the money in May, 1907. She was advised by letter from her brother, of June 1, 1908, of Campbell's dishonesty; that he had drawn her money from a bank in Jackson on June 4, 1907; that he had broken his contract and tried to bribe her brother. Following the suggestion in her brother's letter to "just leave that to me," she constituted him her agent, and authorized him to "try and collect her money, and use his own judgment as to what proceeding to take;" in fact, turned the whole matter over to him, with full power to act.

Being on the ground, knowing the "full facts," and vested with complete authority to represent her and act for her in the matter, he elected to proceed against Campbell, not by civil suit, but by criminal prosecution instituted in the public name, presumably for the public good and for the suppression of crime, seeking by criminal process to force the payment of a private debt in contravention of public policy. He made no demand on defendant, and gave it no notice of the forgery. His acts, if known to defendant, were an intimation that the grievance was Campbell's failure to pay her the money after he had obtained it, not in the manner of obtaining it. He at that time knew Campbell had drawn the money from the bank a year previous, on a draft payable to her order, not indorsed by her. He remained silent, and permitted defendant to part with the property of Campbell, by which both parties could have been protected, in ignorance of what he knew, which, if communicated, would have avoided the loss. It is the common voice of our authorities that notice of a forgery must be given and demand made without unreasonable delay after knowledge; and that this was not done by Smith is patent from the conceded facts. "He had opportunity to speak, it was his duty to speak, and he failed to speak."

It is claimed his agency was special, only for collection of the claim, and such agency did not require him to give the bank notice; nor did his knowledge of the forgery, if he had any, bind the plaintiff. The scope of his agency was to act for and represent her in collecting the money, to collect which this suit is brought. She left it to him to "try and collect it," and use his own judgment as to what proceeding to take. With that authority, his efforts were her efforts, his judgment was her judgment.

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ment, and his knowledge was her knowledge, in all matters involving that transaction.

"Because of the identity of principal and agent in dealings by the agent within the scope of his authority, it is a well settled, general rule, that notice to an agent in the course of his employment, and in relation to a matter within the scope of his actual or apparent authority, is notice to his principal, whether the agent communicates his knowledge to the principal or not." Clarke & S. Agency, § 474; Mechem, Agency, §§ 718, 719.

In *United States v. National Exch. Bank* (C. C.) 45 Fed. 163, it was held that the neglect of the drawer of a check, for more than a month after discovery that it had been paid upon a forged indorsement, to notify a bank that it will hold it responsible therefor, releases the bank from liability. In the case at bar, defendant was not notified that it would be held responsible for over a year after the agent had discovered the full facts, and the principal, with knowledge of facts sufficient to put a person on inquiry, had commissioned the agent with full discretionary power.

In *United States v. National Exch. Bank*, supra, it was said: "So, in respect to two persons equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with loss in exoneration of the former; or, if both are equally innocent and equally ignorant, the loss should remain where the chance of business has placed it. *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334; *Price v. Neal*, 3 Burr. 1355, 1 W. Bl. 390."

We are agreed that an equitable estoppel arises in this case by reason of plaintiff's failure to give notice of the fraud to defendant within a reasonable time after it was known to her, or to her authorized agent; and therefore the loss must remain where the chance of business has placed it.

The judgment is affirmed.

WISCONSIN SUPREME COURT.

UNITED AMERICAN FIRE INSURANCE COMPANY, Resp't,

v.

AMERICAN BONDING COMPANY OF BALTIMORE, Appt.

(146 Wis. 573, 131 N. W. 994.)

Evidence — suretyship — admissions of principal after termination of employment.

1. The O. K. by an insurance agent who is required to remit, for business done, with-

in two months after the expiration of the month in which it is transacted, of a statement of amount due by him to the company within such time, after he has resigned from his position, is admissible in evidence against his surety in an action to hold him liable for a defalcation, since the duty to remit did not terminate with the resignation, and statement as to the amount due, made within the time during which his contract required him to make remittances, was part of the *res gestæ*.

Bonds — suretyship — statements superseding application.

2. A provision in a surety bond as to the frequency with which the principal's books shall be inspected, supersedes a statement in the application as to the frequency with which it shall be done.

Note. — Admissibility against sureties on bond of statements by principal after expiration of term of office or employment.

Under the general rule that the admissions of the principal can only be received as evidence against the surety when they are made during the transaction of the business for which the surety is bound, so as to become a part of the *res gestæ*, declarations or admissions made by an officer or agent when his term of office or employment has ceased are not competent to bind the surety. *Smith v. Whittingham*, 6 Car. & P. 78 (admission as to correctness of account); *Evans v. State Bank*, 13 Ala. 787; *Dennis v. Chapman*, 19 Ala. 29, 54 Am. Dec. 186; *Lewis v. Lee County*, 73 Ala. 148; *Drabek v. Grand Lodge*, B. S. Benev. Soc. 24 Ill. App. 82; *Hotchkiss v. Lyon*, 2 Blackf. 222; *Shelby v. The Governor*, 2 Blackf. 289; *King v. State*, 15 Ind. 64; *Dickinson v. Cotter*, 45 Ind. 445; *Bocard v. State*, 79 Ind. 270; *Com. v. Brassfield*, 7 B. Mon. 447; *Pollard v. Louisville*, C. & L. R. Co. 7 Bush, 597; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *St. Louis v. Foster*, 24 Mo. 141; *Tenth Nat. Bank v. Darragh*, 1 Hun, 111, 3 Thomp. & C. 138; *Tompkins County v. Bristol*, 15 Hun, 116, affirmed on other grounds in 99 N. Y. 316, 1 N. E. 878; *Ayer v. Getty*, 46 Hun, 287 (holding admission of lessee made after expiration of term inadmissible to charge surety); *Stetson v. City Bank*, 2 Ohio St. 167; *State Bank v. Johnson*, 1 Mill, Const. 404, 12 Am. Dec. 645; *Lacoste v. Bexar County*, 28 Tex. 420 (admission of administrator after administration was closed); *McFarlane v. Howell*, 16 Tex. Civ. App. 246, 43 S. W. 315; *Contra The Treasurers v. Bates*, 2 Bail. L. 362 (which held admission of default by sheriff after leaving office admissible against surety).

The reason for excluding such admissions is that they are hearsay. *Lewis v. Lee County*, 73 Iowa, 148; *Stetson v. City Bank*, 2 Ohio St. 167.

This rule is also recognized in the following cases: *Dobbs v. Inferior Ct. Justices*, 17 Ga. 624; *Chicago Portrait Co. v. O'Neal*, 640 L.R.A. (N.S.)

Pleading — burden of establishing defense — failure to supervise agent.

3. The surety on the bond of an insurance agent must plead and prove the failure of the company to comply with its undertaking to exercise due and customary supervision over the agent, and notify the surety immediately of any default on the part of the agent, in order to make such failure available to defeat liability on the bond.

(Kerwin and Timlin, JJ., dissent.)

(June 1, 1911.)

APPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in plaintiff's favor in an action on the bond of a surety to recover from his

Ga. App. 425, 65 S. E. 161; *Bank of Brighton v. Smith*, 12 Allen, 243, 90 Am. Dec. 144; *Union Sav. Asso. v. Edwards*, 47 Mo. 445; *Howe Mach. Co. v. Farrington*, 16 Hun, 591.

On the general question as to how near the main transaction must declarations be made in order to constitute part of the *res gestæ*, see note to *Ohio & M. R. Co. v. Stein*, 19 L.R.A. 753.

The following rule as stated by Greenleaf on Evidence, vol. 1, § 187, has been quoted and approved in numerous cases: "The surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done; and therefore is entitled to proof of his conduct by original evidence, where it can be had, excluding all declarations of the principal made subsequent to the act to which they relate, and out of the course of his official duty."

In *Lewis v. Lee County*, supra, it was said: "The point of objection to the competency of the evidence of his declarations, as against his sureties, is not that they were made after his term of office had expired, but that they were not made while he was doing any act, transacting any business, or performing any duty for which the surety was bound. They were subsequent in point of time to all official acts or duties to which they refer, and are simple admissions that in his official capacity he had received money of the county. . . . As to his sureties, they were mere hearsay, creating no inference or presumption of liability for which they were bound to answer."

So, in *Lee v. Brown*, 21 Kan. 458, it was said: "This admission and settlement were after the default of Lee. These matters referred to past occurrences; they had no connection with the acts to which they related, except as a narrative or admission of what Lee had done at dates prior thereto, and ought not to have been received as evidence so as to bind his sureties; for it was the acts of Lee, and not his admissions or declarations, for which his sureties were bound."

To the same effect are the following cases, where it appeared the term of office or em-

money alleged to have been received and collected by plaintiff's agent and converted by him to his own use. Affirmed.

Statement by Barnes, J.:

The plaintiff is a fire insurance company. One Greene was appointed as its agent to represent it in Chicago. Said Greene was employed under two contracts, one written and one oral. The written contract authorized the agent to write surplus lines of insurance in certain specified states. It ran for one year from March 1, 1908, and authorized the agent to receive proposals for insurance, fix rates of premium, receive moneys, countersign, issue, and renew, and consent to the transfer of, policies, subject to the regulations of the company. The compensation fixed was a stipulated percentage on the business written. The contract obligated the agent to furnish a monthly account of the business written each month, and not later than the 10th day of the following month, and provided that "remittances to cover the balances due to the party of the first part shall be forwarded not later than the end of the sec-

ond month following in which the business is written."

The evidence as to the contents of the oral contract is somewhat indefinite. It permitted the agent to write local business in Chicago, and to write insurance on whiskey stored in bonded warehouses, wherever located, in the United States. The commission was the same as that stipulated in the written contract, but the evidence is silent as to how the business should be reported and when it should be remitted for. As a matter of fact, a daily report was sent to the company of each policy written, which was in effect an abstract of the so-called written portion of the policy. At the end of each month, a statement was made up, showing the number of each policy issued during the month, to whom issued, the rate of premium charged thereon, the amount of the insurance, and the aggregate amount of the premium on the policy. On the reverse side of this statement, the agent charged himself with the aggregate amount of the premiums, less the amount paid out for return premiums on cancellations, and credited himself with his com-

missions had not ceased, but the admissions were excluded because uttered subsequent in point of time to the duties to which they referred: *Shelby v. The Governor*, 2 Blackf. 289; *Lee v. Brown*, 21 Kan. 458; *Cook County Liquor Co. v. Brown*, 31 Okla. 614, 122 Pac. 167; *State v. Randolph*, 22 Mo. 474; *Hatch v. Elkins*, 65 N. Y. 489; *Eichhold v. Tiffany*, 20 Misc. 681, 46 N. Y. Supp. 534; *Wieder v. Union Surety & G. Co.* 42 Misc. 499, 86 N. Y. Supp. 105; *Strobel & W. Co. v. Wiesen*, 144 App. Div. 149, 128 N. Y. Supp. 798; *White v. German Nat. Bank*, 9 Heisk. 475; *Wheeler v. State*, 9 Heisk. 393; *Trousdale v. Phillips*, 2 Swan, 384; *Knott v. Peterson*, 125 Iowa, 404, 101 N. W. 173; *Blair v. Perpetual Ins. Co.* 10 Mo. 559, 47 Am. Dec. 129; *Snell v. Allen*, 1 Swan, 208; *Cf. Bank of Brighton v. Smith*, 12 Allen, 249, 90 Am. Dec. 144.

Of course, where the rendition of an account after the expiration of the term is one of the duties guaranteed by the surety, evidence concerning it is binding upon the surety. *Townsend v. Everett*, 4 Ala. 607 (holding account stated by officer after his resignation, showing amount in his hands as treasurer of county, evidence against surety); *Jenness v. Black Hawk*, 2 Colo. 578; *Trustees of Schools v. Cowden*, 240 Ill. 39, 88 N. E. 285, affirming 143 Ill. App. 241; *Father Matthew Young Men's Total Abstinence Benev. Soc. v. Fitzwilliam*, 12 Mo. App. 445, affirmed in 84 Mo. 406 (which is fully set out and discussed in both prevailing and dissenting opinions of the reported case).

Thus, in *Lewis v. Lee County*, supra, the court said: "In the case before us, we lay no particular stress upon the fact that, prior to the making of the declarations or ad-

missions of Lewis, his term of office as county treasurer had expired. There remained the duty of stating his official account, and of delivering to his successor all the money, books, papers, and property of the county which had come to his possession, and his declarations or admissions accompanying either of these acts, and explanatory of them, would be competent original evidence against his sureties, though his official term had expired."

And in *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689, 81 N. W. 383, where the retiring officer handed his successor a statement of the amounts for which he was accountable at the time the office was being turned over, on the day after the expiration of his term of office, it was said: "It was the duty of Bartley to account to his successor, and to turn over all moneys and securities with which he was chargeable. The sureties contracted that this should be done. It was an official duty, the performance of which was necessary to their exoneration. The accounting was made at the very time the law required it to be made; and we therefore think that, although Bartley had ceased to be the *de jure* treasurer by reason of Meserve's having qualified, his declaration as to the amount of the moneys and securities which he should turn over to his successor was admissible as evidence against the sureties. It was a declaration made during the transaction of business, for which they were liable and so became part of the *res gestæ*."

It is sometimes a question of doubt whether the rendition of an account after the employment has ceased is one of the duties guaranteed by the surety. See dissenting opinion in the reported case. A. L. R.

mission, postage, and taxes, if any. The balance represented the amount due to the company on the month's business. It was shown by the testimony in the case, however, that both of the parties understood that these monthly statements showed the amount of business written, and did not show what premiums had been collected and what had not been. The plaintiff applied to the defendant for a bond to indemnify it against default on the part of its agent. The application is dated April 2, 1908, but was for a bond to run for one year from February 1, 1908. The bond issued pursuant to the application was dated April 17, 1908, and covered the period specified in the application. It indemnified the plaintiff against loss sustained by larceny or embezzlement committed by its employee, but did not cover any losses that the agent might suffer by extending credit to policy holders of the plaintiff. The agent resigned his position about December 1, 1908, and the plaintiff contends that the agent embezzled money belonging to it in the sum of \$2,904.80, to recover which amount this action is brought against the surety. The secretary of the plaintiff testified that the resignation took place about November 1st, but the monthly accounts rendered by the agent showed that he transacted the usual volume of business as agent during the month of November.

The defense rested substantially on two propositions: (1) That there was no proof of embezzlement made in the case; (2) that the plaintiff had forfeited its right to recover upon its bond by reason of having violated the representations contained in its application for the bond, and also by reason of its having violated the conditions of the bond itself. At the close of the testimony, the court directed a verdict in favor of the plaintiff, and from the judgment on such verdict the defendant appeals.

Messrs. Churchill, Bennett, & Churchill, for appellant:

The testimony of Frank A. Krehla, secretary of the plaintiff, as to conversations, statements, and declarations of Cornelius W. Greene, the plaintiff's agent, was hearsay, and was irrelevant, incompetent, and immaterial and prejudicial error.

Lee v. Brown, 21 Kan. 458; *Knott v. Peterson*, 125 Iowa, 404, 101 N. W. 173; *Wieder v. Union Surety & G. Co.* 42 Misc. 499, 86 N. Y. Supp. 105; *Chelmsford Co. v. Demarest*, 7 Gray, 7; *Lewis v. Lee County*, 73 Ala. 148; *Trousdale v. Phillips*, 2 Swan, 384; *Bocard v. State*, 79 Ind. 270; *Shelby v. The Governor*, 2 Blackf. 289; *Dobbs v. Inferior Ct. Justices*, 17 Ga. 624; *Wheeler v. State*, 9 Heisk. 393; *Un-*

ion Sav. Asso. v. Edwards, 47 Mo. 445; *Ayer v. Getty*, 46 Hun, 287; *Eichhold v. Tiffany*, 20 Misc. 681, 46 N. Y. Supp. 534; *Blair v. Perpetual Ins. Co.* 10 Mo. 559, 47 Am. Dec. 129; *Hodnett v. Pace*, 84 Va. 873, 6 S. E. 217; *Hatch v. Elkins*, 85 N. Y. 489; *Stetson v. City Bank*, 2 Ohio St. 167; *Coxe Bros. & Co. v. Milbrath*, 110 Wis. 499, 86 N. W. 174; *New Home Sewing Mach. Co. v. Simon*, 113 Wis. 267, 89 N. W. 144; *Brandt, Suretyship & Guaranty*, § 518; *Stearns, Suretyship*, § 191; *Kamp v. Cox Bros. & Co.* 122 Wis. 206, 99 N. W. 366; *Stone v. Northwestern Slate Co.* 70 Wis. 585, 36 N. W. 248.

The defendant was released as surety on the bond by reason of the plaintiff's failure to inspect and audit the employee's books and accounts, and to verify the same with funds on hand or in bank, and to verify the outstanding accounts as shown by the employee's books or reports.

Hunt v. Fidelity & C. Co. 39 C. C. A. 496, 99 Fed. 242; *Young v. Pacific Surety Co.* 137 Cal. 596, 70 Pac. 660; *United States Fidelity & G. Co. v. Downey*, 38 Colo. 414, 10 L.R.A.(N.S.) 323, 120 Am. St. Rep. 128, 88 Pac. 451; *Wieder v. Union Surety & G. Co.* 42 Misc. 499, 86 N. Y. Supp. 105.

Messrs. Flanders, Bottum, Fawcett, & Bottum, for respondent:

Admissions made in the course of an agent's official duty are admissible as evidence against his surety.

Leake v. Sutherland, 25 Ark. 219; 1 Am. & Eng. Enc. Law, 1089; *Peterson v. Poignard*, 8 B. Mon. 309; 31 Cyc. 1474; *Greenl. Ev.* § 187; *Goldman v. Fidelity & D. Co.* 125 Wis. 390, 104 N. W. 80; *Douglas v. Howland*, 24 Wend. 35; *Father Matthew Young Men's Total Abstinence Benev. Soc. v. Fitzwilliam*, 12 Mo. App. 445, affirmed in 84 Mo. 406; 2 *Wigmore, Ev.* § 1077; *Pratt v. Donovan*, 10 Wis. 379; *Shepard v. Pebbles*, 38 Wis. 373; *Holden v. Curry*, 85 Wis. 504, 55 N. W. 965; *Schoenleber v. Burkhardt*, 94 Wis. 575, 69 N. W. 343; *Meyer v. Barth*, 97 Wis. 352, 65 Am. St. Rep. 124, 72 N. W. 748; *Roberts v. Weadock*, 98 Wis. 400, 74 N. W. 93; *Wallber v. Wilmanns*, 116 Wis. 246, 93 N. W. 47; *Stephens v. Shafer*, 48 Wis. 54, 33 Am. Rep. 793, 3 N. W. 835; *Lowell v. Parker*, 10 Met. 309, 43 Am. Rep. 436; *Champion Ice Mfg. & Cold Storage Co. v. American Bonding & T. Co.* 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197.

The answers given by the insured to the numerous questions which they are required to answer are treated as warranties only, and not in any sense as conditions precedent to a right of action.

Redman v. Aetna Ins. Co. 49 Wis. 431,

4 N. W. 591; *Johnston v. Northwestern Live Stock Ins. Co.* 94 Wis. 117, 68 N. W. 868; *Goldman v. Fidelity & D. Co.* 125 Wis. 390, 104 N. W. 80; *French v. Fidelity & C. Co.* 135 Wis. 259, 17 L.R.A.(N.S.) 1011, 115 N. W. 869.

Failure to give notice by telegraph and registered letter, was matter of defense to be pleaded and proved by the surety, and in the absence of such proof the defense is not established.

Goldman v. Fidelity & D. Co. 125 Wis. 390, 104 N. W. 80; *Champion Ice Mfg. & Cold Storage Co. v. American Bonding & T. Co.* 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197; *French v. Fidelity & C. Co.* 135 Wis. 259, 17 L.R.A.(N.S.) 1011, 115 N. W. 869; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *Title Guaranty & S. Co. v. Bank of Fulton*, 89 Ark. 471, 35 L.R.A.(N.S.) 876, 117 S. W. 537; *Bank of Taboro v. Fidelity & D. Co.* 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908; *Hurt v. Employers' Liability Assur. Corp.* 122 Fed. 828; *Vangindertaelen v. Phenix Ins. Co.* 82 Wis. 112, 33 Am. St. Rep. 29, 51 N. W. 1122; *Flatley v. Phenix Ins. Co.* 95 Wis. 618, 70 N. W. 828.

Barnes, J., delivered the opinion of the court:

The bond sued on obligated the surety to "make good to the employer, within sixty days, any loss sustained by the employer by larceny or embezzlement committed by the employee during a term" of one year from February 1, 1908. The appellant contends that no competent proof was offered to show that the agent, Greene, had collected, or at any time had in his hands, any money belonging to the plaintiff which had not been paid to it, and that the court erred in directing a verdict for the plaintiff and in refusing to direct one for the defendant. The plaintiff insists that the required proof was presented.

The agent of the plaintiff admitted to its secretary on December 22, 1908, that he had collected and used \$2,800 of money belonging to the plaintiff. The total amount due or to become due the plaintiff for collected and uncollected premiums at this time, according to statements rendered by the agent, was \$3,604.80. Of this amount \$700 was paid after December 22d. A statement of account was compiled by the plaintiff from the daily reports and monthly accounts rendered by the agent, which was submitted to the latter on May 17, 1910, and showed a balance of \$2,904.80. The statement is Exhibit 29 of the record. The agent then admitted the correctness of the account, and that he had collected

and retained the entire balance shown by the account. It is suggested that this evidence was modified by the witness on cross-examination; but such is not the fact. If this testimony was competent, a prima facie case of embezzlement was made by plaintiff, as the evidence showed the volume of business done by the agent, the amount of his principal's money which he received and converted to his own use, and repeated demands that he pay the money over.

It is conceded by both parties that any admission by the agent of the amount of money in his hands belonging to his principal, made prior to his resignation, would be competent evidence against the surety. *Goldman v. Fidelity & D. Co.* 125 Wis. 390, 396, 104 N. W. 80, and cases cited. It is contended by the defendant, however, that such admissions were made after the agency was terminated, and were therefore incompetent. There are many cases holding, generally, that declarations or admissions made by an agent when his employment has ceased are not competent in an action by the principal against the surety. *Lee v. Brown*, 21 Kan. 458; *Knott v. Peterson*, 125 Iowa, 404, 407, 101 N. W. 173; *Wieder v. Union Surety & G. Co.* 42 Misc. 499, 86 N. Y. Supp. 105; *Chelmsford Co. v. Demarest*, 7 Gray, 1, 7; *Lewis v. Lee County*, 73 Ala. 148; *Trousdale v. Philips*, 2 Swan, 384; *Bocard v. State*, 79 Ind. 270; *Shelby v. The Governor*, 2 Blackf. 289; *Dobbs v. Inferior Ct. Justices*, 17 Ga. 624, 630; *Wheeler v. State*, 9 Heisk. 393, 397; *Union Sav. Asso. v. Edwards*, 47 Mo. 445; *Ayer v. Getty*, 46 Hun, 287; *Eichhold v. Tiffany*, 20 Misc. 681, 46 N. Y. Supp. 534; *Blair v. Perpetual Ins. Co.* 10 Mo. 559, 47 Am. Dec. 129; *Hodnett v. Pace*, 84 Va. 873, 6 S. E. 217; *Hatch v. Elkins*, 65 N. Y. 489; *Stetson v. City Bank*, 2 Ohio St. 167. The cases in this court bearing on the question are *Stone v. Northwestern Sleigh Co.* 70 Wis. 585, 587, 36 N. W. 248; *Coxe Bros. & Co. v. Milbrath*, 110 Wis. 499, 505, 86 N. W. 174; *Kamp v. Coxe Bros. & Co.* 122 Wis. 206, 212, 99 N. W. 366; *New Home Sewing Mach. Co. v. Simon*, 113 Wis. 267, 89 N. W. 144. None of these cases present the same facts as does the case before us.

It was the duty of the agent, under the written contract, to remit for the business written in October not later than December 31st, and for that written in November not later than the 31st of January following. The time for making remittances for business written under the oral contract does not appear. The agent tendered his resignation about December 1st, and after that time wrote no new business. It was

still the duty of the agent after his resignation to make remittances during the months of December and January, according to the terms of his contract, and to collect any outstanding premiums that were unpaid, and to account for and remit such premiums to the plaintiff, less his commission and expenses. This much satisfactorily appears from the whole record. Even if the record were silent, the duty of an agent to account for moneys coming into his hands is well settled. See collection of cases found in 31 Cyc. 1470, note 90, and 2 Enc. L. & P. 2d ed. 1070 and 1057. Even after his resignation, it was contemplated that Greene would continue to perform his former duties of collecting premiums due to the company, and of remitting the same to it. The agent did not make up Exhibit 29, but it was compiled from statements which he had rendered, and the only thing in reference thereto which it was necessary for the plaintiff to be advised upon was whether or not the business reported as having been written had been paid for by the policy holders to the agent. When he stated that all of the moneys had been collected, he was not making a mere casual remark, but was discharging a duty that devolved upon him under his old contract.

The question we have before us therefore is, Where an agent renders an account or O. K.'s an account submitted to him after his employment has ceased, but which it is his duty under his contract to render or to O. K., as the case may be, is that act a part of the *res gestæ*, and admissible in evidence as such, in an action against the surety? There is no question but that, if the statement had been O. K.'d while he was still actively engaged as agent for the plaintiff, it would be receivable in evidence against the surety. Should that rule be extended beyond the term of employment? The case to which our attention has been called that bears most directly on the subject is *Father Matthew Young Men's Total Abstinence Soc. v. Fitzwilliam*, 12 Mo. App. 445, 449, which was affirmed in 84 Mo. 406. There the treasurer of the society had been removed for dishonesty. After his removal, he made a statement showing the amount of his defalcation, which was admitted in evidence in an action against the surety. The latter claimed that the evidence was incompetent, but the court held that it was the duty of the treasurer to make up a statement of his account, and, such being the case, what he did in this regard was as much a part of the *res gestæ* as if the work had been done before he had ceased to be treasurer. Some significance is given to the fact that

the statement was made during the term of office for which the defaulting treasurer had been elected, but we fail to see how this fact can have very much weight in determining whether the evidence was admissible or not. He was not the treasurer when the statement was made. It has also been held that, where it is the duty of a public officer to render an account of the moneys in his hands as such officer, but he fails to do so before the expiration of his term, a performance of such duty thereafter renders the admissions made competent evidence against the surety. *Townsend v. Everett*, 4 Ala. 607, approved in *Lewis v. Lee County*, 73 Ala. 148; *Jenness v. Black Hawk*, 2 Colo. 578; *Wyehe v. Myrick*, 14 Ga. 584. These cases are quite analogous in principle to the one before us. Other authorities holding that the true test of admissibility is whether the admission is made in the course of official duty are 1 *Greenleaf on Evidence*, 16th ed. § 187; *Douglass v. Howland*, 24 Wend. 35, 59. See also 2 *Wigmore, Ev.* § 1077. We perceive no very good reason why, where an agent does an act which it is his duty under his contract to perform, evidence of that act, after his principal duty as agent has ceased, should not be admissible, as well as if made during the time he was actively performing his duties; and we think it would be the better rule to hold such testimony competent. We conclude, therefore, that a *prima facie* case of embezzlement was made; there being no evidence offered by the defendant upon the question.

In the application of the plaintiff for a surety bond, it was stated: (1) That the agent would remit on the 10th of each month; (2) that he would not be permitted to retain balances; (3) that his accounts and books would be inspected, audited, and verified at least once a month; and (4) that his outstanding accounts would be verified at least once a month. It was further stated that it was agreed that the answers of the applicant should be warranties, and form part of and be conditions precedent to the issuance, continuance, or renewal of the bond. The bond itself contained a statement that all "the representations made by the employer . . . to the surety are warranted to be true." This probably refers to the representations contained in the application for the bond.

The appellant claims that it was incumbent on the plaintiff to prove the truth of the representations made as a condition precedent to the right of recovery. The respondent contends that the representations were mere warranties or conditions

subsequent, which should be pleaded and proven as a defense. The question whether the representations were conditions precedent or warranties is not very material, however, inasmuch as these conditions and the breach thereof were pleaded as a defense, and the proof showed that the agent did not remit on the 10th of each month; that he was permitted to retain balances; and that his books and accounts were not audited monthly; and that his outstanding accounts were not verified monthly. It is true that the plaintiff denied knowledge of the fact that the agent was withholding remittances, but it did not comply with its representations in endeavoring to ascertain what the fact was. There is hardly a pretense of having complied with the agreement to inspect and audit books and accounts, and to ascertain what accounts were unpaid. The question arising on the application, therefore, is not whether we are confronted with conditions precedent or warranties, but whether the representations made affect the plaintiff's right of recovery in any aspect of the case.

The bond provided that the employer should observe "all due and customary supervision over said employee for the prevention of default, and that there shall be a careful inspection of the accounts and books of said employee at least once in every twelve months from the date of this bond," etc. We think this provision of the bond determined what was required in the way of inspection and supervision, and superseded what was stated in the application, and waived any other or further requirement in reference thereto. The applicant was required to do certain specific things in the way of inspection, and to exercise due and customary supervision over the agent, by the terms of the bond. The surety substituted its own requirements for the things which the applicant said it would do. The bond provided that the employer should immediately notify the surety of any default on the part of the agent. The evidence does not disclose whether this notice was given or not. Neither is there any evidence on the question of whether the plaintiff exercised "due and customary supervision" over its agent. If it was incumbent on the plaintiff to show that notice of the default was given, or that it exercised due and customary supervision over its employee, as a condition precedent to its right of recovery, then a verdict should have been directed for the defendant. If these were defensive matters, the ruling of the court was right.

The bond in question was an indemnity contract entered into by the defendant for a money consideration. It has all the es-

sential features of an insurance contract, and should be subject to the rules of construction applicable to such contracts. *Champion Ice Mfg. & Cold Storage Co. v. American Bonding & T. Co.* 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197; *Title Guaranty & S. Co. v. Bank of Fulton*, 89 Ark. 471, 35 L.R.A.(N.S.) 676, 117 S. W. 537; *Bank of Tarboro v. Fidelity & D. Co.* 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908. It being apparent that the bond sued on was prepared by the defendant, as to any ambiguity therein, the provisions, conditions, and exceptions of the bond which tend to work a forfeiture should be construed most strongly against the party preparing the contract. *French v. Fidelity & C. Co.* 135 Wis. 259, 265, 17 L.R.A.(N.S.) 1011, 115 N. W. 869; *American Surety Co. v. Pauly*, 170 U. S. 133, 144, 42 L. ed. 977, 981, 18 Sup. Ct. Rep. 552.

We think the two provisos referred to should be held to be conditions subsequent, which the defendant must plead and prove as part of its defense, if it relies on them to defeat the plaintiff's cause of action. *Redman v. Aetna Ins. Co.* 49 Wis. 431, 435, 439, 4 N. W. 591; *Johnston v. Northwestern Live Stock Ins. Co.* 94 Wis. 117, 119, 68 N. W. 868; *Goldman v. Fidelity & D. Co.* 125 Wis. 390, 392, 395, 104 N. W. 80; *French v. Fidelity & C. Co.* supra. These cases, if not strictly in point in the case at bar, certainly establish a principle that is applicable to it. There is no recital in the bond declaring the clauses to be conditions precedent, and where two constructions are admissible the court should lean toward that which obviates a forfeiture. We deem it unnecessary to discuss the other point raised by appellant's counsel.

Judgment affirmed.

Kirwin, J., dissenting (June 21, 1911):

The majority opinion holds that there was evidence to warrant the court below in directing a verdict for the plaintiff. The correctness of this conclusion depends upon whether certain admissions of the agent, Greene, made after his resignation and when not in the employ of the plaintiff, were admissible against the defendant. On the 17th day of April, 1908, Greene, as principal, and the defendant, as surety, executed to the plaintiff a bond in the sum of \$5,000, conditioned that said Greene would, in the position of state agent in the plaintiff's service, make good to the plaintiff within sixty days any loss sustained by plaintiff by "larceny or embezzlement committed by the employee [Greene] during a term commencing on the first day of

February, 1908, at 12 o'clock noon, and ending upon the first day of February, 1909, at 12 o'clock noon." Greene remained in the employ of plaintiff until November 1, 1908, at which date he resigned and abandoned the employment.

The first question presented is, how far, if at all, the admissions were competent as against the defendant surety. Without this evidence, plaintiff was not entitled to a directed verdict. The general rule is well established that admissions of a principal are not binding upon the surety, unless made in the course of the employment covered by the undertaking of the surety. But it is held by the majority opinion that, since the principal was bound to account, even after his resignation and withdrawal from the employment covered by the bond, his admissions as to prior misappropriation of money were admissible. True the duty under a contract to perform always remains and can only be satisfied by performance. And it may be admitted that the duty of Greene to account and pay over what, under the contract, should be found due on such accounting continued after his resignation. But the amount of shortage, if any, or state of account, could not be proved by the statements of Greene, made without the sanction of an oath, detailing past transactions, after the term of his employment had ceased; such statements not being part of the *res gestæ*. The evidence relied upon in support of the majority opinion is an admission made by Greene in December, 1908, to the effect that he had, prior to that time, collected and used \$2,800 of the money of plaintiff; also admissions made May 17, 1910, to the effect that a statement of account compiled and presented to him by the agent of plaintiff, showing a balance in favor of plaintiff, was correct; and, further, that he had collected and retained such balance. If these admissions be incompetent, it is clear that the plaintiff made no case, and the judgment below should have been reversed. I think that the overwhelming weight of authority establishes the incompetency of these admissions. They were made after Greene's term of employment had ceased, and were merely statements of past transactions or defalcations in the course of Greene's employment, before he had resigned, and whether he was still under obligation to account or not would not make his admissions relating to such past transactions, without the sanction of an oath, competent against the defendant.

The rule is well stated in Greenleaf on Evidence, 16th ed. vol. 1, § 187, as follows: "We are next to consider the admissions of a principal as evidence in an action

against the surety upon his collateral undertaking. In the cases on this subject, the main inquiry has been whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestæ*. If so, they have been held admissible; otherwise not. The surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done, and therefore is entitled to proof of his conduct by original evidence, where it can be had, excluding all declarations of the principal made subsequent to the act to which they relate, and out of the course of his official duty. Thus, where one guaranteed the payment for such goods as the plaintiffs should send to another, in the way of their trade, it was held that the admissions of the principal debtor that he had received goods, made after the time of their supposed delivery, were not receivable in evidence against the surety. So, if one becomes surety in a bond conditioned for the faithful conduct of another as clerk or collector, it is held that, in an action on the bond against the surety, confessions of embezzlement, made by the principal after his dismissal, are not admissible in evidence, though, with regard to entries made in the course of his duty, it is otherwise." To the same effect is 1 Taylor, Ev. §§ 785, 786, and cases cited; 1 Phillips, Ev. 5th Am. ed. 436 (*526).

The rule laid down in Greenleaf and other text-books is supported by the authorities generally, English and American. The theory of the authorities seems to be that all evidence as to what the principal said he had done in the past should be excluded, and the only testimony admitted under this head, what the principal in fact did in the course of his employment, and such statements as were made in connection with the acts done in the course of his business, and constituting part of the *res gestæ*; therefore the surety cannot be bound by the mere statements of the principal made subsequently to the acts done and as a narrative of them. The reason of the rule seems obvious, when we consider the well-settled doctrine that hearsay evidence is not competent generally, and admissions by principal, not supported by the sanction of an oath, rarely admissible against the surety. 1 Taylor, Ev. § 786, and cases cited. A brief review of some of the leading cases quite analogous to the case at bar will illustrate the principle applicable to the instant case.

Smith v. Whittingham, 6 Car. & P. 78, was an action on bond to charge surety for failure to account by principal. After his

discharge, admissions as to correctness of account were held incompetent against surety. The court said (page 80): "This is not an account current; it is only an admission made by Fisherwick after his discharge of what he had embezzled, and, though it would have been evidence against Fisherwick, it is not so against the defendant." This is a leading case, and cited with approval generally in this country.

Hatch v. Elkins, 65 N. Y. 489, was an action on a bond of indemnity. The accounts were offered in evidence and objected to, and the question was as to their competency. In other words, whether, since the relation of surety and principal existed, the admissions of the principal were competent against the surety. It was held that the declarations of the principal were admissible only when part of the *res gestæ*, and admissions made, not during the transaction of business, but subsequently, were not competent. Referring to cases cited, the court said (page 499, 65 N. Y.): "These cases all hold that the declarations of the principal bind the surety only when they are part of the *res gestæ*, in reference to which the surety has covenanted, but that his subsequent admissions, not part of the *res gestæ*, do not bind and are not competent evidence against the surety."

The following cases quoted from are quite similar in their facts to the instant case.

In *Lee v. Brown*, 21 Kan. 458, at page 461, the court said: "This admission and settlement were after the default of Lee. These matters referred to past occurrences; they had no connection with the acts to which they related, except as a narrative or admission of what Lee had done at dates prior thereto, and ought not to have been received as evidence, so as to bind his sureties; for it was the acts of Lee, and not his admissions or declarations, for which his sureties were bound."

In *Knott v. Peterson*, 125 Iowa, 404, at page 407, 101 N. W. 173, it is said: "The bond was not to be responsible for any declaration or admissions of the principal, but for his conduct only. Hence it is only his conduct in carrying on the business, or declarations accompanying his acts while so engaged, that are admissible in evidence against his surety."

Wieder v. Union Surety & G. Co. 42 Misc. 499, 86 N. Y. Supp. 105: "The rule seems to be well settled that a party holding an indemnity cannot prove the loss sustained by him, for which he seeks to hold the surety liable, by the mere admissions or statements of the principal. The declarations of the principal, made during the transac-

tion of the business for which the surety is bound, so as to become part of the *res gestæ*, are competent evidence against the surety; but his declarations subsequently made are not competent."

Trousdale v. Phillips, 2 Swan, 384: "In order to make the declarations and statements of the principal good against the surety, in these kind of bonds, they must be made when the business is transacted, and in connection with it, so as to become a part of the *res gestæ*. They can be admitted on no other principle. The surety is bound for the acts and conduct of his principal, and not for what he may say he had done."

Shelby v. The Governor, 2 Blackf. 289, page 290: "On the trial, the plaintiff introduced a witness to prove that Weathers told him that he had collected the money in controversy. . . . If Weathers, while officially acting in relation to the receipt of this money, stated that he had received it, such statement would form a part of the *res gestæ*, and would be evidence to prove the act of receiving, and would therefore be admissible against his sureties. But declarations made by him at any subsequent period would have no connection with the act, and could not be introduced as evidence of the act, so as to bind his sureties; for it is his acts, and not his admissions or declarations, for which his sureties are bound."

Union Sav. Asso. v. Edwards, 47 Mo. 445, at page 449: "Had the suit been against the sureties alone, the evidence would have been clearly inadmissible. It is not within the power of the principal, after a transaction is past and gone, to make admissions to the detriment of his sureties." To the same effect are *Blair v. Perpetual Ins. Co.* 10 Mo. 559, 47 Am. Dec. 129; *Eichhold v. Tiffany*, 20 Misc. 681, 46 N. Y. Supp. 534; *Ayer v. Getty*, 46 Hun, 287; *Wheeler v. State*, 9 Heisk. 393; *Dobbs v. Inferior Ct. Justices*, 17 Ga. 624; *Bo-card v. State*, 79 Ind. 270; *Lewis v. Lee County*, 73 Ala. 148; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Tenth Nat. Bank v. Darragh*, 3 Thomp. & C. 138.

The majority opinion endeavors to distinguish the instant case from the authorities cited, upon the ground that the agent was obliged to account, and therefore his admissions as to correctness of the account presented to him by the agent of plaintiff, and his further admissions that he converted funds, were competent. It may well be that the reports and accounts made by the agent, Greene, before resignation and in the course of his employment, were competent, and that, if such reports and accounts had shown a misappropriation of

funds, a prima facie case would have been made against the defendant. But I think it clear under the authorities that the admissions supplementing the account made after the reports and accounts had been made were no part of the *res gestæ*; hence not competent evidence against the defendant surety. Had the admissions as to correctness of account and conversion by the agent been made at or about the time the reports and accounts were made, and while the agent was in the discharge of such employment, doubtless such admissions would have been competent against the defendant as part of the *res gestæ*.

The admissions must be contemporaneous with the act, in order to constitute part of the *res gestæ*. 3 Wigmore, Ev. §§ 1757, 1772-1774, and 1776, and cases cited; Stetson v. City Bank, 2 Ohio St. 167, and cases cited; 1 Greenl. Ev. §§ 108, 110; Shelby v. The Governor, 2 Blackf. 289; Hotchkiss v. Lyon, 2 Blackf. 222; Ward v. Suffield, 5 Bing. N. C. 381, 7 Scott, 352, 2 Arnold, 4, 8 L. J. C. P. N. S. 207; Evans v. Beattie, 5 Esp. 26; Longenecker v. Hyde, 6 Binn. 1; Kamp v. Cox Bros. & Co. 122 Wis. 206, 99 N. W. 366.

With all the diligence of the distinguished counsel for respondent, and the court, but one case (Father Matthew Young Men's Total Abstinence Benev. Soc. v. Fitzwilliam, 12 Mo. App. 445) is cited which appears to support the majority opinion. I am not clear that that case is authority for the majority opinion here. It is true the report or statement was made after the removal from office of Fitzwilliam, but the statement included no time not covered by the bond, and the bond provided that such a statement should be made at the expiration of the term. Besides it does not appear clearly whether the statement was made from records properly kept. But, if the case is authority for the majority opinion in the instant case, in my opinion, it is unsupported by reason or authority, and should not be followed.

The other authorities cited in the majority opinion (Townsend v. Everett, 4 Ala. 607, approved in Lewis v. Lee County, 73 Ala. 148; Jenness v. Black Hawk, 2 Colo. 578; Wyche v. Myrick, 14 Ga. 584; Douglass v. Howland, 24 Wend. 35, and Wigmore, Ev. § 1077) do not appear to add strength to the opinion of the court. The point in Townsend v. Everett, supra, pertinent, is that the annual statement of the county treasurer, which by law he was bound to make, was evidence against his surety. On page 611, 4 Ala., the court says: "We do not consider it necessary in this case to go into the inquiry how far the surety is bound by the declarations of

the principal, made in reference to his conduct as treasurer, whilst in office, as he certainly is bound by those acts which, as treasurer of the county, his principal was bound to perform, and for the performance of which he was surety. The statute requires the treasurer to account with the commissioners' court annually, and, upon his resignation or removal from office, to state the account, and deliver the money and other effects of the county to his successor, and these acts when done are as obligatory on the surety as on the principal."

Lewis v. Lee County, 73 Ala. 148, referred to in the majority opinion as approving Townsend v. Everett, 4 Ala. 607, is a strong case in support of this dissent, as I understand it.

Jenness v. Black Hawk, 2 Colo. 578, involved the question of declarations of a principal in an official bond as evidence against the sureties, when made in the performance of some official act or duty and in reference thereto. The court, at page 585, 2 Colo., referring to a case of declarations of the principal in an official bond, lays down the doctrine that the better rule limits the operation of such declarations against sureties to the case in which they are made, in the performance of some official act or duty and in reference thereto, and that they must be part of the *res gestæ*. The court further says (page 586, 2 Colo.): "The sureties obligate themselves to be answerable for what the principal does in his office; his official acts may therefore be shown to charge them; every declaration, accompanying and explanatory of the act, is part of it."

Wyche v. Myrick and Douglass v. Howland, supra, contain nothing contrary to the general rule stated in this dissent. 2 Wigmore on Evidence, § 1077, treats, among other subjects, of principal and surety, but I find nothing in it contrary to the rule laid down in the cases heretofore cited.

Conceding that the statement of account was competent, because the reports from which it was made up were made by the agent, Greene, during the discharge of his duties, such statement is clearly insufficient to charge Greene with larceny or embezzlement, because the evidence is undisputed that it is merely a report of the business done by the agent, Greene, and not of premiums collected. Under the conditions of the bond, the surety was only liable for larceny or embezzlement of the agent, and not for loss otherwise occurring; therefore the amount of premiums appearing upon the account stated was not sufficient to charge Greene with larceny or embezzlement. Travelers' Ins. Co. v. McConkey,

127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868; *Lycoming F. Ins. Co. v. Schwenk*, 95 Pa. 89, 40 Am. Rep. 629, 8 Mor. Min. Rep. 53; *Gauch v. St. Louis Mut. L. Ins. Co.* 88 Ill. 251, 30 Am. Rep. 554; *Dupin v. Mutual Ins. Co.* 5 La. Ann. 482; *Weidner v. Standard Life & Acci. Ins. Co.* 130 Wis. 10, 110 N. W. 246.

Therefore, as conceded in the majority opinion, the admissions of Greene after his resignation, charging himself with conversion, were necessary to make a case, and these admissions being incompetent, no case was made. I think, therefore, the judgment should be reversed.

I am authorized to say that Mr. Justice Timlin concurs in the foregoing dissent.

Petition for rehearing denied, October 3, 1911.

LOUISIANA SUPREME COURT.

PAUL PALERMO, Appt.,

v.

ORLEANS ICE MANUFACTURING COMPANY.

(130 La. 833, 58 So. 589.)

Negligence — child — parent.

1. A child four years old is incapable of committing negligence. A parent is not negligent in permitting his child, four years of age, to be on the sidewalk adjoining his residence.

Same — dangerous condition — injury to child.

2. Where a child four years old fell into a street gutter containing hot water which had flowed from the defendant's plant, and was painfully burned, the defendant will be held liable in damages, where the evidence showed that the water and steam attracted the curiosity of the children of the vicinity, and that the defendant's watchman at the gutter left his post before the accident happened to the child.

(May 6, 1912.)

Headnotes by LAND, J.

Note. — For contributory negligence of parent or custodian of child as bar to an action by child for negligent injuries, see note to *Chicago City R. Co. v. Wilcox*, 21 L.R.A. 76, and *Neff v. Cameron*, 18 L.R.A. (N.S.) 320, and later cases *Blossom Oil & Cotton Co. v. Poteet*, 35 L.R.A. (N.S.) 449. For contributory negligence of parent as bar to action by parent or administrator for death of child *non sui juris*, see notes to *Vinnette v. Northern P. R. Co.* 18 L.R.A. (N.S.) 328, and *Nashville Lumber Co. v. Busbee*, 38 L.R.A. (N.S.) 754.

As to liability for turning steam or other

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans in defendant's favor in an action brought to recover damages for personal injuries to plaintiff's minor son alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Foster, Milling, Brian, & Saal, for appellant:

Whoever does anything in or immediately adjacent to the public street, calculated to attract children of the vicinity into a danger which they cannot appreciate, owes the duty of protecting them by suitably guarding the source of danger.

Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155.

Plaintiff is entitled to recover damages for the injury inflicted.

Westerfield v. Levis Bros. 43 La. Ann. 63, 9 So. 52.

Mr. Philip J. Patorno for appellee.

Land, J., delivered the opinion of the court:

This is a suit brought by the father and natural tutor to recover damages for personal injuries sustained by his minor son, Pascal, a child four years of age at the time of the accident.

On March 25, 1909, Pascal fell into an open gutter on Hospital street, which at the time contained hot water which had flowed from the plant of the defendant company located on the same street. The boy was scalded and burned on the left side of his body from his neck downwards.

The first defense is that one of the bolts of the defendant's boiler blew out, and the hot water escaped through the opening and flowed into the gutter, without fault or negligence on the part of the defendant. The next defense is that the defendant used due diligence in warning children in the street of the presence of hot water in the gutters, and lastly contributory negligence is pleaded.

There was judgment in favor of the defendant, and the plaintiff has appealed.

In his opinion the judge *a quo* said:

dangerous vapors or gases into sewer, see note to *Smith v. Edison Electric Illuminating Co.* 15 L.R.A. (N.S.) 957.

Generally, as to liability for escape of water stored on premises, see notes to *Brennan Constr. Co. v. Cumberland*, 15 L.R.A. (N.S.) 541, and *Weaver Mercantile Co. v. Thurmond*, 33 L.R.A. (N.S.) 1061.

Generally, as to duty toward children in respect of obstructions or defects in street, see notes to *Gibson v. Huntington*, 22 L.R.A. 561; *Newport News & O. P. R. & Electric Co. v. Clark*, 6 L.R.A. (N.S.) 905; and *Townley v. Huntington*, 34 L.R.A. (N.S.) 118.

"The proof is that defendants, in order to keep the hot water of their ice factory out of the street gutter, had installed a large underground pipe for the harmless escape of the hot water, long prior to this accident, and that on the day of the child's injury a tube of their boiler, without any negligence on defendant's part, had exploded, and from its broken or blown-out part the hot water ran into the street gutter. It also appears that at once defendants turned a stream of cold water into the escaping hot water to cool it, and make it harmless, and that defendants also put a dam across the gutter to force the water towards the swamp, and also stationed a man at the gutter to warn the children of a near-by school, who left his post after the children were called into the school-house, and also diligently went to work to repair the boiler and stop the escaping hot water. I find no negligence on defendant's part in all this; but, even if there had been, how could defendants, with the accident to the boiler happening all of a sudden, anticipate or expect that plaintiff's child of tender years would be allowed by its parents to wander on the streets, or that it would manage to get into the street gutter?"

The law of the case is thus stated by the judge *a quo*: "That doctrine is that in order to warrant the finding that negligence is the proximate cause of the injury, it must appear that the injury was the natural consequence of the negligence, and that the defendants ought to have anticipated or foreseen or expected it, in the light of the attending circumstances."

The statement of facts made by the judge *a quo* shows that, when the hot water commenced flowing into the gutter, the defendant's agents did anticipate or foresee that children in the street might be injured by coming in contact with the hot water, and stationed a man at the gutter to warn the children of a near-by school. The judge *a quo* found that this man left his post after giving said warning. As the hot water continued to flow for an hour or more, a guard should have been kept at the gutter until the danger had passed. If a man was stationed at the gutter to warn children, and he deserted his post, the defendant is liable for his negligence.

The hot water and steam in the gutter was a dangerous agency in a public place, forbidden by ordinance of the city of New Orleans; and defendant knew that it was likely to attract children. According to defense witnesses, the hot water and steam did attract children, who were warned and driven away. Defendant was negligent in not taking proper precautions to prevent other children from coming in contact with

the hot water. A watchman at the gutter would have probably prevented the injury of plaintiff's son.

On principle there is no difference between hot water and a dangerous machine left unguarded in a public place. As to a dangerous machine, see *Westerfield v. Levis Bros.* 43 La. Ann. 63, 9 So. 52. In this case it was said: "The machine was in a public place, on a public street in close proximity to the yard of the plaintiffs. It was left exposed, unguarded, and unsecured. The child Richard was of that tender age [five years] when childish instincts are probably at their fullest intensity."

Practically no cases are found which hold that a child under six years of age can be charged with negligence. 29 Cyc. 538.

We are responsible for the damage caused by "the things we have in our custody." Civil Code, art. 2317. This rule has been applied to the explosion of a part of an electrical apparatus. *Yates v. Southwestern Brush Electric Light & P. Co.* 40 La. Ann. 467, 4 So. 250. In that case the owner was negligent in not keeping the apparatus in proper condition of repair.

In the case at bar, the defendant, if not negligent, *quoad* the blowing out of the bolt, or the flow of the hot water into the street, was negligent in not keeping a watchman at the gutter until the danger to children had ceased.

The child was painfully but not seriously burned, and recovered in a short time. We assess the damages at \$300.

It is therefore ordered that the judgment below be reversed, and it is now ordered that the plaintiff do have and recover of the defendant the sum of \$300, with legal interest thereon from this date, and costs in both courts.

TEXAS SUPREME COURT.

L. C. HILL, Plff. in Err.,

v.

H. C. HOELDTKE.

(— Tex. —, 142 S. W. 871.)

Fraud — sale of real estate — materiality.

1. The question of fraud in falsely representing to a purchaser of real estate that a lien note on the property had been paid

Note. — Rescission of purchase of real estate as affecting assumption of mortgage or lien thereon.

As to the effect upon the mortgagor's obligation of a modification between the mortgagee and the subsequent grantee, see note to *Fanning v. Murphy*, 4 L.R.A. (N.S.) 666.

There is a direct conflict among the cases

becomes immaterial if, without notice of its continued existence, the parties agree to rescind the contract.

Contract — rescission — undiscovered fraud — reparation.

2. One who, upon contracting to purchase real estate and assume payment of the vendor's liens thereon as part of the consideration, is misled by a false statement that a particular lien note has been paid, cannot avoid liability on his undertaking to pay such liens because of the misrepresentation, if, before he discovers it, the note has been canceled.

Statute of frauds — promise to pay lien notes — necessity of writing.

3. The promise to pay outstanding lien notes as part of the purchase price of real estate is not within the statute of frauds.

on the question as to the effect of a rescission of the purchase of real estate or the contract by the purchaser to assume and pay a mortgage, upon the assumption of the mortgage or lien. This conflict, as a general rule, arises from different views which the courts entertain as to the nature and character of a promise by a grantee of land who assumes and agrees to pay a mortgage thereon. In many jurisdictions such a promise is regarded as primarily for the benefit of the mortgagor, and the right of the mortgagee to claim thereunder is said to be an equitable right and subject to be defeated, prior to acceptance, by a bona fide rescission of the contract by the immediate parties thereto. The same result is reached in other jurisdictions by regarding the contract as a covenant, and applying the rule that any right of action thereon by a third person must be derived from the covenant. On the other hand, in other jurisdictions such a contract is regarded as directly for the benefit of the mortgagee, and, since it is for his benefit, his acceptance is assumed, and the right of the immediate parties by any subsequent agreement to affect the liability of the grantee under this contract is denied. In other jurisdictions the same result is reached, but by application of the rule of practice authorizing the person for whose benefit a promise is made to maintain an action directly against the promisor to enforce the same. This right of action is said to accrue upon the making of the promise, and hence not to be subject to rescission or alteration by any subsequent agreement between the immediate parties thereto.

Rule that contract is not subject to rescission.

In *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340, the doctrine is asserted that the assumption of a mortgage by the purchaser of land inures to the benefit of the mortgagee, for whose benefit it is made, and the right to sue is vested in him by force of the agreement itself, and his express assent to the agreement is not essential to his right to avail himself of its bene-

Vendor and purchaser — acceptance of 'promise to pay vendor's lien — right to rescind.

4. Acceptance by one holding a vendor's lien on real estate, of the promise of a second vendee to satisfy the lien as part of the consideration which he is to pay the original vendee for the property, deprives the parties to the second sale contract of the power to rescind it so as to relieve the second vendee of his liability, without the assent of the original vendor, although such vendee had no notice of the acceptance.

(January 24, 1912.)

ERROR to the Court of Civil Appeals for the Sixth Supreme Judicial District to review a judgment reversing a judg-

fits. The promise vests him with an immediate interest and right to the same extent as though the contract had been directly with him; hence the mortgagor who procures the promise has no legal right to release or discharge the grantee from his liability thereunder to the mortgagee.

This is also the doctrine of *Starbird v. Cranston*, 24 Colo. 20, 48 Pac. 652, which holds that since such an assumption clause in a deed imposes an obligation upon the grantee, primarily for the benefit of the mortgagee, and not for the indemnity of the grantor, by accepting the deed, the grantee becomes effectively bound by the obligation, and an immediate right to enforce it is vested in the mortgagee, and this right cannot be divested without his consent.

Although the case is not in point as to the facts it is asserted in *Fanning v. Murphy*, 126 Wis. 538, 4 L.R.A. (N.S.) 686, 110 Am. St. Rep. 946, 105 N. W. 1056, 5 Ann. Cas. 435, that such an agreement will create a privity enabling the mortgagee to enforce by an action at law the promise made for his benefit, and his status as regards the promisor cannot, after the happening of the transaction creating it, be changed without his consent; and the court cites with approval *Tweeddale v. Tweeddale*, 116 Wis. 517, 61 L.R.A. 509, 96 Am. St. Rep. 1003, 93 N. W. 440, which asserts and applies that doctrine to a case not in point as to the facts.

In *Gifford v. Corrigan*, 117 N. Y. 257, 6 L.R.A. 610, 15 Am. St. Rep. 508, 22 N. E. 756 (cited in the opinion in *HALL v. HOELDTKE*), it is asserted that this equitable right to hold the grantee upon his assumption is created and becomes vested in the holder of the encumbrance when the situation is created out of which equity is born. The court remarks that "if it be possible to adjourn it to a later period, it must certainly attach when the creditor asserts his right to it, and notifies the other party of his intention to rely upon it. As a right, founded upon the equity of the statute, it must have come into being before the foreclosure suit was commenced, for the permission reads, 'any person who is liable to the

ment of the District court for Fannin County in favor of defendant Hill, but against the other defendants, in an action brought to foreclose a vendor's lien, and to recover on a note given for a part of the purchase price of certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. McGrady & McMahon, for plaintiff in error:

The assumption of liability having been on the false assurance that the prior lien was paid, no recovery can be had on it.

Green v. Chandler, 25 Tex. 148; Drury v. Hayden, 111 U. S. 223, 28 L. ed. 408, 4 Sup. Ct. Rep. 405; Merritt v. Robinson, 35 Ark. 483; Woods v. North, 6 Humph. 309, 44 Am. Dec. 312; Topp v. White, 12 Heisk. 165; Crawford v. Keebler, 5 Lea,

547; Kiefer v. Rogers, 19 Minn. 32, Gil. 14.

On petition for rehearing.

Not having been notified of the acceptance of the promise, and having rescinded the trade, and made a contract with McLeary for a valuable consideration, and parted with things of value, and changed his legal status with reference to the property, such release by McLeary operated to release and discharge Hill from any liability upon said notes.

Ward v. Green, 88 Tex. 177, 30 S. W. 864; A. F. Shapleigh Hardware Co. v. Wells, 90 Tex. 110, 59 Am. St. Rep. 783, 37 S. W. 411; Dalton v. Rainey, 75 Tex. 516, 13 S. W. 34; Shepherd v. May, 115 U. S. 505, 29 L. ed. 456, 6 Sup. Ct. Rep.

plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action.' His liability must precede the commencement of the action. It must exist as a condition of his being sued at all; and so, assuming that this action can be maintained against him upon his promise, the right of action must have arisen at once upon the delivery of the deed, or, at the latest, when the promise came to the knowledge of the creditor, and he assented to and adopted it." The court, however, expressly reserves the question whether in the interval between the making of the contract and the acceptance and adoption of it by the mortgagee it was revocable without his assent, and it is pointed out that the case before the court involves only the question whether such a contract is revocable after it has come to the knowledge of the mortgagee and he has assented to it and adopted it as a security for his benefit." For other cases see *infra*, "right to rescind after acceptance."

Rule that contract is subject to rescission prior to actual acceptance by mortgagee.

In New Jersey the rule obtains that a covenant by a grantee of the mortgaged premises to pay the mortgage debt is a contract with his grantee for his indemnity only, and may be released and discharged by him, and the immediate parties to such a contract may abandon it and mutually release each other from its performance, regardless of the encumbrancer's interests, unless the grantor and grantee, with knowledge that he was relying on the contract, suffer the encumbrancer to put himself in a position from which he cannot retreat without loss in case the contract is not performed. *Crowell v. Currier*, 27 N. J. Eq. 152; *Youngs v. Trustees of Public Schools*, 31 N. J. Eq. 290; *O'Neill v. Clark*, 33 N. J. Eq. 444.

This doctrine is thus stated in *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099, "A deed *inter partes* whereby an estate is conveyed, if accepted by the grantee, is in legal effect the deed of 40 L.R.A. (N.S.)

both parties, and a stipulation in such a deed by the grantee, that he will assume and pay a debt secured by a mortgage on the premises for the payment of which the grantor is personally liable, is a contract by the grantee with the grantor to pay the mortgage debt,—especially where the mortgage debt is computed as part of the consideration money for the conveyance. This contract is with the grantor for his indemnity, and the obligation of the grantee to pay the debt inures in equity for the benefit of the mortgagee, and he may enforce it against the grantee to the extent of the unpaid part of the mortgage debt remaining due after the proceeds of the mortgaged estate have been applied thereon. The principle on which the mortgagee in such cases is entitled to enforce the obligation of the grantee is that, by the acceptance of a deed containing an assumption of the mortgage debt, the grantee becomes the principal debtor; the liability of the grantor as between the parties being that of a surety only; and by a well-settled doctrine of equity the mortgagee as a creditor may, by way of subrogation, have the benefit of all collateral obligations which a person standing in the situation of a surety for another holds for his indemnity. The contract, being with the grantor for his indemnity, may be released or discharged by him at any time before the mortgagee proceeds to enforce his rights against the grantee; but if at the time suit is brought by him the obligation of the grantee to pay the mortgage debt is in existence undischarged, his remedy against the grantee is complete."

The doctrine asserted in the New Jersey decisions is also the rule in Kentucky, *Jones v. Higgins*, 80 Ky. 409, and *Colvin v. Newell*, 8 Ky. L. Rep. 959, holding that where the vendee as part consideration for land agrees to pay a mortgage thereon the promise is for the benefit of the mortgagee, but it may be rescinded by the parties who made it at any time before the mortgagee has asserted any rights thereunder.

This is also the rule in Indiana; *Berkshire L. Ins. Co. v. Hutchings*, 100 Ind. 496, holding that while the relation between the

119; Laing v. Byrne, 34 N. J. Eq. 52; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650; O'Neill v. Clark, 33 N. J. Eq. 444; Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494; Loeb v. Willis, 100 N. Y. 231, 3 N. E. 177; Bull v. Titaworth, 29 N. J. Eq. 73.

In the absence of innocent purchaser or estoppel, certainly plaintiff's occupy no better or different position than McLeary.

Belt v. Raguet, 27 Tex. 478; Bass v. Peevey, 22 Tex. 296; Hudson v. Morris, 55 Tex. 606; Dunning v. Leavitt, 85 N. Y. 30, 39 Am. Rep. 617; Ellis v. Harrison, 104 Mo. 270, 16 S. W. 200.

It is not the law that Hill must turn back to McLeary what he had received, before he can defend against fraud.

mortgagor and the grantee who has assumed and agreed to pay the mortgage debt remains unchanged by acceptance by the mortgagee, the relation between the mortgagor and grantee may be terminated by a bona fide rescission of their contract, and the case then becomes the same as if no such contract ever existed, and in such event the right of the mortgagee as against the grantee will no longer exist.

And see Huffman v. Western Mortg. & Invest. Co. 13 Tex. Civ. App. 169, 36 S. W. 306, holding that where the parties to a conveyance of land rescind the conveyance, a contemporaneous release by the grantor of the grantee upon his agreement to pay a mortgage upon the land is valid as against the mortgagee, who has not yet accepted the grantee as his debtor.

On the theory that it is a general rule of chancery that, as to strangers to a contract, parties may at their pleasure abandon it and mutually release each other from its performance, it has been held that the grantee of land is not liable upon his promise to assume and pay a mortgage upon the land, where the grantor and grantee thereafter rescind the conveyance, including such agreement, before any action by the mortgagee has been commenced to foreclose the mortgage. Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609.

Effect of extrinsic circumstances or character of contract.

The assumption by the grantee, of a mortgage upon the land conveyed to him, although incorporated in the deed of conveyance, does not render him liable thereon to the mortgagee where by a collateral agreement the grantor agrees to pay a portion of the mortgage indebtedness, and it is further stipulated that if he fails to do so the grantee shall not be liable upon his contract of assumption, and the grantor in fact makes default in making the payment according to his contract. Flagg v. Munger, 9 N. Y. 483.

On this point, in Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 40 L.R.A. (N.S.)

Culbertson v. Blanchard, 79 Tex. 492, 15 S. W. 700; Jones v. Phillips, 59 Tex. 612; Johnston v. Loop, 2 Tex. 335; Wall v. Clountz, 26 Tex. Civ. App. 348, 63 S. W. 941; Green v. Chandler, 25 Tex. 160; Oppenheimer v. Half, 68 Tex. 412, 4 S. W. 562.

The fraud was sufficient to warrant rescission, although the lien was subsequently removed.

Stewart v. Lester, 49 Hun, 58, 1 N. Y. Supp. 699; MacLaren v. Cochran, 44 Minn. 255, 46 N. W. 408; Harlow v. LaBrum, 151 N. Y. 278, 45 N. E. 859; Stevenson v. Marble, 84 Fed. 23; Buchanan v. Burnett, 102 Tex. 492, 132 Am. St. Rep. 900, 119 S. W. 1141; Thomas v. Coultas, 76 Ill. 493; Merritt v. Robinson, 35 Ark. 483;

694, the court quotes with approval from Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650, that, although "the assumption of the mortgage debt by the subsequent purchaser is absolute and unqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor which is not embodied in the deed." This doctrine seems also to be recognized in Elliott v. Sackett, 108 U. S. 132, 27 L. ed. 678, 2 Sup. Ct. Rep. 375, and Drury v. Hayden, 111 U. S. 223, 28 L. ed. 408, 4 Sup. Ct. Rep. 405, holding that a mortgagee has no greater right than has the mortgagor against the purchaser of the mortgaged premises who agrees to pay the mortgage, and therefore cannot object to the release by the mortgagor of such an agreement when inserted in the deed by mistake. The pertinency of these later decisions is made manifest by the reasoning of the court in Jones v. Higgins, 80 Ky. 409, wherein the court says that the law implies a promise in such a case by the purchaser to pay the mortgage debt, but since there is no actual privity of contract between the latter and the mortgagee the agreement may be canceled by the act of the parties making it before acceptance by the mortgagee for whose benefit it is made; hence there is no reason why the parties making the contract should not be allowed to speak as to its terms, and their action with reference to it before its acceptance is binding upon the mortgagee.

A person assuming the encumbrance may defend an action by the holder of the encumbrance against him, based on the contract of assumption, by showing either an entire or partial failure of consideration of the contract; and he may establish any defense, complete or partial, as against the holder of the encumbrance, which he could have interposed to an action brought by his grantor. Loeb v. Willis, 100 N. Y. 231, 3 N. E. 177.

A grantee is not liable to a mortgagee upon an agreement contained in a deed of the land mortgaged, by which the grantee assumed such mortgage as part of the consideration, where the deed was in fact exe-

McLain v. Parker, 229 Mo. 68, 129 S. W. 504; Navarre Pub. Co. v. Fishburn, 2 Posey, Unrep. Cas. (Tex.) 596; State v. Snyder, 66 Tex. 696, 18 S. W. 106; Terrill v. De-witt, 20 Tex. 260; McCarty v. Moorer, 50 Tex. 287; Clay v. Hart, 49 Tex. 436.

Messrs. J. W. Gross and G. W. Wells for defendants in error:

Plaintiffs having accepted the assumption and promised to pay the notes, the court should have rendered judgment thereon in their favor.

Hill v. Hoeldtke, 54 Tex. Civ. App. 201, 117 S. W. 217; Morrison v. Barry, 10 Tex. Civ. App. 22, 30 S. W. 376; Huffman v. Western Mortg. & Invest. Co. 13 Tex. Civ. App. 169, 36 S. W. 306; Patterson v. Tuttle, — Tex. Civ. App. —, 27 S. W. 758; Mays v. Sanders, — Tex. Civ. App. —, 36 S. W. 108; Wingate v. People's Bldg. & L. Sav. Asso. 15 Tex. Civ. App. 416, 39 S. W. 999; Smith v. Farmers' Loan & T. Co. 21 Tex. Civ. App. 170, 51 S. W. 517; Davis v. Calloway, 30 Ind. 112, 95 Am. Dec. 671; Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494.

cut to secure an advance of money, and was surrendered before recording, and another deed executed with this clause omitted. Phipps v. Goulding, 14 Ohio L. J. 50.

Where a conveyance of land is taken by a purchaser in the name of another person, without the knowledge of the latter, the grantee is not liable upon a covenant in the deed of conveyance, assuming and agreeing to pay a mortgage on the land conveyed, where, upon being informed of the transaction and of this agreement, he repudiated the latter and was released from the covenant by the grantor; and this is true although he did not reconvey the land. Gold v. Ogden, 61 Minn. 83, 63 N. W. 266.

A release by the grantor without consideration and merely for the purpose of protecting the grantee against his liability to the holder of the encumbrance under his contract to assume the same is invalid as against the encumbrancer. Trustees of Public Schools v. Anderson, 30 N. J. Eq. 366; Willard v. Worsham, 76 Va. 392. And this is especially true after innocent third persons have acquired the indebtedness, relying upon the grantee's assumption of liability. Clark v. Fisk, 9 Utah, 94, 33 Pac. 248.

Right to rescind after acceptance.

It is clear that after the mortgagee has accepted as his debtor a grantee of the mortgaged premises who has assumed and agreed to pay the mortgage, the latter cannot be released by the grantor from his liability to the mortgagee under his contract of assumption. Betts v. Drew, Fed. Cas. No. 1,372; Fleischauer v. Doellner, 58 How. Pr. 190.

This is also the doctrine in New York L. Ins. Co. v. Aitkin, 125 N. Y. 675, 26 N. E. 40 L.R.A. (N.S.)

The plaintiff Hill, having failed to return, or offer to return, the entire consideration received by him under the contract which he seeks to rescind and to avoid, is not entitled to such relief.

Folta v. Ferguson, 77 Tex. 301, 13 S. W. 1037; Chaney v. Coleman, 77 Tex. 100, 13 S. W. 850; 9 Cyc. 437, 438; 6 Cyc. 306.

The representations are immaterial, and afford no sufficient ground for avoiding the contract, because the plaintiff in error sustained no pecuniary injury or damage therefrom.

Moore v. Cross, 87 Tex. 561, 29 S. W. 1051; Lemmon v. Hanley, 28 Tex. 226; 9 Cyc. 431; Bomar v. Rosser, 131 Ala. 215, 31 So. 430.

Dibrell, J., delivered the opinion of the court:

H. C. Hoeldtke filed suit January 20, 1908, in the district court of Fannin county against F. W. Horstman, B. S. McLeary, L. C. Hill, and J. M. Leach, and alleged that on or about March 13, 1905, the said F. W. Horstman executed and delivered to

732, where the covenant of assumption had been accepted by the holder of the encumbrance assumed, prior to any attempt by the vendor and the purchaser by contract to release the purchaser from liability because of such assumption. And it was held that such release was not effective as against the holder of the encumbrance assumed. To the same effect are Gifford v. Corrigan, 117 N. Y. 257, 6 L.R.A. 610, 15 Am. St. Rep. 508, 22 N. E. 756; Hartley v. Harrison, 24 N. Y. 170; Ranney v. McMullen, 5 Abb. N. C. 246; Whiting v. Gearty, 14 Hun, 498.

And it would seem that it is unnecessary that the mortgagee give to the promisor notice of acceptance. HILL v. HOELDTKE, holding that acceptance by a mortgagee of a contract to assume and pay the mortgage by a purchaser of the land mortgaged precludes a subsequent rescission of the entire transaction, including the contract of assumption, by the immediate parties thereto, although notice of the acceptance is not given the promisor by the mortgagee.

It is to be noted that HILL v. HOELDTKE directly reverses the decision of the court of civil appeals (128 S. W. 642), and also in effect overrules the decision of that court when the case was presented to it on demurrer. 54 Tex. Civ. App. 201, 117 S. W. 217.

The decision is in line with the doctrine of Morrison v. Barry, 10 Tex. Civ. App. 22, 36 S. W. 376, holding that the vendor of real estate is not entitled to rescind a sale thereof where, as part consideration of the sale, the purchaser has assumed and agreed to pay an encumbrance on the property, unless it also appears that this contract of assumption has not been accepted by the holder of the encumbrance.

A. G. S.

plaintiff a note for \$690, payable January 1, 1909, with interest at 8 per cent, payable annually, and providing for maturity of principal upon failure to pay the annual interest. The note sued on was given by the defendant Horstman to plaintiff in lieu of four notes aggregating \$690, including \$40 interest, two of which notes for \$175 each had been previously given by one J. J. Dutton to D. E. Taylor and two for \$150 each by F. W. Horstman to J. J. Dutton for the purchase price of 57 acres of land in Fannin county, against which the vendor's lien was retained to secure the payment of said notes. J. J. Dutton conveyed the 57 acres of land to the defendant Horstman on or about December 9, 1902, and Horstman, as indicated above, assumed the payment of the two notes for \$175 each due by Dutton to Taylor, which were a charge upon the 57 acres of land, and, in addition to assuming the payment of said two notes, executed to Dutton two other notes for \$150 each, the assumed payment, and the two notes executed aggregated \$650 principal. On November 6, 1905, Horstman conveyed the 57 acres of land to B. S. McLeary and wife, and B. S. McLeary assumed the payment of the S. W. Horstman note for \$690, which was due on or before January 1, 1909. McLeary also gave to Horstman as a part of the consideration for said land his two certain notes to operate as a second lien on the land, one for \$140 due December 1, 1907, and one for \$195, due December 1, 1908. By regular transfer the note for \$195 given by McLeary to Horstman became the property of the defendant J. M. Leach, who filed his cross action setting up the ownership of such note. On October 16, 1906, the defendant B. S. McLeary conveyed the 57 acres of land to the defendant L. C. Hill, and, as a part of the consideration for the land, Hill assumed the payment to plaintiff of the note for \$690 that had been given plaintiff by S. W. Horstman and the payment of which had been assumed by B. S. McLeary. Hill also assumed the payment of the note given by McLeary to Horstman for \$195, afterwards owned by the defendant Leach. Shortly after McLeary sold the 57 acres of land to Hill, and Hill assumed the payment of plaintiff's note, plaintiff accepted such assumption, which fact, however, was not known to the defendant Hill. On or about July 11, 1907, the defendants B. S. McLeary and L. C. Hill entered into an agreement whereby the sale of the 57 acres of land by McLeary to Hill on October 16, 1906, was rescinded, and a deed was made by Hill to McLeary, a part of the consideration for such conveyance being the assumption of the payment of the 40 L.R.A. (N.S.)

\$690 note to plaintiff by said B. S. McLeary. To this contract and agreement plaintiff was not in any manner privy.

At the time the defendant Hill purchased the land of the defendant McLeary, there was outstanding against the land, in addition to the note for \$690 due plaintiff and the note for \$195 due the defendant Leach, a note for \$140 due December 1, 1907, and which was a second lien on the land. McLeary represented at the time the trade was made with Hill that this note had been paid. As a matter of fact, however, said note had not been paid at the time the trade was made, and was then a subsisting lien against the land, but was, within a week or ten days thereafter, returned to B. S. McLeary by his brother Earnest McLeary, the owner thereof, for cancelation, and has ever since been in the possession of the defendant McLeary. At the time the defendant Hill reconveyed the land to McLeary he was not aware of the facts in regard to the status of the \$140 note on the day of said purchase, and hence his reconveyance to McLeary of the land was not because of any fraud supposed to have been practised upon him by McLeary. The plea of fraud on the part of the defendant Hill was not made until February 14, 1908, a short time after he learned the facts in regard to the \$140 note.

The plaintiff on the trial sought judgment against both McLeary and Hill on the note for \$690, and a foreclosure of the vendor's lien on the 57 acres of land, which had been retained in all the notes, and defendant Leach sought to recover against the same parties on his note for \$195, with foreclosure of vendor's lien. The defendant Hill sought relief against a personal judgment upon two grounds: First, because he claimed that by agreement with McLeary, his vendor, the land was reconveyed to McLeary, and McLeary assumed the payment of said notes and released him; and, second, if he was not released by such agreement and reconveyance, he was released on account of fraud which was practised on him by McLeary at the time he purchased the land on October 16, 1906, in that McLeary represented that the note for \$140, which was a charge on the land in addition to those assumed by Hill, had been paid, when, as a matter of fact, at that time it had not been paid, which fact was not known to defendant Hill until a short time before February 14, 1908.

Judgment was rendered in favor of plaintiff Hoeldtke and the defendant Leach for their notes, interest, and attorneys' fees against the defendants Horstman and McLeary, with foreclosure of the vendors' lien on the land as against all the defendants.

No personal judgment was rendered against the defendant Hill. Upon appeal the court of civil appeals reversed and rendered judgment against Horstman, McLeary, and Hill on the notes, with foreclosure of vendors' lien.

The statement of the case as made by the pleadings, and the findings of fact by the court of civil appeals, present but one issuable question of law for determination by this court. That question is whether the promise of a vendee of land to his vendor to pay the debt of such vendor to his creditor who holds a lien on the land to secure such debt can be revoked by the vendee and vendor by an agreement to which the creditor or mortgagor is not privy, after the creditor or mortgagor has accepted the assumption and promise of such vendee to pay his debt.

Before entering upon a discussion of this question, we will dispose of the question of fraud so earnestly and ably presented by counsel as affording the defendant Hill a defense against a personal judgment in favor of plaintiff and defendant Leach.

The finding of the jury upon special issues submitted to them by the court is to the effect that at the time the defendant Hill purchased the 57 acres of land of McLeary he was made to believe that the note for \$140, a charge upon the land purchased, had been paid, and that Hill was influenced by that statement in making the purchase. We agree with the court of civil appeals in its conclusion that a finding upon that issue is immaterial, as the other findings of fact eliminate from the case the question of fraud.

There was no rescission or attempted rescission of the purchase by Hill of the 57 acres of land from McLeary on account of the fraud or misrepresentation that had been made him by McLeary in respect to the payment of the \$140 note. The pleadings of Hill disclose that he agreed with McLeary on July 11, 1907, to convey back the land and revoke his obligation to pay the debt of McLeary theretofore assumed by Hill, and that he knew nothing of the status of the \$140 note at the date of his conveyance to McLeary, and only learned in February, 1908, the note was unpaid at the time he made his purchase. Hence he could not have possibly been influenced in July, 1907, by any fraud that McLeary had practised upon him at the time of his purchase of the land, for he had not then discovered such fraud. His rescission of the contract of sale and attempted revocation of his obligation to pay plaintiff the debt due by McLeary to plaintiff was superinduced by other causes than McLeary's fraud.

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It was shown, practically without contradiction, that within a few days after Hill purchased the land of McLeary the note for \$140, the subject of the fraud, was delivered to McLeary for cancellation, and at the time of trial was tendered into court, together with a formal release of the lien on the land securing the payment of the note. If Hill had discovered the misrepresentation made him by McLeary before McLeary secured the note for cancellation, and had then manifested his intention to rescind the contract, we are not prepared to say that he could not have done so and relieved himself of his obligation to plaintiff arising out of the assumption to pay the debt of McLeary. But, in view of the facts of this case, in what respect was Hill injured or any right of his impaired? He had, as shown by his pleading, reconveyed the land to McLeary, and thereby rendered it impossible for him to be affected in any particular by the \$140 note, whether paid or unpaid. He had never assumed its payment, and rested under no obligation by reason of said note after he had conveyed the land to McLeary. If the note was unpaid, so far as he was concerned, it was a charge only against the land, in which he had no further interest. The mere fact that there might have been a misrepresentation amounting to fraud on the part of McLeary at the time of the purchase of the land by Hill would be no ground for revoking the obligation of Hill on the assumption and promise to pay plaintiff's note, unless such fraud was an inducing cause of Hill's purchase of the land, or in some way caused him to seek and obtain the rescission of his purchase from McLeary. Where a fraud has been committed in the procurement of the sale of land, and before its discovery by the defrauded party full reparation of all injury has been made, or the probable consequential injury or prejudice to the rights of the party defrauded have been fully arrested, we do not understand the law to be that such an act of fraud will vitiate and revoke the purchase. At the time the fraud was discovered the intended or probable consequential injury had been cured and averted, and no right of Hill's had been impaired or could suffer by reason of the fraud that may have been practised by McLeary. The writ of error seems to have been granted in this case under the impression that the fraud was discovered and contract rescinded by Hill before the \$140 note was secured by McLeary for cancellation, but the record does not support such conclusion. The fact is there was never any rescission or attempted rescission of the contract of purchase by Hill on ac-

count of the alleged fraud. So that we think the question whether the obligation of Hill to pay the note due plaintiff could be revoked by Hill and McLeary in a transaction between them to which plaintiff was not a party is to be determined independent of the question of fraud. This was the view taken by the majority opinion of the court of civil appeals. *Hoeldtke v. Horstman*, 128 S. W. 642.

The promise of Hill, being to pay a debt he had incurred to McLeary to plaintiff in discharge of the debt due plaintiff by McLeary, was not within the statute of frauds. The plaintiff accepted the promise of Hill to pay said note, although Hill seems to have had no notice of this acceptance. When these facts concurred, the obligation of Hill to pay plaintiff his note was as binding as if Hill had executed and delivered plaintiff his written obligation promising to pay same, and could no more be revoked by any subsequent agreement between Hill and McLeary without the consent of plaintiff than could any other obligation of Hill be revoked independent of the assent of the payee whose rights had been established by the concurrence of a promise to pay, a moving consideration, and an acceptance of such obligation. The relation thus established is purely contractual. McLeary was indebted to Hoeldtke upon the note he had assumed, and Hill was indebted to McLeary in a like sum as a part consideration for the land, and in obligating himself to pay Hoeldtke he was but obligating himself to pay a debt he owed to McLeary, but to McLeary's creditor, Hoeldtke, and, when Hoeldtke agreed with McLeary to accept Hill's promise, Hill became the principal debtor to Hoeldtke and McLeary surety for the debt. This arrangement embraced all the elements of a binding contract. There was a valuable consideration and mutuality of obligation. Hill was no longer a debtor of McLeary, but of Hoeldtke. McLeary had no cause of action against Hill, except in the event that Hill failed to pay Hoeldtke, and then only upon the principle that the surety may recover from the debtor whose debt he has been compelled to pay. "It is not necessary that the holder of the mortgage should notify the purchaser who has assumed the mortgage of his acceptance of the promise to pay the debt." 1 Jones, *Mortg.* § 752. The theory that the assumption of the debt of the grantor's creditor by the grantee is nothing more than an agreement of indemnity against the mortgage debt, and may be revoked by a reconveyance of the land, does not seem to have ever been recognized by any ruling of any court in this state that we are aware of. 40 L.R.A. (N.S.)

We doubt if such a rule obtains in any jurisdiction in the United States, where the creditor has accepted the substituted obligor, as in this case. This question seems to have been determined by the supreme court of this state in the case of *Spann v. Cochran*, 63 Tex. 240. In that case Cochran & Ewing bought of Watson & Lurue a printing press outfit, and assumed the payment of a note for \$800 due Spann, which was secured by a chattel mortgage on the property so purchased. Payment seems to have been resisted upon the theory that the promise was to pay the debt of another, and therefore within the statute of frauds, and because there was no privity of contract, and because there was an abandonment of the property by Cochran & Ewing. It appears from the brief statement of the case that Spann was not a party to the contract between Cochran & Ewing on the one hand and Watson & Lurue on the other, from which it may be inferred there was no acceptance on the part of Spann, except as may be inferred from his suit against both parties. The trial court refused to enter a personal judgment against Cochran & Ewing, but the supreme court in reversing that case directed that a personal judgment should be rendered against both parties, and further directed that, in the event that Watson & Lurue paid the judgment, they should have execution over against Cochran & Ewing for such an amount. From this ruling it clearly appears that the supreme court held and regarded that Cochran & Ewing, who had assumed to pay the debt of Watson & Lurue to Spann, became the principal debtors by their assumption, and their grantors became the sureties of the vendees. *Brandt, Suretyship & Guaranty*, § 208. The opinion was rendered by Judge Stayton, and he has established a principle of law applicable to the case at bar, which case is analogous to that case. With reference to the nature of the contract he said: "It is believed, however, that such an agreement between a debtor and a third person, made upon valuable consideration, gives to the creditor a cause of action on which he may sue and recover from the person who has so contracted to pay to him a debt originally due only by the person to whom the promise is made. . . . We are of the opinion that, under the facts of this case, the action may be maintained against Cochran & Ewing, not only for the purpose of foreclosing the chattel mortgage, but also for the purpose of enforcing from them the payment of the debt due to Spann; and this as a personal obligation."

In the *Spann Case*, *supra*, there does not appear to have been an acceptance of the

assumpsit of the grantees to pay the creditor's debt, and, notwithstanding the grantees had abandoned the property, they were held to be personally responsible on their promise. In this respect the case at bar is much stronger, as the findings show an acceptance by Hoeldtke of the grantee's promise to pay, and upon greater reason should an abandonment or reconveyance of the property not defeat the right of plaintiff to a personal judgment.

As bearing upon the question under discussion we refer to the following cases from which numerous authorities may be gathered and the subject pursued without limit: *Spann v. Cochran*, supra, and cases there cited; *Huffman v. Western Mortg. & Invest. Co.* 13 Tex. Civ. App. 169, 36 S. W. 306; *Morrison v. Barry*, 10 Tex. Civ. App. 22, 30 S. W. 376; *Hoeldtke v. Horstman*, — Tex. Civ. App. —, 128 S. W. 642, and cases there cited; *Gifford v. Corrigan*, 117 N. Y. 257, 6 L.R.A. 610, 15 Am. St. Rep. 508, 22 N. E. 756; *Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494. Following the case just referred to comes that of *Huffman v. Western Mortg. & Invest. Co.* supra, decided by the court of civil appeals, where the doctrine discussed in this opinion is fully sustained as follows: "Where, however, there has been an acceptance upon the part of the creditor, then a release by the original promisor does not affect the creditor's right to recover from the party assuming the debt." To a like effect is the case of *Morrison v. Barry*, supra, decided by the court of civil appeals, where it is distinctly held that, upon an acceptance of the assumpsit, the promise becomes irrevocable. In that case it is held that a failure of the creditor to accept the assumpsit or to take some steps to hold the promisor liable upon his promise would leave it within the power of the vendor by an act of rescission of the sale to revoke the promise of the vendee to the creditor. Since the case at bar is based upon a different state of facts, we are not called upon to decide the question whether or not an acceptance on the part of the creditor is necessary to prevent a revocation of the assumpsit, and we do not decide that question. It will not be amiss, however, to suggest that the ruling in the case of *Morrison v. Barry*, above referred to, seems to be in conflict with that in the case of *Spann v. Cochran*, supra.

A question very similar to that under investigation was before the New York court of appeals in the case of *Gifford v. Corrigan*, 117 N. Y. 257, 6 L.R.A. 610, 15 Am. St. Rep. 508, 22 N. E. 756, in which Judge Finch said: "Is this release, thus executed, a defense to this action? I shall not under-

take to decide, if, indeed, the question is open, . . . whether in the interval between the making of the contract and the acceptance and adoption of it by the mortgagee it was or was not revocable without his assent. However that may be, the only inquiry now presented is whether it is so revocable after it has come to the knowledge of the creditor, and he has assented to it, and adopted it as a security, for his own benefit. My judgment leads me to answer that question in the negative." Judge Hodges in speaking for the majority of the court of civil appeals in this case has so ably and elaborately presented the issues that we desire to quote from his opinion at some length as expressive of our views, as follows: "So far as our investigation has been extended, all of the cases where this question has been involved concede that the promise of the grantee becomes irrevocable when the mortgagee has in some manner acted upon it, with the exception of two, one in California and the other in New Jersey. *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Laing v. Byrne*, 34 N. J. Eq. 52. These, however, have become so isolated by the subsequent trend of American adjudications that they may now be regarded as being without weight as judicial authority upon this question. Certainly it may be said that they are at present almost, if not entirely, alone in espousing the doctrine which distinguishes them from the great body of juridical opinions. In those cases where it is held if the mortgagee has in some manner acted upon the promise of the grantee that the liability of the latter becomes fixed, it is not claimed that this action must be such as would create an estoppel against the grantee. It seems to be sufficient if it is such as to evince an acceptance or an adoption of the promise by the mortgagee. If this be the true view, then it follows irresistibly that the grantee cannot thereafter relieve himself of his assumed obligation without the consent of the creditor whose assent fixed his status. This would seem to be in accord with the general principles governing the right of contracting parties. When Hill purchased this land from McLeary, he, in effect, held back that portion of the consideration which was due to Hoeldtke and Leach from the purchase price. This he undertook to pay to them, or to the holders of the notes, not to benefit McLeary, but in order to discharge an encumbrance against the property which he had purchased, and as a part of the consideration. We do not think it was essential, in order to fix the liability of Hill, that he should have received actual notice of the plaintiffs' assent to or acceptance of his promise made for

their benefit. When he accepted the deed from McLeary containing the recitation of his assumption of those outstanding obligations, it was an unconditional promise upon his part to pay those notes according to their terms. It was not a mere offer by him to make a contract, but an absolute contractual undertaking." [128 S. W. 642.]

Upon a careful consideration of the questions presented, we find no reason why the ruling of the court of Civil Appeals in this case, as expressed in the opinion of the majority of that court, should be disturbed, and the judgment of the Court of Civil Appeals will be affirmed, and it is so ordered.

Petition for rehearing denied.

IDAHO SUPREME COURT.

H. H. BARTON, Appt.,

v.

E. M. ROGERS et al., Resp'ts.

(21 Idaho, 609, 123 Pac. 478.)

Libel — report of school officers.

1. Where the board of trustees of an independent school district enter orders and pass resolutions with reference to the government and conduct of the school and the duties of the teachers and superintendent, and such orders and resolutions clearly fall within the powers and authority of the school board under the law, the motives and purposes of such board cannot be put in issue in an action for damages under the charge of civil libel.

Same — privilege — malice.

2. A school board cannot be protected in the use of libelous language or charges against a teacher under the pretext of discharging official duties; but so long as their actions are clearly within the purview of the law and such as they have an unquestionable right to perform, and they use lawful means in the performance of the act, they cannot be held liable in an action for libel, even though it be charged that they performed the act in pursuance of a conspiracy among their members or through a malicious motive.

Same — conspiracy — lawful act.

3. In contemplation of law, there can be

Headnotes by AILSHIE, J.

Note. — As to privilege of school officers in reporting to school authorities upon the character of a teacher, see note to *Tanner v. Stevenson*, 30 L.R.A. (N.S.) 200. Generally, as to the privileged character of complaints to public officer against subordinate, including cases with reference to teachers, see note to *Jozsa v. Moroney*, 27 L.R.A. (N.S.) 1041.

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no malice or conspiracy where the thing to be done is lawful and the means employed in doing the thing are also lawful.

Same — intent.

4. The courts must judge the intent a man has in doing the act, by the means he employs and the thing to be accomplished, and, if they all be lawful, courts cannot impute malice or unlawful motives to the actor.

Pleading — sufficiency.

5. The complaint in this case examined and considered, and held that it fails to state a cause of action.

(April 4, 1912.)

APPEAL by plaintiff from a judgment of the District Court for Kootenai County sustaining a demurrer to the complaint in an action brought to recover damages for an alleged libel. Affirmed.

The facts are stated in the opinion.

Messrs. Thomas H. Mullen and W. H. Plummer for appellant.

Messrs. Elder & Elder and R. T. Morgan, for respondents:

The charge that acts were done in pursuance of a conspiracy does not change the nature of the action.

Boston v. Simmons, 150 Mass. 461, 6 L.R.A. 629, 15 Am. St. Rep. 230, 23 N. E. 210; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L.R.A. 184, 20 Atl. 485; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; *McHenry v. Sneer*, 56 Iowa, 649, 10 N. W. 234; *Cooley, Torts*, pp. 189, 279; *Hundley v. Louisville & N. R. Co.* 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; *Hebner v. Great Northern R. Co.* 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128; *New York, C. & St. L. R. Co. v. Schaffer*, 65 Ohio St. 414, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036; *McDonald v. Illinois C. R. Co.* 187 Ill. 529, 58 N. E. 463; *Schulten v. Bavarian Brewing Co.* 96 Ky. 224, 28 S. W. 504; *Dolz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Macauley Bros. v. Tierney*, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *Boasberg v. Walker*, 111 Minn. 445, 127 N. W. 467; *Dunshee v. Standard Oil Co.* — Iowa, —, 126 N. W. 343; *Cohen v. Nathaniel Fisher & Co.* 135 App. Div. 238, 120 N. Y. Supp. 546; *National Fireproofing Co. v. Mason Builders' Assn.* 26 L.R.A. (N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; *Atchison, T. & S. F. R. Co. v. Brown*, 80 Kan. 312, 23 L.R.A. (N.S.) 247, 133 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346; *Levine v. Klein*, 65 Misc. 498, 120 N. Y. Supp. 196; *Von Au v. Magenheimer*, 196 N. Y. 510, 89 N. E. 1114; *Jones v. Monson*, 137 Wis. 478, 129 Am. St. Rep. 1082, 119 N. W. 179; *Green v. Bennett*, — Tex. Civ. App. —,

110 S. W. 108; Rowan v. Butler, 171 Ind. 28, 85 N. E. 714.

Allshie, J., delivered the opinion of the court:

This is an action for libel. The plaintiff alleges:

That for many years prior to August 1, 1909, he had been engaged in performing the duties incident to the profession of teaching and superintending public schools. That he had earned a lucrative salary at his profession. That for some four years continuously previous thereto he had been employed by the board of trustees of independent school district No. 1 of Kootenai county as superintendent of the schools of that district. That during the entire term he had been so employed he had been diligent in his profession, and rendered efficient and satisfactory service to the board and the school district. That at all the times covered by the acts complained of, the defendants were the members of the board of trustees of independent school district No. 1 of Kootenai county. That prior to the 6th day of April, 1909, and while the plaintiff was so engaged and employed as superintendent of the schools of independent school district No. 1 of Kootenai county, he became a candidate for the office of city clerk of the city of Cœur d'Alene, to be voted upon at the election held in the city of Cœur d'Alene on the 6th day of April, 1909. That the defendants were during that time actively supporting and using every possible effort to procure the election of another candidate to the office of city clerk; and that the defendants, as members of the board of trustees, used every effort possible to dissuade and prevent plaintiff from becoming a candidate or engaging in the campaign for election to such office, and that they "unlawfully conspired together and acted with each other in doing everything possible to humiliate, degrade, and injure the plaintiff in said campaign, and attempted in various ways to compel plaintiff to withdraw his name as candidate on said ticket for said city clerk, and, failing in this, said defendants promulgated and carried on a system of acts and doings for the purpose of humiliating, mortifying, and degrading plaintiff publicly, and injuring him in the estimation of the public, and in his reputation and standing in his profession, and as a citizen and resident of the community." That defendants, failing to prevent the candidacy of plaintiff, did thereafter "maliciously, unlawfully, knowingly, and for the 40 L.R.A.(N.S.)

purpose of slandering and libeling plaintiff, and without any reason therefor, and without any foundation, right, or motive other than malice and revenge, cause the following resolutions and orders to be adopted, passed, and made of record in the books and records of said school district of which defendants were members:"

Cœur d'Alene, April 13, 1909.

H. H. Barton, Sup't Schools,

Dear Sir:—

You are hereby notified that the following resolution was passed unanimously by the board at its meeting April 12, 1909, and you will govern yourself accordingly. Resolution as follows: On motion duly made and carried unanimously it was ordered that the superintendent be required to be in his office from 8:30 to 12 o'clock in the forenoon and from 1 to 5 o'clock in the afternoon, except when otherwise ordered by written notice from the board. Signed by the clerk thereof; and that he issue no order therefrom except on written authority of the board.

Respectfully,

[Signed] F. D. Winn,
A Clerk.

Order No. 1.

Cœur d'Alene, April 13, 1909.

H. H. Barton, Sup't Schools,

Dear Sir:—

You will require the grade and high school teachers to prepare the examination papers for their pupils, examine and grade the same, and deliver papers when completed to Mr. A. C. Davis.

By order of the board:

[Signed] F. D. Winn,
A Clerk.

Order No. 2. Cœur d'Alene Public Schools,
Independent District No. 1.

Officers of the Board: J. C. White, Chairman. F. D. Winn, Clerk. Wm. Dollar, Treasurer. W. A. Andrew, Ass't Clerk. H. H. Barton, Sup't.
Cœur d'Alene, Idaho.

Cœur d'Alene, Idaho,

April 15, 1909.

H. H. Barton, Sup't,

Dear Sir:—

By order of the board you are required to attend a meeting of the board at the clerk's office this morning, April 15, immediately on receipt of this notice.

[Signed] F. D. Winn,
Clerk.

Order No. 3. Cœur d'Alene Public Schools, Independent District No. 1.

Officers of the Board: J. C. White, Chairman. F. D. Winn, Clerk. Wm. Dollar, Treasurer. W. A. Andrew, Ass't Clerk. H. H. Barton, Sup't. Cœur d'Alene, Idaho.

Cœur d'Alene, Idaho,
April 15, 1909.

Sup't Barton:—

You are hereby directed to take all necessary steps to complete a suitable exhibition of school work for educational exhibit at the Alaska Yukon Fair, and to provide, arrange, and carry out suitable programme for Arbor Day.

By order of the board.

[Signed] F. D. Winn,
A Clerk.

Order No. 4.

Cœur d'Alene, Idaho, April 16, 1909.

H. H. Barton, Sup't Schools,

Dear Sir:—

You will prepare, for the use of the board, a statement showing the yearly increase in the high school since its foundation, make an estimate therefrom of probable future requirements, and incorporate such other matter therein as will enable the board to place the necessity of a new high school fairly before the district.

By order of the board.

[Signed] F. D. Winn,
A Clerk.

Order No. 5.

Cœur d'Alene, April 18, 1909.

H. H. Barton, Sup't Schools,

Dear Sir:—

You will draw requisition on Mr. Andrew for such supplementary readers and supplies for the different schools as their necessities require; limited of course by the supply on hand.

By order of the board.

[Signed] F. D. Winn,
A Clerk.

Order No. 6.

Cœur d'Alene, April 19, 1909.

H. H. Barton, Sup't Schools,

Dear Sir:—

You will issue orders to the proper teachers, requiring the admission of all new pupils applying for admission in such schools as may best accommodate them.

By order of the board.

[Signed] F. D. Winn,
A Clerk.

Order No. 7.

Cœur d'Alene, April 21, 1909.

H. H. Barton, Sup't Schools,

Dear Sir:—

You are hereby notified that the following action was taken by the board at a 40 L.R.A.(N.S.)

special meeting held April 20, 1909: Whereas Prof. Barton has expressed a desire to work in harmony with the board for the balance of his term: Therefore be it resolved that order issued April 13, relative to the duties of Sup't Barton, be and the same is hereby suspended upon the condition that Sup't Barton act in harmony with the board for the upbuilding of the schools, and the strengthening of the hands of the teachers, and that in every honorable way he use his influence to that end.

By order of the board.

[Signed] F. D. Winn,
A Clerk.

Order No. 8. Cœur d'Alene Public Schools, Independent District No. 1.

Officers of the Board: J. C. White, Chairman. F. D. Winn, Clerk. Wm. Dollar, Treasurer. W. A. Andrew, Ass't Clerk. H. H. Barton, Sup't. Cœur d'Alene, Idaho,

May 20, 1909.

Mr. H. H. Barton, Sup't:—

It is the order of the school board that the chairman present the diplomas to the members of the graduating class at the commencement exercises this evening.

[Signed] J. C. White,
Chairman.

Order No. 9. Cœur d'Alene Public Schools, Independent District No. 1.

Officers of the Board: J. C. White, Chairman. F. D. Winn, Clerk. Wm. Dollar, Treasurer. W. A. Andrew, Ass't Clerk. H. H. Barton, Sup't. Cœur d'Alene, Idaho,

June 21, 1909.

Mr. H. H. Barton:

You will deliver to the undersigned all property of Ind. School District No. 1, Kootenai Co., Idaho, that may be in your possession.

By order of the board.

[Signed] F. D. Winn,
A Clerk.

That defendants well knew, when they passed these resolutions, that there was no reason or cause therefor, and that they knew at the time of passing such resolutions, that to do so would injure, degrade, and humiliate the plaintiff and would prevent his procuring further employment in his profession, and would result in destroying his profession and leaving him without a profession or means of employment or procuring a livelihood, and plaintiff claimed damages in the sum of \$30,000. The trial court sustained a demurrer to the com-

plaint on the ground that the complaint failed to state a cause of action. Judgment was thereupon entered, and plaintiff appealed.

The only question presented on this appeal is the sufficiency of the complaint to state a cause of action. The foregoing resolutions and communications comprise all of the acts and things charged against the defendants as constituting the injury, and cause for the damages sought herein. Under subdivision 11 of § 658, Rev. Codes (the same as subdivision 11 of § 129 of the school law of 1911, p. 532), the board of trustees of an independent school district is authorized "to require teachers to conform to the laws of the state and regulations of the school board." Subdivision 1 of the same section authorizes the board "to make such by-laws for the government of the schools as they may deem expedient, not inconsistent with the laws of the state;" and subdivision 2 authorizes them to "employ or discharge teachers." They may discharge a teacher without cause. *Ewin v. Independent School Dist. No. 8*, 10 Idaho, 102, 77 Pac. 222. It is admitted that the defendants made and adopted the resolutions of which the appellant complains while acting "as a board of school trustees," and that they had the power and authority to make these orders and resolutions. They all had reference to the government of the school and the duties of the appellant as superintendent thereof. The appellant contends, however, that no reason or cause existed for the passage of such orders and resolutions; and that the necessities of the occasion or requirements of the situation did not demand this action; and that in fact it was not done out of any solicitude or necessity for the schools, but out of malice and ill-will, and for the purpose and motives of revenge alone. This proposition brings us face to face with the *quære*: Can the motives and purposes of a school board when performing an official act clearly within their powers under the law be put in issue in an action for damages under the charge of a civil libel? The answer must inevitably be in the negative.

They have no right to employ libelous language in the performance of their official duties, and cannot shield themselves behind their official character where they have overstepped their authority or exercised official powers in an unlawful manner, but so long as their acts are clearly within the purview of the statute and are such as they have an unquestioned right to perform, they should not be subject to an action for libel on the charge of conspiracy or malice in doing the act. *Henry v. Mob-*

erly, 6 Ind. App. 490, 33 N. E. 981; *Cooley, Torts*, 3d ed. p. 431.

It is quite generally held that what a person may lawfully do may be done with or without malice. *Carpenter v. Grimes Pass Placer Min. Co.* 19 Idaho, 384, 114 Pac. 42; *McHenry v. Snee*, 56 Iowa, 649, 10 N. W. 234; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; note 9, p. 727 of 62 L.R.A.; *Macauley Bros. v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, and notes, 33 Atl. 1, 37 L.R.A. 455. In other words, there can be no legal malice in contemplation of law where the thing done is lawful and the means employed are lawful.

Courts must judge the intent a man has in doing an act by the means he employs and the thing to be accomplished, and if they all be lawful, courts cannot impute malicious or unlawful motives to the actor. Many acts of a school board or other public body or board may indirectly injure someone, but such injury must be borne as an incident which attaches to the public services and dealings with such officers or public agencies. A school board may dismiss a teacher, and the result will be necessarily injurious to the teacher; but no action for damages will lie. City authorities might dismiss a police officer while he is a candidate for an elective office or an applicant for some more lucrative position, and thereby do him irreparable injury; yet the city council would not be liable in damages. These things are hazards incident to the employment, and such public employees must take their chances on such contingencies.

The demurrer was properly sustained, and the judgment is affirmed. Costs awarded in favor of respondents.

Stewart, Ch. J., and Sullivan, J., concur.

IOWA SUPREME COURT.

C. W. BRADBURY

v.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Appt.

(149 Iowa, 51, 128 N. W. 1.)

Trial — instruction — request.

1. A request for special instructions is necessary to require the court, in an action by a servant to hold his master liable for

Note. — Power of state court to enforce right under Federal employer's liability act.

It may now be considered as settled that state courts of general jurisdiction not only may, but must, enforce a right arising un-

personal injuries alleged to have been caused by a protruding bolt, to submit to the jury the question of the knowledge of the servant based on the custom of business, where it has instructed that if plaintiff knew, or in the exercise of reasonable diligence might have known, of the bolt and the danger therefrom, he could not recover.

Courts — jurisdiction — act of Congress — state authority.

2. State courts may, on the ground of comity, take jurisdiction of actions by employees to recover damages from railroad companies for personal injuries arising under the employer's liability act of Congress relating to interstate commerce, of April 22, 1908.

Pleading — amendment — motion to strike — discretion.

3. There is no abuse of discretion in sustaining a motion to strike an amendment

of the answer, filed after all the evidence is adduced, to make the pleading conform thereto.

Evidence — exclusion — variance from pleadings.

4. There is no error in the exclusion of evidence, in an action by an employee to hold a railroad company liable for personal injuries to him, that the injury was received in the transaction of interstate commerce, where there is nothing in the pleadings to indicate that such was the fact.

Damages — loss of arm — excess.

5. A recovery of \$15,000 as damages for loss of an arm by a railroad trackman, twenty-four years old, who was earning from \$80 to \$85 per month, was reduced to \$12,000.

(October 26, 1910.)

der the Federal employer's liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324). A leading and decisive decision upon this question was rendered by the Supreme Court of the United States in *Mondou v. New York, N. H. & H. R. Co.* 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, reversing 82 Conn. 373, 73 Atl. 762, wherein it was expressly held that the enforcement of rights under this act cannot be regarded as impliedly restricted to the Federal courts, in view of the concurrent jurisdiction provision of the judiciary act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508). § 1, and of the amendment of April 5, 1910, to the original employer's liability act, which, instead of granting jurisdiction to the state courts, presupposes that they already possess it. In arriving at this conclusion the court refuted the contentions that a state court, although having ordinary jurisdiction as prescribed by local laws adequate to the occasion, could decline to enforce the act when invoked, on the theory that it was not in harmony with the policy of the state, and that the exercise of such jurisdiction would be attended by inconvenience and confusion because of the different standards of right established by the congressional act and those recognized by the laws of the state. In answering the former objection the court said: "The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature and should be respected ac-

cordingly in the court of the state;" and, continuing, referred to the latter objection as follows: "We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity; as, where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class, merely because the rules of law to be applied in their adjudication are unlike those applied in other cases."

The above stated, as well as other, grounds upon which state courts may decline to administer the act, had been advanced and overcome in the following decisions, which support the rule as announced in the *Mondou Case*: *Zikos v. Oregon R. & Nav. Co.* 179 Fed. 893, holding that the act does not attempt to delegate judicial power of the United States to state courts in violation of the United States Constitution, article 3; *idem*, holding that the state courts cannot refuse to entertain jurisdiction on the ground that the Federal act establishes rules and measures of liability different from those existing under the state laws. In this connection the court said: "The Constitution of the United States being the supreme law of the land, state and Federal courts are alike subject to its provisions; and the refusal of the former to enforce rights conferred by Congress would put them in the same category as would a refusal to entertain causes flowing from any other recognized source of authority. It would be an

APPEAL by defendant from a judgment of the District Court for Emmet County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by its negligence. Affirmed on condition.

Statement by Ladd, J.:

Action for damages resulted in judgment against defendant, from which it appeals.

Messrs. Carroll Wright, J. L. Parrish, and Crim & Morse, for appellant:

The court erred in sustaining plaintiff's motion to strike from the record all the evidence bearing upon the question of whether or not the plaintiff and defendant were at the time of the accident engaged in interstate commerce.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 420; Fulgham v. Midland Valley R. Co. 167 Fed. 660; Southern P. Co. v. McGinnis, 98 C. C. A. 403, 174 Fed. 649; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Dewberry v. Southern R. Co. 175 Fed. 307; Johnson v. Pennell, 67 Iowa, 669, 25 N. W. 874; Mc-

anomoly in our system if state tribunals, after having so long entertained the grievances of litigants, where rights are traceable to congressional legislation, should refuse to further do so because of the fact that there has been provided by a power clearly competent, different rules of liability for those engaged in interstate commerce from those which may be fixed by statute or recognized by decisions in the several states. All government rests upon acquiescence in the established order. When common consent is withdrawn, prescribed rules of conduct are overthrown and anarchy reigns, and it is not to be supposed that state courts will or can refuse to abide by the result when the Supreme Court, the final arbiter, has decided that they have jurisdiction. If that should occur, the Constitution would cease to be the supreme law of the land, and its express provision, that 'the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding,' would become null and its application inoperative"; St. Louis, I. M. & S. R. Co. v. Conley, 110 C. C. A. 97, 187 Fed. 949, holding that, since the statute is remedial in its character, it should be construed so as to prevent the mischief and advance the remedy, and therefore may be enforced either in the state or Federal courts; St. Louis, I. M. & S. R. Co. v. Hesterly, 98 Ark. 240, 135 S. W. 874, which 40 L.R.A.(N.S.)

Allister v. Johnson, 108 Iowa, 42, 78 N. W. 790; Laird v. Cole, 121 Iowa, 148, 96 N. W. 744; Staten v. Hammer, 121 Iowa, 499, 96 N. W. 964; Overhouser v. American Cereal Co. 128 Iowa, 583, 105 N. W. 113; Tracy Land Co. v. Polk County Land & Loan Co. 131 Iowa, 41, 107 N. W. 1029.

While the allowance of amendments is to some extent discretionary, yet the amendment should be allowed in the furtherance of justice and to conform to the evidence.

Tiffany v. Henderson, 57 Iowa, 490, 10 N. W. 884; Blandon v. Glover, 67 Iowa, 615, 25 N. W. 830; Laird v. Cole, 121 Iowa, 148, 96 N. W. 744.

Where an employee is familiar with the character of the appliances used, or the nature of the business, he assumes the risk incident thereto.

Beckman v. Consolidation Coal Co. 90 Iowa, 252, 37 N. W. 889; Forbes v. Boone Valley Coal & R. Co. 113 Iowa, 94, 84 N. W. 970; Campbell v. Illinois C. R. Co. 124 Iowa, 303, 100 N. W. 30; Brooks v. Joyce, 127 Iowa, 266, 103 N. W. 91; Martin v. Chicago, R. I. & P. R. Co. 118 Iowa, 148, 59 L.R.A. 698, 96 Am. St. Rep. 371, 91 N. W. 1034; Keist v. Chicago, G. W. R. Co. 110 Iowa, 34, 81 N. W. 181; Way v. Illinois C. R. Co. 40 Iowa, 342; Missouri P. R. Co. v. Somers, 71 Tex. 700, 9 S. W. 741, 78 Tex. 439, 14 S. W. 779; Green v. Cross, 79 Tex. 130, 15 S. W. 220; Lovejoy v. Boston & L. R. Corp. 125 Mass. 79, 28 Am.

merely states the rule; Midland Valley R. Co. v. LeMoyné, — Ark. —, 148 S. W. 654, holding that jurisdiction was conferred upon the state courts by the express provision of the amendment of April 5, 1910; Atlantic Coast Line R. Co. v. Whitney, — Fla. —, 56 So. 937, holding that the question had been settled by the United States Supreme Court; Lemon v. Louisville & N. R. Co. 137 Ky. 276, 125 S. W. 701, wherein the decision was seemingly based upon the ground that there is nothing in the act that denies to the state court the right to enforce its provisions, and that in such case the state has concurrent jurisdiction with the Federal courts; Owens v. Chicago G. W. R. Co. 113 Minn. 49, 128 N. W. 1011, holding, generally, that the state court will enforce any right which one has by virtue of the Federal Constitution or laws, and that the amendment of April 5, 1910, added nothing to the jurisdiction of the state courts; Missouri, K. & T. R. Co. v. Blalack, — Tex. Civ. App. —, 128 S. W. 706, affirmed on other grounds in — Tex. —, 147 S. W. 559, holding, generally, that it is only where the act of Congress, by express language or necessary implication, provides for the exclusive jurisdiction of the Federal courts, that the state courts are excluded from concurrent jurisdiction, and that there is nothing in the Federal act under consideration that prevented the state courts from as-

Rep. 206; Wyckoff v. Pajaro Valley Consol. R. Co. 11 Cal. App. 106, 103 Pac. 1100.

The verdict of \$15,000 in this case was grossly excessive.

Kroener v. Chicago, M. & St. P. R. Co. 88 Iowa, 16, 55 N. W. 28; Wimber v. Iowa C. R. Co. 114 Iowa, 551, 87 N. W. 505; Struble v. Burlington, C. R. & N. R. Co. 128 Iowa, 158, 103 N. W. 142.

Messrs. J. I. Myerly and Mack J. Groves for appellee.

Ladd, J., delivered the opinion of the court:

The freight train left Emmetsburg for Dowes at about 1:45 o'clock in the morning of July 1, 1908. The plaintiff was head brakeman and had been in defendant's employment about twenty months. He was directed by the conductor at Graattinger to take two stock cars from the side track and place them immediately back of two refrigerator cars next the engine. In order to accomplish this, he uncoupled the remainder of the train from the refrigerator cars, and, after disposing of it and attending to switching, got on the second refrigerator car at the end toward the engine and rode as these backed on the side track on which the stock cars stood. Both his feet were in the stirrup at the side and near the end of the car, one hand hold of the fourth rung of the ladder, and the other carrying a lantern. When the cars had

moved to the depot platform, he was about to get off; but, as one foot reached the platform, his glove caught on a bolt between the third and fourth rung of the ladder, and this jerked him between the cars, where he hung an instant and then fell to the ground. The wheel of the car ran over his right arm, so injuring it that amputation was necessary. The negligence alleged was the leaving of the bolt protruding at a locality likely to cause injury. The defendant pleaded that the risk had been assumed, and adduced evidence tending to show that from all its refrigerator cars bolts protruded with nuts on them an half-inch thick, from which the ends of the bolts usually extended beyond the nut from nothing to five eighths of an inch, and that in every car was a bolt about where the one occasioning the injury was located. On the other hand, the evidence tended to show that the ends of most the bolts were flush with the nuts, and that plaintiff had no knowledge of this bolt. Plaintiff had been in defendant's employment as brakeman about twenty months, and one or more refrigerator cars was in nearly every train.

The court instructed the jury, in substance, that if plaintiff knew, or by the exercise of ordinary diligence might have known, of the existence of the protruding bolt, and appreciated the dangers therefrom, he could not recover. Exception is taken to this on the ground that knowledge

suming jurisdiction to hear and determine actions arising thereunder.

The only decisions adverse to the rule that state courts of general jurisdiction have jurisdiction concurrent with the Federal courts of actions arising under the Federal employer's liability act are *Mondou v. New York, N. H. & H. R. Co.* 82 Conn. 373, 73 Atl. 762, which was reversed by the United States Supreme Court (set out supra), and *Hoxie v. New York, N. H. & H. R. Co.* 82 Conn. 352, 73 Atl. 754; 17 Ann. Cas. 324, upon which the state court decision in the *Mondou* Case was based. The denial of jurisdiction in the *Hoxie* Case by the Connecticut supreme court of errors, speaking through Judge Baldwin, was mainly upon the ground that Congress did not intend to authorize the institution of an action under the Federal employer's act in the courts of the state, and that, assuming that Congress had power to and had prescribed a rule not in harmony with the policy of the state, it had no power to make it incumbent upon the state courts to assume jurisdiction of such an action, and that therefore the courts of the state could decline jurisdiction. Both of these contentions are disposed of by the United States Supreme Court in the *Mondou* Case, as is shown by the summary of the case set out supra. The *Hoxie* Case is also criticized in *BRADBURY v. CHICAGO, R. I. & P. R. Co.*; 40 L.R.A. (N.S.)

Zikos v. Oregon R. & Nav. Co.; and *Atlantic Coast Line R. Co. v. Whitney*, supra.

Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205, although not within the scope of this note, because it involves a Federal act other than the one under consideration herein, is of interest upon the general question of administration of Federal laws in state courts, in that it against demonstrates that the United States Supreme Court regards state courts of general jurisdiction as having jurisdiction concurrent with the Federal courts to enforce Federal laws which do not, either expressly or by necessary implication, confer exclusive jurisdiction on the Federal courts.

For a treatment of the general question of administration of Federal laws in state courts, see note to *Loughlin v. McCauley*, 48 L.R.A. 33.

As to jurisdiction of state courts to enforce forfeiture of interest provided by national banking act, see 56 L.R.A. 688. And as to jurisdiction of state court to recover from national bank twice the amount of usurists' interest paid to it, see 56 L.R.A. 690.

As to power of state courts to pass upon interstate rates, see note to *Thacker Coal & Coke Co. v. Norfolk & W. R. Co.* 28 L.R.A. (N.S.) 108. G. J. C.

or its equivalent concerning the particular bolt was exacted, and it is said that the jury should have been told that if plaintiff knew that defendant customarily operated cars with bolts protruding, and plaintiff knew of this custom and appreciated the peril incident thereto, then he should be held to have assumed the risk. Possibly, had such an instruction been requested, it should have been given, for if refrigerator cars with protruding bolts were customarily used on the road, to plaintiff's knowledge, and concerning which he knew the danger, it might well be held that, in the exercise of reasonable care, he must have ascertained the condition of the car he rode on at the time of the accident. This would be the only ground for so holding, and in the instruction given it was clearly stated that, if in the exercise of ordinary care he might have known of the protruding bolt and have appreciated the danger, he must fail. So that whether the knowledge charged be from the understanding of a custom or direct information, the rule is in harmony with the instruction, and, had defendant desired that the law be more specifically applied to the proof, counsel should have so requested. In the absence of such request, there was no error.

2. Evidence was received, subject to objection, showing that, as part of the train, a car load of eggs was being transported from Ellsworth, Minnesota, through this state to Chicago, Illinois, and that several other car loads of freight were being taken to the latter place and other points in Illinois. After all the evidence had been introduced, defendant moved that the jury be directed to return a verdict in its favor. For that, among other things, plaintiff at the time of receiving the injury was employed in the operation of a railway train engaged in interstate commerce, and recovery could only be had under an act of Congress approved April 22, 1908 (act April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1909, p. 1171). Thereupon plaintiff moved that all the evidence of interstate shipments introduced subject to objection be stricken from the record. The court having intimated that defendant's motion must fail because of not having pleaded that the injury was received while connected with a train engaged in interstate commerce, defendant filed an amendment to its answer raising that issue. Plaintiff moved to strike this amendment because filed too late and the matter alleged did not constitute a defense. This motion was sustained, as, also, was the motion to strike the evidence. An instruction to direct a verdict in defendant's favor because of it being engaged in interstate

commerce at the time of the accident was requested and refused.

It will be noted that the rulings raise the following questions: (1) Was evidence tending to show that defendant was engaged in interstate commerce admissible in the absence of anything in the answer so asserting? (2) If not, did the court err in striking the amendment so pleading from the files? (3) In either event, can the right created by the so-called employer's liability act be enforced in the state courts?

For convenience, the last may be disposed of first. The constitutionality of the act is not assailed. That it is likely to be upheld finally is fairly to be inferred from the several opinions in *Employers' Liability Cases* (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, though a different view appears to have been entertained by the supreme court of Connecticut. *Hoxie v. New York, N. H. & H. R. Co.* 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324. See *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21. In the *Howard Case*, the court held that Congress had the power, under the clause of the Constitution authorizing it to regulate commerce among the several states, to define the duties and liabilities of master and servant when engaged in interstate commerce. Until the approval of this act, at least, the statutes of the state defining the liability of railway companies to their employees were valid and enforceable (*Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819), even when engaged in intrastate commerce. A state statute, when covering a matter within the powers of Congress and necessarily conflicting with an act of that body, must give way to the Federal statute. The rule is tersely stated in the case last cited: "The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to regulation or the liability for its infringement, is exclusive of state authority." *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* 167 U. S. 642, 42 L. ed. 309, 17 Sup. Ct. Rep. 986. See *Western U. Teleg. Co. v. James*, 162 U. S. 654, 40 L. ed. 1106, 16 Sup. Ct. Rep. 934.

But there is nothing in the petition in the case at bar to indicate whether the cause of action is predicated on the state or Federal statutes, and we have no occasion to inquire to what extent, if at all, the statutes of this state eliminating the fellow-servant rule have been superseded

by the Federal statutes. For the purposes of this case, it may be conceded that the facts bring it within the terms of the Federal statute, and that plaintiff must recover thereon, if at all. The petition stated a cause of action thereunder, and, unless it can be said that Federal courts have exclusive jurisdiction in the enforcement of rights created or declared in advancement of those previously existing, there is no ground for interfering with the judgment entered. The matter of jurisdiction is not touched in the act of Congress, and it is now well settled that state courts may exercise concurrent jurisdiction with the Federal courts in all cases arising under the Constitution, laws, and treaties of the United States, unless exclusive jurisdiction has been conferred, expressly or by necessary implication, on the Federal courts. *Claffin v. Houseman*, 93 U. S. 130, 23 L. ed. 833; *Raisler v. Oliver*, 97 Ala. 714, 38 Am. St. Rep. 215, 12 So. 238; *Wilcox v. Luco*, 118 Cal. 642, 45 L.R.A. 582, 62 Am. St. Rep. 306, 45 Pac. 676, 50 Pac. 758; *Schuyler Nat. Bank v. Bollong*, 24 Neb. 827, 40 N. W. 414; *Bletz v. Columbia Nat. Bank*, 87 Pa. 92, 30 Am. Rep. 345; *Brinckerhoff v. Bostwick*, 88 N. Y. 60; *People v. Welch*, 141 N. Y. 273, 24 L.R.A. 117, 38 Am. St. Rep. 793, 36 N. E. 328; 11 Cyc. 996.

In the case first above cited, the Supreme Court, speaking through Bradley, J., said: "The general question, whether state courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises,—sometimes with a leaning in one direction and sometimes in the other; but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case. When we consider the structure and true relations of the Federal and state governments, there is really no just foundation for excluding the state courts from all such jurisdiction. The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state; concurrent as to place and persons, though distinct as to the subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court

of either sovereignty competent to hear and determine such kind of rights, and not restrained by its Constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under state laws may be prosecuted in the state courts, and also, if the parties reside in different states, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class; subject, however, to this qualification, that, where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. . . . This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

An illustration of the exercise of exclusive jurisdiction by the Federal courts will be found in *Copp v. Louisville & N. R. Co.* 43 La. Ann. 511, 12 L.R.A. 725, 26 Am. St. Rep. 198, 9 So. 441, where a plea to the jurisdiction of the state court was sustained on the ground that the act of Congress on which the action for damages was based, directed that it be brought in the United States courts. In *Hoxie v. New York, N. H. & H. R. Co.* supra, the supreme court of Connecticut reached the conclusion that by fair implication the act of Congress excludes jurisdiction of the state courts, and, in any event, the state court was under no obligation to enforce the rights therein created. The last point appears to have been considered as though involving a question of comity merely, regardless of the convenience and propriety of enforcing all rights and redressing all wrongs within the jurisdiction of the local courts.

The prevailing rule is that, where a cause of action accrues by virtue of the statute

of any state, the action may be maintained in any other state if not contrary to the public policy or law of the place where the suit is brought. *Boyce v. Wabash R. Co.* 63 Iowa, 70, 50 Am. Rep. 730, 18 N. W. 673; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 143. See cases collected in note to *Reeves v. Southern R. Co.* 70 L.R.A. 513. In such cases, the law of the place where the right was acquired or the liability incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413.

Even where the cause of action arises in a foreign country, suits may be maintained in our courts, though jurisdiction can be declined; but this is seldom done, unless from fear of inability to do justice through lack of knowledge of the laws of the place where the cause of action arose. *Mason v. The Blaireau*, 2 Cranch, 240, 2 L. ed. 266; *Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Cofrode v. Gartner*, 79 Mich. 332, 7 L.R.A. 511, 44 N. W. 623; *Evey v. Mexican C. R. Co.* 38 L.R.A. 387, 26 C. C. A. 407, 52 U. S. App. 118, 81 Fed. 294; 11 Cyc. 663. The reasons which induce state courts to exercise jurisdiction of causes of action arising in a foreign country or under legislation of another state should be quite as persuasive in favor of assuming jurisdiction over causes of action arising under the statutes of the United States, with this in addition, that these are the laws of the very people the jurisdiction of whose courts is invoked. See 11 Cyc. 996. If a cause of action has become fixed and a legal liability incurred, the doors of the courts of this state should not be closed to the prosecution of such cause of action, regardless of whether the same may have arisen under the statutes of another state, an act of Congress, or the laws of a foreign country, unless to enforce it would be contrary to the laws or public policy of the state, or complete justice probably could not be done. Unless the act of Congress should be construed to confer exclusive jurisdiction on the Federal courts, or the mode of procedure is such that the state courts cannot safely undertake to enforce the liability defined, there seems no ground for declining to exercise a jurisdiction fully approved by the authorities. The statute is silent concerning jurisdiction; but it is said that the rules of practice prescribed therein and the direction as to who shall be the beneficiaries thereunder are so inconsistent with the state laws as to indi-

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cate the congressional intent that redress may be had in the Federal courts alone. In order to dispose of this objection, it will be necessary to set out the main provisions of the act:

"Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several states or territories, . . . or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad, under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

"Sec. 4. That in any action brought against any common carrier, under or by virtue of any of the provisions of this act to recover damages for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

"Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

It is manifest from the mere reading that this act effects quite as important a change

in the trial of such causes in the Federal courts as would be possible in the state courts. Thus the Federal decisions are harmonious on the proposition that the negligence of complainant which contributes proximately to the injury will defeat the recovery of damages therefore. So, too, in the absence of local statutes, the fellow-servant doctrine and that of assumption of risks have been broadly applied in all Federal courts. Hereafter all of these rules are to be modified or eliminated where the injuries are such as contemplated in the above act. If inconvenience and confusion would result from an attempt to enforce the acts in the state courts, like consequences will be the outcome of a similar undertaking in the courts of the United States. Let us examine the several sections and ascertain the alleged inconsistencies which are said to preclude the maintenance of actions based thereon in the state courts. No one, we apprehend, would say that the state courts are not competent to entertain suits by the persons authorized by § 1 to recover damages or to distribute those recovered as specified. Under the statutes of this state, the suit is prosecuted in the name of the administrator where death is alleged to have resulted from wrongful act, and anything recovered distributed as personal property among the heirs. It goes to the surviving spouse and children if any there are, and, if not, to the parents of the deceased, precisely as under the Federal statute. In event there are neither spouse and children nor parents of deceased, the remoter heirs are entitled thereto under the state statute, while under this act the damages go to the next of kin dependent upon deceased. As the state statute must give way to that of Congress, no inconsistency is involved. All essential is that effect be given the latter as though the former were not on the statute book. Nor can it be said that this involves an interference by Congress with the distribution of an estate through the probate court of the state. The cause of action was created by Congress in the exercise of its power to regulate commerce among the several states, and it is elementary that in doing so it might determine who was entitled to maintain the same and for whose benefit. The administrator is not required thereby to institute proceedings; he may do so, and in that event can recover only for the benefit of the person entitled under the act to the damages. The administrator therein sustains the relation to the beneficiaries, like that of trustee to his *cestui que trust*, and it is of little concern whether he shall distribute the damages recovered in pursuance of an order of the court wherein re-

covered or in the appropriate probate court. Surely no court would permit an administrator, after recovering damages under a statute specifically prescribing who is entitled thereto, to divert the money elsewhere.

It must be borne in mind that this act does not relate to the distribution of the personal property of an estate. The cause of action does not belong to the estate of the deceased person, but to certain classes for whose benefit the administrator is authorized to recover damages, and we see no ground for saying this is contrary to our law or its policy. In a few states, notably Connecticut, the fellow-servant doctrine is still applied in case of injury caused in the use and operation of railways, and it seems to have been thought in the Hoxie Case that for a state court to apply that doctrine in causes based on injuries received in intrastate commerce, and to proceed in actions based on the Federal statute on the theory that the master is responsible for the acts of the fellow servant, would create confusion "setting up in the same tribunal different standards of right and policy and practice." More than fifty years ago, the fellow-servant doctrine was eliminated by the legislature of this state wherever the injury was occasioned by the negligent act of the fellow servant engaged in the use and operation of a railway, and, though that doctrine has been continually applied in all cases involving injuries suffered in other employments, little difficulty has been experienced in discriminating between situations exacting the application of the different rules. Indeed, the situation of employees engaged in the operation of railways ordinarily is such that they can exert little direct or personal influence upon each other in discharging their respective duties; and their opportunities for guarding against the negligent acts of one another are so limited that in many, if not in most, of the states, laws have been enacted declaring the master liable for the negligent acts of the servant when engaged in the use and operation of railways, even though the injured party be a fellow servant.

And we apprehend that the design of Congress was to furnish this measure of protection to employees engaged in interstate commerce in those states where, for reasons such as are suggested in the Hoxie Case, none have been provided by local legislation. Section 4 is somewhat similar to a statute of this state relating to assumption of risks. Chapter 219, Acts 33d Gen. Assem. And the only difficulty in entertaining suits for liability under the act of Congress, as it seems to us, will develop in the construction and application of § 3.

Under the decisions of this state contributory negligence, if the proximate cause, has always been held to defeat recovery. But such has been the rule in the Federal courts, and, as said, is now, save as modified by this act. No greater difficulty will confront the state courts in applying this or other sections of the act than the courts of the United States, and for this reason there is no ground for inferring from the somewhat radical nature of the act that it was the intent of Congress to confer exclusive jurisdiction on the Federal courts. With all due respect for the eminent court holding otherwise in *Hoxie v. New York, N. H. & H. R. Co.* supra, we are not persuaded by the reasoning of its opinion. Differences between the Federal and local courts not greater than those between different statutes or laws of the same state do not alone justify the conclusion that Congress intended to deny jurisdiction of the state courts, nor furnish a satisfactory reason for refusing that comity due to the sovereign government. Nor does it appear to have convinced the Congress, for an act approved April 5, 1910 (act April 5, 1910, chap. 143, 36 Stat. at L. 291, U. S. Comp. Stat. Supp. 1911, p. 1324), declared the jurisdiction of the United States courts under this act concurrent with that of the state courts, and further declared that "no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

The ruling of the trial court in retaining jurisdiction has our approval. As the amendment to the answer was filed after all the evidence was adduced, the court did not abuse its discretion in sustaining the motion to strike.

Nor do we think there was error in striking the evidence tending to show that plaintiff was at the time he received the injury engaged in interstate commerce. The fact that he was so engaged had not been alleged in the petition nor asserted in the answer; so that whether he was so engaged was not in issue. As argued, it is not necessary to plead the statutes of the United States; but, to invoke their benefit, facts rendering these applicable should be pleaded. All essential under the state law was proof that the injury was received because of the negligence of the company in the use or operation of its railway within the state, for until the contrary was made to appear it will be presumed to have been engaged in intrastate commerce. The evidence was rightly excluded.

3. Plaintiff was allowed \$15,000 as damages, and this is said to be excessive. He was twenty-four years old and earning \$80 to \$85 per month. His life expectancy 40 L.R.A. (N.S.)

was 39.5 years. Prior to the injury, his health was good, and since then it has been poor. He suffered pain at the time of the accident, and afterwards for four or five days it was severe. The right arm was amputated about 2 inches below the elbow. In *Struble v. Burlington, C. R. & N. R. Co.* 128 Iowa, 158, 103 N. W. 142, a verdict of \$12,000 for the loss of the left arm in favor of a brakeman twenty-seven years old and earning \$60 to \$70 per month was held excessive and reduced to \$7,500. In *Knapp v. Sioux City & P. R. Co.* 71 Iowa, 41, 32 N. W. 18, a verdict of \$9,500 in favor of an engineer under forty years of age earning \$100 per month, for permanent disability of right arm, was held not excessive. See *Grannis v. Chicago, St. P. & K. C. R. Co.* 81 Iowa, 444, 46 N. W. 1067; *Sprague v. Atlee*, 81 Iowa, 1, 46 N. W. 756. In *Kroener v. Chicago M. & St. P. R. Co.* 88 Iowa, 16, 55 N. W. 28, and in *Wimber v. Iowa C. R. Co.* 114 Iowa, 551, 87 N. W. 505, the losses were of a leg, and in each the damages were reduced from \$12,000 to \$8,000. The facts of cases differ so much that no criterion can be established. The loss of an arm will not prevent plaintiff from pursuing another occupation, though always at an inconvenience, and probably with less remuneration. Upon examination of the entire record, we are satisfied that the sum of \$12,000 will compensate him for the injuries received, and, if the plaintiff shall file a remittitur of the judgment in excess of that amount within thirty days of filing this opinion, the judgment will stand affirmed; otherwise it will be reversed.

Affirmed on condition.

Petition for rehearing denied.

Appeal dismissed for the want of jurisdiction by the Supreme Court of the United States, November 13, 1911, 223 U. S. 711, 56 L. ed. 624, 32 Sup. Ct. Rep. 520.

MASSACHUSETTS SUPREME JUDICIAL COURT.

GEORGE H. KERR

v.

JOHN W. CRANE et al., Appts.

(212 Mass. 224, 98 N. E. 783.)

Insurance — benefit certificate — trust in fund.

1. A trust enforceable in equity arises where, with the assent of the beneficiary,

Note. — Enforceability of promise by beneficiary to pay proceeds of life insurance to third person

In accord with *KERR v. CRANE* it is gen-

one who could not acquire an interest in a benefit certificate because not bearing the necessary relationship to the member agrees to pay the dues and make advances to the member in consideration of the agreement with the member that the benefit fund shall be collected for his benefit.

Trust — benefit certificate — execution — enforcement.

2. A sufficient execution of the trust to enable equity to enforce it arises where a mutual benefit certificate is delivered to one having no insurable interest in the life of the member, upon the agreement of the beneficiary that, if he will pay the dues and make advances to the member, he shall have the proceeds when collected, and the member dies leaving the condition unchanged.

(May 27, 1912.)

erally held that a promise by the beneficiary to the insured to collect and pay the whole or a part of the proceeds of the policy to a third person is valid and enforceable as against the promisor. *Catland v. Hoyt*, 78 Me. 355, 5 Atl. 775; *Coyne v. Supreme Conclave*, I. O. H. 106 Md. 54, 66 Atl. 704, 14 Ann. Cas. 870; *Devries v. Hawkins*, 70 Neb. 656, 97 N. W. 792; *Steller v. Sell*, 55 N. J. Eq. 530, 37 Atl. 1010, which modified decree rendered in 53 N. J. Eq. 397, 32 Atl. 211; *Hirsh v. Auer*, 146 N. Y. 13, 40 N. E. 397, affirming 79 Hun, 493, 29 N. Y. Supp. 917; *Brett v. Warnick*, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061; *Hurd v. Doty*, 86 Wis. 1, 21 L.R.A. 746, 56 N. W. 371.

And this is so, notwithstanding the fact that such third person could not acquire an interest in the benefit certificate or policy because not bearing the necessary relationship to the insured as prescribed by the rules of the beneficial association. *Peek v. Peek*, 101 Ky. 423, 41 S. W. 434; *Hurd v. Doty*, 86 Wis. 1, 21 L.R.A. 746, 56 N. W. 371; *Clark v. Callahan*, 105 Md. 600, 10 L.R.A.(N.S.) 616, 66 Atl. 618, 12 Ann. Cas. 162; *Cowin v. Hurst*, 124 Mich. 547, 83 Am. St. Rep. 344, 83 N. W. 274. The reason for this rule is that the beneficial association is the only party in position to contest the legality of the transaction.

Some cases proceed upon the theory that such an arrangement raises a trust in favor of such third person which is enforceable in equity. *Peek v. Peek*, 101 Ky. 423, 41 S. W. 434; *Clark v. Callahan*, 105 Md. 600, 10 L.R.A.(N.S.) 616, 66 Atl. 618, 12 Ann. Cas. 162; *Coyne v. Supreme Conclave* I. O. H. 106 Md. 54, 66 Atl. 704, 14 Ann. Cas. 870; *Cowin v. Hurst*, 124 Mich. 547, 83 Am. St. Rep. 344, 83 N. W. 274; *Devries v. Hawkins*, 70 Neb. 656, 97 N. W. 792; *Steller v. Sell*, 55 N. J. Eq. 530, 37 Atl. 1010, which modified decree rendered in 53 N. J. Eq. 397, 32 Atl. 211; *Hirsh v. Auer*, 146 N. Y. 13, 40 N. E. 397, affirming 79 Hun, 493, 29 N. Y. Supp. 917; *Schomaker v. Schwebel*, 204 Pa. 470, 54 Atl. 337; *Crews v. Crews*, 113 Ky. 152, 67 S. W. 276 40 L.R.A.(N.S.)

APPPEAL by defendants from a decree of the Supreme Judicial Court for Middlesex County in plaintiff's favor in an action brought to recover the amount due upon a benefit certificate. Modified and affirmed.

The facts are stated in the opinion.

Mr. Gilbert A. A. Pevey, for appellants:

Payment of assessments by the plaintiff does not entitle him, in equity, to be repaid out of the fund.

Clark v. Supreme Council, R. A. 176 Mass. 470, 57 N. E. 787; *Supreme Commandery*, U. O. G. C. v. *Merrick*, 163 Mass. 374, 40 N. E. 183; *Clarke v. Schwarzenberg*, 164 Mass. 347, 41 N. E. 655.

(promise by creditor named as beneficiary to pay balance to insured's wife after satisfying his claim).

So, it has been held that an agreement entered into by a member of a fraternal beneficial society, with the consent of the beneficiary named in the certificate, to transfer the certificate to the plaintiff in consideration of plaintiff's undertaking to provide the member with a home, pay his dues and assessments to the order, and at his death pay his funeral expenses, and to repay the beneficiary the amount of dues and assessments which he had previously paid to the society, is enforceable in equity against the beneficiary after the death of the insured, where it appears that it was entered into in good faith, and not as a wagering contract. *Brett v. Warnick*, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061.

In *Woodruff v. Tilman*, 112 Mich. 188, 70 N. W. 420, it was held that a testamentary provision directing a beneficiary named in a fraternal benefit certificate, payable at testator's death, to pay a certain amount due a creditor out of the proceeds of the certificate, created a lien or trust upon the fund which was enforceable in equity, where it appeared that the beneficiary understood the arrangement and knew that the indebtedness was incurred on the faith of such security, and subsequently presented the will for probate.

But in *Fisher v. Donovan*, 57 Neb. 361, 44 L.R.A. 383, 77 N. W. 778, it was held that an oral promise by a wife to her husband, that she would pay his debts, did not create a trust in a benefit certificate on his life of which she was the beneficiary, upon the ground (1) that he had no interest in the fund, but possessed merely a power of appointment and therefore could not impress a trust upon it, and (2) that the oral promise of the beneficiary to pay the debts of another out of her own funds was void. The court said: "It is true, Mrs. Donovan did assent to her husband's request to pay his creditors, but, since he failed to provide the trust fund out of which payment might be made, the plaintiffs cannot recover from her as trustee. After her hus-

The only right Merritt had in the certificate was the power of appointment.

Bacon, Ben. Soc. §§ 236, 237, note 11, 241; Supreme Council, A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 634; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166; Cook v. Supreme Conclave I. O. H. 202 Mass. 85, 88 N. E. 584; Masonic Mut. Ben. Soc. v. Burkhardt, 110 Ind. 191, 10 N. E. 79, 11 N. E. 449; Richmond v. Johnson, 28 Minn. 447, 10 N. W. 596; Warner v. Modern Woodmen, 67 Neb. 233, 61 L.R.A. 603, 108 Am. St. Rep. 634, 93 N. W. 397, 2 Ann. Cas. 660; Fisher v. Donovan, 57 Neb.

361, 44 L.R.A. 383, 77 N. W. 778; Northwestern Masonic Aid Asso. v. Jones, 154 Pa. 99, 35 Am. St. Rep. 810, 26 Atl. 253; Rollins v. McHatton, 16 Colo. 203, 25 Am. St. Rep. 260, 27 Pac. 254; Hellenberg v. District No. 1, I. O. B. B. 94 N. Y. 580; Eastman v. Provident Mut. Relief Asso. 62 N. H. 557; Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543; Ables v. Ackley, 133 Mo. App. 594, 113 S. W. 698; Maryland Mut. Benev. Soc. I. O. R. M. v. Clendinen, 44 Md. 429, 22 Am. Rep. 52; Arthur v. Odd Fellows' Beneficial Asso. 29 Ohio St. 561; Wist v. Grand Lodge, A. O. U. W.

band's death, there being no proper change of beneficiary, half the proceeds of the certificates in question became absolutely the money of Mrs. Donovan, and the promise she made was at most but a promise to pay her husband's debts out of her own property. There is no claim that the promise was in writing, and it is a familiar doctrine that a promise to answer for the debt, default, or misdoings of another is within the statute of frauds, and, to be binding, must be in writing, signed by the party to be charged therewith."

In *Donithen v. Independent Order of Foresters*, 209 Pa. 170, 58 Atl. 142, reversing 23 Pa. Super. Ct. 442, it was held that one named as beneficiary in a benefit certificate will be declared trustee of the fund for the insured's wife, where it is clear the fund was intended for the sole benefit of the wife, though such fact was never communicated to the beneficiary named in the certificate, who had no knowledge that he was so named until after the death of the insured, and he declared to an officer of the association that he was acting solely for the wife's benefit when first being informed of the facts; it appearing that he was the insured's elder brother, residing in a distant state, having a good reputation as a business man; that the insured's wife was a minor, and that insured lacked confidence in his wife's mother.

So, it has been held that where one advanced money to pay the premiums and assessments upon another's life insurance policy, at the request of the insured and the beneficiary, under an agreement that such person's wife would be named as one of the beneficiaries to secure the repayment of the money, the beneficiary so named has no beneficial interest in the proceeds except as trustee for the amount advanced under the agreement. *McDonald v. Humphries*, 56 Ark. 63, 19 S. W. 234.

In other cases, the courts have permitted a recovery at law, applying the general doctrine that a third person may sue upon a contract made for his benefit. *Waterhouse v. Waterhouse*, 29 R. I. 485, 22 L.R.A. (N.S.) 639, 72 Atl. 642; *Katz v. Witt*, 74 Misc. 582, 134 N. Y. Supp. 675 (sustaining right of residuary legatee to recover where beneficiary named in certificate agreed to distribute fund according to directions of 40 L.R.A. (N.S.))

insured's will, which made the fund a part of the residuary estate).

In *Catland v. Hoyt*, 78 Me. 355, 5 Atl. 775, it was held that the executor of the insured could maintain assumpsit against the beneficiary to recover funds collected on the policy, where it appeared that the beneficiary had promised insured to pay the proceeds to the heirs of insured after deducting what should be due from the deceased to him. The defendant objected to evidence to establish the fact, upon the ground that it tended to vary the terms of the written agreement between the deceased and the beneficial association; and further, if admitted, would show a promise by the defendant to pay, not to the deceased, but to his heirs, and such a promise would not support an action by the executor. In disposing of these objections the court said: "The oral evidence was not in conflict with the written contract. It was offered not to vary or control the contract between the deceased and the insurance company, but to show another and an independent contract between the deceased and the defendant. It was offered not to show that the defendant was not to receive the money, but to show what he was to do with it after receiving it."

In *Devries v. Hawkins*, 70 Neb. 656, 97 N. W. 792, it was held that the fund collected by the beneficiary named in a fraternal benefit certificate, which he promised to pay to the member's child, may be recovered from the estate of such beneficiary by the child in an action for money had and received, where it appeared that the beneficiary, after the receipt of the fund, acknowledged that it belonged to the child.

Likewise, in *Hirsh v. Auer*, 146 N. Y. 13, 40 N. E. 397, affirming 79 Hun, 493, 29 N. Y. Supp. 917, it was held that the children of the insured were entitled to recover the proceeds of a certificate of insurance from the beneficiary, upon proof of a promise by beneficiary to collect and distribute the same among the children after paying the funeral expenses. While it was said in the above case that the proofs established a trust which was enforceable in equity, the form of action appears to have been at law, as distinguishing from a purely equitable suit.

A. L. R.

22 Or. 277, 29 Am. St. Rep. 603, 29 Pac. 610; Thomas v. Grand Lodge, A. O. U. W. 12 Wash. 500, 41 Pac. 882.

No valid trust, resulting or otherwise, exists which can be enforced in equity.

Brown v. Spohr, 180 N. Y. 210, 73 N. E. 14; Fisher v. Donovan, 57 Neb. 364, 44 L.R.A. 383, 77 N. W. 778; Supreme Council, A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 364; Pom. Eq. Jur. § 1032; Mee v. Fay, 190 Mass. 40, 76 N. E. 229; Bennett v. Littlefield, 177 Mass. 294, 58 N. E. 1011; Supple v. Suffolk Sav. Bank, 198 Mass. 393, 126 Am. St. Rep. 451, 84 N. E. 432; Olliffe v. Wells, 130 Mass. 221; 1 Perry, Tr. 4th ed. § 165; Sell v. West, 125 Mo. 621, 46 Am. St. Rep. 508, 28 S. W. 969; Hirsh v. Auer, 146 N. Y. 14, 40 N. E. 397; Peek v. Peek, 101 Ky. 423, 41 S. W. 434.

The attempted transfer, assignment, or change in benefit certificate to the plaintiff being void, and not, therefore, entitling him to the money, the defendant is the proper beneficiary to receive the benefit.

Cook v. Supreme Conclave I. O. H. 202 Mass. 87, 88 N. E. 584; Smith v. Boston & M. R. Relief Asso. 168 Mass. 213, 46 N. E. 626; Warner v. Modern Woodmen, 67 Neb. 233, 61 L.R.A. 603, 108 Am. St. Rep. 634, 93 N. W. 397, 2 Ann. Cas. 660; Elsey v. Odd Fellows' Mut. Relief Asso. 142 Mass. 224, 7 N. E. 844; Marsh v. Supreme Council, A. L. H. 149 Mass. 512, 4 L.R.A. 382, 21 N. E. 1070; United Order, G. C. v. Merrick, 165 Mass. 421, 43 N. E. 127; Doherty v. A. O. H. Widows' & Orphans' Fund, 176 Mass. 285, 57 N. E. 463; Clarke v. Schwarzenberg, 162 Mass. 98, 38 N. E. 17; Supreme Council, A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 634; Michigan Mut. Ben. Asso. v. Rolfe, 76 Mich. 146, 42 N. W. 1094; Meyer v. Grand Lodge O. S. H. 108 Minn. 25, 121 N. W. 235; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166; Rindge v. New England Mut. Aid Soc. 146 Mass. 286, 15 N. E. 628; Burns v. Grand Lodge, A. O. U. W. 153 Mass. 173, 26 N. E. 443; Bacon, Ben. Soc. §§ 245, 310; Sturges v. Sturges, 126 Ky. 80, 12 L.R.A. (N.S.) 1014, 102 S. W. 884; Cooley, Briefs on Insurance, 3776; Supreme Council, C. B. L. v. McGinness, 59 Ohio St. 531, 53 N. E. 54; Flannery v. Gleason, 133 Ill. App. 398.

Messrs. J. Weston Allen and Hector M. Holmes, for appellee:

The right of complainant to recover rests upon a valid trust, created by the express wish of the insured, affirmed by the respondent John W. Crane, in the instrument annexed to the complainant's bill, which was on his part a declaration of trust as well as a release, and established by the delivery by the insured to the complainant of the certificate and full disclosure to him of

the intention to establish the trust for his benefit, and acceptance of the offer.

Kendrick v. Ray, 173 Mass. 305, 73 Am. St. Rep. 289, 53 N. E. 823; Stone v. Hackett, 12 Gray, 227; Hewins v. Baker, 161 Mass. 320, 37 N. E. 441.

An assignment of a certificate in a fraternal benefit order, although contrary to the purpose and intent of the by-laws of the order, and made to a stranger outside of the classes eligible under the by-laws of the order or the statutes of the state, must be recognized, in equity at least, in all cases where the fraternal benefit order does not appear to object.

Jarvis v. Binkley, 206 Ill. 541, 69 N. E. 582; Martin v. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; Kimball v. Lester, 43 App. Div. 27, 59 N. Y. Supp. 540; Dexter v. Supreme Council, R. T. T. 97 App. Div. 545, 90 N. Y. Supp. 292; Coleman v. Anderson, 98 Tex. 570, 86 S. W. 730; Peek v. Peek, 101 Ky. 423, 41 S. W. 434; Knights of Honor v. Watson, 64 N. H. 517, 15 Atl. 125; Stoelker v. Thornton, 88 Ala. 241, 6 L.R.A. 140, 6 So. 680; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166; Supreme Council, A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 634.

Sheldon, J., delivered the opinion of the court:

The findings made by the single justice were well warranted and cannot be reversed. The case must be decided upon those findings.

The benefit certificate taken by Merritt B. Crane in the defendant order could not have been made payable to the plaintiff, who came within none of the classes named in the statute or in the "general laws" of the order. Rev. Laws, chap. 119, § 6; Massachusetts C. O. F. v. Callahan, 146 Mass. 393, 16 N. E. 14; Marsh v. Supreme Council, A. L. H. 149 Mass. 512, 4 L.R.A. 382, 21 N. E. 1070; Lavigne v. Ligue des Patriotes, 178 Mass. 25, 54 L.R.A. 814, 86 Am. St. Rep. 460, 59 N. E. 674. Nor could he acquire any rights in the certificate or its proceeds from any subsequent directions or assignment made in his favor by the insured (Briggs v. Earl, 139 Mass. 473, 1 N. E. 847), or by reason of the affectionate relations between himself and the member, or by reason of his having paid assessments and dues for which the member was liable (Supreme Council, A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 634; Skillings v. Massachusetts Ben. Asso. 146 Mass. 217, 15 N. E. 566; McCarthy v. Supreme Lodge, O. P. 153 Mass. 314, 11 L.R.A. 144, 25 Am. St. Rep. 637, 26 N. E. 866; Shea v. Massachusetts Ben. Asso. 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; Clarke v. Schwar-

zenberg, 162 Mass. 98, 38 N. E. 17; *Id.* 164 Mass. 347, 41 N. E. 655; *Supreme Commandery, U. O. G. C. v. Merrick*, 163 Mass. 374, 40 N. E. 183; *Clarke v. Supreme Council, R. A.* 176 Mass. 468, 57 N. E. 787; *Hill v. Supreme Council, A. L. H.* 178 Mass. 145, 59 N. E. 652; *Wilber v. Supreme Lodge, N. E. O. P.* 192 Mass. 477, 78 N. E. 445; *Davis v. McGraw*, 206 Mass. 294, 138 Am. St. Rep. 398, 92 N. E. 332). It is therefore the right and the duty of the defendant order to pay the amount of the certificate to the beneficiary named therein, the defendant John W. Crane.

The real claim of the plaintiff is against the last-named defendant, upon the ground that a trust has been created in the plaintiff's favor and impressed upon the proceeds of the certificate, by which the beneficiary of the certificate is bound to receive and hold its proceeds for the benefit of the plaintiff and to turn them at once over to him. To create such a trust and to bind the beneficiary to the performance thereof, the insured member delivered the certificate to the plaintiff and arranged that the latter should pay the assessments to become due thereon, and also make a small monthly payment to the member himself. The member also informed the beneficiary, John W. Crane, of this, his desire, of his arrangement with the plaintiff, and of his wish that John should pay the proceeds of the certificate, when collected, to the plaintiff. John orally assented to this. A written memorandum was also prepared and signed by the insured member, his wife, and his nearest blood relations, and by John, the beneficiary. And a single justice has found that this beneficiary "understood that he was not to receive the proceeds for his own use," but that he "agreed to collect and hold the proceeds for the use of the plaintiff." Unless this arrangement and the trust which resulted therefrom are invalid, or are not to be enforced by reason of the circumstances of the case, we are satisfied that it did create a duty on the part of John W. Crane to recognize the rights of the plaintiff as entitled to this fund when it should have been collected, and to pay the same at once to him, and that this right of the plaintiff can be enforced in equity. *Kendrick v. Ray*, 173 Mass. 305, 73 Am. St. Rep. 289, 53 N. E. 823; *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441. Though not precisely the same, the situation is analogous to those cases in which one has acquired property "by conveyance or devise, secured to himself under assurances that he will transfer the property to or hold and appropriate it for the use and benefit of another. A trust for the benefit of such other person is charged upon the property,

not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself." *Glass v. Hulbert*, 102 Mass. 24, 39, 3 Am. Rep. 418, and cases cited; *Olliffe v. Wells*, 130 Mass. 221, 224, and cases cited. *John W. Crane*, though already named as beneficiary in the certificate, yet held this position only at the will of the insured member, who at any time could have revoked his designation and appointed another in his stead; and it is an irresistible inference from the facts found that this course would have been taken, and that another beneficiary within the class permitted would have been appointed but for the consent and engagement given by John.

But it is claimed that there was no valid consideration for this promise and the trust which resulted therefrom. This position, however, is sufficiently answered by what has been said. The beneficiary retained his position by reason of his undertaking, and that was consideration enough. As in the cases already referred to, it would be a fraud for him to receive and apply to his own use the proceeds which he has been enabled to obtain only by means of his promise to pay them to the plaintiff.

It is said that the interests, both of the insured member and of this beneficiary, were merely contingent, and not actually vested, rights of property in an existing fund. That is true. The amount of the benefit might never be realized at all. If it were to be realized, yet the member had no other interest therein than the bare power to appoint some person of a limited class to receive the fund if and when it should become due and payable. The beneficiary had no other interest than a mere expectancy dependent upon the will and pleasure of the insured member. But it does not follow that the holder of such a merely expected or contingent interest, growing or expected to grow out of actually existing, though defeasible, contractual rights, has no power of dealing with it, or that his engagements made with reference to such an interest, while it is merely expectant and contingent, may not be enforced in equity after the interest shall have become vested and absolute. And it has been so held with reference to just such contingent and expectant rights as are here in question. *Hirsh v. Auer*, 146 N. Y. 13, 40 N. E. 397; *Dexter v. Supreme Council, R. T. T.* 97 App. Div. 545, 90 N. Y. Supp. 292; *Kimball v. Lester*, 43 App. Div. 27, 59 N. Y. Supp. 540, affirmed in 167 N. Y. 570, 60 N. E. 1113; *Jarvis v. Binkley*, 206 Ill. 541, 69 N. E. 582; *Peek v. Peek*, 101 Ky. 423, 41 S. W. 434. That equitable rights might be attached to

the proceeds of such a certificate was recognized by this court in *Mee v. Fay*, 190 Mass. 40, 42, 76 N. E. 229.

This disposition cannot be avoided on the ground that it was merely testamentary. *Kendrick v. Ray*, 173 Mass. 305, 73 Am. St. Rep. 318, 53 N. E. 823.

The trust was sufficiently executed by the delivery of the certificate to the plaintiff and the promise of the beneficiary to pay the prospective fund to the plaintiff upon its receipt. No doubt all this rested upon a merely contingent foundation, and might have been avoided by the member in his lifetime, through the appointment of a new beneficiary; but this was not done, and the rights of these parties are not now affected by that past contingency.

It is a more difficult question whether by the means here presented the benefit of the certificate can be secured to one who is not a member of the class described in the statute already quoted and in the rules of the defendant order. If the plaintiff claimed merely under the insured member, he could not maintain his claim. It is said that to permit him now to recover would be to allow that to be done by indirection which could not be done directly, and thus to frustrate both the legislative will and the intention of the parties to the contract. On this reasoning it was held in another state that an assignment of such a certificate made by the beneficiary thereof in the lifetime of the insured member and joined in by the latter was invalid. *Rose v. Wilkins*, 78 Miss. 401, 29 So. 397. It may be granted that a beneficiary association could not be required to make payment to any other persons than those specified in its regulations and in the statutes by which it is governed. The power of the court to deal with the beneficiary, to require him to collect the money that has become due, and to pay it out according to the obligations into which he has entered, stands on a different footing. But the existence of even this power has been denied. *Gillam v. Dale*, 69 Kan. 362, 76 Pac. 861: In our opinion, however, there is a fundamental difference between the two propositions. The right of the beneficiary to bind himself by antecedent conduct or agreement as to what he will do with the proceeds of such a certificate when they shall come into his possession, subject only to the contingency of their so coming, is hardly to be denied. His prospective obligation becomes binding only when his contingent interest has become absolute. He has at first only a prospective right, which may never come into existence, but it is a right growing out of a presently existing subject-matter, and 40 L.R.A. (N.S.)

expectancy which, if there is no change in the present state of affairs and if nothing intervenes to destroy rights which have been stipulated for, is likely in the natural order of events to ripen into a reality,—a vested right which will then be capable of enforcement. The right of the beneficiary during the lifetime of the insured member closely resembles the expectation of a farmer to raise a crop which he intends to plant upon his land and which he pledges to obtain the seed therefor; or the expectation of an owner of domestic animals that they will yield a natural increase, about which he may make contracts in advance; or of a dairyman that his cows will yield milk, so that he may properly bargain for the disposing of the butter and cheese which he hopes to make therefrom. *Low v. Pew*, 108 Mass. 347, 350, 11 Am. Rep. 357. And see the cases collected in 35 Cyc. 45, 46. It is enough that there is a present interest in the thing from which the expected article or right is to be directly produced. And even if the actual property does not pass in the future product or result of that which has a present existence, an agreement touching that future product or result may yet have validity and afterwards be capable of enforcement, as was held in the cases cited on pages 695, 696, of this opinion.

The beneficiary cannot indeed make a valid assignment of his expectant interest to one not within the limited classes; but as soon as his right has vested and become absolute, it is his property and he may dispose of it at his will. We see no reason why he may not in advance bind himself, at any rate, by the creation of a trust, to make such a disposition as we have here.

What has been said disposes also of the objection that this is an illegal result, an evasion of the statute. It has been found that the parties had no intention to evade the statutes of the commonwealth or the "laws" of the defendant order. Nor does the accomplishment of their purpose have that effect. The payment of the benefit to the beneficiary is not to be interfered with. The property in that benefit, as between the order and the beneficiary, vests absolutely in the latter. The order is not concerned with the disposition which he may make of it. But it would be grossly inequitable to allow him to set up the legal title which he has acquired, as a means of evading the execution of the trust which he has assumed and by means of which he obtained both his expectant right and his absolute title.

The decree appealed from must be modified by providing that upon the surrender

of the certificate the defendant order shall pay the amount thereof to the defendant John W. Crane, and that he shall forthwith pay the same to the plaintiff. The plaintiff should have also costs against the last-named defendant.

VERMONT SUPREME COURT.

P. BALLANTINE & SONS

v.

ETTA M. FENN, Impleaded, etc., Appt.

(84 Vt. 117, 78 Atl. 713.)

Surety — judgment against principal — binding effect.

A judgment against a man in a bankruptcy proceeding to which his wife is not a party is not admissible in evidence in a proceeding by the judgment creditor to enforce a mortgage which she had given as surety for him, where the judgment against him was not a prerequisite to her liability, and her contract does not bind her to abide a judgment against him.

(January 9, 1911.)

Note. — Effect upon surety of judgment against principal.

- I. Introduction, 698.
- II. Scope, 704.
- III. Official bonds.
 - a. Of sheriffs and constables, 704.
 - b. Of executors and administrators, 708.
 - c. Of guardians, 717.
 - d. Of assignees, 720.
 - e. Of receivers, 721.
 - f. Miscellaneous, 722.
- IV. Indemnity bonds and obligations.
 - a. In general, 723.
 - b. Sheriffs' bonds, 732.
 - c. Miscellaneous obligations, 734.
 - d. Notice, 737.
- V. Special bonds in legal proceedings.
 - a. Appeal bonds, 741.
 - b. Injunction bonds, 742.
 - c. Attachment bonds, 743.
 - d. Replevin bonds, 744.
 - e. Sequestration bonds, 745.
 - f. Miscellaneous bonds, 746.
- VI. Liquor bonds, 747.
- VII. Confession of judgment, 747.
- VIII. Fraud and collusion, 749.

I. Introduction.

The decisions seem to be in great conflict as to the evidential value of a judgment against the principal in an action against his surety. It is not always possible to tell what the language of the obligation involved in the particular suit is, and without this, it cannot be said how far two cases may be out of harmony. The wording of the instrument is everything in this class of cases. There is nothing to prevent a surety

APPEAL by defendant from a decree of the Chancery Court for Rutland County in plaintiffs' favor in a proceeding to foreclose a mortgage on certain premises given by defendant as surety for her husband. Reversed.

The facts are stated in the opinion.

Mr. Charles L. Howe, for appellant:

The doctrine of *res judicata* does not apply against strangers to the proceeding.

Nason v. Blaisdell, 12 Vt. 165, 36 Am. Dec. 331; Knapp v. Marlboro, 31 Vt. 674; Gerrish v. Bragg, 55 Vt. 329.

The liability on a contract of surety cannot be extended by implication beyond the fair scope of its terms, and the contract must be construed *strictissimi juris*.

State v. Mann, 34 Vt. 371, 80 Am. Dec. 688; Ferrisburg v. Martin, 60 Vt. 330, 14 Atl. 88; Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189.

It does not appear that defendant agreed to be bound by any judgment or decree rendered against her husband.

McConnell v. Poor, 113 Iowa, 133, 52 L.R.A. 312, 84 N. W. 968; Chamberlain v. Godfrey, 36 Vt. 380, 84 Am. Dec. 690.

from contracting to be bound by a judgment against his principal, if he choose, and if that is the fair import of his agreement, he will be concluded by such a judgment. It is simply a case of what the surety has said he will do. In an ordinary contract of indemnity, the surety is brought in by notice. It is usually held in such cases that if he is seasonably notified of the original suit and given an opportunity to defend, he will be concluded by the judgment against his principal. Without notice, the judgment is reduced to *prima facie* evidence of the indemnitor's liability.

The broad general rule is that a judgment is no evidence against a stranger to it. Lucas v. The Governor, 6 Ala. 826; McClure v. Colclough, 5 Ala. 65.

Or, as often stated, that no one is bound by a judgment or decree but parties and privies. Bryant v. Owen, 1 Ga. 355.

And the mere fact that several persons are jointly, or jointly and severally, bound by the same instrument, does not create an exception. McClure v. Colclough, *supra*.

It is a general principle that no one can be held for a breach of his own obligation without opportunity to be heard in defense. Graves v. Bulkley, 25 Kan. 249, 37 Am. Rep. 249.

The general rule is that verdicts and judgments bind conclusively parties and privies, because privies in blood, in estate, and in law, claim under the person against whom the judgment is rendered, and they, claiming his rights, are, of course, bound as he is. But, as to all others, they are not conclusively binding, because it is unjust to bind a person by any proceeding in which he had no opportunity to make a defense, of offering evidence, of cross-examining witnesses,

It would be unjust to compel her to be bound by a judgment obtained in a proceeding in which she had neither the right nor the opportunity to be heard.

Lipscomb v. Postell, 38 Miss. 476, 77 Am. Dec. 651; *Chamberlain v. Godfrey*, 36 Vt. 380, 84 Am. Dec. 690; *Gerrish v. Bragg*, 55 Vt. 329; *McConnell v. Poor*, 113 Iowa, 133, 52 L.R.A. 312, 84 N. W. 968; *Ferrisburg v. Martin*, 60 Vt. 330, 14 Atl. 88.

Messrs. Lawrence, Lawrence, & Stafford and T. W. Moloney, for appellees:

The surety was bound by the judgment. *Lindsey v. Danville*, 46 Vt. 144; *Tute v. James*, 50 Vt. 124; *Chamberlain v. Godfrey*, 36 Vt. 380, 84 Am. Dec. 690; *Bradley v. Chamberlin*, 35 Vt. 277; *Tracy v. Goodwin*, 5 Allen, 409; *Dennie v. Smith*, 129 Mass.

or of appealing if he was dissatisfied with the judgment. *Munford v. Nottoway*, 2 Rand. (Va.) 313.

The doctrine is thus stated in the opinion given by the judges in the *Duchess of Kingston's Case*, 20 How. St. Tr. 538: "What has been said at the bar is certainly true as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third, for it would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers."

The rule of law that none shall be bound by a judgment but parties and privies is said to be founded in justice; that it would be most unjust—contrary to all ideas of the administration of justice in civilized countries—to hold that a judgment should be binding upon one who, neither by himself nor by one representing him and identified in interest with him, has had an opportunity to appear in court and make defense. *Chamberlain v. Godfrey*, 36 Vt. 380, 84 Am. Dec. 690.

In a North Carolina case it is said that the general rule laid down by all the writers on the law of evidence is that it would be unjust to bind a third person by a judicial proceeding between two, in which he could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment which he might think erroneous. A verdict or judgment, however, in a former action, upon the same matter directly in question, is also evidence for and against privies in blood, privies in estate, or privies in law, because their rights are derived under the person against whom the judgment is recovered, and must consequently be bound as his were. *M'Kellar v. Bowell*, 11 N. C. (4 Hawks) 34.

The conclusive effect of judgments re- 40 L.R.A. (N.S.)

143; *Alkire Grocery Co. v. Richesin*, 91 Fed. 79; *Burgess v. Simonson*, 45 N. Y. 225; *Central Trust Co. v. Charlotte, C. & A. R. Co.* 65 Fed. 257.

Powers, J., delivered the opinion of the court:

This is a petition in behalf of a New York corporation to foreclose a mortgage on certain premises in Rutland given by a wife as surety for her husband, the latter joining in the conveyance. The husband, Frederick Fenn, was subsequently adjudged a bankrupt, and the petitioner presented its claim against him in the court of bankruptcy, and, without fraud or collusion, there obtained a judgment for a certain sum against Fenn. The only question here

respecting the same cause of action, and between the same parties, is also said to rest upon the just and expedient axiom that it is for the interest of the community that a limit should be imposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. *Robbins v. Chicago*, 4 Wall. 658, 18 L. ed. 429.

By the rule of the civil law, a judgment against the principal, whilst in force, is conclusive against his sureties. But this is because the sureties are permitted to controvert the judgment against the principal, even if it be a judgment of a court of final resort. *Munford v. Nottoway*, supra.

The civil law regarded the relation of principal and surety as creating such a privity of interest as made the surety responsible for whatever bound the principal; but the security was allowed to contest the liability of the principal in any action against the latter, and to appeal from the judgment if it was unfavorable. State use of *Griffith v. Holt*, 27 Mo. 340, 72 Am. Dec. 273.

Under the civil law, the surety was permitted to defend, and even allowed to prosecute an appeal from the judgment against the principal, though not a party to the judgment. As he was given his day in court, there appears no serious objection to binding him by the litigation. Much of the confusion in the decisions seems to have resulted from the attempt to apply the rule of the civil law, binding the surety by the litigation against the principal, without allowing the former the participation there accorded. *McConnell v. Poor*, 113 Iowa, 133, 52 L.R.A. 312, 84 N. W. 968.

It was a rule of the civil law that, the obligation of the surety being dependent upon that of the principal debtor, the surety was to be regarded as the same party with the principal, with respect to whatever was decided for or against him. Therefore, if the demand against the principal had been dismissed, the surety might, in case he was afterwards proceeded against, oppose the exception, *sic judicata*, to the creditor. The creditor could not, in this case, reply that

involved is the amount due in equity under the mortgage; and as the case is presented, this depends upon the admissibility and effect of the judgment of the court of bankruptcy as against Mrs. Fenn, who was not a party to it. When a certified copy of this judgment was offered in evidence at the hearing before the master, the defendant, Etta Fenn, objected on the ground that it was neither conclusive nor admissible against her, since she was in no sense a party to it. Subject to her exception it was admitted and held to be conclusive of the amount due from Fenn, not only against him, but against Mrs. Fenn as well, and evidence offered by her tending to show that the sum due was less than that found by the court of bankruptcy was rejected.

it was *res inter alios judicata*, for, as it was the office of a surety that his obligation should depend on that of his principal, the surety could not owe more than the principal, and he might oppose all the exceptions *in rem* which could be opposed by the principal; it followed that whatever had been decided in favor of the principal must be taken to have been decided in favor of the surety, who ought in this respect to be considered the same party. And on the other hand, if the judgment was against the principal, the creditor might oppose it to the surety, and demand that it be carried into execution against him. But the reason for these rules, as explained by Pothier, was "that the surety is allowed to appeal against the judgment, or to form an opposition to it, if it is in the last resort." *M'Kellar v. Bowell*, supra.

The general rule of the common law is undoubtedly otherwise. A judgment by the common law binds only parties and privies,—privies in blood, in estate, or in law; and as a security has no opportunity of contesting the propriety of a judgment against his principal, nor of appealing from it after it is rendered, he is not in general bound by it. *State use of Griffith v. Holt*, supra.

The general meaning of privies includes those who claim under, or in the right of, parties. It has been held that there is no such privy between a surety and his principal as will take him out of the general rule. *Bryant v. Owen*, 1 Ga. 355.

In *Calhoun v. Gray*, 150 Mo. App. 591, 131 S. W. 478, it was said that in cases where the sureties are not parties to the record or given an opportunity to defend by appropriate notice, a judgment establishing the obligation against the principal is not conclusive on the doctrine of privity alone, and, if it is conclusive at all against the sureties, it is because of the form the obligation has taken, and not from the principles of law which obtain.

The books and daily practice afford many instances where sureties are concluded by judgments against their principals, though not parties to the action; as, for instance, in the case of replevin and supersedeas 40 L.R.A. (N.S.)

Stated abstractly, the question is: Is a judgment against a principal admissible in a suit against his surety, and, if so, what is its effect?

Though it would be difficult to find in the books a question on which the cases are in more hopeless conflict,—some holding that such judgment is *inter alios* and inadmissible, some that it is prima facie evidence of the sum due from the surety, and still others that it is conclusive evidence of the sum so due,—we think there is enough to be found in our own cases to furnish a safe guide for the determination of the question. In *Bramble v. Poultney*, 11 Vt. 208, it was held that a judgment against a constable in a suit of which the town had no notice

bonds. Whether, in the absence of some provision by statute, the surety is thus concluded, depends upon the terms and conditions of his undertaking. If his covenant is that his principal will comply with the judgment, then he is concluded by that judgment as to all matters determined thereby, though not a party to the action. *Shenandoah Nat. Bank v. Read*, 86 Iowa, 136, 53 N. W. 96.

The holding that the sureties on a guardian's bond are concluded by the judgment against their principal is based upon the peculiar obligation of the bond itself, the sureties' undertaking being that their principal shall discharge all his official duties, and one of the duties is to pay over to the persons entitled the amount found by the court to be due. See *infra*, III. c.

The general rule that judgments shall bind only parties and privies admits of this exception, that one may agree to stand in the place of another, and to be so fully answerable for his debt or unlawful act, as that a judgment against the latter shall conclude the former as to the amount of such debt or damage. *Levick v. Norton*, 51 Conn. 461.

But what are sometimes called exceptions to the general rule are really not exceptions, and do not fall within the rule at all, depending, solely, upon the principle that one may contract to be answerable to another person upon such lawful conditions as he pleases. *Pioneer Sav. & L. Co. v. Bartsch*, 51 Minn. 474, 38 Am. St. Rep. 511, 53 N. W. 764.

In every case the important question is: What are the terms of the surety's contract? What has he undertaken to indemnify his covenantee against? On what contingency has he agreed that his liability shall be fixed? *Ibid*.

One way of stating the rule is that a recovery against the principal cannot be used as evidence to charge the surety, unless his contract binds him to the result of legal proceedings against his principal. *Arrington v. Porter*, 47 Ala. 714.

A surety is not bound by a judgment against his principal if the surety is not

was not conclusive evidence against the town. The question whether or not it was prima facie evidence was left undecided. It was pointed out in that case that a suit against the constable was not necessary to a suit against the town, and that therein the case differed from one in which it was sought to charge the sureties of a sheriff and high bailiff,—in which (it was said) a judgment must first be obtained against the officer, and then be affirmed against the bondsmen. Accordingly it was held in *Bradley v. Chamberlin*, 35 Vt. 277, though the statute somewhat influenced the decision, and in *Tute v. James*, 50 Vt. 124, that a judgment against a sheriff was conclusive against his bondsmen, and in *Chamberlain v. Godfrey*, 36 Vt. 380, 84 Am. Dec.

a party thereto, unless he has so contracted. *Thomson v. McGregor*, 9 Abb. N. C. 138.

A judgment against the principal is entitled to no consideration as against the surety, unless by the terms of the contract the surety is to be bound thereby. *McConnell v. Poor*, supra.

The true rule is that a recovery against the principal cannot be used as evidence to charge the surety, except in cases where the contract of the surety can be construed into an undertaking to be bound by the result of legal proceedings against the principal; and when the judgment is binding on the sureties at all, it is conclusive, and not merely prima facie evidence. *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147.

The rule has been said to be that the judgment against the principal is only prima facie evidence of liability against the surety, unless the condition of the bond makes it otherwise. *Price v. Carlton*, 121 Ga. 12, 68 L.R.A. 736, 48 S. E. 721.

In an Iowa case it is said that there is no little confusion in the language of the courts on this subject, and entire harmony does not prevail in the decisions. This has resulted sometimes in treating such a judgment as *res judicata* in an action against the surety, rather than passing on the character of the contract, and simply holding him to its performance. It is a fundamental principal in jurisprudence that every man shall have his day in court, and shall be heard in his own defense, and of this right he may not, under the laws and Constitution of this state, be deprived. For this reason judgment against the principal may never foreclose investigation of the surety's liability, unless, by virtue of the latter's undertaking, he has obligated himself directly or by implication to be bound thereby. Where, by the terms of the bond, the surety is to be bound by the litigation to which he is not a party, the courts decide, not that the judgment is an adjudication because of the connection, but that he must perform the contract as it written. *McConnell v. Poor*, 113 Iowa, 133, 52 L.R.A. 312, 84 N. W. 968.

In *Pioneer Sav. & L. Co. v. Bartsch*, supra, it is said if a surety stipulates for any par-

690, that a judgment against a sheriff was conclusive against the sureties of his deputy. Judge Redfield, in *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98, divides these cases into two classes, saying: "The general rule undoubtedly is that in a collateral undertaking by way of guaranty, where a suit [against the principal] is necessary to fix the liability of the guarantor, the first judgment is prima facie evidence of the default. But, where the guarantor is liable without suit against the principal, the judgment against him is regarded as strictly matter *inter alios*. . . . Where the suit may, in the first instance, be brought directly against the guarantor, the judgment against the principal without notice to the guarantor is not evidence; and

particular method by which the liability of his principal or of himself shall be fixed, he is bound by it. If he has undertaken, either expressly or by implication, from the position which he has assumed with reference to pending litigation, to be responsible for the result of a suit between others, to which he is not a party, and to which he has not been made privy by notice and an opportunity to defend, then, in the absence of fraud or collusion, the judgment against the principal alone would be conclusive evidence against him of every fact which it was necessary to find to recover such a judgment. This would be because he had so contracted. In the absence of such agreement, express or implied, it would be as to him *res acta inter alios*, and evidence of nothing except of the fact of its recovery. There would seem to be no middle ground, and it is consequently very difficult to sustain on principle the numerous class of cases which hold certain judgments against the principal prima facie, but not conclusive, evidence that the facts *in pais* against which the sureties agreed to indemnify were established in the suit.

If a person enters into a contract of indemnity whereby he agrees to become responsible for the result of a litigation, or if, by operation of law, such a responsibility is cast upon him without any agreement, he will, in the absence of fraud or collusion, be conclusively bound by the judgment rendered, whether he had notice of the action in which it was entered or not. The law has been held to be thus: (1) Where the covenantor expressly makes his liability depend on the event of a litigation to which he is not a party, and stipulates to abide the result; and (2) where the covenant is one of general indemnity merely against claims or suits. In cases of the first class, the judgment is conclusive evidence against the indemnitor, although he was not a party and had no notice, for its recovery is the event against which he covenants. In those of the second class, the judgment is prima facie evidence only against the indemnitor, and he may be let in to show that the principal had a good defense to the

so, too, if the guarantor have notice of suit against the principal, he is not obliged to concern himself in its defense, but may await a suit against himself, and then insist upon the right to contest the whole ground. The cases of joint and several obligors, and especially of sureties and co-sureties, as a general rule, we apprehend, have been ranked under the latter class of cases." It may be true, as suggested by Judge Redfield, that this proposition was not strictly necessary to a decision of the case then in hand, and so not entitled to be regarded as an authority; but the point was argued by counsel, and the case seems to be regarded outside the state as an authority on the question, for it is very generally so cited. Judge Aldis, too, in *Chamberlain v. Godfrey*, supra, divides these cases into two classes, saying, in effect, that when a surety, either expressly or by reasonable implication from the nature and intent of his obligation, stipulates to pay the damages and costs which may be recovered against his principal, or otherwise to abide the judgment or decree against the principal, he is bound by the judgment, though he has no notice of the suit. But when a surety merely becomes holden for the payment of money,—as, for instance, a surety

on a promissory note,—or the performance of some act on the part of the principal, he is not bound by the judgment.

It is apparent from the foregoing that, in this state at least, these contracts are classified, and that a different rule applies to one class than to the other. Nor do we think that there is any conflict or inconsistency in the two forms of stating the rule. On the other hand, we think they are fundamentally and practically the same thing. It is plain enough that the case in hand falls into that class in which a judgment against the principal is not admissible at all, either to establish liability or the amount of it; for a judgment against Fenn was not a prerequisite to a right of action against his wife, if we are to apply the rule as stated by Judge Redfield; nor is there anything in the contract or in its nature or object which expressly or by implication binds the wife to abide the judgment against her husband, if we are to apply the rule as stated by Judge Aldis. It follows that the certified copy was improperly admitted, and that the offered evidence (if otherwise admissible) was improperly excluded.

Reversed and remanded.

claim. State use of *Beard v. Abbott*, 63 W. Va. 189, 61 S. E. 369. For note on "How far indemnitors are bound by judgments against their principals," see *Robinson v. Baskins*, 22 Am. St. Rep. 204.

When it clearly appears from the obligation itself that the sureties undertook to pay a particular judgment, or to do something else dependent upon the result of specific litigation then pending, as to pay the costs which may be adjudged therein or to answer for the conduct of a party in respect of a charge which the law lays upon him, the judgment in such litigation against the principal in the undertaking, in the absence of fraud or collusion, is accepted as conclusive upon the sureties, for such, indeed, is the measure of their obligation. The rule in such cases rests not upon the principles of law which obtain between principal and surety, but instead it rests upon the fair construction which the courts place upon the obligation assumed by the parties. *Calhoun v. Gray*, 150 Mo. App. 591, 131 S. W. 478.

There can be no doubt that where a surety undertakes for the principal that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such cases stipulates without regard to notice to him of the proceedings 40 L.R.A.(N.S.)

to obtain the judgment, his liability is, of course, independent of any such fact. *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647.

There is a marked distinction between covenants which stipulate against the consequences of a suit, and those which contain no such undertaking. In the latter class, the judgment is *res inter alios acta*, and proves nothing except *rem ipsam* against the indemnitor, unless he had notice and an opportunity to defend. *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275.

Whenever the surety has contracted in reference to the conduct of his principal in a suit or a proceeding in the courts, he is concluded by the judgment, in the absence of fraud or collusion between the prosecuting parties and him for whom he is bound. *Kennedy v. Brown*, 21 Kan. 171.

Where the sureties, by the express terms of their agreement, or by reasonable implication from the very nature and intent of their obligation, have stipulated to pay the damages and costs which may be recovered against their principal, or otherwise to abide the decree or judgment of a court against the principal, there they are bound by the judgment though they have no notice of the suit. This results from their agreement. *Chamberlain v. Godfrey*, 36 Vt. 380, 84 Am. Dec. 690.

When it appears from the terms of the obligation that the surety has contracted to become bound by a judgment that has been or may be rendered in an action against his principal, it is conclusive against

him, although he was not a party to the suit in which the judgment was obtained; but in an undertaking general in character, the judgment obtained against the principal therein creates only a prima facie liability against the surety, who was not made a party or given an opportunity to defend the suit in which the judgment was obtained. *Browne v. French*, 3 Tex. Civ. App. 445, 22 S. W. 581.

A judgment against a principal does not bind the surety conclusively, as a general rule, but it is prima facie evidence of liability and its extent. If, however, the instrument binds its makers to abide the result of certain litigation, or to satisfy any judgment therein, or to indemnify against it, a judgment against the principal is conclusive upon the sureties, so that they cannot contest the liability, in the absence of fraud or collusion. *State v. Nutter*, 44 W. Va. 385, 30 S. E. 67.

Where the effect of the undertaking of a surety is that he shall be liable for the result of a suit against his principal, he is conclusively bound by the judgment in such suit, even though he be not a party to it, and have no notice of it. *Point Pleasant v. Greenlee*, 63 W. Va. 207, 129 Am. St. Rep. 871, 60 S. E. 301.

Where the bond is an official bond, and not for the performance of a specific act, but for faithful conduct, the courts are in great conflict over the question whether the judgment against the principal is conclusive against the sureties. A few courts hold that the judgment against the principal is conclusive against the sureties. Others hold that the judgment against the principal is prima facie evidence against the sureties, and still others that the judgment against the principal is inadmissible against the sureties, and that to hold the sureties for misfeasance of the principal, the facts of the misfeasance must be proved in an action in which the sureties are defendants.

In the case of most official bonds, the sureties do not assume to pay any judgment rendered against the principal, hence a judgment against the official on such a bond is not conclusive upon the sureties where the latter had no notice of the suit. *Pasewalk v. Bollman*, 29 Neb. 519, 26 Am. St. Rep. 399, 45 N. W. 780.

The only grounds on which sureties on official bonds generally may be regarded as bound by the judgments against their principals is that the sureties, by the terms of their bond, agree, expressly or impliedly, to abide the result of litigation against their principals. *McConnell v. Poor*, 113 Iowa, 133, 52 L.R.A. 312, 84 N. W. 968.

In a California case it is said: "In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties. They do not agree to be absolutely bound by any judgment obtained against him for official misconduct, nor to pay every such judgment. They are only held for a breach of their own obligations. It is a general principle that no party can be so held without 40 L.R.A. (N.S.)

an opportunity to be heard in defense. This right is not defeated by the fact that another party has defended on the same cause of action and been unsuccessful. As the sureties did not stipulate that they would abide by the judgment against the principal, or permit him to conduct the defense, and be themselves responsible for the result of it, the fact that the principal has unsuccessfully defended has no effect on their rights. They have a right to contest with the plaintiff the question of their liability; for, to hold that they are concluded from this contestation by the suit against the sheriff is to hold that they undertook for him that they would be responsible for any judgment against him which might be rendered by accident, negligence, or error, instead of merely stipulating that they would be responsible for his official conduct. *Pico v. Webster*, supra.

In *Graves v. Bulkley*, 25 Kan. 249, 37 Am. Rep. 249, it is said: "To our mind, the better opinion, however, is that, except in cases where, upon the fair construction of the contract, the surety may be held to have undertaken to be responsible for the result of a suit, . . . or when he is made privy to the suit by notice, and the opportunity is given him to defend it, a judgment against the principal is not conclusive against the surety. This is especially true in the case of official bonds, where the sureties undertake in general terms, as in the bond set forth in the petition, that the principal will perform his official duties, pay over the moneys that may come to his hands, and deliver to his successor the writs, books, and papers of his office. They do not agree to be absolutely bound by any order or judgment against him for official misconduct or neglect, nor to pay every such judgment."

The reasons for holding that a judgment against a principal is prima facie evidence against his sureties in an action on an official bond are: First. Because the judgment in the action against the principal, when in his favor, is a complete bar to the action against the sureties, and in any case fixes an absolute limit to the damages which can be recovered against them. It should be mutual, so far, at least, that when the judgment is against the principal, it should be presumptive evidence against the sureties. Second. The nature of the contract in official bonds is that of a bond of indemnity to those who may suffer damages by reason of the neglect, fraud, or misconduct of the officer. The bond is made with the full knowledge and understanding that in many cases such damages must be ascertained and liquidated by an action against the officer for whose acts the sureties make themselves liable; and the fair construction of the contract of the sureties is that they will pay all damages so ascertained and liquidated in an action against their principal. *Stenhens v. Shafer*, 48 Wis. 54, 33 Am. Rep. 793, 3 N. W. 835.

In many of the cases, judgments against the principal are said to be prima facie evi-

dence against the surety. This, of course, gives the surety an opportunity to interpose any defense he may see fit in the action against him.

The general rule is that a judgment against a principal, instead of being conclusive, is only prima facie evidence against the surety, to show the breach of the contract and liability thereunder. *Calhoun v. Gray*, 150 Mo. App. 591, 131 S. W. 478.

Although a judgment against the principal does not conclude the sureties, it is evidence against them until its effect is impugned. *Whitehead v. Woolfolk*, 3 La. Ann. 42.

But this doctrine has been criticized. It has been said that there is no middle ground, and that the surety is either a party or privy, and bound by the judgment; or a stranger, and not bound. *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147.

When the judgment is binding on the surety at all, it is conclusive. He is either a party or privy, or a stranger. *Arrington v. Porter*, 47 Ala. 714.

It would seem, however, that the advantage that would be gained by a rule making judgments against the principal prima facie evidence against the surety, over a rule declaring such judgments to be no evidence at all against the surety, would be very slight in any case in which the surety had a bona fide defense.

Where the surety has not contracted to become responsible for the result of the suit, and where he is not made privy to the suit by notice, and an opportunity given him to defend, the judgment against the principal alone is, as a general rule, evidence of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover judgment. *De Greiff v. Wilson*, 30 N. J. Eq. 435.

II. Scope.

This note is intended to cover cases on the evidentiary value of judgments against the principal not only in actions based on simple contracts of suretyship, but also in suits growing out of ordinary indemnity obligations. Cases on indemnity insurance or reinsurance, however, are not included. Cases of the effect of judgments in favor of principals are also excluded, as well as cases involving the rights of sureties in actions for contribution and in actions on promissory notes, although a number of commercial paper cases are referred to for illustrative purposes. Only such settlements of executors, administrators, or guardians' accounts as have the force of judgments are considered.

III. Official bonds.

a. Of sheriffs and constables.

In considering whether a judgment against the principal is conclusive against his surety in an action on an official bond, the question to be determined, as already 40 L.R.A. (N.S.)

pointed out, is whether the sureties by the language of the instrument have agreed to be so bound. If they contract merely to answer for the good conduct of the principal, and for the faithful performance of his duty, the better opinion is that a judgment against the latter is not conclusive as to the liability of the surety; but that if it is one of the duties of the principal to obey the orders and judgments of the court, a judgment against him will bind the sureties.

It has been held that where the wrongful conversion and acts by the principal as sheriff has been determined by a court of competent jurisdiction, the plaintiff cannot recover against the sureties a larger amount than that adjudicated against the principal, nor can the sureties go behind such judgment and relitigate a question already determined. *Charles v. Haskins*, 14 Iowa, 471, 83 Am. Dec. 378. The court said: "The principle governing is that the liability of the surety is dependent upon that of the principal. Though not a party, the surety is not a stranger to the judgment. He covenants that his principal shall discharge certain official duties. When it is once fairly determined by a competent judicial tribunal that there has been a breach of the official undertaking, the liability of the surety prima facie attaches, whether he was a party to the action adjudging the breach or not. In an action against him, the surety may show fraud or collusion in obtaining the judgment against the principal, or he may show a mistake in the amount, or that it has been paid. . . . And as the surety could claim the benefit of a judgment in favor of his principal, so he is concluded, as above explained, by a judgment against him."

But in *McConnell v. Poor*, 113 Iowa, 133, 52 L.R.A. 312, 84 N. W. 968, it is said that the fallacy in the reasoning in the last-mentioned case, as well as *Lowell v. Parker*, *infra*, on which it was based, lies in supposing that, because the surety may claim the benefit of a judgment in favor of his principal, it follows that he is concluded by one against him. But the surety is discharged by a finding for his principal, not owing to the creditor being estopped, but for the reason that it establishes the absence of liability of the principal; and, if he is not liable, the surety cannot be, as his obligation is merely incidental to that of the principal. Besides, the discharge of the principal does not always release the surety. If the former be an infant when executing an instrument, and is discharged on that ground, the surety may yet be held.

The judgment in an original action against a sheriff is conclusive on the sureties in an action on the bond. *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647.

In the absence of fraud, a judgment against a constable for wrongful attachment settles conclusively against his sureties, as well as himself, not only the right of the plaintiff to recover against him, but the

amount of the damages. *Tracy v. Goodwin*, 5 Allen, 409.

A judgment against a constable for conversion of attached property is conclusive against his sureties in an action on the bond conditioned that the officer should fully perform all duties of a constable in the service of all civil processes which might be committed to him. *Dennie v. Smith*, 129 Mass. 143.

In an action against sureties on a sheriff's bond, to recover moneys paid to the sheriff through a deputy, on a writ of fieri facias, a judgment upon proceedings by scire facias against sureties on the writ of error bond, in a cause in which it was held that payment to the deputy was *pro tanto* a discharge of the judgment, was held conclusive, notice having been given to the sheriff's sureties. *McBroom v. The Governor*, 4 Port. (Ala.) 90.

The sureties on a sheriff's bond, against whom a summary judgment upon motion for failure to return an execution has been rendered, under a statute authorizing judgment to be rendered against sureties without notice when the principal is notified, cannot in equity controvert the conclusiveness of such judgment, the statute appearing to indicate a legislative intention that the litigation in that class of cases should be confined to the plaintiff in execution and the sheriff. *McClure v. Colclough*, 5 Ala. 65.

Where the owner recovers judgment against the officer because of the wrongful seizure of property, for the value of the property seized, the judgment is conclusive against the sureties on the official bond in an action on the bond, as to the ownership of the property at the time of its seizure, and the amount of the damages and costs sustained by the owner by reason thereof, in the absence of a showing that the court was without jurisdiction, or that the judgment was procured by fraud or collusion. *Thomas v. Markmann*, 43 Neb. 823, 62 N. W. 206. To the same effect, *Lewis v. Mills*, 47 Neb. 910, 66 N. W. 817. But these cases were overruled in *Barker v. Wheeler*, 60 Neb. 470, 83 Am. St. Rep. 541, 83 N. W. 678. See *infra*, III. f.

A judgment against a sheriff for failure to pay over money received on execution is conclusive against the sureties on his recognizance, and dispenses with any evidence of request before suit, necessary by the condition of the recognizance. *McMicken v. Com.* 58 Pa. 213.

In an action by a sheriff against his deputy on his official bond for indemnity against the liability for not returning an execution, it is sufficient to introduce the proceedings against the sheriff from the files and minutes of the court, without showing their regularity. *Hall v. Luther*, 13 Wend. 491.

A judgment against a constable for an official default conclusively establishes that fact in a proceeding against his bail. *Eagles v. Kern*, 5 Whart. 144.

A judgment against a constable for de-

fault in executing process prevents the sureties on his official bond from setting up the defense that the constable had been removed within twenty days from the receipt of the writ, and hence, not having the time allowed by law for executing it, was thereby discharged. *Musselman v. Com.* 7 Pa. 240.

A judgment against a constable is conclusive against his sureties as to his misconduct and the extent of the damage sustained by the plaintiff. *Masser v. Strickland*, 17 Serg. & R. 354, 17 Am. Dec. 668.

Where there was a judgment against the estate of a sheriff for moneys which he had collected on execution, but had failed to turn over, it was held that the sureties of the sheriff, although not parties to the proceeding, were concluded thereby as to all defenses which the sheriff's administrator might have interposed. The sureties cannot inquire whether the execution was seasonably delivered, whether it was returned, or whether the claim was barred by the statute of limitations. *Tute v. James*, 50 Vt. 124.

In an early Pennsylvania case, it was held that the sureties on the official bond of the sheriff cannot be concluded by the judgment against the sheriff in an action of trover for wrongful seizure of goods, on the theory that, inasmuch as the sheriff is bound by the judgment, in a joint action against the sheriff and the sureties on the bond, the sureties must be likewise bound. *Carmack v. Com.* 5 Binn. 184. The court said: "This is a very subtle attempt to cut off the securities from all possibility of being heard; but it is too unreasonable to be sanctioned by the law. It is much more just to say that, the plaintiffs having thought proper to join the sheriff in this action with other persons not parties to the action of trover, they have thereby relinquished the estoppel against the sheriff, because that estoppel cannot be insisted on without injustice to the other defendants."

But in *Masser v. Strickland*, *supra*, *Huston, J.*, in referring to official bonds of constables, said: "These official bonds are always joint and several. If the officer is sued first, and a judgment obtained against him, and on failure of obtaining satisfaction, suits are brought against the sureties, I apprehend judgment could not be obtained for a larger sum against them than had been recovered against the officer. The verdict and judgment against him might be used by them to limit the extent of the plaintiff's claim; if it could not, the case of sureties would be alarming. The plaintiff's demand, as shown by his execution, may be large. The sheriff alone can show how much of the defendant's goods he found; whether those goods were in whole or in part subject to claims for rent, or to prior levies on other executions in the hands of the same or a different officer. If any money were paid the plaintiff, this, and the evidence of it, must be peculiarly within the knowledge of the sheriff. A judgment against him for a small sum must then protect his sureties from paying a much

larger, and if the judgment is evidence to protect them, it must be evidence against them; not conclusive in all respects for they may plead *non est factum* to the bond, a release, the statute of limitations, etc., but conclusive either for or against them of the fact that the officer has not performed his duty, and of the damage for which he and his bail are liable." It was said that the opinion in the Carmack Case could be left for consideration when a case on a sheriff's bond accrues.

In following the Masser Case the court in *Evans v. Com.* 8 Watts, 398, 34 Am. Dec. 477, said: "Seeing then that it has become the settled rule of the law in regard to the sureties in a constable's bond, that a judgment obtained in a suit brought against the constable alone, for official misconduct or neglect of duty, will bind and be conclusive upon them, though not notified of the suit, they must be presumed to have known that such was the law, when they entered into the bond; and it must therefore be taken as a part of their obligation or agreement, that they were willing to be so bound and concluded, as often as judgment should be so obtained against their principal; and hence those who have become sureties for constables since the establishment of the rule in this respect can have no reason to complain of."

Under a statute providing that the party claiming to have been injured by the official misconduct of the sheriff shall first, and before resorting to the recognizance, establish his claim by obtaining a judgment against the sheriff for his damages resulting from such misconduct, and show a failure to collect the same of him; and that, on the return of the writ of scire facias, the court, unless satisfactory cause be shown to the contrary, shall render judgment against such sheriff and his sureties in favor of the creditor, for the amount of such judgment and all charges, with interest and costs; and that in all cases where the original judgment against the sheriff was rendered by default, and scire facias brought, as before provided, the sureties may make any defense, and take any advantage in the scire facias, which the principal might by law have made or taken in the original action.—it was held that it was the intention of the legislature that the judgment against the sheriff should be conclusive of the claimant's right to a judgment against the sheriff and his sureties, in the scire facias, as against all defenses that the sheriff might have urged in defense of the suit against him alone. *Bradley v. Cham-berlin*, 35 Vt, 277.

On the other hand, it has been held that a judgment against a sheriff is not conclusive against the sureties on his official bond. *Munford v. Nottoway*, 2 Rand. (Va.) 313. *Green, J.*, in his opinion, said that the creditor cannot complain of the burden of proving his case repeatedly in different suits against the principal and his sureties, for generally he can, if he will, convene them

all in one suit and so avoid that inconvenience.

A surety on a sheriff's bond is not concluded by the judgment against the sheriff for failure to return an execution. *The Governor v. Shelby*, 2 Blackf. 26.

The order or judgment of amercement against a sheriff is not *res judicata* as to the sureties, so as to preclude the latter from setting up as a defense any matter that occurred previous to the entering of the judgment. *Graves v. Bulkley*, 25 Kan. 249, 37 Am. Rep. 249.

A judgment against a sheriff arising out of the breach of duty at a sale under a *fi. fa.* is not *res judicata* against his sureties, and does not conclude them as to the amount of the sheriff's liability for which they are to respond. *Mullen v. Scott*, 9 La. Ann. 173.

A surety on a constable's bond may impeach the judgment against his principal by showing that, by reason of want of legal service of a writ, the latter had no legal notice of the action, and that the court rendering the judgment thus had no jurisdiction of the case. *Fall River v. Riley*, 140 Mass. 488, 5 N. E. 481. The court said: "The surety on a bond, who may, by his contract, be responsible for the amount of such a judgment, is not a party to the original suit, nor privy thereto, and cannot, by the rules of law, review or reverse it. He may therefore impeach it in a suit against himself, and, without reversing it, show that it was invalid for want of jurisdiction over the defendant."

By some courts it is held that the judgment against the sheriff for acts constituting a breach of his official bond is only *prima facie* evidence against his sureties. *Hursey v. Marty*, 61 Minn. 430, 63 N. W. 1090.

The record of a suit against a sheriff for his default is *prima facie* evidence against his sureties, although they were not parties thereto. *Carr v. Meade*, 77 Va. 142.

A judgment against a sheriff is *prima facie* evidence against the sureties on his official bond conditioned for the faithful performance of his duty. This means that the sureties may interpose any defense that they may have, and be fully heard on the merits. *Beauchaine v. McKinnon*, 55 Minn. 318, 43 Am. St. Rep. 506, 56 N. W. 1065. The court admitted that the rule declaring judgments against principals on official bonds ineffectual as against sureties to be more easily sustained on principle. "In fact," said the court, "the *prima facie* doctrine has less to justify it than that which makes a judgment against the principal conclusive upon his sureties, except where there has been fraud and collusion. There is some difficulty in standing upon the middle ground of presumption."

A rule absolute against the sheriff is *prima facie* evidence only against his sureties. *Taylor v. Johnson*, 17 Ga. 521. But the court declared that it was somewhat difficult to perceive upon what principle the rule rests.

Upon an action on a sheriff's bond after a rule absolute against him, the sureties can set up any defense to the action which the sheriff could have urged to the rule. *Watts v. Colquitt*, 66 Ga. 492.

A judgment of amercement against a sheriff is not conclusive upon his sureties in a subsequent suit upon his official bond, but is prima facie evidence only. *Fire Asso. of Philadelphia v. Ruby*, 49 Neb. 584, 68 N. W. 939.

In rebutting the prima facie evidence against the sureties furnished by a judgment of amercement against a sheriff, the former are not limited to showing fraud, collusion, or mistake in the rendition of the judgment, but the original facts are open to inquiry. *Fay v. Edmiston*, 25 Kan. 439.

The record of a proceeding in amercement, while not competent against the sheriff's sureties to prove the default, is competent to prove the extent of the amercement itself. *The Governor v. Montfort*, 23 N. C. (1 Ired. L.) 155.

A sheriff's sureties in an action on the bond may show that a judgment of amercement was either fraudulently or improperly obtained against their principal. *State ex rel. Parker v. Woodside*, 29 N. C. (7 Ired. L.) 296.

In *Crawford v. Word*, 7 Ga. 445, a sheriff having failed to levy an execution, and a rule absolute having been granted against him for the amount of the plaintiff's debt in consequence of his neglect of duty, it was conceded that the rule against the sheriff was presumptive evidence only against the securities; and that they, when sought to be made chargeable therefor, might set up any defense which the sheriff himself could, in answer to the original rule which was taken against him.

A final statutory settlement with a sheriff should be at least prima facie evidence against the sureties, and a judgment against the sheriff for the amount due thereunder is some evidence against the sureties, and in the absence of countervailing testimony, the proceedings and judgment against the sheriff authorize a judgment against the sureties so far as the amount is concerned. *Grayham v. County Ct. 9 Dana*, 182.

A judgment against a constable for the wrongful taking and carrying away of property under color of office, if not obtained by fraud or collusion, is prima facie evidence against his sureties in an action on the bond. *Lowell v. Parker*, 10 Met. 309, 43 Am. Dec. 436.

In an action on a constable's bond, judgment against the officer for neglect to return an execution is prima facie evidence of the amount for which the surety is liable. *Carpenter v. Doody*, 1 Hilt. 465.

A judgment against a sheriff for conversion is only prima facie evidence against his sureties, which may be overcome by competent proof in an action against the sureties on the bond. *Connor v. Corson*, 13 S. D. 550, 83 N. W. 588.

The record of a recovery against a sher-

iff alone, for moneys received in his official capacity and converted, is admissible against his sureties without proof of notice of the pendency of the suit against him, and an opportunity to defend, and is prima facie evidence of the breach of the conditions of the bond. *State ex rel. Coleman v. Cason*, 11 S. C. 392.

A judgment against a sheriff for wrongful levy is prima facie evidence against his sureties, not parties to the action. *People use of Norris v. Mersereau*, 74 Mich. 687, 42 N. W. 153.

Other courts hold that a judgment against the sheriff is no evidence whatever against the sureties in an action on the official bond.

In an action on the official bond of a constable, a judgment against the officer for official misconduct, in an action to which the sureties are not parties, is not even prima facie evidence against them. The burden is upon the plaintiff to establish the facts constituting the misconduct in an action on the bond. *Rodini v. Lytle*, 17 Mont. 448, 52 L.R.A. 165, 43 Pac. 501. The court said: "If we hold that a judgment against the principal is conclusive or prima facie evidence against the sureties, the sureties are obliged to start in an action with a presumption of liability against them. The ordinary rule of law is that the plaintiff must prove his case by evidence; but, if a judgment against the principal is evidence against the sureties, the affirmative of the case is thrown upon the defendants. They must take the burden of proof. Instead of the plaintiff proving his case, the defendants are placed in a position of being obliged to prove their nonliability. In analogy to a criminal case, the defendants would be obliged to prove their own innocence. Defendants, in such a position, would be required to prove that their principal, the constable, had not been guilty of misconduct in his office. They would be obliged to prove that he had faithfully performed the duties of his office. It appears to us, however, that the proof should come from the other side; that the plaintiff should be required to prove against the sureties that the constable had not faithfully performed the duties of his office."

In *Lucas v. The Governor*, 6 Ala. 826, Goldthwaite, J., in referring to the decisions holding a judgment against a sheriff to be prima facie evidence against the sureties, said that it was impossible to perceive on what principle they rest. "Doubtless," said he, "there are cases where the acts or admissions of the sheriff have the effect to bind his sureties; but it will probably be ascertained, whenever these are necessary to be examined, that the acts and admissions are a part of, or immediately connected with, his official duty. The case of a judgment against him is certainly not of this description; and we can conceive of no reason why it should have any effect against his sureties, unless they are concluded by it. If such a judgment is prima facie evidence, anyone will perceive the difficulty there is rebutting it; and why should any greater

effect be given to a judgment obtained by default against a sheriff, or, by his confession, against his surety, when it is certain that his confession, by itself, would not be so? The judgment against the sheriff is not essential in this state, to enable the party to proceed against the surety, and therefore seems to have no bearing in an action upon his bond. It may be remarked that the case of a sheriff is entirely different from that of an administrator and guardian, inasmuch as a part of their duty is the settlement with the court."

A judgment against a sheriff for a breach of his duty is not evidence against the sureties on his official bond, to prove the breach thereof. *M'Dowell v. Burwell*, 4 Rand. (Va.) 317.

A judgment in an action against a sheriff for a false return to an execution does not affect his sureties when a common-law action is brought on the bond. *Lucas v. The Governor*, supra.

A judgment against a sheriff on a motion to pay over money is not sufficient evidence as against the surety to establish a breach of the bond, or the amount of damages, since the surety is not a party thereto. *Carmichael v. The Governor*, 3 How. (Miss.) 236.

A judgment in an action on an official bond of a constable, where it is unnecessary to sue the principal first, is never conclusive or prima facie evidence in favor of the plaintiff of the facts which are essential to its recovery. *Berry v. Schaad*, 50 App. Div. 132, 63 N. Y. Supp. 349.

It is well settled in New York that, in an action on a marshal's bond, a judgment against the marshal for a conversion or an unlawful levy is neither conclusive nor prima facie evidence against the surety of the facts essential to the recovery. *V. Loewer's Gambrinus Brewery Co. v. Lithauer*, 43 Misc. 683, 88 N. Y. Supp. 372.

That a statute makes it necessary to show as a condition of maintaining an action against a surety on a marshal's bond, that a judgment has been recovered against the marshal, and an execution issued and returned wholly or partly unsatisfied, and leave given to prosecute the bond, does not make a judgment against a marshal evidence against the surety of anything more than the fact that the judgment has been obtained. *Ibid*.

A judgment obtained against a sheriff for a false return is not evidence of such default against the sureties on his official bond conditioned that he shall "well and faithfully, in all things, perform and execute the office of sheriff," since the surety on such a bond has not agreed that his principal shall pay any judgment whatever. In this respect the sheriff's official bond is different from an administrator's bond. *People ex rel. Tuthill v. Russell*, 25 Hun, 524.

b. Of executors and administrators.

By the weight of authority, it results from the nature of the obligation entered in-
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to by a surety on an administrator's or executor's bond, that he is bound and concluded by the judgment against his principal, in the absence of fraud or collusion; and the judgment against the principal in such action is *res judicata*, and cannot be collaterally attacked in the action on the bond. *Ne-vitt v. Woodburn*, 160 Ill. 203, 52 Am. St. Rep. 315, 43 N. E. 385, affirming 56 Ill. App. 346.

The surety cannot, in an action on the bond, attack a decree made against an administrator for whose fidelity to his trust he has bound himself. *Stovall v. Banks*, 10 Wall. 583, 19 L. ed. 1036.

The sureties on an administrator's bond are bound to the extent to which their principal is bound. *Greer v. McNeal*, 11 Okla. 526, 69 Pac. 893.

The final decree of distribution of the county court is conclusive against the bondsmen as well as the administrator. *Sjoli v. Hogenson*, 19 N. D. 82, 122 N. W. 1008.

Sureties upon an administrator's bond are bound and concluded by the decree against their principal primarily and to the same extent as their principal is bound. *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190, 27 So. 432.

An order of the county court requiring an executor to pay over the money due is as conclusive upon the sureties as upon the principal. *People v. Stacy*, 11 Ill. App. 506.

A decree of the orphans' court against the administrator is conclusive on his sureties. *Holley v. Acre*, 23 Ala. 603; *Garber v. Com.* 7 Pa. 265; *Com. use of Krebs v. Ruhl*, 199 Pa. 40, 48 Atl. 905.

It is well settled in Missouri that a suit on the administration bond can be maintained against the sureties of an administrator who has been ordered to pay over money by the probate court, and that the judgment of that court against the administrator is conclusive against his sureties. *State ex rel. Frost v. Creusbauer*, 68 Mo. 254.

An order of the court directing the executor to pay over a sum of money, made by a court of competent jurisdiction and unappealed from, and not set aside for fraud or otherwise, if conclusive upon the executor, is conclusive upon his sureties also. *State ex rel. Richardson v. James*, 82 Mo. 509.

There is but one exception in Missouri to the rule of the conclusiveness which attends a final settlement, and that is when an action is brought, either on the administration bond or otherwise, for waste or mismanagement where the estate proves insolvent (1 *Wagner*, Stat. p. 118, § 6), in which case the settlement is to be held conclusive only so far as the administrator "has applied the assets pursuant to the apportionment made by the court for the payment of debts." *Id.* § 7. *Woodworth v. Woodworth*, 70 Mo. 601.

A judgment against an administrator in a probate proceeding, fixing the indebtedness to the estate, is conclusive against his sureties. *Kenck v. Parehen*, 22 Mont. 519, 74 Am. St. Rep. 625, 57 Pac. 94.

An order of removal of an administrator, valid as to him, is valid as to his sureties. *Kelly v. West*, 80 N. Y. 139.

The general settlement of an administrator's account is conclusive upon the sureties on his bond. *Altman v. Hofeller*, 152 N. Y. 498, 46 N. E. 961.

The final settlement of the accounts of an executor is conclusive upon his bondsmen. *Thompson v. Dekum*, 32 Or. 508, 52 Pac. 517, 755.

A settlement or allowance of an executor's account, by a county court having jurisdiction thereof, is binding upon the executor's sureties. *Wallber v. Wilmanns*, 116 Wis. 246, 93 N. W. 47.

A surrogate's order fixing the amount of an administratrix's defalcation binds the sureties as well as the administratrix. *Powder v. Bermeester*, 34 N. Y. S. R. 716, 12 N. Y. Supp. 25.

A certificate which determined the claimant's right to costs in an action brought by him against the estate is a binding adjudication against the sureties of the administrator. *Re Gall*, 42 App. Div. 255, 59 N. Y. Supp. 254.

A judgment entered by a county court upon the final accounting of an executor is conclusive against the bondsman as well as the executor, and as against the bondsman imports verity, and is not merely prima facie evidence of its contents. *Joy v. Elton*, 9 N. D. 428, 83 N. W. 875.

The sureties on an administrator's bond cannot attack collaterally a judgment of the probate court against the administrator upon a final settlement and accounting by their principal, for whose fidelity to his trust they have obligated themselves. *Greer v. McNeal*, 11 Okla. 526, 69 Pac. 893.

Prior to 1844, a judgment against an administrator in North Carolina was no evidence whatever against the sureties, not parties thereto, as to the assets. *State ex rel. Brown v. Pike*, 74 N. C. 531.

The North Carolina statute of 1844 (*Battle's Revisal*, Chap. 43, § 10) provides "that in actions brought upon official bonds of administrators and others there named, 'when it may be necessary for the plaintiff to prove any default of the principal obligors, any receipt or acknowledgement of such obligors, or any other matter or thing which by law would be admissible and competent for or toward proving the same as against him, shall in like manner be admissible and competent against all or any of his sureties who may be defendants with or without him in said action.'" Under this statute a judgment against the principal is conclusive against the surety. *Ibid.*

The general law is that a judgment against an administrator or executor for a debt, or a decrease of a balance in his hands, is conclusive upon the sureties in his bond, though they are not parties. *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826, 33 S. E. 310.

A judgment against the executors of a deceased executor is conclusive against the sureties on his bond, although they were not 40 L.R.A. (N.S.)

parties to the action. *Biggins v. Raisch*, 107 Cal. 210, 40 Pac. 333.

A decree of the distribution entered in the superior court, and the order of the court in passing upon and proving the account of an executor, are, in the absence of fraud, binding upon the sureties, although they were not parties to the proceeding. *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20.

A decree of the orphan's court vacating a prior decree of distribution, and ordering a new distribution, is binding on the administrator's sureties, though they were not heard in the proceeding in which it was made. *Yung's Estate*, 199 Pa. 35, 48 Atl. 692.

A judgment against an administrator in settlement of his accounts is conclusive against a surety who was a party to the proceeding. *Clark v. Newman*, 20 Ky. L. Rep. 1339, 49 S. W. 310.

Where the surety on the executor's bond is cited to appear and show cause why the complainant should not have leave to sue on the bond, and has acquiesced in the decision, he is bound thereby, and cannot thereafter attack the decree against the executor. *Clark v. Fredenburg*, 43 Mich. 263, 5 N. W. 306.

A judgment in settlement of an administrator's account is conclusive upon the surety. *Williamson v. Howell*, 4 Ala. 693. The court said that it was the duty of the surety where, as in this case, his principal was insolvent, to attend the settlement and protect his rights, and his failure to do so could be considered in no other light than gross laches.

Where after a decree has been rendered fixing the amount due from an executor to a legatee, and an application to sue on the bond is made by the legatee, and notice thereof given to the sureties on the executor's bond, and where, at the time of the application, the sureties had opportunity to apply for leave to appeal, but did not do so, it was held that they could not in an action on the bond attack the correctness of the decree against the executor. *Holden v. Lathrop*, 65 Mich. 652, 32 N. W. 879.

But in *Robbins v. Burrridge*, 128 Mich. 25, 87 N. W. 93, it was held that an order granting leave to sue on the bond is not *res judicata* of plaintiff's right to maintain an action, although the sureties have notice thereof and appear.

It has been held that the doctrine that the surety is bound by a judgment against his principal does not apply in a case where the surety of an administrator has been discharged by a secret agreement between the administrator and the distributees of the estate, that he might use the moneys of the estate to carry on his private business. *Brooks v. People*, 15 Ill. App. 570.

Nature of obligation.

In a California case it is said that as a general rule sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have

had their day in court or an opportunity to be heard in their defense; but administration bonds seem to form an exception to this general rule, and the sureties thereon, in respect to their liability for the default of the principal, seems to be classed with such sureties as covenant that their principal shall do a particular act. To this class belong sureties upon bail and appeal bonds, whose liability is fixed by the judgment against their principal. This distinction seems to be founded upon the terms of the obligation into which the sureties upon an administration bond enter, which are that their principal shall faithfully perform all the duties imposed upon him by the nature of his trust, and will account for and pay over all money which may come into his hands pursuant to the orders and decrees of the probate court. The account must be rendered to and settled by the court, and the money must be paid out and distributed by and pursuant to the orders and decrees of the court, and the undertaking of the sureties is that their principal will do all this. *Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125.

In holding that a decree of a probate court settling the amount due the estate from an executor cannot be questioned in an action on the bond, the court, in *Probate Judge v. Quimby*, 89 Me. 574, 36 Atl. 1049, said that the sureties in signing the bond in effect stipulated that their principal should abide and perform decrees of the court upon all questions between him and the estate within the court's jurisdiction. They did not stipulate for any opportunity to object to any proceedings. They intrusted the representation of their principal's rights and interests to the principal himself. As well might the sureties upon an appeal bond question the judgment of the appellate court, as the sureties upon a probate bond question the decree of the probate court in cases within its jurisdiction. This language was cited with approval in *Shaw v. Humphrey*, 96 Me. 397, 90 Am. St. Rep. 349, 52 Atl. 798.

In *Perkins v. Moore*, 16 Ala. 9, it is said: "When we reflect that the orphans' court has full jurisdiction to make final settlements of decedents' estates, and to decree the payment of the assets to those entitled either as distributees or legatees, it must be apparent that when such decree is rendered, it is conclusive on the administrator; and if he then refuse to pay the amount thus ascertained, such refusal must be a breach of the condition of his bond, which is, that he will perform all the duties required of him by law as such executor. And if there has been a breach of the bond, and the amount ascertained to which the party aggrieved by the breach is entitled, by a judicial proceeding to which the administrator was a party, there can be no reason for requiring further proceedings before the bond can be put in suit."

Where one of the conditions of a probate bond is that the administrator shall "pay any balance remaining in his hands upon 40 L.R.A. (N.S.)

the settlement of his accounts to such persons as the court shall direct," his failure to make payment according to the decree of the probate court is a breach of the bond, and such decree is conclusive upon his sureties. *White v. Weatherbee*, 128 Mass. 450.

"A judgment for a specific sum of money due from the administrator to the estate is conclusive upon his sureties, the obligation of the bond being "should faithfully administer said estate, account for, pay, and deliver all money and property of said estate, and perform all other things touching said administration required by law, or the order or decree of any court having jurisdiction." This obligation does not arise out of the relation of principal and surety, but springs from the express stipulation of the bond. *State use of Griffith v. Holt*, 27 Mo. 340, 72 Am. Dec. 273.

✓ In an action on an executor's bond, the sureties are concluded by an order of the court to pay over money, not because they were parties to the record, as was their principal, with the right to appeal or prosecute a writ of error, but because, by the stipulations of their bond, they bound themselves to the performance of whatever should be required of their principal by the order or sentence of any court having jurisdiction. *Taylor v. Hunt*, 34 Mo. 205.

Where an executor or administrator is required by the statute to give a bond, with sufficient sureties, on condition (1) to return to the judge a true and perfect inventory of the estate of the deceased, upon oath, within three months from the date of the bond; (2) to administer the estate according to law; (3) to render an account within a year; and (4) to pay and deliver the rest and residue of the estate which shall be found remaining upon the account to such person or persons as the judge, by his decree according to law, shall limit and appoint,—the sureties are concluded by the decree on the settlement of an executor's account, since they by such bond are privies thereto. *Probate Judge v. Sulloway*, 68 N. H. 511, 49 L.R.A. 347, 73 Am. St. Rep. 619, 44 Atl. 720.

✓ Whenever any order is made by a surrogate in respect to the administration of an estate cognizable by him, which concludes the administrator, the sureties of the latter are also concluded by it, the condition of the bond being that their principal "shall obey all orders of the surrogate of the city of New York touching the administration of the estate committed to her." *Baggott v. Boulger*, 2 Duer, 160.

In the absence of fraud or collusion, a decree of a surrogate directing an administrator to pay a debt is conclusive upon his sureties, under a bond by which they undertake that he shall obey the orders of the surrogate touching the administration of the estate committed to him. *Thayer v. Clark*, 4 Abb. App. Dec. 391, affirming 48 Barb. 243.

✓ A judgment against executors in their official capacity, and the return of an execution "no property found," are conclusive

of a devastavit, not only against the defendants in the judgment, but also against the sureties on the bond. *Grimmet v. Henderson*, 66 Ala. 521. The court said: "The sureties have, by the execution of the bond, assumed the office of guarantors for the faithful performance of the executorial duties of their principals. (This includes the duty to pay on demand all debts ascertained judicially to be due by the principals in their capacity as executors, provided the estate is not declared to be insolvent.) The failure to pay such judgment is a breach of the bond, and the sureties, as well as the principals, are estopped from asserting anything to the contrary."

But in *Banks v. Speers*, 97 Ala. 560, 11 So. 841, it was said that the statements in the last-mentioned case were *obiter*, the court refusing to follow the decision on this point.

A distinction is taken as to administration bonds founded upon the terms of the obligation, as used in South Carolina and other states,—those being that the administrator should account, meaning account before the probate court,—which was held equivalent to an obligation by the surety to pay, such decree as that court might render. *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647.

Privity of surety.

A judgment against an executor is conclusive on the sureties as to the breach of the bond and the amount of damages, since the sureties are privy in contract to the judgment, standing in the same relation to their principal as bail to theirs. *Willey v. Paulk*, 6 Conn. 74.

A surety is concluded by a surrogate's decree from contesting the validity of a debt upon which it is founded, so long as it remains unreversed. Sureties are bound by the decree of the surrogate in such a case, because by their contract they have made themselves privy to the proceedings against their principal, and when the principal is concluded, the sureties, in the absence of fraud or collusion, are concluded also. *Casongj. v. Jerome*, 58 N. Y. 315.

When persons become sureties upon the bond of an administrator, they make themselves privy to the proceedings against their principal, and when he, without fraud or collusion, is concluded, they are concluded also. *Gerould v. Wilson*, 81 N. Y. 573, affirming 16 Hun, 530.

The sureties are bound by a decree of the surrogate requiring their principal to pay to parties entitled a certain sum of money. They are bound because they are privy to the proceedings against their principal, and when the principal is concluded, they, in the absence of fraud, are concluded also. *Harrison v. Clark*, 87 N. Y. 572.

In an action on an executor's or administrator's bond, a decree of final settlement is conclusive not only upon the executor or administrator, but also, in the absence of fraud or collusion, upon the sureties, because by their contract they have made

themselves privy to the proceedings against their principal, and when the principal is concluded, the sureties are concluded also. *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 40 Pac. 229.

But in *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651, it was held that there is no such privity existing between an executor and the sureties on his official bond as to render a judgment against the executor conclusive against the sureties, in the absence of special language in the bond by which the sureties agree to be so bound.

Statutes.

The binding effect of a decree against an administrator in Alabama is provided for by statute, which makes it the duty of the administrator, imposed by his bond, to make settlement of his administration. Hence, the state of the accounts ascertained and decreed against the personal representative himself is alike conclusive on him and his sureties, in the absence of fraud and collusion. *Martin v. Tally*, 72 Ala. 23.

Under a statute providing that failure of an administrator to pay over moneys to any person entitled thereto shall be deemed to be a devastavit, and an action upon such executor's or administrator's bond, and against his or their executors, may be forthwith instituted and maintained, and the failure aforesaid to pay such moneys or dividend shall be a sufficient breach to authorize a recovery thereon, an order of the court directing the payment of money to an heir is conclusive upon the administrator's sureties, since the sureties by their bond so agree. "This," said the court, "answers every objection of hardship or injustice which might appear to exist by holding him concluded by a proceeding which he was not notified to defend. By entering into the bond, he not only assumed that the administrator should act with fidelity and discretion in the management of the estate, but he also took the responsibility that he should properly defend any proceeding against him which might be instituted in the probate court. The administrator might do or omit a thousand acts for which the security would be liable, but of which he might be entirely ignorant, or if known, he might be unable to control in the least degree. The hardship in the one case is no greater than in the other. If he was not willing to take the responsibility of the administrator's conduct and discretion to that extent, he should not have become his security." *Ralston v. Wood*, 15 Ill. 159, 58 Am. Dec. 604.

A judgment against an executor for an amount found due from him to the estate is by statute, in Illinois, made evidence of a devastavit, and is conclusive upon the sureties in an action on the bond, except as to the question of fraud. *Housh v. People*, 66 Ill. 178.

Under a Kentucky statute providing that "in all suits against executors or administrators, on their bonds or otherwise, for devastavits, they shall be at liberty to plead

plene administravit; and under such plea shall be at liberty to show the real amount of assets which were in their hands to be administered when the original judgment was rendered against them, for which sum judgment may be rendered, and 'for no more,' a judgment against an administrator by default in an action suggesting a *devastavit* is not conclusive against the sureties in an action on the bond. *Fauntleroy v. Lyle*, 5 T. B. Mon. 266.

In New Hampshire by express provisions of statute, as well as by the well-settled rules of law, a decree of the orphans' court upon the final settlement of executors' and administrators' accounts is conclusive, and cannot be questioned in an action on the bond. *The Ordinary v. Kershaw*, 14 N. J. Eq. 527.

What cannot be relitigated.

Sureties are concluded by orders of the probate court fixing the amount due by an administrator. *Stewart v. Morrison*, 81 Tex. 396, 26 Am. St. Rep. 821, 17 S. W. 15; *Gray v. MacFarland*, 29 Tex. 163.

A judgment of a county court charging an administrator with a certain sum is conclusive against his sureties in an action on the bond. *Holden v. Curry*, 85 Wis. 504, 55 N. W. 965.

✓ The judicial ascertainment by the probate court of the amount of an administrator's indebtedness, when not procured by fraud or collusion, is conclusive against his surety. *Jones v. Ritter*, 56 Ala. 270. To the same effect, *McDonald v. People*, 222 Ill. 325, 78 N. E. 609, affirming 123 Ill. App. 346.

✓ A judgment against an administrator recovered without fraud or collusion is conclusive upon the sureties in respect to all matters of defense affecting "the amount due" on the claim upon which it was founded. *Bourne v. Todd*, 63 Me. 427.

A decree of a probate court determining the sum due from an administrator to the estate on the final accounting of the administrator is, in the absence of fraud, conclusive upon his sureties. *Perkins v. Scott*, 9 Ohio C. C. 207, 6 Ohio C. D. 226.

An adjudication by a probate court on the final settlement of the administrator's accounts, as to the amount of the administrator's liability, is conclusive evidence against his sureties in an action on the bond. *George v. Elms*, 46 Ark. 260.

In an action against sureties on an administrator's bond, to recover the amount adjudged to be due the estate, the sureties cannot defend on the ground, that the probate court erred in finding that any amount was due from the administrator. *Bonner v. Gorman*, 71 Ark. 480, 77 S. W. 602.

An adjudication of a probate court as to the amount of the liability of an administrator for dower is conclusive against his sureties in an action on the bond. *Briggs v. Manning*, 80 Ark. 304, 97 S. W. 289.

In a suit on a probate bond, founded on the failure of a trustee to pay over the

assets remaining in his hands or due from him on the settlement of his account in the probate court, it is not competent, either for the principal or the sureties, to attack collaterally the decree of the probate court fixing the amount due on account. *Re Glover*, 167 Mass. 280, 45 N. E. 744.

✓ The sureties upon an administrator's bond are, in the absence of fraud, concluded by the decree of the probate court duly rendered upon a final settlement and accounting by their principal, as to the amount of the principal's liability although the sureties on the bond are not parties to the accounting. *Greer v. McNeal*, 11 Okla. 526, 69 Pac. 893.

✓ Sureties upon a probate bond are, in the absence of fraud or collusion, concluded by the decree of the probate court rendered upon an accounting by their principal, as to the amount of the principal's liability; and this is the rule even though the sureties be not parties to the accounting. *Meyer v. Barth*, 97 Wis. 352, 65 Am. St. Rep. 124, 72 N. W. 748.

✓ A judgment of a surrogate's court finding that there was a certain sum of money in the hands of an administrator subject to distribution, which judgment is unreversed, is conclusive against the administrator's sureties, not only as to the amount in his hands, but that the same was at that time liable to distribution. *Frank v. People*, 147 Ill. 105, 35 N. E. 530.

A judgment or order of the court directing an executor to pay over a sum ascertained to be in his hands on the final settlement of the account, as assets belonging to the estate, is conclusive upon him and his sureties in an action on the bond. *Dix v. Morris*, 66 Mo. 514.

The amount found due from an administrator or executor to the estate on the settlement of his accounts in the probate court is, in the absence of fraud or collusion, binding not only upon him, but also upon his sureties, in an action upon the administration bond, unless an appeal has been taken or the judgment has been reversed upon a proceeding in error. *Slagle v. Entrenkin*, 44 Ohio St. 637, 10 N. E. 675.

A surety is estopped from controverting the validity of a decree establishing the amount of debt to be paid by the administrator. *Salyer v. State*, 5 Ind. 202.

An administrator's sureties in an action on the bond cannot inquire into the validity of the decree against their principal, in the absence of any claim that there was fraud or collusion in securing it. *Jenkins v. State*, 76 Md. 255, 23 Atl. 608, 790.

When a suit has been brought on the bond, neither the administrator nor his sureties can contest the validity of the order of the court authorizing it. *Choate v. Jacobs*, 136 Mass. 297.

The sureties on an administratrix's bond cannot inquire into the validity of a decree setting aside a deed and decreeing payment of a certain sum to the grantor, where the decree is not attacked on the ground of fraud or collusion, and it is not claimed

that there was any error in the ascertainment of the amount directed to be paid. *Jenkins v. State*, supra.

A surety of an administrator in an action on the bond cannot be heard to question the validity of a decree of the probate court settling the account of his principal and making distribution, on the theory that the probate court had not due and legal proof that the proper notice thereof had been given, where a statute (Code § 1638) provides that "the account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact." *McClellan v. Downey*, 63 Cal. 520.

In a suit on an administration bond, the regularity of the proceedings upon which the ordinary founded his decree for a sum of money due by the administrator is not open to inquiry by the sureties. *Lyles v. Brown*, Harp. L. 31.

When the sureties on an administrator's bond agree that their principal shall faithfully execute his duty, and obey the orders of the surrogate touching the administration, they are so far concluded by the decree fixing the amount due from the administrator that they cannot impeach it for errors or irregularity by an appeal on their own motion, nor collaterally, but they have the right to impeach it for fraud. *Annett v. Terry*, 35 N. Y. 256.

A decree rendered on final settlement in favor of a distributee is conclusive upon both administrator and sureties as to the sufficiency of assets. *Kyle v. Maye*, 22 Ala. 692.

Where the defense of insufficiency of assets was pleaded and relied on in the original action against the administrator, the judgment there obtained is conclusive against his sureties in an action on the bond. *McKim v. Haley*, 173 Mass. 112, 53 N. E. 152.

Where the administrator is directed by a judgment to pay over a certain sum, the sureties, in the absence of fraud, cannot inquire into the justice of the claim upon which it was founded. *Tucker v. Stewart*, 147 Iowa, 294, 126 N. W. 183.

A judgment or decree against an executor in favor of a creditor, payable out of assets, is conclusive evidence upon the executor and his sureties as to the existence and justness of the demand. *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826, 33 S. E. 310.

A decree of an orphans' court against an administrator cannot be impeached either by the administrator or his sureties, on the ground that the parties in whose favor the decree was rendered as distributees were not distributees, since a judgment rendered by a court of competent jurisdiction is conclusive upon the rights of the parties as to all matters that were or could have been properly litigated in that suit. *Lamkin v. Hoyer*, 19 Ala. 228.

A decree of the orphans' court which is 40 L.R.A. (N.S.)

conclusive against the administrator is equally conclusive against the sureties, both as to claims against the estate and as to assets in the administrator's hands. *Watts v. Gayle*, 20 Ala. 817. The rule is that the sureties, in the absence of fraud, cannot litigate any questions except those which arise upon the *factum* of the bond or its legal sufficiency.

A decree of the probate court against an administrator *de bonis non* by virtue of his office as sheriff, in the absence of fraud, prevents the sureties from contesting their liability on the ground that their principal was appointed administrator in his individual capacity, and gave bond with new sureties. *Ragland v. Calhoun*, 36 Ala. 606.

The sureties of an action on the bond cannot raise the question whether or not the debt for which the judgment was rendered against the administrator was that of the administrator. *Hobbs v. Middleton*, 1 J. J. Marsh. 176. The court said that, the responsibility of securities being incidental and collateral to that of the principal, a judgment in favor of a creditor, against the administrator, concludes the securities as to the existence and character of the debt thus ascertained, and cannot be questioned or reviewed in a suit on the official bond.

Where the issue was made by an executor as to whether the widow had accepted the provisions of the will, it was held that the judgment rendered thereon concluded the surety. *Frazer v. Frazer*, 25 Ky. L. Rep. 473, 76 S. W. 13.

A judgment having been rendered against an administrator in favor of a corporation, the administrator having pleaded the non-existence of the corporation, the surety in an action on the bond cannot deny the legal existence of the corporation, since, as to all those matters of defense going to the merits of the debt as between the original parties, the judgment against the administrator must be taken to be conclusive in a suit on the administration bond, where there has not been fraud or collusion. *Heard v. Lodge*, 20 Pick. 53, 32 Am. Dec. 197.

The sureties of an administratrix are bound by an order of the surrogate setting aside a decree discharging her, and requiring her to pay a certain sum of money to persons entitled, although they had required the administratrix, as a condition of the signing of the bond, to deposit the moneys of the estate in their hands, and had paid them back after the original decree discharging her, and although they had no notice of the application to set aside the original decree. *Deobold v. Oppermann*, 111 N. Y. 531, 2 L.R.A. 644, 7 Am. St. Rep. 760, 19 N. E. 94. The court said that the sureties were privies of the administratrix, and were precluded from questioning any lawful order of the surrogate in a proceeding wherein she was a party.

In an action for the breach of an administrator's bond, evidence of matter relating to the conduct of the administration prior to the decree is properly rejected as immaterial

and *res judicata*. *Mortenson v. Berghthold*, 64 Neb. 208, 89 N. W. 742.

A final decree of the orphans' court, reaffirmed on the petition for relief presented by the sureties of the administrator, and not appealed from, is conclusive against the administrator and his sureties as to their liability for the proceeds of the sale of the real estate of the testator, and they cannot, in an action on the bond, defend on the ground that the real estate was sold prior to the period designated by the will. *Hartzell v. Com.* 42 Pa. 453.

The decree is conclusive that the administrator has failed fully to account, although not that he is in default in any other particular, and as to the amount set out in the decree. *Norton v. Wallace*, 2 Rich. L. 460.

In the absence of fraud or collusion, an administrator's sureties cannot impeach a judgment against the administrator for a debt of the intestate, on the ground that before it was recovered, the debt had been paid by the administrator. *Boyd v. Caldwell*, 4 Rich. L. 117.

Neither an administratrix nor her sureties can dispute a verdict which finds that she did not administer the whole assets, and it is no excuse that the verdict was without defense on her part. *Greenside v. Benson*, 3 Atk. 248.

What sureties may litigate.

A decree against an administrator on the official settlement of his account is not conclusive upon his sureties as to the *factum* of the bond and the sureties' liability upon it. *Martin v. Tally*, 72 Ala. 23.

In an action on an administrator's bond after a decree of the probate court directing him to pay over a sum adjudged to remain in his hands, the sureties may show in defense either that the bond was not made, or that the decree was not made; or, if made, that the same has been obeyed; or that the same was obtained by fraud or collusion; but they cannot show that the court has erred in making the decree, or that no assets ever came into the possession of the administrator, although the court has so found and adjudged. If any error has been committed a remedy is afforded by appeal. Until the order or decree is reversed, it is equally conclusive upon the administrator and his sureties. *Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125.

The recovery of a judgment against a personal representative, on a debt of his testator or intestate, is not conclusive upon the representative's sureties, that there were sufficient assets of the estate to pay the liability thus ascertained. *Banks v. Speers*, 97 Ala. 560, 11 So. 841.

In holding that the surety is not precluded by a judgment against the executor, from showing deficiency of assets, the court, in *Hayes v. Seaver*, 7 Me. 237, said: "It is clear that the executors suffered a judgment to be rendered against them which they might have successfully resisted; and inasmuch as the defendant, their surety, was 40 L.R.A. (N.S.)

not a party, he ought not to be barred by that judgment thus negligently or collusively suffered by his principals, even were it *de bonis propriis*, but may now be permitted to avail himself of the same matter in his defense which they might have urged against the original suit or the *scire facias*."

The surety of an administrator's bond is not estopped by reason of a judgment against his principal, from denying his liability for the proceeds of land sold under a judgment or decree, although he may have been a party to the action and have excepted to the report, no judgment having been rendered against him or sought in that action. *Stuart v. Hathaway*, 4 Ky. L. Rep. 438.

A judgment against an administrator is not conclusive against his surety as to the persons entitled to surplus assets, even though it be conclusive as to the amount. *Helm v. Donnelly*, 5 Ky. L. Rep. 517.

The sureties are not concluded by a judgment against the administrator, from showing that, prior to the commencement of the action in which the judgment was rendered, the administrator's authority had become extinguished. *Bourne v. Todd*, 63 Me. 427.

If an administrator fails to plead the statute of limitations, a judgment against him does not preclude his surety from setting up that defense, not being a party to the suit against his principal, and having no opportunity to avail himself of the defense which the statute intended for his benefit. *Dawes v. Shed*, 15 Mass. 6, 8 Am. Dec. 80.

A surrogate court decree against the administrator does not conclude his sureties on the question of jurisdiction. *Browning v. Vanderhoven*, 4 Abb. N. C. 166.

A judgment of the court may be looked into by the sureties on an administrator's bond, in order to see that it was rendered against the principal. *Shelton v. Cureton*, 3 M'Cord, L. 412.

A judgment at law against an administrator *de bonis testatoris*, on a contract originating with himself, though for the benefit of the estate, will not estop his sureties in a subsequent suit in equity from charging him with the payment of such judgment. *Thompson v. Mann*, 65 W. Va. 648, 22 L.R.A. (N.S.) 1094, 131 Am. St. Rep. 987, 64 S. E. 920.

An absolute judgment against an administrator is not conclusive that he had assets with which to discharge a demand, where fraud is alleged against the administrator and heirs. *Griffin v. Inferior Ct. Justices*, 22 Ga. 590.

Judgment not conclusive.

It is the rule in some jurisdictions that a verdict or judgment against an administrator is not conclusive against his sureties. *Henrico Justices ex rel. Craddock v. Turner*, 6 Leigh, 116.

An administrator's sureties are not concluded by the decree on the settlement of the estate adjudging the amount in his

hands for distribution. *Gambill v. Campbell*, 12 Heisk. 737.

To bind a surety of an administrator by a judgment ascertaining a balance in his principal's hands, it must appear that he was a party to the action. *Creutz v. Artzman*, 8 Ky. L. Rep. 422.

A judgment against an administrator is not conclusive against his surety, not a party thereto, in an action on the bond. *Canal & Bkg. Co. v. Brown*, 4 La. Ann. 546.

A surety not a party to the proceedings against his administrator is not concluded by the decree against the latter for a devastavit, but may show that his principal, having received nothing, should have been amenable for nothing. *The Ordinary v. Carlile*, 1 McMull. L. 100.

In the absence of special arrangements, a judgment or award against a principal debtor is not binding on a surety, and is not evidence against him in an action in which he is sued by the creditor, the judgment being as to the surety *res inter alios acta*. *Zimmerman v. Kemp*, 30 Ont. Rep. 465.

There is nothing in the nature of the obligation of a surety on an administration bond to take the case out of the general rule. *Ibid.*

The contract of the surety being that the executor "shall well and truly pay over and deliver the legacies," etc., "so far as the law will charge him," he is not concluded by a judgment against his principal. The contract will be strictly construed. *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651.

A surety is not concluded as to the amount due a distributee from an administrator, by a recovery in a suit against the latter. *Kaminer v. Hope*, 9 S. C. 253.

In an action against an executor's sureties, an account upon which a decree against the executor was rendered is not conclusive against the sureties, who have the right to surcharge it, or to demand a new one. *Hobson v. Yancey*, 2 Gratt. 73.

But the fact that the decree was *de bonis testatoris*, and not *de bonis propriis*, is a matter which cannot avail the sureties. *Franklin v. Depriest*, 13 Gratt. 257.

The record of a recovery by a creditor of the estate against the administrator is not prima facie evidence in a suit by a creditor against the administrator's sureties. *Chairman of Mecklenburg County Ct. v. Clark*, 11 N. C. (4 Hawks.) 43.

Where a surrogate's decree is defective through failure of service of citation upon, and failure of appearance of, necessary parties, it is not binding upon the sureties, although jurisdiction was obtained as to the principal; and it is immaterial that the parties omitted to join in an action on the bond. *Keegan v. Smith*, 20 Misc. 305, 45 N. Y. Supp. 663.

And where a statute makes the sureties necessary parties to a voluntary accounting, a decree of judicial settlement of an administrator's account is not binding on the sureties who were not cited and who did 40 L.R.A. (N.S.)

not appear. *Cookman v. Stoddard*, 132 App. Div. 485, 116 N. Y. Supp. 901.

In an action of debt upon an administrator's bond suggesting a devastavit, the surety is not concluded by the omission of the administrator to defend the action against him by pleading and proving that he had fully administered, under a statute providing that "no security for an executor or administrator shall be chargeable beyond the assets of the testator or intestate, on account of any omission or mistake in pleading of the executor or administrator." *Williams v. Hinkle*, 15 Ala. 713.

If the executor neglect to make the defense of the insolvency of the estate, such defense is nevertheless open to the sureties. *Burgess v. Young*, 97 Me. 386, 54 Atl. 910.

But it has been held that the mere fact that an administrator omitted to prefer charges against an estate which he might have made will not authorize his surety to go into chancery for a resettlement, although the administrator may be insolvent. *Williamson v. Howell*, 4 Ala. 693.

Prima facie evidence.

In some jurisdictions the rule is that a judgment against an administrator is prima facie evidence against his sureties, but not conclusive against them. *Bennett v. Graham*, 71 Ga. 211.

A decree against an administrator in an action on his bond is at least prima facie evidence of the sum due, and when the legality of the decree is not contested, and no claim is made that it was obtained by fraud or that the amount decreed was not due, it is conclusive. *Lyles v. Caldwell*, 3 M'Cord, L. 225.

A judgment against an administrator fixing the amount of assets in his hands unaccounted for is prima facie evidence against his sureties, who can impeach it only by proof of collusion or mistake. *O'Connor v. State*, 18 Ohio, 225.

In a suit against a surety on an executor's bond, the judgment or decree of the probate court is only prima facie evidence against him. *Lipscomb v. Postell*, *supra*.

A decree against an administrator is only prima facie evidence against his sureties. *The Ordinary v. Condry*, 2 Hill, L. 313.

A decree in equity against the principal is only prima facie binding upon the sureties. *Dunagan v. Dunagan*, 38 Ga. 554.

A decree of settlement of an administrator's account is only prima facie evidence against his sureties. To render the judgment conclusive, the surety must have been a party and have had an opportunity of being heard. *Todd v. Lewis*, 2 Handy (Ohio) 280. The court said: "We do not suppose that sureties to the bond of an administrator are necessary or proper parties to the settlement of accounts made by him with the probate court. The effect of any proper defense in such a case would be to increase the balance against the administrator,—the interest of the sureties

would be that it should be diminished. When an administrator offers for settlement an account showing a balance in his hands, a defense interposed by his surety that there was no such balance would present a novel issue to a probate court. It will probably be found the better practice not to complicate the settlement by any such issue, leaving the surety, when any proceeding is instituted against him, to show, if he can, that there was error or fraud in the settlement. This course will generally be found to be the most just and convenient."

A judgment or decree against an administrator is at least *prima facie* evidence against the surety in an action on the bond, and the surety cannot contend that he is not bound by the decree against his principal, if he has made no effort to attack it. *American Bonding & T. Co. v. United States*, 23 App. D. C. 535.

A judgment against an executor is receivable against the surety as *prima facie* evidence of the amount due from the executor, subject to be inquired into and corrected on proper allegation and by legal evidence. *Verret v. Belanger*, 6 La. Ann. 109.

A judgment against the principal debtor is *prima facie* proof of the amount for which the surety on the administrator's bond is liable, and until rebutted by sufficient evidence no other proof is required. *Ferguson v. Glaze*, 12 La. Ann. 667.

The plaintiff in an action on an administrator's bond makes out a *prima facie* case by the production of the judgment in his favor against the administrator, together with the execution and the officer's return thereon. *Bourne v. Todd*, 63 Me. 427.

In *Norton v. Wallace*, 2 Rich. L. 460, it is said that it certainly was in the beginning stretching legal principles as far as they would bear, to hold that it was only *prima facie* evidence; for the general rule is invariable that "until the judgment of a court of competent jurisdiction, upon the same matter, is reversed in a course of regular proceedings on it, a resort to any other tribunal, or to the same tribunal, for its judgment on the same controversy, is inadmissible."

A judgment against an administrator in an action in which the sureties are not parties is only *prima facie* evidence against them. *Barksdale v. Butler*, 6 Lea, 450.

A judgment in favor of a creditor and a distributee in a garnishment proceeding, when conclusive upon the administrator, is *prima facie* binding upon his sureties. *Brown v. Wiley*, 107 Ga. 85, 32 S. E. 905.

A judgment against an administrator is *prima facie* evidence in a suit against his sureties, that there are assets in the administrator's hands sufficient to discharge the judgment. *Bird v. Mitchell*, 101 Ga. 46, 28 S. E. 674.

A judgment against an administrator is *prima facie* evidence merely against his sureties as to the sufficiency of assets to pay debts. *Gibson v. Robinson*, 90 Ga. 756, 35 Am. St. Rep. 250, 16 S. E. 969.
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A judgment against an administrator who was also guardian for the heirs, for the amount due to the widow, in which it was incidentally declared that a certain sum remained in the hands of the administrator for distribution, was held only *prima facie* evidence against the sureties on the guardian's bond, who were not parties thereto. *Com. ex rel. Bracken v. Bracken*, 17 Ky. L. Rep. 785, 32 S. W. 609.

In an action against the sureties on an administrator's bond, a judgment previously obtained against the administrator is admissible in evidence, but it is not conclusive as against the sureties, with respect either to the fact or the extent of the breach by the administrator of the obligation of the bond, since to hold them bound thereby would be to hold that they may be condemned without being heard. *Wiemann v. Mainegra*, 112 La. 305, 36 So. 358.

Although the judgment against the administrator is evidence against him of a debt due by the intestate, and is evidence also of assets in his hands to discharge it, and although it is also evidence of the debt due as far as relates to his securities, yet it is not evidence against them that he has assets to discharge it, so as thereby to subject them to the payment of the debt in case *nulla bona* is returned on an execution against the administrator. *Chairman of Washington County Ct. v. Harramond*, 11 N. C. (4 Hawks) 341. The court said that whether the administrator has wasted the assets or not is an inquiry in which the securities are interested, and the judgment ought not to be introduced as evidence of the affirmation, because they are neither parties or privies to that judgment.

An equity decree against an administrator is only *prima facie* evidence against a surety in an action on the bond, and he may impugn the decree so far as to permit him to introduce evidence to show that his principal was charged with a larger number of working hands than he had control of in his fiduciary capacity. *Norton v. Wallace*, 1 Rich. L. 507.

The recovery of a judgment or decree against the principal on a bond, although the sureties were not parties to the suit, is *prima facie* binding upon them. They can relieve themselves of such binding effect of the recovery against the principal only by showing that the amount recovered was in excess of the amount which the plaintiff in the judgment or decree was entitled to recover, or that he was not entitled to recover at all. *Jenkins v. State*, 76 Md. 255, 23 Atl. 608, 790.

Under a statute providing that no executor or surety shall be chargeable beyond assets by reason of any omission or mistake in pleading, and that the surety may offer any defense admissible in an action against the executor suggesting a devastavit, a decree against an executor finding a sum of money in his hands from assets is *prima facie* evidence against the sureties on his bond. *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826, 33 S. E. 310.

Deceased representative of principal.

A decree against the personal representative of a deceased administrator is not binding upon or evidence against his sureties. *Stallworth v. Farnham*, 64 Ala. 259. The court said that it is a judgment or decree against their principal, for whose acts they have agreed to be liable, rendered against him in his representative capacity, that is evidence against and binding on them, and the foundation of an action at law against them; and not a judgment or decree against the personal representative of the principal, for whose diligence and good faith they have not consented to be answerable. To the same effect, *Means v. Hicks*, 65 Ala. 241.

In the absence of fraud or collusion, a surety is bound by a judgment or decree rendered against his principal in the course of his administration, as he is bound by such acts as his principal is required by law to perform, but the surety is not bound by any judgment or decree against or acts done by the personal representative of his principal, for whose fidelity he has not promised to answer. *Street v. Henry*, 124 Ala. 153, 27 So. 411.

An administratrix of a deceased executor and testamentary trustee cannot voluntarily account for a devastavit of the latter, so as to conclude the sureties on the bond. *Re Williams*, 26 Misc. 636, 30 N. Y. Civ. Proc. Rep. 76, 57 N. Y. Supp. 943.

Probate court settlement of a deceased administrator's accounts, made before the appointment of an administrator of the deceased administrator, is not binding upon the sureties, neither the principal nor the administrator being legally before the court at the time of the settlement. *State v. Drake*, 52 Ark. 350, 12 S. W. 706.

Judgments on settlements and liabilities.

In an Alabama case it is said, upon the question of the conclusiveness of a judgment against an executor or administrator upon his sureties, that "a distinction was taken" in the Alabama courts, "at an early day, between decrees rendered against the representative in the orphans' or probate court on settlements made therein, and judgments rendered against him on debts or liabilities of his testator or intestate. In cases falling within the first class—decrees on settlements in the probate court—it has been uniformly ruled that the sureties were bound and concluded by the decree rendered precisely and to same extent as their principal was bound. . . . One reason given for this ruling, and a very strong one, was and is that in settlements in the probate court, the receipt of assets by the representative, the amount received, and the surplus after allowing all proper disbursements, are the very questions considered and passed upon. They constitute the basis of the decree. And the form of the decree is another reason. It is not that the sum be levied and collected of the property and the effects of the testator or in-

testate in his hands to be administered. It is that he pay the amount decreed; for the presumption is that he has converted the assets into money. In suits against the personal representative to enforce a debt or liability of his testator or intestate, the issue is different. The question in such case is the decedent's liability *vel non*; and the inquiry of assets in the representative's hands is not one of the issues presented. The recovery is not against the administrator personally, but to be levied of the goods and chattels of the decedent in his hands to be administered. Hence, in all our early decisions it was held that such recovery did not conclude or estop the sureties from denying that the administrator had come into possession of assets with which to discharge the indebtedness." *Banks v. Speers*, 97 Ala. 560, 11 So. 841.

A judgment against a personal representative to enforce a debt or liability of his intestate is not binding on the sureties on his bond, so as to preclude or estop them from denying that the administrator had come into the possession of assets with which to discharge the indebtedness. *Woodall v. Wright*, 142 Ala. 205, 37 So. 846.

c. Of guardians.

It is generally held that a judgment against a guardian is conclusive not only as against him, but as against the sureties in an action on the bond. *Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742, 37 Pac. 360.

A probate court judgment against a guardian is conclusive against the sureties upon his official bond; whatever binds and concludes the guardian equally binds and concludes the sureties. *Brodrick v. Brodrick*, 56 Cal. 563.

An order of the probate court entered against a guardian, finding the amount of money in his hands upon the settlement of his accounts, and the amount due to persons lawfully entitled, is conclusive upon his sureties. *Jacobson v. Anderson*, 72 Minn. 426, 75 N. W. 607.

A judgment of a probate court having jurisdiction of the matter fixing the amount due by a guardian is conclusive both against the guardian and his sureties. *Bopp v. Hunsford*, 18 Tex. Civ. App. 340, 45 S. W. 744.

Fraud or collusion not being asserted, an adjudication of the amount due the ward from the guardian is conclusive on his sureties. *Chase v. Wright*, 116 Iowa, 555, 90 N. W. 357.

A judgment of a court of competent jurisdiction against a guardian for an amount due his ward, affirmed by consent upon appeal, is conclusive in an action on the bond. *McCleary v. Menke*, 109 Ill. 294.

A surrogate's decree determining the amount due from a guardian is conclusive upon his sureties. *Eberle v. Schilling*, 32 Misc. 195, 65 N. Y. Supp. 728.

An order of the county court requiring a guardian to pay over a sum of money in

his hands is conclusive upon the guardian and his security, except for fraud or mistake, as to the amount then actually in the hands of the guardian. *Gillett v. Wiley*, 126 Ill. 310, 9 Am. St. Rep. 587, 19 N. E. 287.

The settlement of a guardian's account is conclusive upon the sureties. *Altman v. Hofeller*, 152 N. Y. 498, 46 N. E. 961.

The settlement of a guardian's accounts and his discharge by the court cannot be attacked in a suit on the bond. *State ex rel. Favorite v. Slaughter*, 80 Ind. 597.

A judgment against a guardian on final settlement, directing the payment of a sum of money to his ward, is conclusive upon his sureties. *State ex rel. Yeoman v. Hoshaw*, 86 Mo. 193.

The surety of the committee of a lunatic is concluded by the judicial settlement of the committee's account. *Com. use of Todd v. Rhoads*, 37 Pa. 60.

A surrogate's decree in an accounting proceeding against the administrator of a deceased guardian is binding upon the sureties on the guardian's bond, although they were not parties thereto. *Van Zandt v. Grant*, 67 App. Div. 70, 73 N. Y. Supp. 600, affirmed in 175 N. Y. 150, 67 N. E. 221; *Hornung v. Schramm*, 22 Tex. Civ. App. 327, 54 S. W. 615.

The order and determination of the probate court as to the amount due from a guardian to his ward, made after due notice to the guardian, is final and conclusive upon the sureties on the guardian's bond in an action against them thereon. *Cross v. White*, 80 Minn. 413, 81 Am. St. Rep. 267, 83 N. W. 393.

A final settlement of the accounts of a guardian, made in the orphans' court, showing the amount of his indebtedness to his wards is conclusive alike on the guardian and his securities, although the sureties had no notice of the proceedings in the orphans' court, and were not present and did not give their consent to the rendition of the judgment against them, unless the securities can impeach it for fraud. *Chilton v. Parks*, 15 Ala. 671.

A judgment of the court establishing the amount of a guardian's indebtedness, and ordering him to pay the sum over immediately to his successor, is conclusive upon his sureties without notice to them. *Botkin v. Kleinschmidt*, 21 Mont. 1, 69 Am. St. Rep. 641, 52 Pac. 563.

It is not necessary to bring a guardian's sureties before the county court by citation, in order to make a decree of that court on final settlement of the guardian's account conclusive against the sureties as to the amount due from their principal. *Fahey v. Boulmay*, 24 Tex. Civ. App. 279, 59 S. W. 300.

Where there is a final settlement of the guardian's accounts upon due notice and final judgment rendered, which may be enforced by attachment or action on the bond, the guardian's sureties are concluded thereby, the condition of the bond being for the faithful discharge of the guardian's duties

according to law. *State ex rel. Hyslop v. Bilby*, 50 Mo. App. 162.

An order of the probate court settling the guardian's final account is conclusive upon his sureties, although they had no notice thereof. *Rice v. Wilson*, 129 Mich. 520, 89 N. W. 336. The court said: "The bonds of executors, administrators, and guardians are placed by the courts upon a different basis from those given by sheriffs, treasurers, etc., for the performance of their duties. The distinction is probably based upon the theory that the former are intrusted with estates which are under the control of the courts; that they must render accounts to such courts, and have them determined and the amount fixed before suit upon the bond. One of the conditions of the bonds is that they shall render accounts, and, if such guardians, etc., do not pay the judgments found against them by the court, the sureties will. These bonds stand on the same basis as do bail and appeal bonds in suits at law. In each case there must be a judgment against the principal before the bail can be sued. Not so, however, with bonds of sheriffs, treasurers, etc. It is no condition of their bonds to pay any judgment that courts may render against them. The universal method pursued is to sue the principal and sureties in the same suit."

It has been said that the decree against the guardian is conclusive on the sureties, because they are privies in contract. For the faithful performance of all the duties required of the guardian by law, they are bound by the terms of the bond; and a full settlement of his guardianship in the court of probate or the court of chancery, as the ward may elect the one or the other forum, is the duty enjoined upon him by the law. The decree rendered against him is in the nature of a judicial admission made by him; is an act done in the performance of his trust and duty, and for this reason is binding and conclusive on the sureties; and not upon the theory that they are parties to the record, directly or indirectly. *Hailey v. Boyd*, 64 Ala. 399.

A guardian's sureties are bound by the judgment of the supreme court setting aside a settlement of the guardian's account for fraud, and fixing the amount due from the guardian to the ward. The sureties by their contract have so connected themselves with the obligation of the guardian, and with the proceedings to bring him to account, and with the judgment rendered, to make it binding upon them as to all questions necessarily involved. *Douglass v. Ferris*, 138 N. Y. 192, 34 Am. St. Rep. 435, 33 N. E. 1041.

The final settlement of a guardian's accounts on the determination by the probate court of the amount due his wards, in the absence of fraud or collusion, concludes the sureties in an action on the bond. *Braiden v. Mercer*, 44 Ohio St. 339, 7 N. E. 155. The court said: "By their bond the sureties contract with reference to the action of a court, and that their principal will obey its orders and conform to such action. Can

they say they are strangers to such proceedings? Upon their principal's failure to obey the orders of the court, there is clearly a breach of the bond. The relation they assume to such court and its action so far makes them privy to the proceedings affecting their principal as to deny to them the right, when called upon to answer for the breach of the bond, to call in question the grounds upon which the court based its action, and to have the same cause retried."

Under a bond providing that "if the guardian should, upon removal from office or at the expiration of his trust, settle his accounts in said court, or with the ward or his legal representatives, and pay over and deliver all the estate, title papers, and effects remaining in his hands or due from him on such settlement, to the person or persons lawfully entitled thereto, then the obligation to be void," etc.,—an order by the court that the guardian pay over to his successor the balance found to be due the ward is conclusive upon the sureties. *Ream v. Lynch*, 7 Ill. App. 161.

A surety who makes himself a party to the final settlement of the guardian's account is bound thereby. *McWilliams v. Kalbach*, 55 Iowa, 110, 7 N. W. 463.

A decree of a probate court against a guardian for a sum due his ward is conclusive against his sureties as to every matter of defense which could have been urged against its rendition, and on an application for supersedeas, neither the surety or his principal can go behind it and show that in fact the principal was not liable for the sum decreed against him, either because he had never received the assets with which he was charged, or, having received them, had accounted for them. *Gravett v. Malone*, 54 Ala. 19.

An order of the probate court as to the amount due from a guardian to his ward is conclusive upon his sureties as to the amount actually in the hands of the guardian, and is impeachable only for fraud or mistake. *Ryan v. People*, 165 Ill. 143, 46 N. E. 206, affirming 62 Ill. App. 355. To the same effect, *Badger v. Daniel*, 79 N. C. 372; *Niehoff v. People*, 171 Ill. 243, 49 N. E. 214, affirming 66 Ill. App. 689; *Schoenleber v. Burkhardt*, 94 Wis. 575, 69 N. W. 343.

A judgment of a county court as to the amount due from the guardian to his ward on final settlement is conclusive upon his sureties, and not prima facie only as to the amount due, in the absence of any allegation of fraud or collusion. *Brooks v. People*, 15 Ill. App. 570.

The settlement of a guardian's account adjudging the amount due the ward is conclusive both on the principal and the sureties, so as to preclude the sureties from setting up the claim that the guardian squandered the money before their appointment. *Knepper v. Glenn*, 73 Iowa, 730, 36 N. W. 763.

The sureties on a guardian's bond cannot show in an action on the bond that the moneys with which the guardian was

charged in the final report, and which were ordered to be paid to his successor, were largely expended for necessities which, upon a proper showing, might have been sanctioned by the court. *Knox v. Kearns*, 73 Iowa, 286, 34 N. W. 861.

The decree of a surrogate's court entered on the accounting by the executrix of a general guardian is, unless impeached for fraud, conclusive as against the sureties of the guardian, as to the amount due from his estate to the ward. *Martin v. Hann*, 32 App. Div. 602, 53 N. Y. Supp. 186.

A judgment establishing the liability of the estate of the ward for taxes in a suit by the guardian to restrain their collection is *res judicata* as to that question in a subsequent action against the guardian and his sureties to collect the unpaid taxes. *Baldwin v. Maryland*, 179 U. S. 220, 45 L. ed. 160, 21 Sup. Ct. Rep. 105.

But a surety cannot be deprived of the right to litigate the question of suretyship, or, if it existed, the question whether it continued at the time the decree was rendered against the guardian. *Gravett v. Malone*, 54 Ala. 19. The court said: "The settlement is made without notice to him, and is conclusive on him only because it is an act his principal, the guardian, is required by law to perform, and the due performance of which is within the condition of his bond."

The judgment roll in an action brought by wards against their general guardian, adjudging that proceedings for the sale of the wards' estate were fraudulent and void, and setting such proceedings aside, and proceedings before a surrogate for his removal, assuming that the bond was intended to provide against wrongful and fraudulent conduct of the guardian, are incompetent evidence to prove such misconduct, as against a surety who was neither a party nor a privy to such proceedings for action. *Clark v. Montgomery*, 23 Barb. 464.

But a decree of the orphans' court against a guardian is not conclusive against his sureties as to items accruing after their discharge. *Hamner v. Mason*, 24 Ala. 480.

Judgment not binding.

But it has been held that an accounting in a probate court, without notice to the guardian or surety, is not conclusive upon the latter in an action on the bond. *Gilbert v. Gilbert*, 13 Ohio C. C. 29, 7 Ohio C. D. 58.

An order of the probate court granting leave to sue on a guardian's bond is not *res judicata* of the liability of the sureties. *Perkins v. Cheney*, 114 Mich. 567, 68 Am. St. Rep. 495, 72 N. W. 595.

A decree of a probate court against a guardian on the settlement of his accounts, also rendered against the sureties on his bond, on the mistaken theory that the statute permitting execution of the decree against both guardian and sureties authorizes a decree against the sureties, will not support a garnishment proceeding against

the sureties, or a judgment against the garnishee, who admits an indebtedness to them. *Smith v. Jackson*, 56 Ala. 25.

Prima facie evidence.

In some jurisdictions it is held that a judgment against a guardian is prima facie, but not conclusive, evidence against his sureties. *Bradwell v. Spencer*, 16 Ga. 578.

Proceedings upon which a judgment is rendered finding the amount due by a guardian to his ward are prima facie, not conclusive, evidence of indebtedness as against the sureties in an action on the guardian's bond. *Weaver v. Thornton*, 63 Ga. 655.

A guardian's surety is only prima facie bound by a judgment against the estate of the ward, to which he was not a party. *Fidelity & D. Co. v. Rich*, 122 Ga. 506, 50 S. E. 338.

A final settlement of a guardianship creates a prima facie liability on the part of the guardian's sureties. *State use of Brent v. Grace*, 26 Mo. 87.

A decree against a guardian is only prima facie evidence of a devastavit. The surety may "look into it." *Bryant v. Owen*, 1 Ga. 355. The court said: "The surety now before this court was not a party to this suit in equity; he had no notice, so far as the record discloses, of its pendency; of course, he was not heard in his own defense in that suit. It is contrary to natural justice, and also to all the analogies of the law, that one should be estopped by a decree to which he was not a party, and of which he had no notice. Such a rule would most effectually oust the security of his day in court. His rights would, by such a rule, depend upon the diligence or the fidelity of others. The principal might collude with the complainant, and permit an iniquitous decree to be rendered against himself, in order to charge his surety. Human nature is, unfortunately, not too good for that; or his carelessness or neglect might work irreparable injury to the surety."

A judgment against a tutor upon an account of tutorship is only prima facie evidence against the tutor's surety. *Fuselier v. Babineau*, 14 La. Ann. 777.

A decree directing a guardian to pay over a certain sum of money is prima facie evidence against his sureties, although they are not parties to the action. They can relieve themselves of such binding effect of the recovery against the principal only by showing that the amount recovered was in excess of the amount which the plaintiff in the judgment or decree was really entitled to recover, or that he was not entitled to recover at all. *Parr v. State*, 71 Md. 220, 17 Atl. 1020.

A decree of the chancery court on the final account of a guardian is only prima facie evidence against his surety, who may exonerate himself from liability for any charges or omissions in the final account which were not legal as against him. *State use of Baird v. Hull*, 53 Miss. 626. 40 L.R.A. (N.S.)

Where the bond of a curator in the statutory form provides that he shall discharge all his duties according to law, a final settlement of the probate court having the binding effect of a judgment is not conclusive against the sureties, but prima facie correct only. *State use of Smith v. Martin*, 18 Mo. App. 468. The court said that the decisions holding judgments against the principal conclusive against the sureties turned wholly upon the language of the particular bond.

But in *M'Kellar v. Howell*, 11 N. C. (4 Hawks) 34, it was held that, in an action against the securities on a guardian's bond, the record of a judgment against the guardian in a suit brought against him alone is not competent evidence against the sureties.

d. Of assignees.

A judgment against an assignee has been held binding upon him and his sureties. *Cook v. Lehmer*, 9 Ohio C. C. 632, 6 Ohio C. D. 726.

By signing the bond, the surety, it has been said, covenants that his principal will faithfully execute the trust imposed upon him by his appointment as assignee, and in such a case, the surety, in the absence of fraud, is bound by the judgment against the principal, and without regard to any right to appeal. *State ex rel. Glidden & J. Varnish Co. v. National Surety Co.* 76 Mo. App. 227.

Whether or not sureties were parties to an action in which the amount of defalcation of an assignee, their principal, was adjudged, they are bound thereby. *Hindman v. Lewman*, 23 Ky. L. Rep. 181, 63 S. W. 478, rehearing denied in 23 Ky. L. Rep. 179, 61 S. W. 470.

The sureties of an assignee for the benefit of creditors, who has been directed by the final decree to pay a claim of a specific creditor, are bound thereby. They cannot, in an action on the bond, set up that the decree was erroneously made against the assignee. Their remedy, if any, is by appeal from the decree of distribution. *Little v. Com.* 48 Pa. 337.

In an action on the bond, the sureties of an assignee are concluded by the findings of the county court as to the amount unaccounted for that came to the hands of the assignee, and which he was ordered by the county court to pay over; and they are not entitled to have such matters retried. *Moulding v. Wilhartz*, 169 Ill. 422, 48 N. E. 189.

A judgment for the amount ascertained to be due in a settlement suit against an assignee for creditors is conclusive as to the amount against his sureties, although they had no notice thereof. *National Surety Co. v. Arterburn*, 110 Ky. 832, 62 S. W. 862.

Where, by the decree of the probate court upon the final account of the assignee, he is ordered to pay over a balance remaining in his hands to the assignor, the sureties will be concluded by the decree, although, in executing the assignment, there may have

been collusion between the assignor and assignee to defraud the creditors, unless an appeal has been taken, or the judgment has been reversed upon a proceeding in error. *Garver v. Tisinger*, 46 Ohio St. 56, 18 N. E. 491.

In an action on an assignee's bond for the recovery of the amount found due the successor of the assignee on the settlement of his accounts, the sureties are concluded by the settlement, and, in the absence of fraud or collusion, can neither question the correctness of the settlement, nor demand a rehearing of the accounts; nor will they be heard to assert that the assets with which the assignee is charged in his accounts were not the property of the assignor. *Walsh v. Miller*, 51 Ohio St. 462, 38 N. E. 381. The court said: "It is the settled law of this state that sureties on the bond of a guardian or assignee are in privity with their principal, and so bound and concluded by the findings and judgments of the probate court in the settlement of the trust, that they cannot question their correctness, or dispute the amount found due from the principal."

It has been said that in proceedings under a voluntary assignment by a failing debtor, for the benefit of his creditors, there is a general likeness or analogy to those involved in the settlement of decedent's estates and guardianships. It is well settled that interlocutory orders or actions by the court relating to reports or matters connected with decedent's estates and guardianships cannot be attacked collaterally by way of suits on bonds of administrators and guardians. As to all matters embraced in such reports or settlements, the action of the court is deemed to be *prima facie* correct, and must stand until reversed or set aside in some direct way or proceeding by the court having control over them. And as to the making of all reports and the action of the court thereon, those interested must take notice, unless the statute makes provision that notice be given. To allow a review of the action and decrees of the court in such cases, whether interlocutory or final, by way of suits upon the bond given by the trustee, would be to admit and invite examination and re-examination of every report made by the trustee as often as any captious interested person might become dissatisfied. *State ex rel. Puett v. Musser*, 4 Ind. App. 407, 30 N. E. 944.

But in *Pierpoint v. McGuire*, 13 Misc. 70, 34 N. Y. Supp. 150, it was held that a judgment against an assignee for creditors is *prima facie* evidence against the sureties in an action on the bond.

In *Macready v. Schenck*, 41 La. Ann. 456, 6 So. 517, it was held that a judgment against a liquidator of a partnership is *prima facie* evidence against the surety on the bond, to show breach of contract and liability, but that adverse proof is admissible.

In *People v. White*, 28 Hun, 289, it was held that the proceedings taken by creditors

against an assignee for the benefit of creditors are not admissible against the sureties on the assignee's bond conditioned only for the faithful discharge by their principal of his duty as such assignee, and that he shall duly account for all moneys received, since neither in language nor by implication have the sureties covenanted to be bound by the result of the proceeding against the assignee to which they were not parties, and of which they had no notice.

e. Of receivers.

In *E. Martin & Co. v. Kirby*, — Nev. —, 117 Pac. 2, it was held that if a receiver is bound by an order in a receivership proceedings, his surety is likewise concluded thereby.

Upon the settlement of a receiver's accounts, the order of the court directing him to pay over the balance in his hands to persons entitled thereto is not only binding upon the receiver, but is also binding upon his sureties as to the amount due on account of his receivership. *Clark v. First Nat. Bank*, 57 Mo. App. 277.

The amount found due from a receiver in a chancery accounting is conclusive upon the surety in an action upon the receiver's bond, where the surety had notice of the accounting and an opportunity to intervene. *Ball v. Chancellor*, 47 N. J. L. 125.

An order of the court directing the receiver to pay a sum of money is conclusive upon the surety on his bond, although not a party thereto, under a bond conditioned upon the faithful discharge by the receiver of the duties of his trust, since the failure to pay is within the terms of the bond and a breach of its terms. *Thomson v. McGregor*, 13 Jones & S. 197.

The condition of a receiver's bond being that he should faithfully conduct himself in his office as receiver, faithfully perform his duties as required by law and in obedience to the directions of the court, and truly and faithfully account for and pay over the moneys of the company which should come into his hands,—an order of the court, after due proceedings and a full hearing, ascertaining the sum due and to be paid by the receiver, is competent evidence against his sureties as well as himself, both of a breach of his bond and of an amount due from him upon such breach, for which they are responsible. *Com. v. Gould*, 118 Mass. 300.

But it has been held that the sureties on a receiver's bond conditioned upon the faithful discharge of his duties as receiver are not concluded in an action on the bond, by a judgment against the receiver. *Coe v. Patterson*, 122 App. Div. 76, 106 N. Y. Supp. 659, rehearing denied in 123 App. Div. 914, 108 N. Y. Supp. 1127.

A judgment against a receiver directing him to pay over a certain sum of money is competent evidence for the purpose of showing a breach of his bond, although it may not be evidence as to the amount of property received by him. *Thompson v.*

Denner, 16 App. Div. 160, 44 N. Y. Supp. 723.

On the settlement of a receiver's account, the decree of the court requiring him to pay over a certain sum to a special commissioner for disbursements is conclusive upon his sureties as to the liability and its amount. *State use of Beard v. Abbott*, 63 W. Va. 189, 61 S. E. 369.

A judgment fixing the amount of assets for which a receiver fails to account is not binding upon his sureties, who were not parties thereto, as to the amount of the default; but it is evidence that the receiver is in default and that he has failed to account. *Carl v. Meyer*, 51 App. Div. 5, 64 N. Y. Supp. 1077.

Where a receiver refused in an action against him to interpose the defense of the statute of limitations, and refused to allow his indemnitors to do so, it was held that the latter were not concluded by the judgment from setting up such defense. *Chapin v. Thompson*, 4 Hun, 779.

In *Preston v. American Surety Co.* 104 Md. 40, 64 Atl. 292, it was held that a decree against a receiver fixing the amount for which he had not accounted, and directing a suit to be brought against a surety therefor, is not conclusive, but prima facie, evidence only against the surety, not a party thereto and ignorant of the proceedings on which the decree was based.

f. Miscellaneous.

It has been held that the sureties of a public officer are not concluded by the settlements made by him with the court. *Nolley v. Callaway County Court*, 11 Mo. 447.

In *Foxcroft v. Nevens*, 4 Me. 72, it was said that the default of the principal on an official bond can have no effect to charge the sureties.

A judgment against an officer establishing a defalcation beyond the penalty of his bond is, in the Federal courts at least, prima facie evidence against his sureties to show the breach of the bond. *Moses v. United States*, 166 U. S. 571, 41 L. ed. 1119, 17 Sup. Ct. Rep. 682.

A judgment against a principal alone for the amount of public money which he has failed faithfully to expend and account for is prima facie evidence against the sureties in an action on the bond. *Ibid.*

A judgment against a government official for the amount of his defalcation, or for the major part of it, is competent evidence against his sureties in an action on the bond, though not conclusive. *Howgate v. United States*, 3 App. D. C. 277.

A judgment against a United States internal revenue collector for his default is binding upon his sureties. *United States v. Ingate* (C. C.) 48 Fed. 251.

In Arkansas a judgment by a county court in favor of the plaintiff is conclusive evidence against the sureties of a collector in an action on the bond. *Jones v. State*, 14 Ark. 170.

An order of a court directing a surro-

gate's clerk to pay over a sum of money has been held at least prima facie evidence against his sureties, having no notice of the proceedings preliminary to such order. *State use of St. Louis v. Thornton*, 8 Mo. App. 27.

It is now the rule in Nebraska that in an action on the official bond of an officer, a judgment against the latter for breach of trust in converting money of the plaintiff to his own use is only prima facie evidence against his sureties. Such an adjudication is conclusive evidence of the liability of the sureties only in case they agreed to abide by any judgment that might be rendered against their principal. *Barker v. Wheeler*, 60 Neb. 470, 83 Am. St. Rep. 541, 83 N. W. 678, overruling *Thomas v. Markmann*, 43 Neb. 823, 62 N. W. 206, and *Lewis v. Mills*, 47 Neb. 910, 66 N. W. 817. The court said that, upon the question whether their principal had been guilty of misconduct in office, they were entitled to be heard, and that it was contrary to natural justice that they should be concluded by a judgment to which they were not parties.

In Alabama it has been held that a judgment against an officer for defalcation is not prima facie evidence against his sureties, either as to the fact of the embezzlement or as to the amount thereof, in the absence of a statute applicable thereto. *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147.

A settlement made in a county court by the administrator of a county treasurer, of an indebtedness due the county, has been held binding upon the sureties on the treasurer's bond, although made without notice to them, the sureties by their contract and by force of law covenanting for the faithful performance of their principal's duty, and to settle in accordance with the judgment of that tribunal, if no appeal is prosecuted from its findings. *Wycough v. State*, 50 Ark. 102, 6 S. W. 598.

A judgment of the probate court on the final settlement of the administrator of a partnership estate, rendered after the death of the surety, when there was no one to be affected by the notice of the proceedings and no one to represent the estate at the hearing in the probate court, or to take an appeal if desired, has been held not conclusive upon the estate of the surety. *State ex rel. Taaffe v. Goggin*, 191 Mo. 482, 109 Am. St. Rep. 826, 90 S. W. 379. The court said: "Proceedings in the probate court are somewhat in the nature of proceedings *in rem*, and when the notices required by law have been given, all persons interested are chargeable with notice and have the right to be heard. The sureties on the administrator's bond are interested in his final settlement, and are entitled to be heard before a judgment which is to be binding on them is rendered, and have the right to appeal if they feel aggrieved. If they do not, after due notice of the purpose of the administrator to make final settlement has been given, appear in court, but let the judgment of final settlement go against their principal, and take no part in the

proceedings until the period for appeal has elapsed, they have no cause to complain, because they have neglected their opportunity, and the judgment is conclusive on them."

But in *State ex rel. Christy v. Donegan*, 12 Mo. App. 190, a judgment against the administrator of a partnership estate, rendered upon a final settlement and order of distribution then made upon him, was held conclusive against the sureties upon his bond, and not merely *prima facie* evidence against them, as to the amount due by the partnership administrator.

It has been held that the trustees' bondsmen cannot question the auditor's account duly ratified by the court, finding a certain sum due from the trustees. *State use of Whitelock v. Banks*, — Md. —, 24 Atl. 540.

But in New York, where the bond of a testamentary trustee is conditioned upon the faithful execution of the trust, a judgment against the executrix of the trustee is not conclusive upon the sureties of the trustee as to the amount of the damage due to the alleged breach of the trust. *Thomson v. American Surety Co.* 170 N. Y. 109, 62 N. E. 1073.

The sureties on a trustee's bond conditioned upon the faithful performance by the principal of his duties as trustee are not concluded by a judgment against the representatives of their deceased principal for moneys due a beneficiary. *People ex rel. Collins v. Donohue*, 70 Hun, 317, 24 N. Y. Supp. 437. The court said: "We here find that neither by the nature of the contract nor the express terms of the bond does the surety obligate himself to be bound by the judgment of the court; and when it is sought to charge him, after the death of the principal, with the latter's unfaithfulness, he should not be precluded by a judgment obtained against the representatives of the deceased principal, in an action to which he was not a party and of which he had no notice."

A judgment obtained against a principal on a statutory bond, official in character, is *prima facie* sufficient to warrant a recovery against his sureties. It is therefore unnecessary for the plaintiff to furnish proof of the contract upon which such judgment was rendered. *Ihrig v. Scott*, 13 Wash. 559, 43 Pac. 633.

When the principal and sureties on an official bond are sued together, the judgment as to the principal is *res judicata* as to the sureties, and, within the limit of the amounts for which they are held under the terms of their bond, they are bound to make good the entire judgment against the principal, including the penalty. *Eastin v. School Directors*, 40 La. Ann. 705, 4 So. 880.

A North Carolina statute (Acts 1844) rendered competent against the sureties to official bonds, and those given by executors, administrators, and guardians, whatever evidence would be competent against the principals, and this was declared to be conclusive, where the evidence was a judgment 40 L.R.A. (N.S.)

against the latter. In 1881, the statute was amended by making the evidence "*prima facie* only" against the surety. (Code § 1345.) *Moore v. Alexander*, 96 N. C. 34, 1 S. E. 536.

IV. Indemnity bonds and obligations.

a. In general.

The rules with reference to the evidentiary value of judgments against the principal in actions on indemnity obligations are well summarized in a New York case in which it is said that covenants to indemnify against the consequences of a suit are of two classes: 1. Where the covenantor expressly makes his liability depend on the event of a litigation to which he is not a party, and stipulates to abide the result; and, 2. Where the covenant is one of general indemnity merely against claims or suits. In cases of the first class, the judgment is conclusive evidence against the indemnitor, although he was not a party and had no notice, for its recovery is the event against which he covenanted. In those of the second class, the want of notice does not go to the cause of action, but the judgment is *prima facie* evidence only against the indemnitor, and he may be let in to show that the principal had a good defense to the claim. *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275.

In *Grommes v. St. Paul Trust Co.* 147 Ill. 634, 37 Am. St. Rep. 248, 35 N. E. 820, it is said that the courts holding the judgment conclusive evidence against the surety are those in which the contract of the surety obligates him to be responsible for the result of a suit against his principal, or where he has been made privy to the suit against the principal by notice, and has been given an opportunity to defend it; that the general tendency of the decisions is in favor of the position that, in the absence of such notice and opportunity to defend, or of such assumed responsibility for the result of a court proceeding, the judgment against the principal is not conclusive against the surety, but can be introduced against him only as evidence of its own existence, and not as evidence of any of the facts upon which its recovery rests. Citing 2 Brandt, *Suretyship & Guaranty*, §§ 630-632, 2 Black, *Judgm.* §§ 586, 592; 1 Freeman, *Judgm.* § 180.

In *Chamberlain v. Preble*, 11 Allen, 370, the court said: "A faithful performance of the covenant to warrant and defend requires the covenantor, on notice, to appear and take upon himself the defense of the estate, when assailed by a paramount title. After suit brought and notice to him, the covenantor stands in a different relation to the party who has a right to look to him for indemnity. If he does not assume the defense, it is at least his duty to communicate all information in his power as to the validity of the plaintiff's title. If he fails to do so, if he stands by and permits a recovery for want of evidence of

which he has knowledge, he cannot be permitted to show that the result would have been otherwise if the evidence had been produced, and so avoid the effect of the recovery in a suit against him. If he pays no attention to the notice, and turns his back upon the suit, he cannot, when called upon to respond, be permitted to prove that the defendant in the original suit would have prevailed if the defense had been conducted with a fuller knowledge of material facts."

Nor can it make any difference that the facts or some of them, in a proper case, were agreed to by the parties, instead of being passed upon by the jury. *Ibid.*

The obligors on a bond given to the obligee to secure the payment of damages for his land taken by a railroad company are bound by a judgment therefor, although not parties thereto, since, by the terms of their bond, they by implication agree to be represented by the railroad company and to abide by the judgment against it. *Hunt v. Card*, 94 Me. 386, 47 Atl. 921.

A surety covenanting for the payment of rent by his principal, the lessee of a hotel about to be built under a contract by which the time when the rent is to become due is to be fixed by arbitrators, is bound by an award which binds his principal, except that he is at liberty to show fraud or collusion, or perhaps that there was good defense which his principal neglected to interpose, this being a case in which the surety makes his liability depend upon the result of litigation between other parties. *Binsse v. Wood*, 37 N. Y. 526, affirming 47 Barb. 624.

Under a statute which declares that the stockholders of a corporation are jointly and severally liable for the payment of all debts or demands contracted by the corporation, and that no suit shall be commenced upon such debt or demand against a stockholder until judgment shall have first been obtained against the corporation, execution issued, and returned unsatisfied in whole or in part, or the corporation shall have been dissolved,—a judgment against the corporation is not even *prima facie* evidence of the genuineness of the debt. *Moss v. McCullough*, 5 Hill, 131.

When one covenants for the results or consequences of a suit between other parties, the decree or judgment in such suit is evidence against him, although he was not a party. *Rapelye v. Prince*, 4 Hill, 121, 40 Am. Dec. 267.

Privity of surety.

It has been held in a number of the more recent decisions, that an engagement by one man to be responsible for another creates such a privity between them as to render a recovery against the latter *prima facie* evidence in a suit brought on the guaranty given by the former. *Spencer v. Dearth*, 43 Vt. 98.

Where one party is liable to indemnify another against a particular loss, it is 40 L.R.A. (N.S.)

because, by law or by contract, the primary liability for such loss is upon the party indemnifying, and in such instances the party bound to indemnify is in privity with the party to be indemnified, and he therefore has a direct interest in defeating any suit whereby there may be a recovery as to the subject-matter of the indemnity, against the party to be indemnified. *Drennan v. Bunn*, 124 Ill. 175, 7 Am. St. Rep. 354, 16 N. E. 100.

If the party indemnifying, warranting, guarantying, etc., has notice of the suit and a chance to defend, this makes him privy to the suit, and the judgment is evidence against him. *Kettle v. Liipe*, 6 Barb. 467.

When one has expressly or impliedly agreed to indemnify and save harmless another, and has notice of the suit in which the recovery is had, he is bound by the result of that suit, and the record concludes him, upon the principle that he is regarded as a privy to the suit. *Thomas v. Hubbell*, 18 Barb. 9.

In an action on a guaranty to secure the plaintiff as commission merchants for advances which they might make for the benefit of a certain firm, it was held that the guarantors were privies to the contract upon which the judgment in the original action was founded, so as to make it admissible and conclusive to show a breach of the bond and the amount of damages. *De Forest v. Strong*, 8 Conn. 514.

When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of a suit and requested to take upon himself the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record. In every such case, if due notice is given such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not. *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759; *Veazie v. Ponobscot R. Co.* 49 Me. 119; *Davis v. Smith*, 79 Me. 351, 10 Atl. 55; *Fowler v. Jersey Shore*, 17 Pa. Super. Ct. 366.

When the warrantor is properly vouched, he becomes in effect the real party in interest to the ejectment. *Paul v. Witman*, 3 Watts & S. 409.

With notice, judgment is conclusive.

Where one stands in the position of indemnitor to another who is liable over to a third party, his liability may be fixed and determined in the action brought against such third party, by notice of the pendency of such action and an opportunity offered him to defend it. *Davis v. Smith*, 79 Me. 351, 10 Atl. 55. To the same effect, *Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

In holding that the record of a judgment against the indemnitee is evidence against

the indemnitor, the court, in *Weld v. Nichols*, 17 Pick. 538, said: "In a promise to indemnify, especially against a demand which the parties think is not well founded, the party indemnified is bound, in good faith, not to yield to the demand, until compelled by law to do so. He is therefore bound to show that he has paid under a judgment, and for this purpose the judgment is the proper evidence. It is like the ordinary case of one suing on a covenant of seisin or warranty, who must ordinarily produce the judgment by which he has been evicted. If the defendant has had due notice of the suit, and full means to aid in the defense, such judgment will in general be conclusive of the existence of the claim against which the covenant was made. The covenantee, or party indemnified, may, if he please, yield to the claim and pay without a judgment; but he does it at the risk of being obliged in his suit for indemnity, to prove the existence and truth of such claim."

The same rules in respect to notice, which apply to the indemnitor, are applicable also to his surety in like cases. *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275.

If, by operation of law, a third person is answerable to a defendant for whatever a plaintiff may justly recover, and has due notice of the suit, a judgment obtained without fraud against the defendant is, in an action brought by him against such third person to enforce his liability, conclusive evidence of the facts determined by it. *Lebanon v. Mead*, 64 N. H. 8, 4 Atl. 392.

If it was through the fault of the party sought to be held liable over for damages due to personal injuries, that the plaintiff in the original action was hurt, the defendant in the subsequent action is concluded by a judgment in the first action, if he knew the suit was pending and could have defended it. *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298.

The judgment is conclusive against the party sought to be held liable over, where he has had an opportunity to defend. *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564.

The person in fault is concluded by a judgment against a municipal corporation if he knew that the suit was pending and had an opportunity to defend it. *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298.

After notice and a request to defend, the indemnitor is concluded by the judgment in the first suit. *Drennan v. Bunn*, 124 Ill. 175, 7 Am. St. Rep. 354, 16 N. E. 100.

If the indemnitor has notice of the pendency of the action, and of the intention of the defendant therein to look to him for indemnity in case of a recovery, and is not denied an opportunity to defend, he is bound by the result of such action. *Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

If the party who is ultimately responsible has notice of the pendency of an action against his indemnitee, and is given an opportunity to defend, and neglects it, he is 40 L.R.A. (N.S.)

bound by the result of the action, and estopped from controverting, in an action subsequently brought against him by such indemnitee, the facts which were litigated in the original action. *Ibid*.

One who, at the request of another, enters into a contract as his surety, is bound by a suit brought against the party whom he is bound to indemnify, even in the absence of a provision in his contract to that effect, since the law implies a promise to indemnify; and where the indemnitor has notice of the suit against the indemnitee, he is bound by the judgment therein. *Konitzky v. Meyer*, 49 N. Y. 571.

Even a judgment by default has been held conclusive between the parties thereto and their privies, and effectually to bind an indemnitor who had notice of the action with an opportunity to defend the same. *Morlette v. Bostwick*, 56 Misc. 140, 106 N. Y. Supp. 1102.

If the indemnitor takes charge of the litigation, the judgment is equally conclusive. Cal. Civ. Code, § 2778. *Showers v. Wadsworth*, 81 Cal. 270, 22 Pac. 663.

The Georgia Civ. Code of 1910, § 5821, provides: "Where a defendant may have a remedy over against another, and vouches him into court by giving notice of the pendency of the suit, the judgment rendered therein will be conclusive upon the party vouched, as to the amount and right of the plaintiff to recover." *Central of Georgia R. Co. v. Macon R. & Light Co.* 9 Ga. App. 628, 71 S. E. 1076.

The Code is merely declaratory of the principle announced by the supreme court in the case of *Western & A. R. Co. v. Atlanta*, *infra*. *McArthur v. Ogletree*, 4 Ga. App. 429, 61 S. E. 859.

Prima facie evidence.

In some jurisdictions a judgment against the principal is held to be prima facie evidence against the surety.

As between the principal and indemnitor, in a case of general indemnity against claims or suits, the judgment against the obligee is only prima facie evidence; and in a suit upon such obligation, the indemnitor may show that his principal had a good defense to the original action which he neglected or refused to interpose, or that there was collusion between the plaintiff and defendant in such action; and if either is established, it will defeat a recovery. *Chapin v. Thompson*, 4 Hun, 779.

A judgment in favor of the United States on an official bond is, at least, prima facie evidence against the obligors on the bond of indemnity given to the surety. *Lee v. Wisner*, 38 Mich. 82.

Where a builder contracts with the owner to indemnify him for injury occasioned to an adjoining building, the record of a suit against the owner for damages caused by the builder is admissible in an action by the owner against the builder and his sureties. *Leppert v. Flaggs*, 101 Md. 71, 60 Atl. 450.

Where a mortgage was assigned, and the sureties covenanted that the assigned security should produce a certain sum with interest, over and above all costs and expenses of suing upon it or foreclosing the mortgage, and that they would pay any deficiency, it was held that the proceedings in chancery for the foreclosure of the mortgage were evidence against the sureties, although they were not parties thereto. *Rapelye v. Prince*, 4 Hill, 121, 40 Am. Dec. 267.

A judgment arising out of matters connected with a contract guaranty is prima facie evidence against the guarantor on the question of liability. *Kearney v. Sascor*, 37 Md. 284.

In *Pierce v. Wright*, 33 Tex. 631, the record of a suit against the signer of a promissory note was held admissible in an action on a bond obligating the defendant to save the plaintiff harmless.

With notice, prima facie evidence.

Some of the cases held that even with notice the judgment against the principal is only prima facie evidence against the sureties.

The general rule is that a judgment against a principal is prima facie evidence against the surety with notice of the proceeding. *McPharlin v. Fidelity & D. Co.* 162 Mich. 141, 127 N. W. 307.

Where an action is brought against a principal and sureties on an indemnity bond, and a judgment is obtained against the defendants, which is set aside as to the sureties on their motion upon a second trial, the judgment against the principal is prima facie evidence against the sureties. *Ibid.*

A judgment against a warrantee if fairly obtained, and especially if obtained upon a notice to a warrantor, is admissible against the latter in a suit against him on his contract of warranty of indemnity. *Clark v. Carrington*, 7 Cranch, 308, 3 L. ed. 354.

Where the purchaser of goods seeks to hold his vendor liable over for damages recovered against him on account of defects in the goods, the judgment is admissible in his favor, notice having been given to his vendor and the latter having participated in the trial. *Carleton v. Lombard, A. & Co.* 149 N. Y. 137, 43 N. E. 422.

In an action by a municipal corporation for damages paid at the suit of a person injured by a defect in a street caused by the negligence of a railroad company, the record of the suit is admissible against the company, where it was requested to defend. *Western & A. R. Co. v. Atlanta*, 74 Ga. 774.

Without notice, prima facie evidence.

Failure to give notice is often held to render a judgment otherwise conclusive against the surety, prima facie evidence only.

With notice, the former judgment is conclusive against the security; and without it, it is prima facie only. *Napier v. Neal*, 3 Ga. 208.
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If notice and opportunity to make a defense are not given to the indemnitor, judgment is but prima facie evidence of his liability on the bond. *Stewart v. Thomas*, 45 Mo. 42; *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123.

The judgment is prima facie evidence of the amount of the indemnitor's liability. *Grant v. Maslen*, 151 Mich. 466, 16 L.R.A. (N.S.) 910, 115 N. W. 472.

Where notice was not given to the indemnitor, and he did not participate in the original suit, it was held that judgment rendered therein was not conclusive upon him, but that it was admissible as part of the plaintiff's case. *Baltimore & O. R. Co. v. Howard County*, 111 Md. 176, 73 Atl. 656.

If the indemnitee wishes to make a judgment against him conclusive against the indemnitor, he should give the latter notice and an opportunity to defend. The omission to give notice does not go to the right of action, but leaves the onus upon the indemnitee of showing that the judgment was recovered for a claim or demand against which the indemnitor was bound to indemnify him. *Aberdeen v. Blackmar*, 6 Hill, 324.

If a thing determined in a prior case is the same thing which works the breach of covenant complained of, then, whether the covenantor was well warned or not, the judgment is a piece of lawful evidence in the action upon the covenant, the difference being that if it turn out that the covenantor was not adequately warned,—was not in substance a party,—the judgment, instead of being final as against him, is merely prima facie evidence of the validity of the title it purports to validate, and is disputable. *Mason v. Kellogg*, 38 Mich. 132.

The record of a judgment of ejectment against an indemnitee's tenant is prima facie evidence against the indemnitors, although they had no notice of the action upon which it was founded. *Taylor v. Barnes*, 69 N. Y. 430.

Where the condition of the bond is that the indemnitor shall pay a sum of money due to a third person, or save the indemnitee harmless, notice of the suit against the indemnitee is unnecessary. A verdict recovered against the indemnitee is at least prima facie, not to say conclusive, evidence against the sureties on the bond to show the amount of damages. *Lee v. Clark*, 1 Hill, 56.

An award of arbitrators against an owner primary liable for breach of contract is not binding upon one liable over, who has had no notice thereof. *Saveland v. Green*, 36 Wis. 612.

Where the owner conveyed land subject to a mortgage which the grantee assumed and agreed to pay, and the mortgage was foreclosed in an action against the grantor only, it was held that the proceedings and judgment in foreclosure were properly received in evidence in an action by the grantor against the grantee to show the amount of the mortgage debt, the sale of

the property, and the amount of the deficiency, although the grantee was not a party thereto, and had no notice of the suit. *Comstock v. Drohan*, 8 Hun, 373. The court said: "Where one person has become obligated to protect another against the consequences of his or her default in payment, a judgment regularly recovered against the party entitled to such protection is prima facie evidence of the facts established by it, in his favor in an action against the person bound to make the indemnity."

But where notice is expressly stipulated for, the want of it will, of course, defeat the action. *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275.

Judgments held not conclusive.

It is only when the indemnitor has been notified and has had an opportunity to defend that he will be concluded by a judgment against the indemnitee, as to all questions determined therein which are material to a recovery against him by the indemnitee. *Henderson v. Eckern*, 115 Minn. 410, 132 N. W. 715.

If the indemnitor is not notified of the suit against the indemnitee, the judgment is not conclusive against him; but if he is notified and refuses to defend the action, he is estopped by the judgment. *French v. Parish*, 14 N. H. 496.

A judgment based on the breach of an agreement by a corporation to perform certain acts is not conclusive against the company's guarantors. *Broadus v. Russell*, 160 Ala. 353, 49 So. 327.

Where a sublessee has recovered a judgment against the lessee for damages resulting from failure of the landlord to perform a covenant in his lease, the landlord, who was not a party thereto, cannot technically be said to be concluded thereby, either as to the issues involved or the amount recovered. *Feland v. Berry*, 130 Ky. 328, 113 S. W. 425.

In an action on a bond to pay a debt and hold the indemnitee harmless, a judgment against the principal is not conclusive and does not operate as an estoppel against the surety, and he will be permitted to interpose any valid defense that would defeat plaintiff's case existing at the time the judgment was obtained. *Browne v. French*, 3 Tex. Civ. App. 445, 22 S. W. 581.

The guarantors of the payment of a bond and mortgage are not estopped from interposing the defense of extension of time of payment, by a judgment against the mortgagor, where they were not parties to the action in which it was rendered. *Kane v. Cortesy*, 100 N. Y. 132, 2 N. E. 874.

Where the assignor of a judgment guaranteed to the assignee a certain sum in case of the latter's failure to collect the judgment after prosecuting the judgment debtor to insolvency, and the judgment debtor set up payment and was successful, it was held that the record of the suit did not conclude the assignor, who had no notice thereof, from showing that the judgment

assigned was a valid and subsisting judgment and that, had proper diligence been used in the conduct of the suit, the defense of payment would not have been successful. *Woodward v. Moore*, 13 Ohio St. 136.

An abutting owner who is not permitted to appear and defend an action against the city is not bound by the judgment entered against it. *Lewiston v. Isaman*, 19 Idaho, 653, 115 Pac. 494.

But where the party sought to be made liable over was sued as a joint defendant in the original action, and appeared therein, and the action against him was discontinued, he is not bound by the judgment rendered therein, in the absence of any notice to defend the action in its changed form. *Boston v. Brooks*, 187 Mass. 286, 73 N. E. 206.

Upon no principle can the party indemnifying be held liable where he has not had notice of the suit and an opportunity to defend given him. *Thomas v. Hubbell*, 18 Barb. 9.

In *Eaton v. Lyman*, 26 Wis. 61, it was held that grantor will not be bound by a judgment of eviction against his grantee, even after proper notice, if after judgment he is not permitted to pay costs and take a new trial as provided by statute. The court said: "Where a grantee seeks to conclude a grantor in an action on the covenants of the deed, by the result of the suit in which the grantee was ousted under an alleged paramount title, it should appear not only that the grantor was notified of the suit and requested to defend it, but that he was allowed to do so to the utmost extent of the law, if he desired to. Otherwise a defendant in ejectment might acquiesce in an erroneous result of a trial, and refuse his grantor an opportunity to correct it by appeal, and still conclude him by the judgment in an action on his covenants. This would be clearly unjust. And it would be equally so to allow the grantee to acquiesce arbitrarily in the result of a first trial in ejectment, and conclude his grantor by it, refusing the latter the privilege of taking the second trial allowed by the statute, and conducting the litigation farther."

The doctrine that where a person against whom suit is brought to recover damages is entitled to indemnity from another in case of being compelled to pay such damages, such other is bound by the judgment against such person if he be notified of the pendency of the suit and has an opportunity to defend against the same, does not apply to a case in which the indemnitor is first sued. If the indemnitor be first sued, the judgment in a subsequent suit by the same plaintiff against the indemnitee will not affect the plaintiff as to any question litigated in such first suit. *Schaefer v. Fond du Lac*, 99 Wis. 333, 41 L.R.A. 287, 74 N. W. 810.

Judgment no evidence whatever.

Other courts hold that the judgment, in the absence of notice, is no evidence whatever against the indemnitor.

If the property owner has had no notice of the suit against the city for damages sustained by reason of an unsafe sidewalk, a judgment against the city does not establish a liability against him. *Catterlin v. Frankfort*, 79 Ind. 547, 41 Am. Rep. 627.

The indemnitor not having had notice of the suit against the indemnitee, a judgment obtained therein is as to the indemnitor *res inter alios acta*. *American Bldg. & L. Asso. v. Stoneman*, 53 Minn. 212, 54 N. W. 1115.

A decree against the principal in an action to compel an accounting is not evidence against a guarantor unless he has had notice thereof and an opportunity to defend. *Douglass v. Howland*, 24 Wend. 35.

The record of a judgment against a tenant for rent is not evidence against one who has become surety for the rent, who was not a party to the action, and who had no notice to defend it. *Giltinan v. Strong*, 64 Pa. 242, reversing 7 Phila. 176.

In an action on a bond conditioned to support the poor of a town for a certain period, and to indemnify and save the town harmless from all "expenses, loss, or costs on account of such poor," a judgment against the town for the support of a pauper is as to the indemnitors having no notice thereof *res inter alios acta*. *Castleton v. Miner*, 8 Vt. 209.

In an action on a bond indemnifying a surety on the bond of a tax collector, a judgment against the tax collector's surety at the suit of the receiver general is no evidence of the amount of damages sustained by the collector's surety. *King v. Norman*, 4 C. B. 884, 17 L. J. C. P. N. S. 23, 11 Jur. 824. The court said that the judgment could not be used for such a purpose without holding that a stranger to a judgment, who has had no opportunity to cross-examine witnesses or to dispute the conclusions to be drawn from the evidence, can be bound by verdict where the judgment is after the verdict, or can be bound by an agreement made without his privity or intervention between the parties to the judgment where it is a judgment founded on agreement.

To what extent, evidence.

Where the judgment is conclusive or admissible against the sureties, the question arises of how far it may be conclusive or prima facie evidence against them.

It has been held that where a party has the right of recovery over secured to him, either by operation of law or express contract, and he has given the person so responsible due notice of the suit, the judgment, if obtained without fraud or collusion, will be conclusive evidence against such person of every fact established by it. *Spencer v. Dearth*, 43 Vt. 98.

A judgment against an indemnitee is conclusive upon the indemnitor as to the amount of the demand and the costs, where the indemnitor was notified of the suit and assumed to defend it, and where it was his own fault and his failure to fulfil his agree-

ment in connection with the defense of the suit, which made the costs. *Wright v. Whiting*, 40 Barb. 235.

A judgment against the voucher is conclusive upon the vouchee as to such matters as the latter could have proved in defense of the judgment against the voucher. *McArthur v. Ogletree*, 4 Ga. App. 429, 61 S. E. 859.

Where one of the parties to a pending action claims that a third person is liable over to him in the event he loses in the suit, and vouches that person by notifying him of the pendency of the suit and giving him opportunity to appear therein, the judgment in that suit is conclusive on the person vouched as to the correctness of the judgment, but is not conclusive of the fact that there is such a relationship between the person vouched and the person vouching that a right of action over exists. *Central of Georgia R. Co. v. Macon R. & Light Co.* 9 Ga. App. 628, 71 S. E. 1076.

In case of eviction by force of judgment at law, with notice of the suit to the warrantor, the judgment, unless obtained by fraud, is plenary evidence of a paramount title. *Hamilton v. Cutts*, 4 Mass. 348, 3 Am. Dec. 222.

A judgment of eviction cannot be impeached in an action against the grantor on his covenants, who has been duly notified, merely by proof of mistake in the defense of the original suit, if the judgment is valid and free from fraud or collusion. *Chamberlain v. Preble*, 11 Allen, 370.

A judgment in an ejectment action is conclusive evidence of the breach of the covenant of title, if the grantor was duly notified of the suit against the grantee, and, where notice is not given, the defendant in the action on the covenant is precluded only from proving a good title to the land conveyed. The record is prima facie evidence of what is equivalent to an eviction, and also that the plaintiff did not fail to recover in consequence of any act or neglect of his. This is sufficient to support an action, unless the defendant shows good title in himself at the time of his conveyance to the plaintiff. *Pitkin v. Leavitt*, 13 Vt. 379.

If a covenantor to warrant and defend title be notified of the pendency of a suit in ejectment against the covenantee, the judgment against the latter is evidence against the former that the recovery was obtained by paramount title, and if the notice was sufficient, the judgment will be conclusive, unless it was obtained in consequence of some fact which occurred after the date of the covenant. *Davenport v. Muir*, 3 J. J. Marsh. 310, 20 Am. Dec. 143.

When a grantee has been evicted by virtue of a judgment recovered against him, that judgment is legally admissible to prove the fact of eviction, but not to prove the superior title of the recovering party. If the grantor, however, had notice of the suit and opportunity to appear and defend, it is evidence against him to prove the title of the recovering party. *Hardy v. Nelson*, 27 Me. 525

It is maintained in many cases that a judgment against a warrantee is *prima facie* evidence of both eviction and the infirmity of the title, even though the warrantor had no notice of the former litigation, in a suit by the warrantee against the warrantor upon the covenants in the deed. *Ryerson v. Chapman*, 66 Me. 557.

The record of a judgment against the maker of a note is admissible against the guarantor to prove that such judgment had been rendered, especially where the notice of the pendency of the action was given him; but whether the judgment was upon the merits of the case, whether the same point was in issue, is a necessary matter of inquiry, and open to proof by parol evidence. *Robinson v. Lane*, 14 Smedes & M. 161.

In an action by an indorsee against one who has indorsed and delivered to him a negotiable promissory note in the usual course of business, to recover the amount which he has been adjudged to pay in consequence of a forgery of the signature of a prior indorser, the plaintiff having given to the defendant timely notice of the pendency of the suit in which such judgment was recovered, and an opportunity to defend,—such former judgment is conclusive with respect to the forgery. *First Nat. Bank v. First Nat. Bank*, 68 Ohio St. 43, 67 N. E. 91.

In *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. 439, affirming 35 Hun, 507, the court said: "The covenantor in an action on a covenant of general indemnity against judgments is concluded by the judgment recovered against the covenantee, from questioning the existence or extent of the covenantee's liability in the action in which it was rendered. The recovery of a judgment is the event against which he covenanted, and it would contravene the manifest intention and purpose of the indemnity to make the right of the covenantee to maintain an action on the covenant to depend upon the result of the retrial of an issue which as against the covenantee, had been conclusively determined in the former action, 'always, however, saving the right, as the law must in every case where the suit is between third persons, to contest the proceeding on the ground of fraudulent collusion for the purpose of charging the surety.'"

Where the undertaking of a surety was that buildings should be erected by his principal upon certain real property, and the same turned over free from encumbrance, proper records showing the filing of claims for mechanic's liens, and a decree establishing the same as claimed, are admissible as proof of the existence of liens against the property in a suit against the surety on his undertaking, notwithstanding the fact that such surety was neither named in, nor made a party to, the proceedings evidenced by such records. *Comstock v. Cameron*, 41 Neb. 814, 60 N. W. 105.

A judgment against a contractor in a mechanics' lien action is conclusive against the sureties as to the validity of the claim 40 L.R.A. (N.S.).

upon which it was founded, where the conditions of the bond sued upon bind the obligors to keep the obligees harmless and indemnified "from and against all and every claim, demand, judgment, liens, mechanics' liens, costs, and fees of every description incurred in suits or otherwise, against the building erected under said contract, and to repay to the obligees all sums of money which they may pay to other persons on account of work and labor done or materials furnished on or for said building." *Oberbeck v. Mayer*, 59 Mo. App. 289.

In an action by the owner of a canal to hold contractors liable for damages sustained by property owners due to the negligent carrying on of the work of construction, under a contract by which the contractors agreed to save the canal owner harmless, judgments obtained against the indemnitee for such neglect are admissible against the indemnitors, and are conclusive in so far as, and to the extent to which, they were rendered on account of the work done or omitted to be done by the contractors or indemnitors, where it appeared that the contractors had notice of the commencement of the action, and were requested to defend, but neglected to do so. *Lake Drummond Canal & Water Co. v. West End Trust & S. D. Co.* 73 C. C. A. 227, 142 Fed. 41.

But the judgment cannot be extended beyond the issue necessarily determined by it, nor is the person who is responsible over precluded from setting up any defense which, from the nature of the action or the pleadings, he could have interposed in the first litigation, had he been a formal party to it. *Fowler v. Jersey Shore*, 17 Pa. Super. Ct. 366.

One who guarantees that all wines supplied to his principal "shall be duly paid for" is not bound as to the amount of his liability by an award of arbitrators provided for in the agreement between his principal and the seller. *Ex parte Young*, 50 L. J. Ch. N. S. 824, L. R. 17 Ch. Div. 668, 45 L. T. N. S. 90.

Where the amount of the judgment was determined by agreement without securing the consent of the indemnitor, this was held to reduce the judgment from conclusive to *prima facie* evidence only of his liability and the amount thereof, and to afford him the opportunity of showing either that the judgment was procured by fraudulent collusion, was not founded upon a legal liability, or that it exceeded such liability. *Kansas City, M. & B. R. Co. v. Southern R. News Co.* 151 Mo. 373, 42 L.R.A. 380, 74 Am. St. Rep. 545, 52 S. W. 205.

Personal injuries.

It is a well-settled general rule that, when one who has a right to recover over is sued, the judgment regularly rendered against him is conclusive upon the person liable over, provided notice of the suit be given to the latter and full opportunity afforded him to make defense. But when the liability over is not as broad as the

original liability, the plaintiff in the suit to recover over, if he relies on the adjudication made in the former case, must show that the very ground of liability against the indemnitor was found to exist, and was necessarily adjudicated, in the original suit. The estoppel created by the first judgment cannot extend beyond the questions necessarily determined by it. *B. Roth Tool Co. v. New Amsterdam Casualty Co.* 88 C. C. A. 569, 161 Fed. 709.

If a property owner through whose negligence a person is injured by reason of a dangerous sidewalk is notified of the action against the city for damages, he is concluded by the judgment against the corporation as to all questions adjudicated in that action. *McNaughton v. Elkhart*, 85 Ind. 384; *Elkhart v. Wickwire*, 87 Ind. 77.

A judgment obtained against a municipal corporation for injuries caused by a defect or obstruction in a highway is conclusive evidence of its necessary facts, if a subsequent action be brought by the municipality against a third person who was the author of the defect or nuisance, and who, having been legally notified of the first suit, is liable over. *Fowler v. Jersey Shore*, supra.

A judgment against a city for damages due to a dangerous street obstruction erected by an abutting owner is conclusive against the latter duly vouched into court, as to the amount and the right of the plaintiff to recover in the suit against the city, and as to all defenses that either the municipality or the party vouched could have set up in the first suit, and which were actually set up and passed upon in that suit. *Byne v. Americus*, 6 Ga. App. 48, 64 S. E. 285.

Where a railroad company through whose negligence in maintaining the approach to a bridge, a person was injured, had timely notice of the bringing of a suit against a village therefor, and was notified to take charge of the defense, it was held that a judgment against the village was conclusive against the company, so far as the right of the injured person to recover was concerned. *Port Jervis v. Erie R. Co.* 59 Misc. 623, 111 N. Y. Supp. 851.

Where a railroad company liable over to a city for damages arising from personal injuries received by falling into an unguarded excavation has been duly vouched to appear and defend, the judgment against the municipality is conclusive upon the company on the question of its negligence, if that fact was necessarily determined in the original action. *District of Columbia v. Baltimore & P. R. Co.* 1 Mackey, 314.

One who has been prosecuted to judgment upon a cause of action based upon the negligent act of another who owed a duty to him, where such other party has been called in to defend, and has actually assumed the conduct of the defense, may sue such other party for indemnity, and rest his case in respect of the question of negligence upon proof of the former adjudication, it being shown that it was in consequence of such negligence that the former 40 L.R.A. (N.S.)

judgment was rendered. *Lawrence v. Stearns*, 79 Fed. 878.

Where a judgment has been obtained against a town for injuries due to a defect in a highway caused by the negligence of a railway company, which had notice of the suit and an opportunity to defend its interests, the judgment is conclusive in an action by the town against the company, on the question whether the highway was defective in the manner alleged. *Waterbury v. Waterbury Traction Co.* 74 Conn. 152, 50 Atl. 3.

A judgment against a city for the maintenance of a dangerous sidewalk is conclusive as to the dangerous condition of the walk, upon the property owner who permitted the condition to exist, and who was called in to defend. *Bloomington v. Roush*, 13 Ill. App. 339.

When a suit is brought against a city for damages caused by the act of one who obstructs or excavates in the street, and such person has notice of the suit, the judgment will be conclusive against him in an action by the city to recover the amount it has been compelled to pay, so far as relates to all matters necessarily included in the adjudication,—such as that the person was injured at the place alleged, without fault on his part, and that damages were sustained to the amount of the judgment, and that the excavation was wrongfully and negligently permitted to remain uncovered and unguarded. *Todd v. Chicago*, 18 Ill. App. 565.

A judgment against a city for an injury received by reason of a defective highway is conclusive against a tenant of the abutting land in an action over by the city, as to the defective condition of the highway, as to the care used by the injured person, and as to the amount of his damage, where the tenant has had notice of the action upon which the judgment was founded. *Boston v. Worthington*, 10 Gray, 496, 71 Am. Dec. 678.

A judgment for the plaintiff in an action against a city for injuries received by the overturning of a sleigh in one of its streets, due to the negligence of a railroad company in laying its tracks, is conclusive against the company in an action over, as to the extent of the damages, as to the dangerous character of the street, and as to the freedom of the person injured from contributory negligence, where the company was requested to defend, but declined. *Troy v. Troy & L. R. Co.* 49 N. Y. 657.

A judgment against a city for personal injuries caused by an obstruction placed in a street by a contractor is conclusive against the contractors and their sureties in an action over against them by the city, as to the amount of damages, the existence of the defect or obstruction in the street, and as to the freedom of the person injured from contributory negligence, where both the contractors and the sureties had timely notice of the suit, and that it was brought for the purpose of obtaining judgment against the city for an act of the contract-

ors, and that they were required to come in and defend. *New York v. Brady*, 151 N. Y. 611, 45 N. E. 1122.

The party liable over to a city against which a judgment has been recovered for injuries due to negligence, who has been given due notice of the original action, is concluded as to any matter which might have been urged as a defense against such liability, and evidence that the person injured was guilty of contributory negligence is not receivable. The primary liability, however, must be established. *Rochester v. Montgomery*, 72 N. Y. 65.

A judgment against a city for personal injuries caused by the collapse of a temporary bridge in a highway, due to the negligence of contractors employed by an abutting owner, is conclusive in an action over by the city against the defendant, who was properly vouched in, as to the amount of damages, the extent of the defect, and as to the fact that the injured person was free from negligence. *New York v. Corn*, 133 App. Div. 1, 117 N. Y. Supp. 514.

A judgment obtained against a borough for personal injuries due to a defective highway is conclusive evidence of the existence of the defect in the highway, and of the injury to the individual hurt while in the exercise of due care, and of the amount of the damages. *Fowler v. Jersey Shore*, 17 Pa. Super. Ct. 366.

Where a judgment was obtained against a city for personal injuries caused by a defective sidewalk, it was held conclusive of the existence of the defect in the street, and of the primary liability of the city therefor, and of the fact that the plaintiff in the original action was injured without contributory negligence, and of the amount of the judgment, in an action by the city to hold the contractor and his sureties liable on a bond to indemnify the city, where notice of the original action and an opportunity to defend were given to the contractor and his sureties, and nothing remained to be proved by the city except that the contractors were responsible for the defect for which the recovery was had. *Seattle v. Regan*, 52 Wash. 262, 132 Am. St. Rep. 963, 100 Pac. 731.

In an action against an indemnitor to recover over after a judgment against a city for the killing of a boy as the result of defective wire insulation, contributory negligence of the deceased is not a defense, in the absence of bad faith on the part of the city in not presenting that defense in the original action. *Owensboro v. Westinghouse, C. K. & Co.* 91 C. C. A. 335, 165 Fed. 385.

In an action by a town against those by whom an excavation causing an injury was made, the verdict and judgment after notice, are conclusive evidence of the existence of the defect in the highway, the injury to the individual while he was in the exercise of due care, and the amount of the injury. *Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720.

But whether, as between the defendant in 40 L.R.A. (N.S.)

the first action and the party sought to be held liable over, the latter is primarily liable for the damages occasioned to the person injured, must be determined by evidence outside of the record of the first action. The judgment is not conclusive as to the liability of the defendant in the second action. *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 987.

Where there was a judgment against a city for personal injuries caused by the negligence of the city in permitting a plank to be taken up from the sidewalk so as to make it dangerous, a judgment for the plaintiff obtained therein was held not conclusive on the property owner on the question of the latter's negligence, the negligence of the city being the only question at issue in the original action. *Lansing v. Detroit, L. & N. R. Co.* 129 Mich. 403, 89 N. W. 54.

A judgment against a city for personal injuries claimed to be due to the negligence of a railroad company in failing to remove snow from its tracks is competent evidence against the company in an action over by the city against it, and an estoppel except as to the question whether the injury happened by the negligence of the railroad company. *Troy v. Troy & L. R. Co.* 3 Lans. 270.

When indemnity is sought by a city which has been adjudged liable for damages arising from negligence of a contractor primarily liable therefor, a judgment against the city, in an action against the contractor, is evidence that the city was liable for the damages, and, when notice has been given to defend, of the amount of damage arising from the injury; but it does not establish which of the parties is primarily liable. *New York v. Brady*, 70 Hun, 250, 24 N. Y. Supp. 296, second appeal, 77 Hun, 241, 28 N. Y. Supp. 324.

As a general rule, when indemnity is sought by one who has been adjudged liable for damages arising from negligence for which another, as between themselves, is primarily liable, the judgment in the action against the former is evidence in the action brought for indemnity, that the defendant in the first action, plaintiff in the second, was liable for the damages, and, when notice has been given to defend, of the amount of the damages arising from the injury; but it does not establish which of the wrongdoers is primarily liable, unless that question was in issue and decided. *Lexington v. Aetna Indemnity Co.* 155 N. C. 219, 71 S. E. 214.

A judgment against a city for personal injuries due to a dangerous condition of the street concludes the person liable over, who has been given reasonable notice and opportunity to defend, as to all matters necessary to establish the liability of the city, to the person injured, and as to any matter which might have been urged as a defense by the city against such liability. Unless, however, it appears that evidence showing the liability of the alleged indemnitor was

necessarily involved in the determination of the original action, and passed upon by the trial court in rendering judgment, the defendant is not concluded upon the point that, notwithstanding the liability of the city, he was not at fault, and has not failed in any duty which he owed to the city or the person injured, and he may plead and show such facts as a defense upon the trial. *Grand Forks v. Paulsness*, 19 N. D. 293, — L.R.A. (N.S.) —, 123 N. W. 878.

The party sought to be held liable over is not estopped by the first judgment from showing that he was not the owner of the premises upon which the accident occurred, and that he was under no obligation to keep them safe, and that the accident did not result from his neglect of duty. *Fowler v. Jersey Shore*, 17 Pa. Super. Co. 366.

Where a city was held liable for personal injuries received by a person falling over a plank negligently extended over a sidewalk, the judgment is not *res judicata* as to the ultimate liability of the contractor alleged to have been responsible for the obstruction. The judgment against the city is conclusive only as to the fact of the injury, that the city was guilty of negligence, and as to the amount of the recovery. In this case the contractor was sued jointly with the city, and the action was dismissed as to him, on the plea of the statute of limitations. *Richmond v. Sitterding*, 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562.

The person sought to be made liable over to a municipal corporation is not estopped by a judgment against the corporation, from showing that he was under no obligation to keep the street in which the accident happened in a safe condition, and that it was not through his fault that the accident occurred. *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298.

If the lot owner has notice of the action against the city for injury due to a defective sidewalk, the judgment is conclusive upon him as to the fact, cause, and extent of the injury, but not as to the responsibility of the lot owner for such cause. *Lincoln v. First Nat. Bank*, 67 Neb. 401, 60 L.R.A. 923, 108 Am. St. Rep. 690, 93 N. W. 698.

b. Sheriff's bonds.

Bonds indemnifying sheriffs, constables, and similar officers in particular cases are governed by the same rules that apply to other indemnity contracts, in respect to the effect of judgments against such officers in actions against their indemnitors.

If the indemnitor of a sheriff on the levy of an execution has seasonable notice of the suit against the sheriff for a wrongful levy, judgment obtained therein is conclusive against him; but if he has not had such notice, judgment is only *prima facie* evidence against him. *Train v. Gold*, 5 Pick. 380.

The judgment against a constable is conclusive in an action by a constable against his indemnitor, the latter having had notice of the original action and an opportunity

to defend. *Miller v. Rhoades*, 20 Ohio St. 494.

A judgment against a sheriff is conclusive as to his right to recover from his indemnitors. *Moore v. McSleeper*, 102 Cal. 277, 36 Pac. 593.

A judgment against a sheriff for wrongful seizure of property is conclusive against his indemnitors. *Woodworth v. Gorsline*, 30 Colo. 186, 58 L.R.A. 417, 69 Pac. 705.

The indemnitors, having notice to defend, are concluded by the judgment against a sheriff, their principal, under the California Civil Code, § 2778, subd. 5. *Showers v. Wadsworth*, 81 Cal. 270, 22 Pac. 663.

In an action on a sheriff's indemnity bond, a judgment against the sheriff is binding upon the obligors who participated in the defense of the action against the sheriff. *Meyer v. Purcell*, 214 Ill. 62, 73 N. E. 392, affirming 114 Ill. App. 472.

Where the surety indemnifies an officer in a sale of property under execution, a judgment is conclusive against the surety having notice of the suit against the officer. *Jones v. Henry*, 3 Litt. (Ky.) 427. The court said: "The meaning of the undertaking is that he will undertake for the officer to pay all that shall be recovered for the act against the consequences of which the officer is indemnified, and thus the obligor stipulates to become party and to be bound by all legal proceedings against the officer; and to avoid the effect of this stipulation, it would be incumbent upon him to show that there was some fraud or collusion in obtaining the recovery, or at all events that he had no notice of it."

A judgment against a sheriff for the escape of a prisoner is conclusive evidence for the plaintiff in an action on a bond taken for his security on the granting of the liberties of the jail to the prisoner on execution. *Kip v. Brigham*, 7 Johns. 168.

Where a judgment has been recovered against a sheriff for an escape, the *postea* is evidence without the judgment to prove actual damages at least, if not the escape; and the sheriff may recover the amount of the debt and the costs in the original suit, and also the costs of the action against him for the escape. *Ibid.*

In an action on a bond given as security for jail liberties, the record of a recovery against the sheriff for an escape, after notice to the sureties and their assumption of the defense, is conclusive that the plaintiff in an action on the bond has been damnified, and to that extent. *Ibid.*

In a Nebraska case the court says: "The conclusion we have reached is that in an action against the sureties on a bond given to a sheriff to indemnify him against judgments to which he shall be a party, the judgment recovered against the officer is conclusive against the sureties, although they had no notice of the pendency of the action in which the judgment was obtained. When it is shown that their principal defended the suit for the officer, the obligation being to indemnify the sheriff "from all harm, trouble, damages, costs, suits, actions, judg-

ments, and executions that shall or may arise, come, or be brought against him." *Pasewalk v. Bollman*, 29 Neb. 519, 28 Am. St. Rep. 399, 45 N. W. 780. The court further said: "The sureties undertook to save the officer harmless from any judgment that might be recovered against him by reason of the levying of the executions. It was no part of the agreement that the sureties should be notified of the pendency of the action. If the sureties desired notice of the proceedings to obtain the judgment, they should have stipulated for it in the bond if indemnity; not having done so, the failure to receive such notice does not affect their liability. They agreed absolutely to be bound by any judgment rendered against the officer."

In a suit on a bond indemnifying a sheriff against damages to third persons claiming title to property levied upon under attachment, and to save him harmless from any judgment which might be obtained against him with reference thereto, the sureties are concluded by a judgment against the sheriff, in the absence of any question of fraud or collusion. *Flack v. Thaxter* (com. pl.) 44 N. Y. S. R. 107, 17 N. Y. Supp. 350, affirming 39 N. Y. S. R. 197, 14 N. Y. Supp. 366.

The indemnitor of a constable making sale of a chattel upon execution, not having notice of the suit against the constable in which title was established in a third person, is not bound by the judgment obtained therein on that question. The judgment is no evidence against him on the question of title. *Burrill v. West*, 2 N. H. 190.

A judgment against a constable for not collecting an execution would not be conclusive against a town in an action over to hold it liable, if the town had no notice of the suit. *Bramble v. Poultney*, 11 Vt. 208.

Where no notice is given to the sheriff's sureties of an action against him for a false return, the judgment is only prima facie evidence of the amount to be recovered. *State use of Fulton v. Colerick*, 3 Ohio, 487. The court said: "We take the distinction to be that where the sureties have notice of the suit, and may or do make defense, the judgment against the principal is conclusive against them. Where such notice is not given, the judgment against the principal is prima facie only. It may be impeached for collusion or for mistake. But until so impeached, it is sufficient to entitle the plaintiff to recover the amount for which it is rendered."

A judgment against a constable for the wrongful taking of goods in replevin is only prima facie evidence against his sureties in an action on the official bond, where the sureties had no notice of the suit against their principal, and while, in the absence of other evidence, it will authorize a recovery against them, they have the right not only to attack the judgment for fraud or collusion, but also to open up an inquiry on the merits. *State use of Story v. Jennings*, 14 Ohio St. 73.

A judgment against a constable is not conclusive against the sureties on his bond 40 L.R.A. (N.S.)

as to the question whether the sureties gave the indemnity, whether the judgment was fairly obtained, or whether it was rendered for the matter to which the indemnity applied. *New Haven v. Chidsey*, 68 Conn. 397, 38 Atl. 800. In this case the judgment did not show whether the neglect of the duty complained of was a breach of the bond in suit or of another bond.

In an action on a bond indemnifying the sheriff on the sale of goods on execution, it was held that the record of the suit against the sheriff was proper evidence to show that the very thing had happened which the surety contracted that his principal should not allow to happen, but that it was not conclusive of the amount, for the surety might have shown that the amount was increased by reason of some fault of the sheriff for which the bond was not intended to secure him. *Huzzard v. Nagle*, 40 Pa. 178.

Actions against deputies.

A judgment against the sheriff for the default of his deputy, who defended the action, is conclusive upon the deputy's sureties, although they had no notice of the suit, under a bond to indemnify and save the sheriff harmless from all actions, costs, damages, and expenses on account of the wrongful conduct of the deputy. *Chamberlain v. Godfrey*, 38 Vt. 380, 84 Am. Dec. 690.

The sureties on a deputy sheriff's bond indemnifying the sheriff for a default of the deputy are bound by the judgment against the sheriff for such default, if notice thereof is given to the deputy, although not to them. *Fay v. Ames*, 44 Barb. 327. The court said: "The defendants being jointly bound to indemnify the plaintiff, they were in privity of contract with each other, and are to be regarded and treated, *quoad* the contract and the rights and liabilities connected with and growing out of it, as one person. In such a case notice to one is notice to all, on the same principle as where two or more persons are shown to be jointly bound by a contract, the acts and admissions of either are binding upon all the others, to the same extent as upon the one doing the acts or making the admissions. . . . If, in addition to giving notice to the deputy, notice had been given to the sureties also, it would have been little more than an idle and useless ceremony, as it is to be presumed that all they would or could have done would have been to refer the matter to their principal, the deputy, and cast the burthen of the defense upon him, as the sheriff has done."

A judgment against a marshal for the taking of insufficient bail by his deputy is conclusive against the sureties on the bond of the deputy, where notified of the original suit and authorized to defend. *Hand v. Taylor*, 4 Ind. 409.

In a proceeding by a high sheriff against his deputy for failure to collect an account

for county tax levies, which went into his hands, it is not incumbent upon the sheriff to do more than produce the record of the judgment showing that he had been subjected to liability in consequence of the default of his deputy; and it appearing that the deputy was informed of the motion against his principal, and failed to defend it, he is estopped to deny his delinquency or his liability. *Lee County v. Fulkerson*, 21 Gratt. 182.

In an action by a sheriff against his deputy and the sureties of the deputy on the official bond of the deputy, to recover the amount of a judgment rendered against the sheriff for the default of the deputy in not duly accounting for money made by the latter under execution, a judgment rendered against the sheriff, the deputy having attended the trial and made full defense to the action, is binding and conclusive upon him and his sureties, in the action of the sheriff against them, where the bond provides that the deputy "shall, in all things, well and truly and faithfully discharge the duties of his said office of deputy sheriff during his continuance therein," and also that he "shall, in all respects, indemnify and save harmless the sheriff and all other persons, whom any loss and damage in any wise arising from the conduct of the said deputy in the said office." *Crawford v. Turk*, 24 Gratt. 176. The court said that the deputy's sureties have no right to require the sheriff to do more than to notify the deputy to defend the action, and having done that, the sheriff may leave the defense of the action to the deputy; and may look to the deputy and his sureties for full and complete indemnity against any judgment which may be recovered in the action, and against the costs of defending it. The court declared that, according to the true intent and meaning of the bond, it binds the sureties as well as the deputy, to pay such a judgment in exoneration of the sheriff. Without doing so, the deputy will not in all respects indemnify and save harmless the sheriff from all loss and damages in any suit arising from the conduct of the deputy in his said office, for which he and his sureties expressly bound themselves, jointly and severally, to the sheriff.

In an action on a bond to indemnify a sheriff for the misconduct and default of his deputy, a judgment against the sheriff is admissible against the sureties, both as to the liability and the amount thereof, where they had notice of the pendency of the action. *Kettle v. Lipe*, 6 Barb. 467.

A judgment against a sheriff or his representative, for a default of his deputy, in the absence of all other proof, furnishes prima facie evidence against the deputy and his sureties of the facts therein recited. *Cox v. Thomas*, 9 Gratt. 323.

Where judgment has been obtained against a sheriff for the default of his deputy, and the deputy has had notice of the suit, such judgment is prima facie evidence of the deputy's default as against the deputy's sureties, in an action on the dep-

uty's bond. *Westervelt v. Smith*, 2 Duer, 449.

A judgment against a sheriff in an action for a default of his deputy, of which the deputy had notice, but of which the deputy's sureties had not, is at least prima facie evidence against the sureties in an action on the bond, of the plaintiff's right to recover, and as to the amount he is entitled to recover. *Stephens v. Shafer*, 48 Wis. 54, 33 Am. Rep. 793, 3 N. W. 835.

In *Beall v. Beck*, 3 Har. & M'H. 242, a judgment in favor of a sheriff against his deputy for the default of the latter was held inadmissible in a subsequent action against the deputy and his surety on the bond.

The sureties on a deputy sheriff's bond are not concluded by a judgment against a sheriff in a suit of which they had no notice or opportunity to defend, although their principal had notice of the suit. *Thomas v. Hubbell*, 35 N. Y. 120.

The sureties on a deputy's sheriff's bond conditioned that he will do his duty as such officer, who have no notice of an action against the sheriff for the deputy's default, are not concluded by the judgment rendered therein. *Thomas v. Hubbell*, 15 N. Y. 405, 69 Am. Dec. 619, reversing 18 Barb. 9.

A judgment against a sheriff for failure to account for part of the revenue taxes is not admissible against a deputy and his sureties, the latter not being parties thereto; and a statute which gives a remedy by motion to a sheriff against his deputy makes the deputy equally liable to the same extent, whether the commonwealth has obtained a judgment against the principal or not. *Johnson v. Thompson*, 4 Bibb. 294.

c. Miscellaneous obligations.

A judgment against the principal is conclusive against a guarantor who had notice of the pendency of the action, and was present at the trial, and could have defended the action had he seen fit to do so. *Blanding v. Cohen*, 101 App. Div. 442, 92 N. Y. Supp. 93, affirmed in 184 N. Y. 538, 76 N. E. 1089.

If the guarantor of a note has notice of an action against the guarantee, the judgment concludes him. Without notice, it is prima facie evidence only. *Ayres v. Findley*, 1 Pa. St. 501.

Where a city has been sued for damages caused by a defective sidewalk, and the property owner upon notification appears and assists in the defense, he is bound by the judgment, and cannot, in an action over against him, litigate any of the questions involved in the first suit. *McDonald v. Lockport*, 28 Ill. App. 157.

If a railroad company, responsible for the dangerous condition of a highway, is notified of an action against a municipal corporation for damages occasioned thereby, and requested to defend, it is bound by the judgment against the municipality as to the cause of the injury and the extent of the

damage. *Veazie v. Penobscot R. Co.* 49 Me. 119.

Where the negligence of the contractor consisted in failure to erect proper barricades or barriers in the street, it was held that a judgment against the city in the original action, of which the contractor had notice, was conclusive in an action over based upon the latter's contract of indemnity, although the city inspector was on the ground during the time the work was in progress, and gave no directions as to the erection of any barricades or barriers, and seemed to be satisfied with the condition of the street, and although the erection of the barricades would have closed the street to traffic, and although it was really for the benefit of the city that the barriers were not erected. *Seattle v. Saulez*, 47 Wash. 365, 92 Pac. 140.

A judgment against the owner for damages done to a tenant by the negligence of a builder is conclusive against the contractor having notice to defend, in a subsequent action by the owner against the contractor to recover therefor. *Katterjohn v. Nahm*, 32 Ky. L. Rep. 727, 106 S. W. 1179.

In an action by a property owner against a builder liable over for his negligence in failing properly to guard an area of the building, a judgment against the owner by default is conclusive against the builder, who is shown to have had notice thereof and who agreed to "take care of" it. *Mackey v. Fisher*, 36 Minn. 347, 31 N. W. 363.

Where the charterers of a steamship, without fault on their part, were adjudged liable for damages caused by the collapse of a pier, such judgment was held to establish the liability over to them of the owners of the pier. *Vogemann v. American Dock & Trust Co.* 131 App. Div. 216, 115 N. Y. Supp. 741.

A judgment against a master for damages due to the negligence of his servant is evidence against the servant, who was notified and who was a witness in the case in which the master was condemned to pay damages. *Costa v. Yochim*, 104 La. 170, 28 So. 992.

Where a title guaranteed by covenant is assailed by action, upon a ground which, if adjudged valid, would involve infringement of the covenant, the holder of such title, on being so sued, may give proper notice to the covenantor and require him to defend; and having done this, if the case in which notice is given results adversely to him, and he thereupon sues on the covenant, he will be relieved from making proof, except by the judgment itself, of the truth and force of what was there adjudged. *Mason v. Kellogg*, 38 Mich. 132.

Where one not a party to an action that involves the title to property is bound to answer to the defendant for the title which he is called on to defend, the latter may call upon the former to defend it in the action; and, in such event, the judgment is conclusive against the third person in favor of such defendant on the question of title. *Hersey v. Long*, 30 Minn. 114, 14 N. W. 508. 40 L.R.A. (N.S.)

An eviction by a paramount title is prima facie evidence in favor of the warrantee in a suit on the warranty. And if the warrantee takes the precaution to vouch or call in the warrantor to warrant and defend the title, the recovery in ejectment is conclusive. *Paul v. Witman*, 3 Watts & S. 409.

If the grantor has notice of the former suit and an opportunity to defend, then, in the absence of fraud or collusion, the judgment in the former suit is conclusive against him. *Ryerson v. Chapman*, 66 Me. 557.

Upon proper and sufficient notice being given to the covenantor by the covenantee, of a suit of eviction, requiring him to appear and defend, he will be bound by the judgment establishing a paramount title, and no other proof of the paramount title will be required. *Williams v. Burg*, 9 Lea, 455.

A decree or verdict against a vendor on the warranty of a personal chattel, in favor of the vendee, is conclusive against a prior vendor who has been vouched. *Davis v. Wilbourne*, 1 Hill, L. 27, 26 Am. Dec. 154. The court said: "The notice to the warrantor makes him a privy to the record, and he is bound by it to the extent to which his rights have been tried and adjudged; and in an action against him at the suit of the warrantee, in addition to the record, all that is necessary to be shown is that his title was in issue, and judgment given upon it."

In an action on a bond to indemnify a plaintiff against mechanic's liens, a surety having interposed an answer for the indemnitee, and having conducted the defense in an action as attorney for the latter and for his principal, is concluded by the judgment in the lien actions. *Reed v. McGregor*, 62 Minn. 94, 64 N. W. 88.

Where a surety in a contract of indemnity against liens resulting from the failure of his principal, a building contractor, to pay debts incurred in the construction of a building, is notified of an action against the obligee to enforce such liens, and assumes charge of and conducts the litigation to its final determination, the judgment therein is final and conclusive against him as to the nature and extent of the liability of the obligee. *Great Northern R. Co. v. Akeley*, 88 Minn. 237, 92 N. W. 959.

The sureties are conclusively bound by judgments in a mechanics' lien action, the condition of their obligation being that their principal would pay all claims for labor and material necessary for the construction of the building, and would protect the owner's property from all judgment liens or mechanics' liens, and that if the principal failed, the sureties would be liable. *McFall v. Dempsey*, 43 Mo. App. 369.

A surety who guarantees the faithful performance of a building contract which requires the contractor to furnish all materials, and who has notice of an action to foreclose a mechanics' lien for materials furnished the contractor, is bound by the judgment obtained in good faith against

the latter. *Friend v. Ralston*, 35 Wash. 422, 77 Pac. 794; *Henry v. Aetna Indemnity Co.* 36 Wash. 553, 79 Pac. 42.

A judgment in a mechanics' lien action is conclusive against the sureties in an action on the bond to dissolve the lien. *Ruggles v. Bernstein*, 188 Mass. 232, 74 N. E. 366.

Where the United States government has recovered back money paid to redeem notes, on the ground that they were counterfeit, and the person from whom the vendor purchased the notes was given notice of the suit and of the claim of the government that they were forged, and that the vendor of the government would look to the original vendor for repayment and for indemnity in case judgment should be rendered in favor of the government,—the judgment is conclusive in an action over as to the genuineness of the notes. *Heiser v. Hatch*, 86 N. Y. 614.

The indemnitors of a garnishee defending a subsequent action brought by a creditor of the garnishee to recover on the same cause of action on which the judgment in the garnishment proceeding was rendered are bound by the judgment therein. *Lucy v. Price*, 39 Iowa, 26.

The sureties on a contractor's bond are not concluded by a judgment against their principal in an action to which they were not parties, in the absence of a contract so stipulating. *McConnell v. Poor*, 113 Iowa, 133, 52 L.R.A. 312, 84 N. W. 968.

A judgment against a contractor in an action to establish a mechanics' lien is prima facie evidence of the existence of such lien, as against the sureties. *La Fayette Mut. Bldg. Assn. v. Kleinhoffer*, 40 Mo. App. 388.

A judgment obtained without fraud against the sureties on a contractor's bond is prima facie evidence in an action on an underwriter's bond as to the liability of the defendants. *Brown & H. Co. v. Ligon*, 92 Fed. 851.

Even if the contractor is not a party to a decree declaring liens upon the property of the owner, and requiring payment of the amounts thereof, it is admissible in evidence against him in an action on his bond breached by the filing of the liens. *Whelan v. McCullough*, 4 App. D. C. 58. The court said: "The surety may, of course, be allowed to show, if he can, that the subject-matter of the judgment or decree against the principal was not within the scope or operation of the contract of suretyship, or that there had been collusion or fraud in obtaining the judgment or decree. But if the claims recovered against the principal, or for which he is bound, as in this case, are such as are embraced in the contract of suretyship, in the absence of fraud or collusion, the surety is equally bound as the principal."

As a general rule a judgment against an insurance company, if no fraud or collusion is shown, is evidence against the surety on a bond executed by the company for the benefit of the policy holders. *Baxter County* 40 L.R.A. (N.S.)

Bank v. Ozark Ins. Co. 98 Ark. 143, 135 S. W. 819.

A judgment against an insurance company on a policy is prima facie evidence against its sureties on the bond to indemnify policy holders, in the absence of fraud or collusion. *Union Guaranty & T. Co. v. Robinson*, 24 C. C. A. 650, 49 U. S. App. 148, 79 Fed. 420.

A judgment against an insurance company, if no fraud or collusion is shown, is evidence against the surety on a bond executed by the company for the benefit of the policy holders. But the suit against the company cannot be based upon an issue as to liability not covered by the obligation of the bond itself. *Ingle v. Batesville Grocery Co.* 89 Ark. 378, 117 S. W. 241.

The sureties on a promissory note are not concluded by a judgment of the county court allowing the claim on the note against the estate of their deceased principal, as to the question whether the claim was presented within the time acquired by law therefor. *Curry v. Mack*, 90 Ill. 606.

The surety for the seller of a promissory note is not concluded by a judgment procured by an accommodation indorser against the maker fixing the amount due on the note, from setting up the defense of usury, although that defense was litigated in the original suit against the principal, where the surety was not a party to the suit and had no notice of it. *Germain v. Wing*, 1 Sheldon, 441.

In the absence of fraud or collusion shown, or a clerical error in entering the judgment, a judgment against the principal is conclusive against the surety, though he be not a party to the suit, if he have notice of the proceeding, or, at least, where he has been a party defendant, and has filed an answer, though before trial the suit be dismissed as to him. *Stoops v. Wittler*, 1 Mo. App. 420.

A record of proceedings in bankruptcy against the maker of a promissory note is *res inter alios acta* in a subsequent action by the payee against the surety. *Kennedy v. Moore*, 17 S. C. 464.

A statutory surety for the payment of damages resulting from the negligent conduct of a driver is concluded by the judgment as to the amount of damages, but not as to fraud or as to the question of whether his principal was master. *Levick v. Norton*, 51 Conn. 461.

A judgment against a debtor is not binding on one who has not contracted to save him harmless from the debt, unless he has been notified to come in and defend. *Busell Trimmer Co. v. Coburn*, 188 Mass. 254, 69 L.R.A. 821, 74 N. E. 334.

So, on a contract to assume charge of an attachment suit, and to save a plaintiff harmless from all costs, where judgment was rendered against the plaintiff in the attachment action for costs, and where the defendant had notice of the taxation of costs, and made no effort to have them re-taxed, it was held that he could not there-

after, in an action for reimbursement, attack the correctness of the taxation of costs. *Morgan v. North Texas Nat. Bank*, — Tex. Civ. App. —, 34 S. W. 138.

A decree of foreclosure of a purchase price mortgage is not evidence that the sale was not rescinded, as against a surety not a party thereto, in an action to recover the balance of the purchase money. *Arrington v. Porter*, 47 Ala. 714.

A mere surety for the payment of a debt, without any agreement, express or implied, to be bound by a suit between the principal parties, is, at common law, no more affected by its event, if against him, than a mere stranger; and the rule is not affected by the fact that the suit was conducted on the part of the principal exclusively by the surety as his agent. *Jackson v. Griswold*, 4 Hill, 522.

In an action on a contract guarantying payment of rent by a tenant, a judgment against the tenant, after the assignment by him of the lease, does not conclude the guarantor from setting up the claim that he was discharged from liability by the assignment of the lease. *Fleck v. Feldman*, 54 Misc. 223, 104 N. Y. Supp. 366.

A surety on a bond given for security for the purchase price of land cannot, after an order unappealed from dissolving an injunction given the purchaser for want of title, obtain another injunction on the same ground. *Ross v. Woodville*, 4 Munf. (Va.) 324.

d. Notice.

The purpose of giving notice to the indemnitor is to bind him by the judgment. *Smith v. Compton*, 3 Barn. & Ad. 407, 1 L. J. K. B. N. S. 146.

In *Duffield v. Scott*, 3 T. R. 374, Buller, J., said: "The purpose of giving notice is not in order to give a ground of action; but if a demand be made which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money."

Requisites of notice.

The notice should be unequivocal and explicit, but no particular form of words is necessary, and it need not be of record. *Williams v. Burg*, 9 Lea, 455.

To have the effect of depriving the warrantor of the right to show title, the notice should be unequivocal, certain, and explicit. A knowledge of the action and a notice of attend the trial will not do, unless it is accompanied with express notice that he will be required to defend the title. *Paul v. Witman*, 3 Watts & S. 409.

The notice must be such in substance as to give the person notified information that he is called upon to come in and defend the suit, or that he is given an opportunity to

do so, and that if he does not defend it, he will be held responsible for the result; but the defendant in the original action cannot control the defense in that suit, if he expects to be indemnified by the person notified to come in. *Consolidated Hand-Method Lasting Mach. Co. v. Bradley*, 171 Mass. 127, 68 Am. St. Rep. 409, 50 N. E. 464.

Express notice to a person liable over to a municipal corporation is not necessary in order to charge him with such liability. *Chicago v. Robbins*, 2 Black. 418, 17 L. ed. 298.

In *Carroll v. Nodine*, 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51, it is said: "While notice of the pendency of the suit or action is always necessary to render the decree or judgment binding upon the indemnitor, the better reason and the weight of authority dispenses with any request to take charge of or assume the responsibilities of the defense. Having notice, the indemnitor may, as it is his right, interpose and make such defense as to him might seem most expedient and effective; and, if he did nothing in that direction, it must be considered a matter of his own volition, and a request for him, coupled with a warning of consequences, to do that which duty and interest require him to do, would seem superfluous, and the law, which is founded upon reason, does not require a vain thing."

In order that a railroad company may be bound by a judgment against a city for personal injuries alleged to have been due to the negligence of the company, the company should be asked and afforded an opportunity to defend the action against the city. *Seattle v. Northern P. R. Co.* 47 Wash. 552, 92 Pac. 411.

It is not necessary in the notice to the person liable over, to offer to surrender to him the sole control and management of the litigation. He is simply entitled to an opportunity to defend and protect his own interests in the same way and to the same extent as if he had been sued jointly with the person sued in the first instance. *Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola*, 144 N. Y. 663, 39 N. E. 360.

Where the sheriff turned over the summons and complaint in an action against him for conversion, to the attorneys of his indemnitors in an attachment action, and they answered and defended, and where he also wrote to the indemnitors informing them of the action, and that their attorneys had put in an answer, to which the indemnitors made no dissent, this was held a waiver of formal notice. *Audley v. Townsend*, 49 Misc. 23, 96 N. Y. Supp. 439.

Verbal notice.

It has been held that no particular form of words is necessary in order to constitute notice, and that it is not even necessary to give a written notice. It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim, and that the action is pending,

with full opportunity to defend or to participate in the defense. If he then neglects or refuses to make any defense he may have, the judgment will bind him in the same way and to the same extent as if he had been made a party to the record. *Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola*, supra.

A notice in writing, or even express notice, is unnecessary, but notice may be implied from knowledge of the pendency of the action, and a participation in its defense. *Davis v. Smith*, 79 Me. 351, 10 Atl. 55; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

In order to bind the warrantor by the result of an action of ejectment against the party holding under him, and to conclude him from showing title when he is sued on his warranty, it is not necessary for the notice to him by the defendant in the action of ejectment to be in writing in any particular form, or that a demand should be made of him to defend the action. If he has reasonable notice and opportunity to defend, he will be bound. *Cummings v. Harrison*, 57 Miss. 275.

In an action by a buyer to hold a seller liable over on his warranty of title to personal property, it was held that it is unnecessary that the notice should be in writing and formal, so long as it clearly apprises him that an action involving the title has been commenced, and that he will be looked to, to establish title in such action. *Hersey v. Long*, 30 Minn. 114, 14 N. W. 508.

In *Miner v. Clark*, 15 Wend. 425, it was held that verbal notice to the warrantor of title, of the commencement of the action of ejectment against the grantee, was sufficient. *Bronson, J.*, in a dissenting opinion, however, said: "If the notice is to have any influence upon the right of the party, it should be given in such form as fully to apprise the person receiving it of what is required of him, and the consequences which are to follow if he neglects to take upon himself the defense of the suit. A verbal notice may be misapprehended by the person to whom it is addressed; and without any intentional error may be proved in a very different form from that in which it was actually delivered. It should be in writing, not only for the purpose of avoiding those consequences, but to enable the party to examine it deliberately, and consult his counsel on the proper course to be pursued. In ordinary legal proceedings, however trifling may be the consequences of neglecting the warning, no person is allowed to be prejudiced, either in his action or defense, by a mere verbal notice. . . . The modern practice of giving notice bears a strong analogy to the old method of vouching the grantor to warranty, when the tenant was sued in a real action. If the grantor did not appear voluntarily, a summons ad warrantizandum issued, informing him of the pendency of the suit, and requiring him to appear and warrant the land to the tenant; and this writ was served by the sheriff. 40 L.R.A. (N.S.)

Real actions have everywhere fallen much into disuse of late years, and in this state most of them have been abolished. The practice of giving notice when the tenant is sued in the action of ejectment seems to have been suggested by the old process of voucher and summons ad warrantizandum. And as in the one case the right of the grantor could only be asserted by means of a writ served by a public officer, he ought not in the other to be prejudiced by anything less definite and formal than a writing which shall advise him of what has been done, and what he is required to do."

It has been held that verbal notice to the covenantor is insufficient. *Mason v. Kellogg*, 38 Mich. 132. The court said: "Our policy has always favored written memorials of titles to real estate, and in view of the effect which the law attributes to this proceeding, it is sufficiently near being a fact of title to be within the policy. . . . Then the giving notice is virtually a step, and an important step, in the cause. It contemplates the introduction of the covenantor and the entire prosecution of the defense in complete accordance with his views and under his direction. It is essentially a legal proceeding, and it is a well-recognized general rule that every notice of that character must be in writing. . . . And every reason proper to be urged for this rule must apply with great force to the notice in question. If a mere verbal notice is allowed to answer, a wide door is opened to mistake, misapprehension, and misunderstanding, and all manner of uncertainty, and the practice does little less than invite expensive and perplexing contests about a matter which ought to be as simple and certain as the service of a declaration."

A statutory provision, however, that "when a statute required notice to be given, it must be in writing, etc., and served in the manner required by the Code, § 597," has been held not to require notice to the sureties on an indemnity bond, that the sheriff has been sued for a wrongful levy of an execution, to be in writing. *Martin v. Buffalo*, 128 N. C. 305, 83 Am. St. Rep. 679, 38 S. E. 902.

Sufficiency of notice.

Formal notice is not necessary to bind the indemnitors, and if one of them, who is a counselor of the court, appears for the defendant in the original action, it is enough. *Holbrook v. Holbrook*, 15 Me. 9. The court said: "It cannot be material to the person agreeing to indemnify, that he should have a formal notice served upon him. The law requires that he should have notice before the judgment can be used against him, because he is the real party in interest. But any notice which will enable him to present any defense which he may have, either in law or on fact, is all that can be useful to him; and the law requires no vain or useless ceremonies in such cases."

Where the indemnitor, together with his witnesses, is present at the trial of the ac-

tion against the indemnitee, testifies in the case, pays all the expenses of the indemnitee and his witnesses, the judgment is conclusive against him, although he was not in terms requested to take upon himself the defense of the action. *Davis v. Smith*, 79 Me. 351, 10 Atl. 55.

If a person who is liable over has notice when the writ against the city, in an action for personal injuries due to a defective highway, is returnable, and of the character of the action, and that he will be held responsible, and be required to govern himself accordingly, the notice is sufficient to make a judgment against the city binding on him, although he is not in terms requested to take upon himself the defense of the action against the city. *Boston v. Worthington*, 10 Gray, 496, 71 Am. Dec. 678.

But notice which merely calls upon the person liable over to come in and defend the pending suit, without indicating the nature of the suit or how the person notified may be interested in it, is insufficient. *Lebanon v. Mead*, 64 N. H. 8, 4 Atl. 392.

The fact that an attorney at law who is a surety on a promissory note appeared as attorney for his principals in an action brought against the latter to recover on the note, and assisted in managing and conducting their defense, does not make a judgment rendered against the principals conclusive on the attorney or his cosureties in a separate suit on the note, brought against them. *Park v. Ensign*, 66 Kan. 50, 97 Am. St. Rep. 352, 71 Pac. 230. The court said: "The contract of suretyship imposed no duty upon the sureties to defend their principals, gave the principals no right to represent the sureties, and gave one surety no authority, in any capacity, to charge his fellows by either his knowledge or his conduct."

Where the notice was given to the president and to a director of a railroad company liable over to a municipal corporation for damages caused by an injury due to a dangerous highway, and the director was present at the trial and took notes, but did not participate therein, it was held sufficient to charge the company, although notice was not given until the day before the trial. *Veazie v. Penobscot R. Co.* 49 Me. 119. The court said that if the company had desired further time for preparation, it should have moved the court for a continuance, or have notified the town that it desired more time, or in some manner have signified its wish for postponement.

A notice to the owner of a building, of an action against a municipality for personal injuries due to a defective awning, specifying the name of the plaintiff, the injury, the place of the injury, the time and the court at which the writ is returnable, and requiring him to defend, and stating that if he does not defend, the municipality will claim reimbursement, is sufficient. *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735.

Where a person was injured by falling into an excavation made by direction of the officers of a bank in a sidewalk, and recovered judgment against a village there-

for, and the president of the bank, who was also a trustee of the village as well as a member of the committee of the bank, authorized to superintend the construction of the building, in the course of which the excavation was made, had notice of the suit against the village, consulted with an attorney for the village with reference to the defense thereof, and was informed of the probable liability of the bank to the village in case of the recovery of the injured person in that action, and was a witness on the trial, it was held that this notice was sufficient. *Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

Where the owner obtained judgment against a contractor for injuries caused by the neglect of a subcontractor, it was held that the judgment was conclusive as to the liability in an action over by the contractor against the subcontractor, where the latter was given notice of the claim of the owner, the notice stating that, unless the subcontractor came in and defended such action, the contractor would permit the court to determine the damages suffered by the owner by reason of the subcontractor's negligence, and that if the contractor had to pay such damages, he would hold the subcontractor liable therefor. *Corning v. Spelman*, 130 App. Div. 767, 115 N. Y. Supp. 366.

Evidence that the party sought to be held liable over by a city for a judgment against it for personal injuries caused by a person falling into an excavation knew that the action had been commenced against the corporation; that he was informed of the day of the trial, and was requested to assist in procuring testimony, and that he actually wrote to a witness on the subject; that the attorney for the corporation called upon such party soon after the suit was commenced, for the purpose of finding out whether he knew anything about the case that would be of any benefit to the corporation in preparing the defense, and made inquiries of him to that effect; and that the party sought to be held liable over mentioned the name of a person who would be a good witness, and agreed to get an exact statement of what he would testify to if called, together with evidence that a witness met the party sued by the city on the day before the trial of the original action, and told him that the case was about to be tried,—was held sufficient to warrant an instruction that if the defendant in the action brought by the city knew that the original suit was pending, and could have defended it, and it was through his fault that the person who recovered from the city was injured, the defendant was concluded by the judgment, and that express notice of the suit against the city was not required, and that it was unnecessary that the city should have notified the defendant that it would look to him for indemnity. *Robbins v. Chicago*, 4 Wall. 658, 18 L. ed. 427.

Where the attorney for a city sued for injuries caused by a defective sidewalk wrote

to the agents of the property owners, but received no reply, the attorney for the property owners consenting to sit in the case, if the property owners would not be bound in any way by his action, it was held that the notice was sufficient to bind the property owners, and that they were not relieved by the stipulation. *Lansing v. Detroit*, L. & N. R. Co. 129 Mich. 403, 89 N. W. 54.

In *Davis v. Wilbourn*, 1 Hill, L. 27, 26 Am. Dec. 154, in referring to the time when notice to the warrantor of title to personal property should be given, the court said that, in cases within the summary jurisdiction, it ought, if practicable, to be given at or before the return of the process. In cases within the general jurisdiction, notice at any time before the expiration of the rule to plead would seem to be in time. The object is to enable the warrantor to come in and defend his title. He ought therefore to have a reasonable time to prepare for it, and the time which the law allows to a defendant furnishes perhaps the safest rule. In the first class of cases, however, the process might be served on the last hour of the last day before the return, so as to render the service of the notice impracticable before the return. In those cases, notice within a reasonable time afterwards would be all that could be expected. So, where the warrantee had entered an appearance and put in his plea to the merits, notice even after the continuance, if the warrantor had sufficient time to prepare evidence for the trial, would probably be sufficient.

Although the notice is short, if the obligors on a bond for the limits appear in season to make defense and have a fair opportunity to defend, the notice is sufficient. *Riley v. Seymour*, 1 Wend. 143.

Notice to the seller of a promissory note as indemnitor, though short, was held sufficient where the seller at the time of the transfer agreed to appear as a witness for the buyer if called upon, and did so, thus expecting a suit at the time, and impliedly indicating a willingness that the buyer should conduct the defense in the seller's behalf. *Carroll v. Nodine*, 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51.

It cannot be said that a notice of ten days is, as a matter of law, insufficient, where it appears that the person entitled thereto made no objection that the time was insufficient, and no attempt was made at the trial to show that any prejudice resulted from the omission to give longer notice. *Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola*, 144 N. Y. 663, 39 N. E. 360. The court said that the person liable over is entitled to reasonable notice and a reasonable opportunity to defend, and that this question is not governed by any fixed or arbitrary rule, but must depend upon the facts and circumstances of the case.

It cannot be said as a matter of law that notice of an action against a city for personal injuries, given to a contractor and his sureties sought to be held liable over 40 L.R.A. (N.S.)

on a contract of indemnity, eleven days before the trial, is not sufficient to enable them to prepare for and present a defense to the action. *Spokane v. Costello*, 33 Wash. 98, 74 Pac. 58. The court said: "It must be remembered that the action was primarily against the city, that the city had denied all of the allegations of negligence set out in the complaint, and presumptively had made preparation for a defense based on its denials. It will not be presumed that it neglected that duty, or that it was not otherwise fully prepared to present to the court and jury the facts concerning the transaction as they actually existed. If this were so, there was nothing left for the appellants to do in the way of preparation. If, therefore, as a matter of fact, the city had neglected its duty, or if for any cause the notice given was insufficient, it should have been made to appear affirmatively, before the court would be warranted in saying the judgment was not binding upon the appellants."

Notice given to the warrantor the day before the commencement of the term of the court at which a judgment of eviction was rendered against the warrantee is not seasonable. *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191. The court said: "The object being to enable the warrantor to come in and defend his title, the notice should be given at or before the return of process, or at least before the expiration of the time to plead or answer, and so that he may have reasonable time to prepare for the defense. It does not appear that the knowledge acquired by the plaintiff in error at that late day was, or could have been, of any avail to him, and the inference must be that it was unavailing."

Notice given three months before the final trial, to an indemnitor of a sheriff, on the levy of an execution, is sufficient to bind him. *Train v. Gold*, 5 Pick. 380.

Notice to whom.

On a bond indemnifying a sheriff against the default or misconduct of his deputy, notice to the deputy of a suit against the sheriff for an omission of duty by the deputy is sufficient to bind the deputy's sureties. *Thomas v. Hubbell*, 18 Barb. 9.

Notice to two or three joint indemnitors of the commencement of a suit against the indemnitee is sufficient to render the judgment against the indemnitee conclusive against all the indemnitors. *Carman v. Noble*, 9 Pa. 366.

Notice to the son of the person sought to be held liable over, not shown to have been communicated to the latter, is insufficient. *Chester v. Schaffer*, 24 Pa. Super. Ct. 162.

Where the plaintiff in an action brought against the city brought another action at the same time for the same cause, against the person sought to be held liable over, and gave information of the action against the city to the attorney of the person afterwards sued by the city, this notice was held insufficient, it not appearing that the at-

torney was informed of the action against the city for the purpose of giving notice to his client of its pendency, or that he might defend or join in the defense, or that the attorney was requested to inform his client of the action, or that he promised to do so, or that he did so, or that the client was informed of its legal consequence to him, or that he participated in the trial, or had opportunity to do so. *Ibid.*

When notice unnecessary.

It is no objection to the plaintiff's recovery of costs in an action upon a warranty of title, that the plaintiff give the defendant no written notice to defend, where the defendant took charge of the suit. *Jennings v. Sheldon*, 44 Mich. 92, 8 N. W. 96.

One who deposited stock to secure a bonding company in giving a bond, and who knew of a suit against the company on the bond, and who testified at the trial, cannot say that he was not notified of the suit and that he had no opportunity to defend it. *American Bonding Co. v. Loeb*, 47 Wash. 447, 92 Pac. 282.

But it has been held that mere knowledge by the warrantor of an action against the warrantee will not take the place of the notice required of such action, together with the opportunity to defend, so as to make a judgment of eviction binding upon the warrantor. *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191.

Where a person is responsible over to another, and he is notified of the pendency of a suit involving the subject-matter of the indemnity, his liability will be fixed and determined by the judgment rendered therein, and notice to him will be implied where he has knowledge of the pendency of the suit and participates in the defense thereof. *Meyer v. Purcell*, 214 Ill. 62, 73 N. E. 392, affirming 114 Ill. App. 472.

But a judgment against an indemnitee was held not conclusive except actual notice of the suit pending is had by the person liable over. *Grant v. Maslen*, 151 Mich. 466, 16 L.R.A. (N.S.) 910, 115 N. W. 472.

V. Special bonds in legal proceedings.

a. Appeal bonds.

A surety on an appeal bond cannot go behind the judgment of the circuit court. *Butler v. Wadley*, 15 Ind. 502.

The judgment in the original action is not open to attack in an action on an appeal bond. *Supreme Counsel, C. B. L. v. Boyle*, 15 Ind. App. 342, 44 N. E. 56.

The surety in an action on an appeal bond cannot question the judgment in the original suit, except for fraud or collusion. *Piercy v. Piercy*, 36 N. C. (1 Ired. Eq.) 214. To the same effect, *Denis v. Veazey*, 12 Mart. (La.) 79.

In the absence of fraud or collusion, the surety on an appeal bond containing the usual conditions has no right to open the original judgment, where the principal

would not have such right. *Ingersoll v. Seatoff*, 102 Wis. 476, 72 Am. St. Rep. 892, 78 N. W. 576.

A judgment in an action upon which an appeal bond is given is, unless void, conclusive upon the sureties in an action on the bond. *Pierce v. Banta*, 9 Ind. App. 376, 31 N. E. 812; *Hydraulic Press Brick Co. v. Neumeister*, 15 Mo. App. 592; *Barber v. Rutherford* (com. pl.) 12 Misc. 33, 33 N. Y. Supp. 89.

The correctness of a judgment of a surrogate court cannot be questioned in an action upon an appeal bond. *Thixton v. Goff*, 5 Ky. L. Rep. 764.

A bond conditioned to pay the amount of such judgment as might be obtained in a suit is conclusive upon the sureties, where not obtained by fraud or collusion. *Tracy v. Maloney*, 105 Mass. 90.

The sureties on a bond to answer the decree in the original suit are, in the absence of fraud, bound by the decree. This liability is, by the terms of the obligation, made to depend upon the issue of the action. Having chosen to bind themselves in a given event which has happened, they are thereby charged. *Riddle v. Baker*, 13 Cal. 295. The court said: "To hold otherwise would be to hold that the surety in an appeal bond or undertaking could demand a retrial of everything tried in the suit, or, what is the same thing in effect, that a party giving such an obligation could, in the name of the surety, hold himself practically absolved from the judgment, at least without further trial. It would be the interest of a party to make mistakes and be guilty of negligence, since this would afford a pretext for opening the judgment and trying to anew the suit decided against him. In order to hold so dangerous a doctrine, we would have to interpolate new conditions in the bond, and to expunge the terms therein written. We think the surety in such a bond stands in the shoes of his principal, so far as the definitive force of the judgment is concerned, subject to the single exception that, if the judgment be procured by collusion between the plaintiff and defendant, he is not bound."

In Arkansas, an appellant who desires a stay of execution pending an appeal causes a supersedeas bond to be executed, and the sureties on the bond become, in legal effect, parties to the suit, and agree that if the judgment be affirmed, judgment may be rendered against them by the supreme court, for costs, damages, and the amount of the judgment below, etc., the statute authorizing this judgment being part of their contract as fully as if incorporated into the supersedeas bond executed by them. *White v. Prigmore*, 29 Ark. 208.

Under a statute providing for judgment against sureties on an appeal bond in case of judgment against the appellants, the sureties, by executing the undertaking, are deemed to consent that they shall, under the contingencies specified in the undertaking, be considered parties to the original suit, and liable to judgment for the original

cause of action against their principal. *Shannon v. Dodge*, 18 Colo. 164, 32 Pac. 61.

The surety on a supersedeas bond is not a stranger to the proceeding thereafter conducted on appeal, and is concluded by the decisions and orders of the court. *Pennsylvania use of Huidekoper v. Fidelity & D. Co.* 180 Fed. 292.

The sureties upon an undertaking on appeal cannot show want of jurisdiction of the appellate court. *Hathaway v. Davis*, 33 Cal. 161.

A mistake in a bond upon which judgment was rendered constitutes no defense to an action on an appeal bond. *Watson v. Johnson*, 13 Ky. L. Rep. 336.

Irregularities in the original suit not corrected by appeal cannot be taken advantage of in an action on the appeal bond. *Miller v. M'Luer, Gilmer (Va.)* 338.

In an action on an appeal bond, the judgment of the supreme court is conclusive as to the validity of the judgment appealed from, and no inquiry can be had in a collateral proceeding as to the merits of the original controversy, nor even as to the validity of the judgment itself. *Keithsburg & E. R. Co. v. Henry*, 90 Ill. 255.

The sureties on an appeal bond, upon the affirmance of the judgment, are concluded, by their agreement to pay, from again bringing in question any established fact that was necessarily determined by the judgment they agreed to pay. *Seymour v. Smith*, 114 N. Y. 481, 11 Am. St. Rep. 683, 21 N. E. 1042.

The defense that the original judgment was procured by fraud, and that the verdict was obtained by false testimony to the knowledge of the plaintiff, is not available to the sureties in an action on an appeal bond, and the doctrine that courts of equity will relieve against judgments at law obtained by fraud does not apply to such a case. *Krall v. Libbey*, 53 Wis. 292, 10 N. W. 386. The court said that the sureties were strangers to the original litigation, and that after judgment they had voluntarily assumed the obligation to pay it if affirmed, and therefore must stand by their agreement.

In answer to a rule against the sureties on an appeal bond, the sureties set up the defense that since signing the bond, they had learned that the whole demand had grown out of an illicit enterprise on the part of both the plaintiffs and defendant, to traffic with the people in rebellion against the government, which was not disclosed in the original suit; but in holding that the sureties could not go behind the judgment, the court said: "The authorities and principles of good morals invoked by the appellants do not, in our opinion, apply to the liability and obligations of sureties on appeal bonds, which are fixed by special laws. Their obligations arise out of the bond, which are that their principal shall prosecute his appeal and satisfy any judgment which may be rendered against him, failing in either of which they are liable in his place. The law does not contemplate that 40 L.R.A. (N.S.)

the case shall be tried anew on its merits between the appellees and the sureties on the appeal bond." *Murison v. Butler*, 20 La. Ann. 512.

b. Injunction bonds.

A surety on an injunction bond suing for relief against the judgment on the bond cannot go into the merits of the decree against his principal, nor of the original judgment at law upon which the injunction was issued. *McBroom v. Sommerville*, 2 Stew. (Ala.) 515.

The sureties on an injunction bond cannot go behind the decree in the injunction suit, and defend on the ground that the agreement upon which it was founded was illegal. *Oelrichs v. Spain (Oelrichs v. Williams)* 15 Wall. 211, 21 L. ed. 43.

A referee's report fixing the amount of damages in an injunction suit, afterwards affirmed by the court, is conclusive upon a surety on the injunction bond, although he had no notice of the order of reference or of the application for the affirmance of the report. *Poillon v. Volkenning*, 11 Hun. 385.

The report of a referee assessing damages in an injunction proceeding, having been duly affirmed, is conclusive upon a surety on the injunction bond, although he had no notice of the proceeding. *Jordan v. Volkenning*, 72 N. Y. 300. But the court said it was a safer and fairer course in all such cases to give notice.

The sureties on an injunction bond assume such a connection with the injunction suit that they are concluded by the decree therein in an action on the bond, so far as the same matters are in question. *Towle v. Towle*, 46 N. H. 431.

The sureties, by signing the injunction bond, voluntarily assume such a connection with the suit that, in the absence of fraud or mistake, they are concluded by the judgment therein, and estopped in a subsequent action on the bond, to dispute any fact fairly settled by said judgment. The sureties thereby became identified with their principal as privies, if not as quasi parties to the action. *Jones v. Mastin*, 60 Mo. App. 578.

The undertaking of a surety on an injunction bond being that he "will pay all such costs and damages as shall be awarded against the complainant in case the injunction shall be dissolved," he is bound by a decree assessing damages on the dissolution of the injunction. *McAllister v. Clark*, 86 Ill. 236.

A surety on an injunction bond conditioned to pay all damages which may be adjudged against his principal by reason of an injunction is bound by the decree dismissing the injunction, although not a party to the injunction proceedings. *Shenandoah Nat. Bank v. Read*, 86 Iowa, 136, 53 N. W. 96.

An injunction bond being conditioned to pay all damages which should be awarded in a chancery suit, the surety can raise no question as to the correctness of the decree,

nor impeach it in a collateral proceeding. *Lothrop v. Southworth*, 5 Mich. 436. The court said that "if this were not the case,—as the action is against principal and surety jointly,—the result would be that [the principal] would be permitted, under color of [the sureties'] claim of injury, to relitigate the matters settled by the decree by showing it to be erroneous, or by introducing new matter to diminish or obliterate the claim upon which the decree was based. This could not be done to defeat the service of the execution, if property had been found; and it can no better be done upon a proceeding subsequent to, and measurably auxiliary to, the execution. To hold otherwise would be to introduce a dangerous and novel doctrine into the law of remedies; viz., that when an action is brought upon a bond given for the performance of a decree against principal and surety, the whole subject of the decree must be relitigated, if a defense is set up impeaching it, before a joint recovery can be had."

Where the sureties, by their undertaking, engaged that their principal, who obtained the order of injunction, would pay to the parties enjoined such damages, not exceeding a certain sum, as they might sustain by reason of the injunction, if the court should finally decide that he, the principal, was not entitled thereto, "such damages to be ascertained by a reference or otherwise, as the court shall direct," a reference and report upon the damages sustained by reason of the injunction, and a confirmation by the court, are conclusive upon the sureties in the undertaking in an action against them, although they are not parties to the reference, or notified of the proceedings. *Methodist Churches v. Barker*, 18 N. Y. 463.

c. Attachment bonds.

A judgment against a sheriff is conclusive against the sureties on an attachment indemnity bond. *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129.

In the absence of fraud or collusion, the sureties on an attachment indemnifying bond are bound by the judgment against their principal in the attachment action. *Mihalovitch v. Barlass*, 36 Neb. 491, 54 N. W. 826.

A judgment *nunc pro tunc* entered after the death of the plaintiff in an attachment action is, in the absence of fraud or collusion, conclusive against the surety on the bond to dissolve the attachment. *Tapley v. Goodsell*, 122 Mass. 176. The court said: "A surety on a bond to dissolve an attachment does not stand upon the footing of a stranger to the action. The very purpose, as well as the tenor, of his obligation, is to secure the payment of any judgment that may be recovered against his principal. The bond is not affected by contingencies which might have discharged the attachment if no bond had been given. Neither death nor bankruptcy of the principal discharges the surety from his obligation to satisfy a judgment lawfully rendered against the

principal or his representatives; but such judgment, in the absence of fraud or collusion, is conclusive against the surety."

In an action in attachment, defendants undertaking for the recovery of the amount of judgment in favor of plaintiff, and against the defendant in attachment, the sureties are concluded by the judgment, and will not be heard, in the absence of fraud, collusion, or manifest mistake, to question its correctness, or inquire into the action of the court either upon a preliminary motion or in rendering the final judgment. *Jayne v. Platt*, 47 Ohio St. 262, 21 Am. St. Rep. 810, 24 N. E. 262. One of the conditions of the bond sued on was that the principal would "perform the judgment of the court in this action." The court said: "In general, the obligation in official bonds is that the surety will be responsible in case the officer fails to faithfully discharge the duties of the office. The question in issue, in an action on the bond against the sureties, is, Has there been dereliction of official duty within the meaning of the bond, and has the party complaining been damnified? In this class of cases the question is different. It is: Did the plaintiff recover judgment, and for what amount, and did the defendant satisfy it? Proof that a judgment was rendered for the plaintiff in attachment, which the defendant has not satisfied, shows a breach of the bond. And of such judgment, it would seem, that the record itself is not only the best, but the only, evidence, and, until impeached for fraud, collusion, or manifest mistake, ought to be held conclusive."

Where a rule is taken against a surety on a release bond, he cannot set up in defense that the affidavit was insufficient and false; that the bond was insufficient in amount; that the property seized was not the property of the defendants, but of one of them; that the bond was signed on the representation and assurance that a legal defense would be made, which was not set up, and that the plaintiffs were parties to the fraud practised, the obligation of the surety being that he will satisfy such judgment to the value of the property attached, as may be rendered against the defendant in the suit pending. *Fusz v. Trager*, 39 La. Ann. 292, 1 So. 535. The court said: "The preponderance of the jurisprudence on the rights and obligations of sureties on release bonds in attachment proceedings against residents is to the effect that such sureties, when ruled to be held liable, cannot be heard to set up any defense which the defendant himself could not raise; and that, where the judgment rendered on the merits condemns him, the surety is concluded by it, even if it were true that it is not justified by the evidence; provided, it was regularly rendered, has become final and executory, and remains unsatisfied, and the signature of the surety to the bond is genuine."

Although the defendant in the original attachment action might have pleaded in bar his bankruptcy, not having done so the judgment against him is valid, and, in the

absence of fraud or collusion, is conclusive both against him and against the surety on his bond to dissolve the attachment. *Cutter v. Evans*, 115 Mass. 27.

But in *Johnston v. Sexton*, 86 C. C. A. 260, 159 Fed. 70, it was held that the sureties on an attachment bond are not concluded by a judgment against their principal in an action to which they were not parties, from showing that the recovery was for wrong committed by the principal apart from the attachment.

The surety on an attachment bond not a party to the attachment action is not concluded by a judgment on a counterclaim for damages for the wrongful suing out of the attachment, the obligation on the bond being to pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment. *Bunt v. Rheum*, 52 Iowa, 619, 3 N. W. 667.

The sureties on the bond of a claimant in an attachment suit are concluded by a judgment against their principal dismissing the claim and requiring the return of the property. The surety in such a case is bound by what binds the principal. He has nothing to do with the trial of the right of property, his obligation being to deliver the property to the officer if the claim made by his principal shall be determined against him. *Higdon v. Vaughn*, 58 Miss. 572.

But although the indemnitors assume the defense of an attachment action against the attaching officer, they may nevertheless show that the judgment was rendered by reason of illegal acts subsequent to the attachment or for misconduct in the service of other writs, or for wrongful conversion of the attached property or its proceeds. *Boynton v. Morrill*, 111 Mass. 4.

In *Hosie v. Hart*, 141 Mich. 679, 105 N. W. 32, it was held that in an action on an attachment bond, the judgment in the attachment action, valid on its face, is admissible, and prima facie establishes the defendant's liability.

But in *Lartigue v. Baldwin*, 5 Mart. (La.) 193, it was held that the record of a suit in which judgment was obtained against a principal in an attachment bond is not evidence against the surety thereon. The court said: "There is no rule of our laws better understood than that which allows to the surety the right of availing himself of the same means of defense (save those that are merely personal) which the principal debtor could resort to. That principle is founded on the sacred maxim that no one ought to be condemned without being heard, and consequently that no person shall be bound by a judgment to which he was no party."

d. Replevin bonds.

The surety on a replevin bond is bound by the result of the litigation with his principal. *Wells v. Griffin*, 2 Head, 568.

The sureties on a redelivery bond are bound by the judgment in the replevin suit. *O'Loughlin v. Carr*, 9 Kan. App. 818, 60 Pac. 478.
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A surety will not be heard in an action on the bond to attack a judgment in replevin, while it remains unreversed or unvacated, and therefore valid against his principal. *Christiansen v. Mendham*, 26 Misc. 662, 56 N. Y. Supp. 655.

A judgment in replevin which is binding upon the principal is valid and binding against his sureties. *Christiansen v. Mendham*, 45 App. Div. 554, 61 N. Y. Supp. 326.

In an action upon a replevy bond in garnishment, neither the principal nor his sureties, who are his sponsors, can go behind the judgment. *McCoslin v. David*, 22 Tex. Civ. App. 53, 54 S. W. 404.

A judgment in a replevin suit constitutes a breach of the bond, and, when admitted in evidence in a suit on the bond, is conclusive of the rights of the parties, except the right saved to the plaintiff by statute to plead and prove his title in mitigation of damages. *Rankin v. Kinsey*, 7 Ill. App. 215.

The sureties on a replevin bond, although not parties to the action, are concluded by the judgment therein by force of their undertaking. *Lee v. Grimes*, 4 Colo. 185.

Until the verdict for the plaintiff, the sureties on a replevin bond in attachment are in no danger of a judgment against them. Before that they are not called on to speak in their defense. They cannot as sureties, and in their names, plead to the action or interpose any defense, for the action is not against them. Their liability is only for a delivery of the property replevied, or payment of its value as assessed. Their concern with the case commences at the point where their responsibility begins, and right to a judgment against them arises, i. e., at the finding of the issue in favor of the plaintiff. They may then show any thing which furnishes a legal reason for not entering judgment against them on the finding of the issue in favor of the plaintiff. They may contest original liability on the bond, or show a discharge from its obligation, but they cannot complain of mere errors in the action against their principal. They cannot make any defense to the action, except such as will discharge them. *Atkinson v. Foxworth*, 53 Miss. 733.

A surety, by signing a replevin bond, makes his principal on the bond his agent to compromise a claim for damages arising out of the replevin, and upon such compromise the court has authority to enter up judgment against the principal and surety on his bond. *Nimocks v. Pope*, 117 N. C. 315, 23 S. E. 269.

One who becomes a surety for the performance of the judgment of a court in a pending case is represented by his principal, and is bound by the judgment against his principal within the limits of his obligation. *William W. Bierce v. Waterhouse*, 219 U. S. 320, 55 L. ed. 237, 31 Sup. Ct. Rep. 241.

The sureties on a replevin bond assume such a connection with the original action that they are concluded by the judgment in so far as the same issues are involved. *Kennedy v. Brown*, 21 Kan. 171.

A surety on a replevin bond conditioned for the redelivery of the property attached is connected in privity with the proceedings in the original action, and the record of the judgment is conclusive against him. *Collins v. Mitchell*, 5 Fla. 384.

The sureties on a replevin bond stipulating for the payment, in case of defeat in the replevin action, of "such sum of money as may, from any cause, be recovered against the said plaintiff,"—the judgment in the replevin action is conclusive against them in a suit upon the bond. *Cantril v. Babcock*, 11 Colo. 143, 17 Pac. 296.

Where the sureties bind themselves to abide the judgment in the replevin suit, it is too late in an action on the bond, to plead the return of the property, which should have been pleaded in the replevin suit. *Buckmaster v. Beames*, 9 Ill. 443.

The surety in replevin who contracts with reference to the action of his principal in prosecuting the replevin suit is concluded by judgments and orders made in that suit showing a breach of the bond. *Schott v. Youree*, 142 Ill. 233, 31 N. E. 591, affirming 41 Ill. App. 476.

In an action upon a bond given in a suit for the recovery of personal property, and conditioned for the delivery of the said property to the plaintiff, if such delivery should be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant in this action, the judgment against the principal is conclusive evidence of the breach of the bond, and of the damages sustained by reason of such breach. *Thomson v. Joplin*, 12 S. C. 580.

The same matters litigated in an original action cannot be re-examined in a suit on the replevin bond. *Colorado Springs Co. v. Hopkins*, 5 Colo. 206; *William W. Bierce v. Waterhouse*, supra.

In an action on a redelivery bond, the sureties are concluded as to any defense which should have been properly interposed in the replevin action. *Boyd v. Huffaker*, 40 Kan. 634, 20 Pac. 459.

In an action on a replevin bond, the sureties cannot set up and have retried matters that were controverted in the replevin actions and settled by the verdict. *Cox v. Hartranft*, 154 Pa. 457, 28 Atl. 304.

It has been held that a replevin judgment is conclusive as to the right of possession and return of the property. *Warner v. Matthews*, 18 Ill. 83.

A replevin judgment is conclusive in an action on the bond as to the ownership of the property. *McMurchy v. O'Hair*, 67 Ill. 242.

The question of ownership and the right of possession are *res judicata* in an action against a surety on a replevin bond. *Woods v. Kessler*, 93 Ind. 356.

Where the title to personal property is in dispute, and replevin is brought by a third party against the vendee, the vendee must notify his vendor to come in and defend, or else the latter will not be concluded by the judgment. *Axford v. Graham*, 57 Mich. 40 L.R.A. (N.S.)

422, 24 N. W. 158. The court said the reason why judgments are held conclusive against both parties and their privies is because an opportunity has been afforded to the parties thus concluded to assert or defend their rights before the court rendering the judgment.

Both the principal and sureties on a replevin bond are estopped in an action on the bond, from denying the regularity of the proceedings in the replevin action, and they cannot be heard to say that there was no consideration for the bond. *McFadden v. Fritz*, 110 Ind. 1, 10 N. E. 120.

That the property in dispute in a replevin action was turned over to a receiver upon an order of the court cannot be shown in an action against the sureties on a redelivery bond. *Boyd v. Huffaker*, 39 Kan. 525, 18 Pac. 508.

In an action in a summary proceeding on a replevin bond, it is not competent for the surety to question the validity of the judgment against the principal on any other ground than fraud or mistake. In such case the judgment is as conclusive against the surety as against the principal. *Richardson v. People's Nat. Bank*, 57 Ohio St. 299, 48 N. E. 1100.

A judgment in a replevin suit as to the value of ice taken is conclusive upon the sureties on the bond as to the value of the property at the time and place taken. *Washington Ice Co. v. Webster*, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947.

The question of the value of property taken as adjudicated in the replevin suit is not open to re-examination by the sureties on the redelivery bond. *William W. Bierce v. Waterhouse*, 219 U. S. 330, 55 L. ed. 239, 31 Sup. Ct. Rep. 241.

But it has been held a complete defense to sureties sued upon a replevin bond that the court was without jurisdiction to render the judgment in replevin, or that such judgment was obtained by fraud. *McBrayer v. Jordan*, 73 Neb. 483, 103 N. W. 50.

In *Harbaugh v. Albertson*, 102 Ind. 69, 1 N. E. 298, however, it was held that a surety on a replevin bond cannot set up lack of jurisdiction of a justice of the peace over the persons of the parties who voluntarily have submitted thereto.

c. Sequestration bonds.

The judgment in a sequestration action is binding on the sureties on the sequestration bond as to the ownership of the property, where the undertaking of the sureties is that they will pay the damages if the sequestration should in that suit be decreed to have been unlawfully issued. *Jones v. Doles*, 3 La. Ann. 588.

Where the principals in a sequestration bond are bound *in solido*, a judgment regularly obtained against either will be binding on the surety. *Herrick v. Conant*, 4 La. Ann. 276.

The sureties on a bond given to release property sequestered have a right, when

sued on the bond, to prove that the sequestration was invalid and illegal, and that the property sequestered does not belong to the defendant in the sequestration suit. *Carroll v. Hamilton*, 30 La. Ann. 520.

In an action on a sequestration bond, the judgment in the original suit to obtain possession of the property is not conclusive as to the rights of the parties and the amount of damages, where it appears from the opinion of the court in the original action that judgment was affirmed in favor of the defendant therein, on the ground that the courts will not lend their aid in the enforcement of contracts reprobated by the law. *Clarke v. Scott*, 2 La. Ann. 907.

f. Miscellaneous bonds.

A judgment against a special bail is conclusive against the sureties on the indemnity bond having notice of the suit against their principal. *Beers v. Pinney*, 12 Wend. 309.

The bail or security takes the fortunes of his principal, and is bound equally with him by the judgment in the main action. The bail can no more go behind the judgment, or attack it by affidavit of illegality, after it is duly entered against both, than can the principal. *Jackson v. Guilmartin*, 61 Ga. 544.

A judgment against a debtor in an action for fraud is conclusive upon his surety on a bond given on his release from arrest, and he cannot go behind it to inquire into the reasons upon which it was based. *Keane v. Fisher*, 10 La. Ann. 261.

In a suit upon a recognizance, the sureties are concluded from alleging that the original plaintiff, when in a state of intoxication, was induced to consent to a judgment for costs against him, procured by the plaintiff in the bond action. *Parkhurst v. Sumner*, 23 Vt. 538, 56 Am. Dec. 94. The court said: "It is a universal rule in regard to judgments, that all matters which might have been urged by the party before the adjudication are concluded by the judgments as to the principal parties and all privies in interest or estate,—and among privies are no doubt included bail."

No fraud or collusion being shown, a judgment against the principal is conclusive evidence of the debt thereby ascertained, both against him and against his surety on a recognizance subsequently taken upon his arrest on execution. *Way v. Lewis*, 115 Mass. 26.

A judgment for assault and battery, false imprisonment, and malicious prosecution prevents the raising of the question of good faith in a proceeding against the surety upon breach of a recognizance given upon the debtor's arrest on execution. *McChristal v. Clisbee*, 190 Mass. 120, 3 L.R.A. (N.S.) 702, 76 N. E. 511, 5 Ann. Cas. 769.

A surety on a release bond is concluded by a judgment which concludes his principal. *McCloskey v. Wingfield*, 32 La. Ann. 38.
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A judgment for damages against the claimant and his surety on a damage bond is conclusive upon both, unless procured by fraud, or unless the proceedings constituting the claim case are, upon their face, fatally defective. The court said that the surety for the claimant, when he signed the bond, put himself in a boat which the claimant was to steer in behalf of both, and if there was injudicious or unskilful navigation, he must take the consequences. *Mitchell v. Toole*, 63 Ga. 93.

The surety on a bond given by a defendant in an action of trover for the eventual condemnation money is bound by the judgment against the defendant, and cannot, after judgment, raise any question which could have been raised by the principal before judgment. *Waldrop v. Wolff*, 114 Ga. 610, 40 S. E. 830.

The final decree of a court in the original action must be taken as the only evidence of the eventual condemnation money to be recovered in an action on the bond. *Lockwood v. Saffold*, 1 Ga. 72.

Formerly, it was necessary to bring suit against the sureties on the bond, but the Georgia Code expressly provides that where a bond is given in a judicial proceeding, conditioned to pay the condemnation money, judgment may be entered up against the surety, and it shall not be necessary, as heretofore, to bring suit on the bond. Civil Code, 2978. *Price v. Carlton*, 121 Ga. 12, 68 L.R.A. 736, 48 S. E. 721.

The surety on an eventual condemnation money bond given a defendant in a distress warrant proceeding based upon a judgment in an action for an equitable accounting, in which it was adjudged that a certain sum was due as rent from the defendant in the distress warrant proceeding, is bound by the judgment. *Ibid*.

The security on a claim bond is bound by the judgment and verdict therein for damages and costs. Upon affirmance, he cannot go behind it by affidavit of illegality. *Harvey v. Head*, 68 Ga. 247.

In a suit on a forthcoming bond, neither the legality of the levy nor the authority of the officer to make it is an established fact. *Oliver v. Warren*, 124 Ga. 549, 4 L.R.A. (N.S.) 1020, 110 Am. St. Rep. 188, 53 S. E. 100.

The claimant's surety on a dissolution bond in a garnishment proceeding is bound by the judgment against his principal, and cannot subsequently be heard to attack the right of the plaintiff to the fund garnished, on any ground put in issue, or that, under the rules of law, could have been put in issue, by the claimant in the previous case in which the judgment was rendered. *Jordan v. Thornton*, 5 Ga. App. 537, 63 S. E. 601.

In an action on a bond to secure the performance of award under a statutory submission to arbitration, the obligor may defend on the ground that the judgment based upon the award is void, although it is unreversed, since, being neither a party nor a privy to that judgment, he could not

sue out a writ of error to reverse it. *Ladlin v. Field*, 6 Met. 287.

Conceding that the record of a judgment against a principal is not evidence to establish the debt against the surety for an unliquidated demand, the rule does not apply where, by agreement, conduct, and active participation of the surety in the award of arbitrators, the case is taken out of the rule. *Hostetter v. Pittsburgh*, 107 Pa. 419.

In a *scire facias* against the indorser of a writ, the judgment in the original action, so long as it remains unreversed, concludes the defendant from setting up that the plaintiff, in taxing costs, fraudulently procured the allowance by the clerk of various sums to which he was not entitled. *Sherburne v. Shepard*, 142 Mass. 141, 7 N. E. 719.

The indorser of a writ in the original cause cannot, upon *scire facias* against him to enforce a liability for costs, dispute the validity of the judgment. *Pullman's Palace-Car Co. v. Washburn*, 66 Fed. 790, affirmed in 21 C. C. A. 598, 33 U. S. App. 628, 76 Fed. 1005.

The sureties on a bond for costs are concluded by the decree for costs against their principal. *McClaskey v. Barr* (C. C.) 79 Fed. 408.

A judgment for costs against the principal alone, and not against the sureties, is conclusive against the latter in an action on the cost bond, the condition of which is that the surety will pay the costs which have accrued or may thereafter accrue. *Calhoun v. Gray*, 150 Mo. App. 591, 131 S. W. 478.

On a *scire facias* on a recognizance for costs, the surety cannot defend by showing an irregularity in obtaining judgment against his principal. *Stedman v. Ingraham*, 22 Vt. 346.

VI. Liquor bonds.

It has been held that a judgment of a criminal court convicting the prisoner of a violation of the liquor law is conclusive on his sureties, where the statute provides that "whenever a person so licensed shall be convicted of a violation of any of the provisions of part 6 of this act, and no appeal is pending, said bond shall thereupon become forfeited." *Welch v. McKane*, 55 Conn. 25, 10 Atl. 168.

Where the express condition of a liquor dealer's bond is that the sureties shall pay any judgment against their principal for actual or exemplary damages awarded in a court of competent jurisdiction, they cannot, in an action on the bond, retry the merits of the action against their principal, on the theory that they have had no day in court. They can show only that the judgment was not rendered by a court of competent jurisdiction, or that it is void for fraud or collusion. *People use of Clinton v. Laning*, 73 Mich. 284, 41 N. W. 424.

A judgment against a liquor dealer for the offense of selling the liquor to minors, in violation of the law, is conclusive upon 40 L.R.A. (N.S.)

his sureties. *State v. Nutter*, 44 W. Va. 385, 30 S. E. 67.

A judgment against a liquor dealer for selling drink to plaintiff's husband is conclusive against his sureties in an action on the bond. *Point Pleasant v. Greenlee*, 63 W. Va. 207, 129 Am. St. Rep. 971, 60 S. E. 601.

But it has been held that in an action on a liquor dealer's bond conditioned upon his faithful observance of the law, the sureties are not estopped by his confession of guilt or conviction of a violation of the law, from showing that there has been no breach of the bond. *Paducah v. Jones*, 126 Ky. 809, 104 S. W. 971.

A judgment against a saloonkeeper under the Illinois Dramshop act is held *prima facie* evidence of the amount of damages sustained by the plaintiff in an action against his sureties, especially where the sureties have been notified of the suit and have actually appeared and aided in the defense, and the fact that the statute permits exemplary damages to be recovered in the original suit does not affect the rule. *Wanack v. People*, 187 Ill. 116, 58 N. E. 242, affirming 87 Ill. App. 371.

In an action to recover the penalty of a liquor dealer's bond, the record of the criminal case and of the principal plea of guilty, is, in Mississippi, only *prima facie* evidence in a civil action as to the breach of the bond, either as against the sureties or the principal. *Albrecht v. State*, 62 Miss. 516. This case was decided under the rule that a verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action to establish the truth of the facts on which it was rendered.

And in Tennessee the surety on a liquor dealer's bond, though not a party to a criminal prosecution which resulted in the conviction of the principal, of the offense of keeping a disorderly house, was held privy thereto, and the record of the conviction *prima facie* evidence against him in an action on the bond. *Webb v. State*, 4 Coldw. 199.

VII. Confession of judgment.

Consent judgments are not binding on third persons, and therefore any third person sought to be affected by such a judgment has a right to show its character. *Carroll v. Hamilton*, 30 La. Ann. 520.

A default judgment against a principal on a bond for the payment of claims for labor and materials will not prevent his sureties, who were parties to the action, from disputing on appeal facts which were necessary to establish their liability. *United States use of Fidelity Nat. Bank v. Rundie*, 52 L.R.A. 505, 46 C. C. A. 251, 107 Fed. 227.

An award against a principal founded on his acknowledgments, and not confined to debts covered by an indemnity bond, is not evidence against his sureties, who were

not parties to the submission and who did not attend before the referee. *Simonton v. Boucher*, 2 Wash. C. C. 473, Fed. Cas. No. 12,877.

A judgment confessed by a principal for a liability to a partnership is admissible in evidence to charge one guarantying the faithful discharge of the engagements of the principal. *Drummond v. Prestman*, 12 Wheat. 515, 6 L. ed. 712.

In commenting on the last-mentioned case, the court, in *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147, said: "It will be observed that the judgment in that case was by confession of the principal. It was a voluntary undertaking on his part, of record, to pay the sum confessed to the creditor; and the guarantor, by his letter of guaranty, stipulated to guarantee the conduct of his son, the principal, and to hold himself liable 'for the faithful discharge of all his engagements' to the plaintiff, 'both now and in the future.' The payment of this judgment, which the son had confessed, might, perhaps, have properly been regarded as one of 'the engagements' the son had entered into, within the scope and covered by the undertaking of the guarantor as contained in the letter of guaranty. If such be the extent of the guarantor's undertaking, it is very clear the judgment confessed by the son was not only *prima facie* evidence, but, in the absence of fraud or collusion between him and the creditor, was conclusive against the father."

On a motion against a sheriff for the default of his deputy, a judgment confessed in open court is evidence against the deputy's sureties of his default, unless disproved by them. *Jacobs v. Hill*, 2 Leigh, 393.

The sureties of a constable, upon a suit or motion against him for moneys received, are not concluded by a confession of judgment by their principal after his retirement from office. The sureties may show that they are not liable because their principal did not in his official character receive the money, and they may show that by collusion they were sought to be fixed with the individual responsibility of their principal. *Atkins v. Bailey*, 9 Yerg. 111.

The confession of judgment by a sheriff is *prima facie* evidence against his sureties, but they may show that it was made by mistake or by fraud or collusion, or that the sum confessed is greater than he was really liable for, or that the confession was for liabilities which they had not undertaken to guarantee. *The Treasurers v. Bates*, 2 Bail. L. 362.

Where a sheriff with the assent of his deputy, but without the knowledge of the deputy's sureties, confesses judgment for the default of his deputy, the judgment is admissible against the sureties upon a motion by the sheriff against the deputy and his sureties, and charges the sureties unless disproved by them. *Jacobs v. Hill*, *supra*.

Where a bond has been executed to secure a sheriff against apprehended litigation as

to the title of property seized under an execution, a judgment against the sheriff by consent, in the absence of fraud or collusion or any suggestion that there was a defense to the action against the sheriff, presumptively, at least, establishes the liability of the sureties. The sureties are at liberty to show that the judgment was not founded upon any legal liability to the plaintiff in the action, or that it exceeded such liability. *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. 439, affirming 35 Hun, 507.

Where a guardian in the settlement of his accounts with his ward admits an indebtedness to him, the account receiving the approval of the probate court, this is admissible against the sureties on the guardian's bond, but is not conclusive. *State use of Wagenmann v. Rosswaag*, 3 Mo. App. 11. The court said that "no reason is perceived why like any other admission or act of a party for whom sureties engage, it may not be evidence tending to prove the defalcation in respect of which sureties are responsible. The sureties of a guardian do not occupy different relations to their principal, or to those who are interested in the good conduct of their principal, from that which is occupied by other sureties towards their obligees. We know of no exception to the rule that admissions made by a principal in the course of the business, for his performance of which his sureties are liable, are binding on the surety."

The confession of fiat has been held only *prima facie* evidence of the sufficiency of assets as against the sureties on an administrator's bond, and in a suit on the bond they may show the true condition of the estate at the time of the confession, and the amount of assets in the hands of the administrator properly chargeable with the payment of the same. *Kearney v. Sascor*, 37 Md. 264.

A judgment by confession against an executor, while binding upon him, is *prima facie* evidence only against his surety. As to the latter it is nothing more than a declaration or confession of his principal clothed with legal solemnities, and should be deemed in all respect correct only until the contrary is made to appear. *Iglehart v. State*, 2 Gill & J. 235.

The confession of judgment by an administrator does not preclude his sureties in an action on the bond from showing that, at the time of the confession, the administrator had fully administered to the estate and had no assets in his hands. *Seat v. Cannon*, 1 Humph. 471.

The record of a judgment confessed by an administrator is not even *prima facie* evidence of the amount of the debt, or of the fact that the administrator had assets to pay the same. *Vanhook v. Barnett*, 15 N. C. (4 Dev. L.) 268.

But a judgment *nil dicit* against an administrator was held to be a finding of assets in his hands, and binding upon his sureties as well as himself. *Grace v. Martin*, 47 Ala. 135.

Where a plaintiff in replevin suffers a voluntary dismissal or nonsuit, and judgment of *retorna habenda* is awarded, in a suit on the replevin bond, the defendant cannot, in bar of the action or in mitigation of damages, show property in the plaintiff in replevin, under a statute providing that "in any action upon any bond given as required by the provisions of this chapter, where the merits of the case have not been determined in the action of replevin in which such bond was given, the defendant may plead such fact, and also their title, or the title of any one or more of them, to the property in dispute in such action of replevin, except in cases where the plaintiff, in such action of replevin, shall have voluntarily dismissed his suit, or submitted to a nonsuit therein" (§ 14, replevin act, Rev. Stat. p. 540). *Clark v. Howell*, 3 Colo. 564.

In Louisiana it is held that a confession of judgment by a principal has, as to the surety, only the force of a private agreement between the principal and his creditor. *Allison v. Thomas*, 29 La. Ann. 732.

VIII. Fraud and collusion.

It is almost universally held that the surety is not prevented by the judgment against his principal from setting up the defense of fraud or collusion.

The surety may show fraud or collusion, or a mistake in the amount of the judgment. *Berger v. Williams*, 4 McLean, 577, Fed. Cas. No. 1,341.

A surrogate's decree obtained by fraud and collusion does not conclude the sureties. *Thayer v. Clark*, 4 Abb. App. Dec. 391, affirming 48 Barb. 243.

A plea that the judgment in the principal action was entered by collusion between the original parties with a view to defraud bail may be set up in an action on the recognizance. *Parkhurst v. Sumner*, 23 Vt. 538, 56 Am. Dec. 94.

Collusion between the parties in the original suit, to enter up judgment for the purpose of defrauding the bail, is available as a defense in an action on the bond. *Mott v. Hazen*, 27 Vt. 208. The court said: "As against the bail the judgment is void; it has no legal effect, and is the same in legal contemplation as if no judgment had been rendered. . . . This rule is of universal application, and equally affects judgments, recognizances, debts of record, as well as instruments under seal and simple contracts. Wherever fraud exists, the party injured can find redress at law, as well as in equity. If it is a defense in one tribunal, it is equally so in the other."

The sureties may contest the conclusiveness of a judgment against a sheriff obtained by fraud or collusion. *Dane v. Gilmore*, 51 Me. 544; *State ex rel. Parker v. Woodside*, 29 N. C. (7 Ired. L.) 296.

The sureties on a cost bond may, in an action thereon, impeach the judgment in an original action on the ground of fraud. 40 L.R.A.(N.S.)

Great Falls Mfg. Co. v. Worster, 45 N. H. 110.

But where the fraud alleged was that of the guardian alone, in charging himself with more money than he had received, it was held that the surety could not question the decree rendered upon the settlement of the guardian's account, in the absence of collusion between the guardian and the ward. *Corbin v. Westcott*, 2 Dem. 559.

It has been held that the decree of a surrogate on an accounting of an administrator ordering him to pay the persons entitled a certain sum cannot be attacked on the ground of fraud in an action against the sureties on the bond. There must be a direct application for that purpose. *People v. Downing*, 4 Sandf. 189.

And that, in an action on the bond, the surety will not be allowed to show that a decree in equity against an administrator was fraudulently obtained. *Norton v. Wallace*, 2 Rich. L. 460.

Where the sureties were made parties to an administrator's accounting, which was dismissed as to them on an objection by demurrer to being joined in that suit, they cannot afterwards be heard to say that the decree was not binding upon them on the theory that they were not parties thereto. *Chaquette v. Ortet*, 60 Cal. 594.

H. C. S.

KANSAS SUPREME COURT.

IVA C. NESBIT

v.

CITY OF TOPEKA, Appt.

(— Kan. —, 124 Pac. 186.)

Municipal corporation — notice of injury — promptness.

A person injured by the negligence of a city failed to give a notice as required by the act governing cities of the first class (Gen. Stat. 1909, § 1218). He died from such injuries after the time limited for such notice had expired. His widow gave a notice within four months after his death, and then commenced an action under the statute giving a right of action for damages for death caused by wrongful act. It is held that the action may be maintained, notwithstanding the failure to give the pre-

Headnote by BENSON, J.

Note. — Does time of notice as condition of municipal liability begin to run from the accident or from the injury or death.

As to physical or mental incapacity as an excuse for failure to give notice of injury required as a condition of municipal liability, see note to *Touhey v. Decatur*, 32 L.R.A.(N.S.) 350.

The sufficiency of the description of an injury in a notice given as a condition of municipal liability is discussed in *Spear v.*

liminary notice within four months after the injury.

(June 8, 1912.)

APPEAL by defendant from a judgment of the District Court for Shawnee County overruling a demurrer to a petition in an action brought to recover damages for the death of plaintiff's husband alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. W. O. Ralston and James W. Clark, for appellant:

The filing of a statement giving the time and place of the happening of the accident or injury received, and the circumstances relating thereto, within the required time, is a condition precedent, and must be alleged in the petition and proven at the trial, before any recovery can be had against the city for personal injuries.

Cook v. Topeka, 75 Kan. 534, 90 Pac.

Westbrook, 20 L.R.A.(N.S.) 804, and the note appended thereto.

A number of cases hold that the requirement of notice to a municipality does not apply to actions by the administrator for the death of an injured party in behalf of the next of kin, under the so-called death acts, and therefore no notice is necessary in such cases. Prouty v. Chicago, 250 Ill. 222, 95 N. E. 147; Perkins v. Oxford, 66 Me. 545; Orth v. Belgrade, 87 Minn. 237, 91 N. W. 843; Senecal v. West St. Paul, 111 Minn. 253, 126 N. W. 826; Brown v. Salt Lake City, 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 Ann. Cas. 1004; Laconte v. Kenosha, — Wis. —, 135 N. W. 843.

And it was so held in Clark v. Manchester, 62 N. H. 577, and Jewett v. Keene, 62 N. H. 701, which were actions under a survival statute for damages sustained by the injured party.

In Barnes v. Brooklyn, 22 App. Div. 520, 48 N. Y. Supp. 36; Conway v. New York, 139 App. Div. 446, 124 N. Y. Supp. 660 (affirmed without opinion on second appeal in 148 App. Div. 915, 133 N. Y. Supp. 1116); and Crapo v. Syracuse, 183 N. Y. 395, 76 N. E. 465, reversing 98 App. Div. 376, 90 N. Y. Supp. 553, it is held that a statute providing that notice must be given within six months after the action shall have accrued applies to accidents resulting in death, but the cause of action does not accrue until an administrator is appointed, and the time for serving notice begins to run from the date of such appointment.

In Nash v. South Hadley, 145 Mass. 105, 13 N. E. 376, under a statute providing for notice within thirty days by the injured person, or someone on his behalf if disabled, within ten days after removal of the disability, "and in case of his death without having given the notice and without having been, for ten days at any time after his in-

244; Reining v. Buffalo, 102 N. Y. 308, 6 N. E. 792; Denver v. Saulcey, 5 Colo. App. 420, 38 Pac. 1098; Starling v. Bedford, 94 Iowa, 194, 62 N. W. 674.

Mr. D. Basil Rankin, with Mr. Edwin D. McKeever, for appellee:

No written statement by plaintiff was required.

Chicago, R. I. & P. R. Co. v. Martin, 59 Kan. 437, 53 Pac. 461; McCarthy v. Chicago, R. I. & P. R. Co. 18 Kan. 52, 26 Am. Rep. 742; Hulbert v. Topeka, 34 Fed. 513; Parish v. Eden, 62 Wis. 272, 22 N. W. 399; Maylone v. St. Paul, 40 Minn. 406, 42 N. W. 88; Brown v. Salt Lake City, 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 Ann. Cas. 1004; Colorado Mill. & Elevator Co. v. Mitchell, 26 Colo. 284, 58 Pac. 28; Nestelle v. Northern P. R. Co. 56 Fed. 261; Mason v. Union P. R. Co. 7 Utah, 77, 24 Pac. 797; Pym v. Great Northern R. Co. 4 Best & S. 396, 32 L. J. Q. B. N. S. 377, 10 Jur.

jury, of sufficient capacity to give the notice, his executor or administrator may give such notice within thirty days after his appointment,"—it was held that where the person injured lived more than ten days in a condition in which it was possible for him to have given the notice, but failed to do so, his executor was not entitled to serve the notice within thirty days after his death.

But under the same statute, where the injured person died upon the twelfth day after the injury, and before the expiration of ten days from the time of the accident she became delirious and remained in that condition until death, it was held that her administratrix was entitled to give the notice. Barclay v. Boston, 173 Mass. 310, 53 N. E. 822.

In McKeigue v. Janesville, 68 Wis. 50, 31 N. W. 298, it is held that where an injured party dies before the expiration of the time for giving notice, without having given it, suit may be brought by his administrator for the wrongful death without giving notice; but the court intimated that the rule might be different in case the injured party lived for the notice period without having given it.

In Dodge v. North Hudson, 188 Fed. 489, under a statute requiring notice to the municipality within a certain time after the right of action accrued, the court said that the right of action by an administrator for the death of the injured party accrued when the death occurred.

In Crocker v. Hartford, 66 Conn. 387, 34 Atl. 98, it was held that a person who fell on an icy sidewalk was barred from recovery by failure to give notice within fifteen days of the accident, though the internal injury complained of did not develop, and plaintiff was unaware of it until after the period for notice had elapsed.

R. L. S.

N. S. 199, 8 L. T. N. S. 734, 11 Week. Rep. 922; Franklin v. Southeastern R. Co. 3 Hurlst. & N. 211, 4 Jur. N. S. 565, 6 Week. Rep. 573, 8 Eng. Rul. Cas. 419; Dalton v. South-Eastern R. Co. 4 C. B. N. S. 296, 27 L. J. C. P. N. S. 227, 4 Jur. N. S. 711, 6 Week. Rep. 574.

No act or laches of decedent can destroy right of action by widow.

Orth v. Belgrade, 87 Minn. 237, 91 N. W. 843; Robinson v. Canadian P. R. Co. [1892] A. C. 481, 61 L. J. P. C. N. S. 79, 67 L. T. N. S. 505; Prouty v. Chicago, 250 Ill. 222, 95 N. E. 147; Hoover v. Chesapeake & O. R. Co. 46 W. Va. 268, 33 S. E. 224.

Benson, J., delivered the opinion of the court:

The question to be decided in this case is whether a notice, as provided by § 1218 of the General Statutes of 1909, is a condition precedent to the maintenance of an action for damages for death caused by the wrongful act or omission of another, under the provisions of § 6014 of the General Statutes of 1909 (Code Civ. Proc. § 419); the death having occurred more than four months after the injury. A demurrer to a petition alleging such negligence and resulting death, but failing to allege the notice referred to, was overruled, and the defendant appeals.

The statute relating to notice declares: "No action shall be maintained by any person or corporation in any court for damages on account of injury to person or property, unless the person or corporation injured or damaged shall, within four months thereafter, and prior to the bringing of the suit, file with the city clerk a written statement, giving the time and place of the happening of the accident or injury received, and the circumstances relating thereto." Gen. Stat. 1909, § 1218. This statute is mandatory, and in a case within its purview, if the notice is not given, an action cannot be maintained by the person sustaining the injury. Cook v. Topeka, 75 Kan. 534, 90 Pac. 244.

The statute under which this action is brought provides: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission." Gen. Stat. 1909, § 6014. A later statute allows the widow to maintain the action in her own name in cases like the present. Ibid. The damages recoverable by a widow in such an action are for her loss caused by the

death of her husband. A cause of action accrued to him when he was injured. A cause of action accrued to her at his death. Chicago, R. I. & P. R. Co. v. Martin, 59 Kan. 437, 438, 53 Pac. 461; Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230, 238, 38 L. ed. 422, 424, 14 Sup. Ct. Rep. 579. She was not the person injured, and so was not required to give the notice provided by the statute within the four months' period. Before her right of action accrued, the time for giving it had elapsed. A construction that would bar the widow in such a situation should not be given unless imperatively required. It is said that it is required by the express terms of the statute giving the remedy, that the action can only be maintained by the widow "if the former (the person injured) could have maintained an action, had he lived . . . for the same act or omission;" and as notice was required as a condition precedent to the maintenance of his action, in the absence of such a notice her action must fail. But the husband might have maintained the action by giving the notice, filing a petition, and causing a summons to issue. His failure to take these steps, or any of them, cannot bar her right even under the letter of the statute.

In referring to a similar situation, the supreme court of Utah said: "The statute must receive a reasonable construction, and such as will make it possible to present a claim. If, therefore, a claim may not arise until the time has elapsed in which it must be presented, the statute should not be held to apply, unless the language used therein permits of no other construction." Brown v. Salt Lake City, 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 Ann. Cas. 1004.

It is true that in that case the period for giving notice had not elapsed at the time of the death of the injured person; but the language quoted is nevertheless applicable. In another court, in a case where the time for notice had elapsed, it was held, affirming a prior decision, that a statute requiring such a preliminary notice in an action for negligence against a city did not apply to an action brought under a statute giving the next of kin of a deceased person an action when his death had been caused by wrongful act. Orth v. Belgrade, 87 Minn. 237, 91 N. W. 843, followed in Senecal v. West St. Paul, 111 Minn. 253, 126 N. W. 826.

It is argued that the failure to receive notice within the four months deprived the city of an opportunity to examine into the nature and cause of the alleged injury while the means of doing so were available,

thus working hardship. It may be observed, on the other hand, that the construction of the statute contended for would strike down a right of action before it accrues,—if that were possible.

These views are in substantial accord with an opinion filed by the District Court in overruling the demurrer, and the judgment will be affirmed.

All the Justices concur.

MISSOURI SUPREME COURT.
(Division No. 1.)

JAMES R. WOOLDRIDGE et al., Appts.,
v.

D. H. SMITH, Resp't.

(— Mo. —, 147 S. W. 1019.)

Cemetery — private burial — conveyance without restriction — effect.

1. The conveyance without restriction or establishment as a private burying ground, as provided by statute, of a parcel of land on which burials have taken place, destroys the right of the relatives of the deceased to protect the graves from desecration.

Note. — Prescription or adverse possession of grave or burial lot.

As to character of estate or property of owner in burial lot, see note to Waldron's Petition, 67 L.R.A. 118.

As to prescriptive right to maintain a public nuisance, see note to Leahan v. Cochran, 53 L.R.A. 891.

The title to an easement in a burial lot may be acquired by prescription, where adverse possession for that purpose is held for the statutory period. Hook v. Joyce, 94 Ky. 450, 21 L.R.A. 96, 22 S. W. 651.

One who enters upon, sets apart, and asserts an exclusive right to a plot of land as a family burial ground, and who from year to year for a series of years, as death in his family occurs, or when the members of a friend's family die, buries them on that plot, and erects monuments to mark the spot of interment, has an adverse possession sufficient under the statute of limitations to give title. Mooney v. Cooledge, 30 Ark. 640, wherein it is said that in such cases neither actual residence upon nor continuous occupancy is necessary; Conger v. Weyant, 3 Silv. Sup. Ct. 588, 28 N. Y. S. R. 745, 7 N. Y. Supp. 809; El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21. And this same holding is recognized in Illinois Steel Co. v. Billot, 109 Wis. 418, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402.

And proof in an action of ejectment to recover a strip of land conveyed by a deed 40 L.R.A. (N.S.)

Corpse — prescriptive right to burial.

2. No prescriptive right which will descend to heirs can be acquired by burying dead bodies in private grounds.

(May 31, 1912.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Pettis County in defendant's favor in a suit to enjoin the disturbance of a burying ground. Affirmed.

The facts are stated in the opinion.

Mr. George F. Longan for appellants.

Mr. James T. Montgomery, for respondent:

There can be no dedication under the common law, even for private uses public in their nature, where the enjoyment is restricted to a limited part of the public.

9 Am. & Eng. Enc. Law, 23, note 8; Todd v. Pittsburg, Ft. W. & C. R. Co. 19 Ohio St. 514; Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 28 L.R.A. 612, 46 Am. St. Rep. 355, 40 N. E. 1014; Methodist Episcopal Church v. Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Coberly v. Butler, 63 Mo. App. 556.

Plaintiffs have no right of burial in said plot of ground, either by grant or prescription.

2 Washb. Real Prop. 4th ed. 301.

defectively executed, showing the use of the land as a burial plot for some twenty-one years or more, the interment of a relative in a grave partly in the disputed strip, the erection of a head and foot stone thereon, and the planting of trees and shrubbery around the other sides of the lot for from twelve to fourteen years prior to action,—justifies the defendant's claim to title to the strip by adverse possession. Conger v. Kinney, 42 N. Y. S. R. 906, 16 N. Y. Supp. 752.

But where the occupancy of the plot of land for burial purposes is not under color of title, title by adverse possession will reach no further than the land actually occupied by graves. Mooney v. Cooledge, 30 Ark. 640.

And while possession of part of a tract of land under color of title to the whole tract is possession of the whole tract described in the deed, the possession of a few feet of ground by a grave with a fence around it, in a small tract of land used as a general burial place, will only establish title by prescription to the spot where the grave is located. Zirngibl v. Calumet & C. Canal & Dock Co. 157 Ill. 430, 42 N. E. 431.

And evidence showing that the plaintiff's ancestors, husband, and children were buried in the burial lot; that she visited and kept it in good condition as long as she lived near by, and left some one in charge when she was away, who visited it frequently and kept it in good condition; and that the person purchasing the land more

Graves, P. J., delivered the opinion of the court:

Bill in equity seeking injunctive relief. Plaintiffs are lineal descendants of Powhatan Wooldridge, who died in the year 1862. The bone of contention is the right to a tract of ground 10 by 30 feet, on which are the graves of the said Powhatan Wooldridge, his wife, and several of his relatives.

The petition charges that the plaintiffs "are and have been for more than twenty years the owners and in possession of" the tract of land in dispute. The petition further avers "that said tract of land has been for more than twenty years used exclusively as a family burying ground by the plaintiffs and their ancestors; that all the graves on said ground have been, during all the time since the burial of said bodies, inclosed with fences; and these plaintiffs have been in peaceable and adverse possession of said land for more than twenty years." The petition then further proceeds: "Plaintiffs state that the defendant owns the land surrounding and adjoining to the said tract of land so, as aforesaid, described as containing the bodies of the ancestors and relatives of these plaintiffs; that these plaintiffs are desirous of inclosing with a substantial fence the graves of their said ancestors and relatives, so as

to prevent them from the intrusions and molestations of the animals and beasts that otherwise have access to them. Plaintiffs state that the defendant, on or about the — day of March, 1907, without authority of law and in violation of the rights of these plaintiffs, removed the fences which inclose a part of the said graves, thereby turning said graves or burial places into a pasture belonging to the defendant, and used by him as a hog lot or pasture; that defendant threatens and is about to remove the fences inclosing the other graves located on said tract of land, and denies to plaintiffs the right and privilege of erecting around said graves a fence or wall inclosing the same; that plaintiffs have notified the defendant of their rights in the premises, and warned him to desist from removing the said fences, and informed him that they would erect around said graves a wall or fence inclosing the same. But the defendant refused to permit them to erect said wall or fence, and threatens to remove the fence surrounding the remainder of said graves. Plaintiffs state that if they are not permitted to erect a wall or fence inclosing the said graves, and the defendant is allowed to remove the said fences now inclosing a part of said graves, they will be

than ten years before suit promised that "the graveyard would never be troubled,"—disclosed no such acts of control and possession as could ever amount to adverse possession. *Bonham v. Loeb*, 107 Ala. 604, 18 So. 300.

So, evidence that merely shows that the widow of the testator, to whom a burial plot was devised, took possession of the plot in 1866 by interring the body of her husband, and then in 1872 disinterred the body and deeded the plot to the plaintiff, does not give the plaintiff title to the plot by adverse possession in 1900. *Meiggs v. Hoagland*, 69 App. Div. 182, 74 N. Y. Supp. 234, wherein it was said: "Even if it were true that the body . . . was buried in one of the lots, and remained there thereafter for more than twenty years, and that adverse possession of that lot, or even of the whole plot, could have been predicated thereon, . . . still this adverse possession ended when the body was removed, and such removal was more than twenty years before the contract for the sale of the property to the defendant."

In *Baker v. Oakwood*, 123 N. Y. 16, 10 L.R.A. 387, 25 N. E. 312, it was held that a purchase, by a public corporation organized in perpetuity, of land held in joint tenancy, to be devoted to the burial of the dead, followed by inclosing, improving, and laying out in such manner and devoting to such use as is utterly inconsistent with every other claim of title, is a termination of the joint tenancy, although the title of 40 L.R.A. (N.S.)

the corporation is derived from one only of the joint tenants, and constitutes such an ouster as will give title by adverse possession after the expiration of the statutory period.

Entering into possession of a portion of a cemetery lot which is inclosed, by one claiming to be the owner of such portion, and erecting a substantial iron fence so as to divide the part so claimed from the remaining part of the lot, is, as to that peculiar character of property, an act showing adverse possession of a public nature totally irreconcilable with cotenancy, and amounts to an actual ouster of others claiming to be tenants in common with the possessor. *Roumillot v. Gardner*, 113 Ga. 60, 53 L.R.A. 729, 38 S. E. 362.

One who buys a burial lot from another not expressly authorized by the owners of the land, who devoted it to burial purposes, to sell the lot, but who had sold lots for a number of years with the owners' knowledge, and pays a part of the purchase money under an agreement to pay the balance upon the production and delivery of the deed, and who occupies and uses the lot for more than twenty years as a burial lot,—all the while keeping the lot in good condition,—is entitled to hold until the production and delivery of the deed to the lot, even if the contract is executory; and if the contract is not executory, his title by adverse possession is complete. *Conger v. Treadway*, 132 N. Y. 259, 30 N. E. 505.

E. M. S.

unprotected, and exposed to the ravages and desecration of the hogs and other live stock belonging to this defendant, and that the injury and damage to plaintiffs will be irreparable, and that the injury and damage would not be susceptible of compensation in damages, and that plaintiffs are without an adequate remedy at law. Wherefore plaintiffs pray that the defendant, his agents, servants, and employees, be perpetually enjoined from removing any fence or wall inclosing said graves, and from interfering with or molesting in any way these plaintiffs in building and erecting a wall or fence inclosing the said tract of land so, as aforesaid, described containing the graves of the ancestors and relatives of these plaintiffs, and for such other and further relief as to the court shall seem just and proper in the premises."

The answer is (1) a general denial, (2) the statute of limitations for adverse and continuous possession for more than eighteen years, and (3) that plaintiffs have no rights, either in law or equity, because "said plot of ground has never been set apart according to law for a family burial place."

Upon trial had, plaintiffs failed to get relief, and from this adverse judgment bring the case here.

The facts are practically undisputed. Powhatan Wooldridge, mentioned supra, was the original owner of a farm of which the small tract in dispute was a part. He is the father and grandfather of those buried there, with the exception of one stranger. There are some nine graves in all. There were no tombstones; but there were markers of common field stone, and the graves were fenced. In one instance, three graves were inclosed within a picket fence. Other graves were separately inclosed by rail pens. No sign distinguished one grave from another. The last interment was the body of Jno. M. Wooldridge, a son of Powhatan, in about 1880. The first was in or about 1856 or 1857.

The land of Powhatan Wooldridge went by descent to his children, and by voluntary partition was divided. The 40 acres upon which these graves are located passed to a daughter, Elvira, and from her by deed, without reservation, to a son, John M., who died in 1880, and the land passed by descent to his children. In 1889 the children of Jno. M. deeded, without reservation, the land to defendant, D. H. Smith, who took possession in March, 1890, and has been in continuous possession thereof ever since. Smith did not know of the graveyard at the time of his purchase. Such graves were obscured by brush and undergrowth, so that they were not easily dis-

cernible, but might have been discovered by examination of the premises. No fixed tract was ever marked off by Powhatan Wooldridge for a graveyard, and no public road touched upon the tract, although there was a private way leading to it. Since the possession of Smith, plaintiffs have never been permitted to exercise any control over the ground in dispute. Such in brief are the facts.

1. In the brief filed in this court, the plaintiffs undertake to plant themselves behind the case of *Tracy v. Bittle*, 213 Mo. 302, 112 S. W. 45, 15 Ann. Cas. 167. That case was written with care after a thorough research of all the authorities. The known lax methods used in the earlier days for the establishing of public burying grounds prompted the writer to the use of diligence and care in outlining the doctrine of the law announced in that case. But that case is not this case. We were dealing there with a public graveyard, and not with a private graveyard, as these plaintiffs in their petition aver this one to be. In the *Bittle Case* we held (1) that the evidence showed that the land in dispute had been dedicated to a public use by the owner thereof; (2) that the public could acquire an interest in a graveyard by a common-law dedication, as well as by deed; (3) that the statutes of limitation had no bearing upon grounds dedicated to a public or charitable use, and that a cemetery was such a use; (4) that there was no abandonment of such public use, so long as the dead remained buried therein, and the grounds were maintained in condition to evidence its use; (5) that mere ceasing to bury in the grounds did not change the character of the use, so long as such grounds were kept up as the home of the dead; (6) that parties related to persons buried in the grounds had such an interest in the maintenance of a public use that they could sue to protect such use; and (7) that injunction was a proper remedy to prevent the owner of the fee from thwarting the public use and desecrating the graves of the dead in such public burying ground.

This case does not avail the plaintiffs here for two reasons: First, they do not charge the graveyard now under consideration to be a public graveyard. They aver it to be a private burial ground. Therefore, by their pleadings, they have not brought themselves within the beneficent rules of the *Tracy Case*. Secondly, their proof fails to show such acts by the elder Wooldridge as would amount to a common-law dedication of any particular tract of land to a public or charitable use, and the acceptance of the same by the public. When

the conceded facts of this case are fully measured up, it is seen that they fall far short of showing a dedication to public use. An examination of the facts tending to show a dedication in the Tracy Case, and in the other cases cited in that opinion, will demonstrate the absence of the necessary facts in the case at bar. In this case Wooldridge marked out no plot of ground for a burial ground. He in no way attempted to segregate a burying ground from the general farm. There is practically no evidence of a dedication to the public, or of an acceptance by the public. So that we conclude that, both by pleading and proof, the question of a public graveyard is not in this case. If plaintiffs have any rights in the premises, they must be sought from another source.

2. One theory of plaintiffs' petition seems to be that there was established a private family burying ground; and that they, as relatives of the dead ones buried therein, have a right to enjoin the desecration of the graves therein. We think the latter proposition may be conceded as good law. In other words, if in law and fact this is a private family burial ground, these plaintiffs are not without remedy to prevent the desecration of the graves. Is this such a private family burial ground, within the meaning of the law, as to give the plaintiffs a standing in equity? Alleged desecration of the last resting place of the dead always appeals strongly to the courts. With firm voice, in cases wherein we had power to act, this court has chided the heartless spirit which dared such a desecration. Desecration of graves is a heartless act, bespeaking the absence of humanity in the breast of the desecrator. Gladly would the courts place their correcting hand upon the heads of all grave desecrators, if the cold law in many cases did not stay it. In some cases the courts are left powerless, and this seems to be one of them. If A bury his wife upon his farm, and then sells the farm without reservation, what power can protect that grave, save the humane heart of the grantee in the deed? If he bury his whole family there, is the rule different? We think not. The law contemplates two classes of graveyards, public and private. Such has been the statute law of this state. The first kind we consider in the Tracy Case, *supra*. The latter we must consider here. There is no such thing as the dedication of property to private use. The proprietor of lands can dedicate it to a public use; and, if there is an acceptance by the public, rights are acquired therein by the public. On this theory, we say that a public graveyard may be established without a deed 40 L.R.A. (N.S.)

from the original owner. Private burial grounds, however, must be established in a different way. In Missouri we have a statute prescribing the method. Section 1303, Rev. Stat. 1909, reads: "Any person desirous of securing family burying ground or cemetery on his or her lands may convey to the county court of the county in which the land lies any quantity of land not exceeding one acre, in trust for the purpose above mentioned, the deed for which to be recorded within sixty days after the conveyance; and such grounds, when so conveyed, shall be held in perpetuity as burying grounds or cemeteries for the use and benefit of the family and descendants of the person making such conveyance."

This statute was first enacted in 1857, and has only been slightly changed by amendment. The lawmaking power realized that a landowner could not dedicate property for such use. It realized that such use could only be created by deed or reservation in a deed, and, so impressed, provided this statutory method of creating such a use. Under our statute, we doubt whether a family burying ground could be established by a mere reservation in a deed; yet we need not decide the point, because not involved here. Such a reservation, of course, would convey the title and interest reserved to the parties for whom it was reserved, and in this way amounts to the preservation of such grounds as a graveyard. But, as said, this question need not be discussed.

The elder Wooldridge did no acts to create a public cemetery; nor did he establish a private or family burying ground in the manner pointed out by the statute. He at all times was possessed of the fee, unhampered by any act of his in the premises. By this we mean any act which could be legally asserted against his grantees, without express reservation in the deeds of conveyance. No such reservations appear. The title he has possessed has passed to defendant. The statute as to family burying grounds not only requires a deed, but it requires the record of such instrument. To our mind, this statutory method is exclusive; and, if so, there is no family burying ground in which plaintiffs could have any legal rights. The statute may have a double purpose; but it evidently was intended to protect a subsequent purchaser without actual notice, by requiring the deed creating the burial ground to be placed of record.

3. Another theory argued by plaintiffs, and perhaps well covered by their petition, is that they can hold possession by prescription. This presents a novel proposition. In support of it, we are cited to a

Kentucky case, *Hook v. Joyce*, 94 Ky. 450, 21 L.R.A. 96, 22 S. W. 651. In that case one Clark was the owner of certain land when defendant's father was buried there. Later his brother was buried there. Defendant's mother caused tombstones to be placed at the graves, and had the same fenced. She died and was buried at the same place. The defendant in the Hook Case was the only heir at law of the mother, Lucinda Joyce. In 1847 the city of Paducah acquired the land upon which these graves were situated, and established a cemetery. The city platted the grounds into lots, and sold the lot upon which defendant's father, mother, and brother were buried, to the plaintiff, Hook. Hook sued for possession, and, under peculiar instructions from the lower court, lost the case, and appealed to the Kentucky court of appeals, which affirmed the judgment nisi. The court held that the defendant's mother had an easement in the soil which had been acquired by prescription, which easement could not be defeated, but passed by descent to her heirs at law. The court further held that the possession of such easement was held by virtue of the burial of the dead therein, with properly inscribed tombstones. This language is used: "But the question arises: What is the nature and extent of the adverse possession required, in order to ultimately ripen into a title to an easement of a burial lot? It seems to us burial of the dead body is the only possession, when claimed and known, necessary to ultimately create complete ownership of the easement, so as to render it inheritable. And as long as it is inclosed as a burial place, or even without inclosure, as long as gravestones stand, marking the place as a burial ground, the possession is, from the nature of the case, necessarily, and therefore in legal contemplation, actual and adverse and notorious. Moreover, there cannot be an actual ouster of possession by an intruder, nor running of the statute of limitation in his favor, while such gravestones stand there, indicating by inscription the previous burial of another."

Of this case the learned annotator of L.R.A. in a note, says: "The question in the above case is a peculiar one, and seems to be without exact precedent." We are not impressed with this case. Under the head of "Cemeteries," 6 Cyc. 716, we find this statement: "No formal deed is necessary to confer the exclusive right to the use of a lot in a cemetery for burial purposes. Oral permission from the proprietors is sufficient." An examination of the authorities cited shows much diversity of opinion upon the question stated. 40 L.R.A. (N.S.)

Following the paragraph above quoted, we find this further statement: "The title to an easement of a burial lot may be acquired by prescription, where adverse possession for that purpose is held for the statutory period." In support of this latter doctrine, the Hook Case, *supra*, is cited. Following this is the generally conceded doctrine as to cemetery lots: "The purchaser of a lot in a cemetery, though under a deed absolute in form, does not take any title to the soil. He acquires only a privilege or license to make interments in the lot purchased, exclusively of others, so long as the ground remains a cemetery. Such privilege or license is subject to the police power of the state, in the exercise of which not only future interments may be prohibited, but the remains of persons theretofore buried may be removed. Therefore when by any lawful authority the ground ceases to be a place of burial, a lot holder's right ceases, except for the purpose of removing remains previously buried." Going further the same authority says: "A burial lot is regarded as property in which title may in most cases descend to heirs."

It must be remembered that these general rules have reference to lots in established cemeteries. To our mind, there is where the Kentucky court became confused. At the date of the action, the ground was in fact a cemetery; and if it were not for the recited facts as to when the bodies were buried in the lot in question—i. e., at a time prior to the establishment of the cemetery, and when the ownership of the land was in Clark—we can see where the general rule, above quoted, might be made to apply. But from the vague statement of the facts in the opinion, we are led to think that the court intended to hold that an easement was created in favor of Lucinda Joyce upon the land by the burial of the bodies therein and the continued use of the lot in that way for the prescriptive time of fifteen years. If by the opinion it is meant to be held that the prescriptive term began when Clark's land was invaded, we cannot agree to the doctrine. It may be—a question we do not decide, because outside of the case in hand—that if, after the Paducah cemetery was platted, persons had buried their dead in a certain lot, and the graves were readily discernible, and this use had continued for the prescriptive term, then a subsequent purchaser of the lot, who, under the general rule of law, only purchased a right or privilege to bury in the lot, might be precluded from the possession of the lot by the holder of the prescriptive use. This assumed case is not the Hook Case as we understand it; nor is it the case at bar.

Whilst the term "easement" might be applied properly to a lot in an established cemetery, because of the peculiar character of the holding of such property, can the term be applied to a tract of ground carved out of a farm, upon which a grave has been dug and used? Can the term "easement" be used to apply to a small area occupied by a grave or graves outside of any burial ground, either public or family? Our statutes only recognize two kinds of burial grounds; i. e., public and family burial grounds. If the graves in question in this case were in either a public or family burial ground, as such burial grounds are defined by the law, there would be no question of plaintiffs' right to relief. But have they a status under the facts here? Broadly speaking, an easement contemplates a dominant and a subservient estate. Excluding from view the fact that the possessory right to a lot in a cemetery is denominated by some writers as an easement which is inheritable, and going to the status of the plaintiffs in the case at bar, what interest, estate, or right have they to any part of their grandfather's land, which has passed by inheritance or deed to the defendant? That they have no title or interest in the fee is clear. Can it be said that they have an easement in the land by prescription? We think not.

In 14 Cyc. p. 1139, the essential elements of an easement are thus stated: "The essential qualities of easement are: (1) They are incorporeal; (2) they are imposed upon corporeal property, and not upon the owner of it; (3) they confer no right to a participation in the profits arising from such property; (4) they are imposed for the benefit of corporeal property; (5) there must be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests. In order to constitute an easement, there must be two estates, the one giving and the other receiving the advantage, denominated, respectively, the servient and the dominant estates."

The right to bury in a given tract of land is not a right "imposed for the benefit of corporeal property." In such case there is no such thing as a dominant estate to which the easement right can attach. The mere right to bury upon a tract of land in no sense fills the general definition of the term "easement."

But we have what is recognized in the law as rights or easements in gross. These are rights which rest upon lands in favor of a person or individual, and, of course, there is no dominant estate. But rights or easements of this character are not 40 L.R.A. (N.S.)

usually assignable; nor do they pass by descent. 14 Cyc. p. 1140.

Viewing the law of easements from all angles, we can see no remedy for these plaintiffs. There is no easement appurtenant, because no dominant estate. If a right or easement in gross, it would not pass by descent; and hence plaintiffs have no standing.

We have held that one having relatives buried in a public graveyard can, in equity, prevent the desecration of their graves. This, however, is on the theory that the land has been dedicated to a public use, and any interested party has a right to protect such public use. On the other hand, if the graves were in a family burying ground, then the rights of the parties to protect the graves are secured by the terms of the deed required to be executed and spread of record. Rev. Stat. 1909, § 1303. But where neither of these conditions exist, we can see no remedy. If it can be said that the Hook Case from our sister state holds that the placing of a body in a grave upon the land of another, and permitting it to remain there for the prescriptive term, creates an easement by prescription, which easement will descend to the legal heirs for all time, then we do not agree to the doctrines of that case. The bill in this case avers that defendant has denied plaintiffs all rights, except the right to remove the bodies. Of this right they had better avail themselves. To them it may seem harsh that they cannot be permitted to inclose the graves of their forefathers, to the end that their dust might rest in peace. So it seems harsh to us; but the harshness is not of our making. Defendant is standing upon the cold law, and that we must give him, if he asks and insists. It is not the humane idea which adjudicates the rights here involved, but the cold law as demanded by defendant. Under the law, we see no remedy for plaintiffs, and with regrets we so say.

Let the judgment be affirmed.

All concur.

WASHINGTON SUPREME COURT.

CITY OF TACOMA, Resp't,

v.

GUS W. KEISEL, App't.

(68 Wash. 685, 124 Pac. 137.)

Municipal corporation — power to prohibit treating in saloons.

1. Authority to forbid treating in saloons is conferred upon a municipal corpora-

tion by a charter empowering it to regulate the selling and giving away of intoxicating liquors, and to make regulations necessary for the preservation of peace and good order within its limits.

Intoxicating liquor — prohibition of treating — charter authority.

2. An ordinance forbidding the keeper of a saloon to permit liquor to be bought by one person and drunk by another in his place of business is not so unreasonable as not to be within the provisions of a charter empowering the municipality to regulate the selling and giving away of intoxicating liquors, and making regulations necessary for the preservation of peace and good order within its limits.

Same — inherent right to treat — power to remove.

3. There is no inherent right in a purchaser of intoxicating liquor to offer it to another in a saloon as an act of hospitality, which cannot be taken away under the police power of the state.

Municipal corporation — ordinance — forbidding treating — amendment.

4. An ordinance forbidding treating in saloons is not, because it makes regulations and restrictions upon the sale of intoxicating liquor, an amendment to existing ordinances regulating such traffic, so that it must be passed as an amendment rather than as an original ordinance.

Intoxicating liquor — forbidding treating — due process of law.

5. The keeper of a saloon is not deprived of his property without due process of law or of the equal protection of the laws, because he is made punishable for permitting treating in his place of business, while the persons purchasing the liquor are not punished for doing the treating.

(June 8, 1912.)

A PPEAL by defendant from a judgment of the Superior Court for Pierce County convicting him of selling intoxicating liquors in violation of an ordinance prohibiting treating in saloons. Affirmed.

The facts are stated in the opinion.

Messrs. Sullivan & Christian and Leo & Flaskett for appellant.

Messrs. T. L. Stiles, F. R. Baker, and F. M. Carnahan, for respondent:

The city had the right to regulate the selling or giving away of intoxicating liquors.

St. Louis v. Howard, 119 Mo. 41, 41 Am. St. Rep. 630, 24 S. W. 770; Rochester v. West, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673; Richards

v. Bayonne, 61 N. J. L. 496, 39 Atl. 708; People ex rel. Morrison v. Cregier, 138 Ill. 401, 28 N. E. 812; Higgins v. Mitchell County, 6 Kan. App. 314, 51 Pac. 72; Vinson v. Monticello, 118 Ind. 103; 19 N. E. 734; State v. Adamson, 14 Ind. 296; Williams v. State, 48 Ind. 306; Chicago Packing & Provision Co. v. Chicago, 88 Ill. 221, 30 Am. Rep. 545; Perry v. Salt Lake City, 7 Utah, 143, 11 L.R.A. 446, 25 Pac. 739, 998; Black, Intoxicating Liquors, ¶ 227; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

Parker, J., delivered the opinion of the court:

This defendant, being the proprietor of a saloon situated in the city of Tacoma, in which he was licensed by the city to sell intoxicating liquors, was charged with selling intoxicating liquor in his saloon to one person to be drunk on the premises by another person, in violation of the following ordinance of the city:

An ordinance to regulate the sale of intoxicating liquors in the city of Tacoma by the prohibition of treating, and to provide a penalty for the violation thereof.

Be it ordained by the city of Tacoma:

Section 1. Every licensed saloon in the city of Tacoma shall be conducted on the plan of 'No Treating;' and every owner of any such saloon shall post and keep posted in a conspicuous place within the bar of such saloon a white placard, on which shall be printed in black letters not less than three (3) inches high, the words, 'No Treating Saloon.'

Sec. 2. It shall be unlawful, for the owner of any licensed saloon in the city of Tacoma, or any agent, servant, or employee of such owner, to sell any intoxicating liquor to any person to be drunk on the premises by any other person, or to deliver to any person, other than the one buying the same, any intoxicating liquor to be drunk on the premises.

Sec. 3. Every owner, or agent, servant, or employee of such owner, of a licensed saloon in the city of Tacoma, who shall violate any of the provisions of this ordinance, shall, upon conviction thereof, be fined in any sum not exceeding \$100. Ordinance No. 4386.

Having been tried and convicted in the police court of the city, he appealed there-

Note. — While the prohibition of treating has been quite generally discussed and advocated as a temperance measure, *TACOMA v. KEISEL* appears to be the only case involving an attempt to put such a policy into law. However, social treating has some- 40 L.R.A. (N.S.)

times been prosecuted as an offense under general laws regulating the sale or furnishing of intoxicating liquors, and such cases are collected in a note to *People v. Peterson*, 21 L.R.A. (N.S.) 134.

from to the superior court for Pierce county, where he was again convicted, from which last conviction he has appealed to this court. The questions raised upon this appeal relate only to the validity of the ordinance; the principal contention being that it is void for want of power in the city to enact it. Tacoma is a city of the first class, having more than 20,000 inhabitants, and as such has framed and adopted a charter for its own government in pursuance of § 10, art. 11, of the state Constitution, and the act of the legislature of 1890 commonly called the "enabling act" (Laws 1890, p. 215; Rem. & Bal. Code, § 7494, and following). Section 5 of that act, being § 7507 of Rem. & Bal. Code, provides: "Any such city shall have power: . . . (32) to regulate the selling or giving away of intoxicating, malt, vinous, mixed, or fermented liquors; Provided, that no license shall be granted to any person or persons who shall not first comply with the general laws of the state in force at the time the same is granted; (33) to grant licenses for any lawful purpose; . . . (34) to regulate the carrying on within its corporate limits of occupations which are of such a nature as to affect the public health or the good order of said city, or to disturb the public peace, and which are not prohibited by law; and to provide for the punishment of all persons violating such regulations, and of all persons who knowingly permit the same to be violated in any building or upon any premises owned or controlled by them; . . . (36) to provide for the punishment of all disorderly conduct and of all practices dangerous to public health or safety, and to make all regulations necessary for the preservation of public morality, health, peace, and good order within its limits, and to provide for the arrest, trial, and punishment of all persons charged with violating any of the ordinances of said city; but such punishment shall in no case exceed the punishment provided by the laws of the state for misdemeanors." The city charter provides for the exercising of these powers by ordinance.

It is argued by counsel for appellant that the powers given to the city by the provisions of the enabling act above quoted do not confer upon it the power of prohibition of the liquor traffic, and that the validity of the ordinance can be sustained only upon the theory that the city possesses the power of prohibition. The authorities cited by counsel seem to sustain the view that the power of absolute prohibition is not conferred by the power to regulate only, which apparently is the extent of the power given by the language of the enabling act. Black,

Intoxicating Liquors, § 227; Woollen & T. Intoxicating Liquors, § 278. This is conceded to be the law by counsel for the city, and they do not contend that the city possesses the power from any other source. So, we need not further concern ourselves with the question of the city's power of absolute prohibition; which power, if existing, would seem to conclusively support the ordinance so far as the city's power to enact it is concerned. We will therefore discuss the question from the viewpoint of the grant of power by the terms of the enabling act, expressing no opinion as to what power of prohibition the city may possess, by virtue of the constitutional provisions enabling it to frame its own charter and to enforce local police regulations, the extent of its power from that source not being here discussed by counsel.

The problem for our solution then is, Does the power "to regulate the selling or giving away of intoxicating . . . liquors," taken in connection with the power to license and the power to ordain police regulations as conferred by the provisions of the enabling act above quoted, give to the city the power to regulate the liquor traffic in the manner provided by this ordinance?

We are first confronted by the fact that the ordinance does in a measure restrain and prohibit the disposition of intoxicating liquor, and this, it is insisted, amounts to more than regulation as that term is used in the enabling act. The word "regulate" seems to necessarily imply some degree of restraint and prohibition of acts usually done in connection with the thing to be regulated. It negatives the idea that all acts which would ordinarily be performed in connection therewith may be so performed without any restraint or prohibition whatever; and it seems to necessarily follow that some restraint upon the sale and giving away of liquor, as well as upon other acts in the conduct of the business which do not directly pertain to the disposition of the liquor, must fall within this power. In *Black on Intoxicating Liquors*, at § 227, that learned author, commenting upon the distinction between the power to regulate and the power to prohibit, adds: "But true regulation of the sale of intoxicants is not inconsistent with a partial or qualified prohibition." Justice Martin, speaking for the court of appeals of New York in *Rochester v. West*, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673, says: "To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business,

but also as to the erection in or upon which the business is to be conducted." In *Provo City v. Shurtliff*, 4 Utah, 15, 5 Pac. 302, in construing the power of the city to regulate under a grant of power which was held not to give the city the power to entirely prohibit, the court observed: "Under this statute, the power to license, regulate, or restrain is not questioned, and this power implies the power of partial prohibition to incumber the sale with conditions and limitations, to hinder and prevent in degree, and to prescribe reasonable rules by which the sale of intoxicating liquors to persons, and at places, is to be governed, to the end that the abuse to which they are obviously liable may, at least in degree, be prevented." In the following cases where the power to regulate or a general welfare clause only was involved, ordinance regulations were held valid which in a measure restrained and prohibited the disposition of intoxicating liquor. *Richards v. Bayonne*, 61 N. J. L. 496, 39 Atl. 708; *Morris v. Rome*, 10 Ga. 532; *Baton Rouge v. Butler*, 118 La. 73, 42 So. 650; *State ex rel. Howie v. Northfield*, 94 Minn. 81, 101 N. W. 1063; *Monroe v. Lawrence*, 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113; *Ex parte Hayes*, 98 Cal. 555, 20 L.R.A. 701, 33 Pac. 337; *People v. Case*, 153 Mich. 98, 18 L.R.A.(N.S.) 657, 116 N. W. 558. From these authorities and others which could be cited, it seems clear to us that the mere fact that the ordinance in some measure prohibits the sale and giving away of intoxicating liquors in licensed saloons in the city does not render the ordinance invalid because of lack of power to enact it; since a limited degree of prohibition is apparently one of the methods of regulating the liquor traffic recognized by law. This seems to reduce our problem to the question of the reasonableness of the ordinance.

In considering the question of the reasonableness of the ordinance, we must remember that we are here dealing with a general welfare power, together with the specifically granted power of licensing and regulating the selling and giving away of intoxicating liquors. It is argued that the provisions of the ordinance are so unusual that we cannot assume that the legislature contemplated a regulation of this nature by the language of the enabling act above quoted, which is general only, and leaves the nature and extent of the regulations which the city may make undefined. It is true that no ordinance of any municipality, no statute of any state, nor any decision of the courts, has come to our notice involving a prohibition against treating, though counsel for appellant say in their

brief that antitreating laws did exist for a short time in the states of Wisconsin and Nevada; and they call our attention to the doubts expressed by Professor Tiedman in his work on Limitations of Police Power at page 155, where, referring to these statutes, he says: "These regulations are open to the constitutional objections of a deprivation or restraint of liberty, in a case in which no right has been invaded." We are not cited to the volumes where these laws may be found, nor advised of their exact nature. If they prohibited the giving to another of liquor as an act of hospitality under any and all circumstances, and were restrictions upon all such acts wherever committed, independent of the regulation of the disposition of intoxicating liquor as a business, there might be some plausible argument to support that learned author's suggestion touching their constitutionality. But we think it hardly likely that he intended to express the opinion that the police power is not sufficient to support a prohibition against treating in places licensed for the sale of intoxicating liquors. It is inconceivable that the police power will not support any and every regulation and restraint, when it will support absolute prohibition. The question here, however, is not one of constitutionality, or the right of the legislature to itself make such a regulation or grant the power to make it to a municipality. But the question is, Is this ordinance so unreasonable as not to come within the power granted to the city of Tacoma? Now the mere fact that this is seemingly a new and unusual regulation is not conclusive, nor do we think it is even a very persuasive argument against the reasonableness of the ordinance. Every restriction upon the liquor traffic had a beginning somewhere at some time. It was only by the awakening conscience of the race that the evils of the liquor traffic became recognized to the extent that it has become regarded as a proper subject of control under the police power. Under the old common law a person was as free to engage in the disposition of liquor as a business as he was to engage in any other business. In *Woollen and Thornton on the Law of Intoxicating Liquors*, at § 323, the beginning of these regulations in England is interestingly mentioned as follows: "It is true that brothels and gaming houses were, at common law, under all circumstances held to be nuisances, but ale houses and other places in which intoxicating liquors were sold to be drunk were not so held or regarded unless they became disorderly, and in such cases it was not the mere sale of the liquors which constituted them nuisances, but it was the dis-

orderly conduct therein; or, in other words, the disorderly manner in which they were conducted or kept, and in such cases it was immaterial whether the keepers thereof were licensed or unlicensed. The first general statute restricting and regulating the keeping of ale houses and tippling houses was passed by the British Parliament in 1552, and was the act of the Fifth and Sixth Parliament of Edward VI. This statute constitutes chapter 25, p. 391, of the English Statutes at Large, 1540 to 1552. The preamble to this statute declares: 'For as much as intolerable hurts and troubles to the commonwealth of this realm doth daily grow and increase through such abuses and disorders as are had and used in common ale houses and other houses called tippling houses, it is therefore enacted by the King, our sovereign lord,' etc. At common law, prior to the passage of this statute, any person had the right, without a license, to keep and maintain ale houses and tippling houses. Such business was not regarded as a public offense, but was considered and held to be a means of livelihood which one was free to follow." The modern conception of the legal status of the liquor traffic in the United States is clearly expressed by Justice Field speaking for the Supreme Court of the United States in *Crowley v. Christensen*, 137 U. S. 86, 91, 34 L. ed. 620, 623, 11 Sup. Ct. Rep. 13, 15, as follows: "By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dramshop, where intoxicating liquors in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons; than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of Federal law. The police power of the state is fully competent to regulate the business,—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a 40 L.R.A. (N.S.)

privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils." So far as the rights of appellant are concerned, we are not able to see that the restraint placed upon his disposition of intoxicating liquor in his licensed saloon, by this ordinance, is any different in principle from the municipal-ordinance regulations, amounting in some degree to prohibition, such as are noticed and held to be valid in the decisions above cited, among which we find prohibitions against sales in licensed saloons during certain hours of the night, prohibitions against sales to women, limiting saloons to certain districts of the city, and limiting the number of saloon licenses to be granted in the city. Such regulations are clearly in a measure prohibitive; yet are sustained under grants of power to cities no broader than we are here dealing with, upon the theory that the acts prohibited are said to be conducive to immorality and public disorder in the municipality, and are therefore such as it has a right under such a grant of police power to suppress by prohibitive regulations. The legislature, by the enabling act above quoted, not only gave to the city the power to "license" and "regulate" this particular business, but also gave the power to "make all regulations necessary for the preservation of public morality, health, peace, and good order within its limits," but without specifically defining the extent or nature of such regulation. Clearly it must have been intended that the city could make regulations by ordinance relative to the liquor traffic, in addition to those found in the general laws of the state, and such as local conditions might suggest to the city authorities as appropriate and beneficial to the morals and good order of the people of the city. Otherwise this grant of power would serve no purpose, since all the regulations of the general state law would be in force without the city's action. It follows that the city authorities must have been intended to exercise some degree of discretion in determining the nature and extent of the regulations they should make. Now, we must assume that they were of the opinion that the custom of treating in saloons was a source of many of the evils which flow from the retail liquor traffic. They are by no means alone in entertaining this view; since many of our people have cause to regard the custom of treating in saloons as one of the principal sources of evil which the public suffers from the disposition of

intoxicating liquors. This being true, we cannot say that an ordinance which has for its purpose the prohibiting of such treating is unreasonable as a regulation of the liquor traffic, when such ordinance is enacted by virtue of the power here given to regulate that specific business, and also the general power to make regulations necessary for the preservation of public morality, unless we can say that there has been a clear abuse of discretion by the city authorities in the exercise of the power. The city authorities must, of necessity, in the first instance, decide upon the reasonableness of any such regulations, and their decision should be controlling upon the courts unless the unreasonableness of the ordinance is fairly free from doubt. Mr. McQuillin in his exhaustive and able work on Municipal Ordinances, at § 186, observes: "Judicial authority to declare an ordinance unreasonable is a power to be cautiously exercised. The rule is generally recognized that municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances, and hence the legal presumption is in their favor." In the early case of *Mobile v. Yuille*, 3 Ala. 137, 143, 36 Am. Dec. 441, 446, the court said: "As, however, by-laws are the rules of action which the inhabitants of a place prescribe for their own government, there is a peculiar propriety in permitting them to be the judges of what rules are necessary and proper, and such is the constant, the invariable, practice." These views but reflect the spirit of the right of local self-government so highly prized by all English-speaking people. A right which this grant of power was intended to foster, and a right which in this age of increasing enlightenment should be extended rather than curtailed. We are of the opinion that the ordinance is not unreasonable.

Some contention is made by counsel for appellant, which they seem to rest upon the supposed rights of the purchaser of liquor; it being argued that treating such as is here prohibited is an act of hospitality which has always been exercised by a free people. That argument could have been, and doubtless was, advanced in opposition to every regulation and restriction that was ever put upon the liquor traffic at the beginning of such regulation. In our opinion it is of no weight whatever in support of a practice which becomes recognized as a source of evil and a menace to public morality and good order. Just as the right to engage in the liquor traffic is not an inherent right in any citizen, neither is it an inherent right in any citizen to treat another in a licensed saloon which is under

the control of the police power being exercised by a municipality, as in this case. Whatever the right of the citizen may be elsewhere, he has no inherent right even to buy liquor, at such a place.

Some contention is made that this ordinance is invalid because it is in effect an amendment, but not enacted as such, to the general license ordinance of the city of Tacoma, which contains many regulations and restrictions upon the liquor traffic, and is in violation of that provision of the city charter which requires that in the amendment of an ordinance or section thereof such amendment shall be accomplished by a new ordinance which shall contain the entire ordinance as amended, and shall repeal the ordinance or section so amended. It will be noticed that this is an original ordinance in form, and does not purport to amend any ordinance. The argument seems to be that, since it provides additional regulations and restrictions upon the sale of intoxicating liquors, it is in effect an amendment upon the general ordinance upon that subject. We cannot agree with this contention. No authorities have been called to our attention indicating that such an ordinance is an amendment of a former ordinance, when the former ordinance does not purport to cover the regulations embodied in the new one. We think there are no decisions so holding. Both ordinances can stand without in the least conflicting with each other.

It is finally contended that this ordinance is in violation of those provisions of the Federal and state Constitutions which secure to the citizen his property, except as he may be deprived thereof by due process of law, and which guarantee to him the equal protection of the laws. The argument advanced is, in substance, that the offense defined by this ordinance, in order to be committed, must be participated in by the purchaser as well as the seller; and that, while the seller is to be punished therefor, the purchaser is not. This is an argument that might be made against a great many laws and ordinances which prohibit the selling of intoxicating liquor and other commodities, except upon certain conditions, and which punish only the seller, when violated by him. No authority has been called to our attention holding that such laws are in violation of the Federal or state constitutional provisions here invoked. Indeed, the act of selling and the act of buying are not, in contemplation of law, the same act; hence, it is not a case of making an act a crime when performed by one person, and not a crime when performed by another. We think appellant cannot rightfully complain upon

constitutional grounds, because he alone may be punished under the ordinance.

We conclude that the ordinance is a valid exercise of the power conferred upon the city by the provisions of the enabling act above quoted; that it was regularly enacted; and that it does not violate any of the constitutional rights of appellant either state or Federal. The judgment is affirmed.

Dunbar, Ch. J., and Crow and Gose, JJ., concur.

WASHINGTON SUPREME COURT.
(Department 1.)

MARY W. BARRETT, Resp.,
v.

ELLEN S. H. MONRO et al., Appts.

(— Wash. —, 124 Pac. 369.)

Landlord and tenant — deposit as liquidated damages — right of landlord to retain.

1. A deposit by one leasing for a five-year period, of two months' rent to indemnify the lessor against any loss or damage which he may sustain by reason of any violation of the contract by the lessee, as liquidated damages, may be retained by the lessor in case he is compelled to evict the tenant for nonpayment of rent, although he acts immediately upon the default, so that the deposit more than equals the rent due and unpaid.

Same — termination of lease — waiver of right.

2. A landlord does not, by electing to terminate the lease because of default in payment of rent, waive his right to retain a deposit made by the tenant as liquidated damages for any loss or damage which the landlord may sustain by reason of any violation of the contract by the tenant.

(June 26, 1912.)

APPEAL by defendants from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover the amount of a deposit held by defendants as liquidated damages to indemnify them against loss for breach of a lease. Reversed.

The facts are stated in the opinion.

Messrs. Revelle, Revelle, & Revelle, H. R. Olise, and C. K. Poe, for appellants:

The lease contained a clear and unequiv-

ocal agreement that the \$1,200 deposited by the lessee should be forfeited and held by the lessor as liquidated damages.

13 Cyc. 90; Drumheller v. American Surety Co. 30 Wash. 546, 71 Pac. 25; Reichenbach v. Sage, 13 Wash. 364, 52 Am. St. Rep. 51, 43 Pac. 354.

Where money is deposited as liquidated damages, or as a security for the covenants of the lease generally, the landlord, after dispossessing the tenant for a breach of the lease, is entitled to retain the deposit; and this retention does not deprive him of his rights to recover also rent due upon covenants of the lease during the period of the occupancy.

24 Cyc. 1143; Kahn v. Tobias, 16 Misc. 83, 37 N. Y. Supp. 632; Martin v. Lee, 29 Misc. 333, 60 N. Y. Supp. 515; Bernstein v. Heinemann, 23 Misc. 464, 51 N. Y. Supp. 467; Coro v. Greenwald, 52 Misc. 548, 102 N. Y. Supp. 752; Hecklau v. Hauser, 71 N. J. L. 478, 59 Atl. 18.

Messrs. John D. Dill and Foster & Worthington, for respondent:

The court could not enforce a forfeiture of the deposit as liquidated damages.

Wibaux v. Grinnell Live Stock Co. 9 Mont. 154, 22 Pac. 492; Caesar v. Robinson, 174 N. Y. 492, 67 N. E. 58; Everett Land Co. v. Maney, 16 Wash. 552, 48 Pac. 243; McDaniels v. Govey, 30 Wash. 412, 71 Pac. 12; American Copper, Brass & Iron Works v. Galland-Burke Brewing & Malting Co. 30 Wash. 178, 70 Pac. 236; Krutz v. Robbins, 12 Wash. 7, 28 L.R.A. 676, 60 Am. St. Rep. 871, 40 Pac. 415; Bell v. Scranton Coal Mines Co. 59 Wash. 659, 110 Pac. 628; Madler v. Silverstone, 55 Wash. 159, 34 L.R.A. (N.S.) 1, 104 Pac. 165; Hall v. Middleby, 197 Mass. 485, 83 N. E. 1114.

The eviction terminated the relation of landlord and tenant; and the surrender of possession of the premises in obedience to the writ of restitution, and the re-entry of appellants into possession thereof, preclude them from recovering any damages subsequent to the eviction.

Carson v. Arvantes, 27 Colo. 77, 59 Pac. 737; Caesar v. Robinson, 174 N. Y. 492, 67 N. E. 58; Sutton v. Goodman, 194 Mass. 389, 80 N. E. 608; Scott v. Montells, 109 N. Y. 1, 15 N. E. 729; Chaude v. Shepard, 122 N. Y. 397, 25 N. E. 358; Michaels v. Fishel, 169 N. Y. 381, 62 N. E. 425; Hecklau v. Hauser, 71 N. J. L. 478, 59 Atl. 18; 24 Cyc. 1143; D'Appuzo v. Albright, 76 N. Y. Supp. 654.

Note. — Upon the question whether a sum deposited to secure the performance of a contract is to be regarded as a penalty or liquidated damages, see note to Bilz v. Powell, 38 L.R.A. (N.S.) 847.
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As to the effect of a provision for damages in a land contract, as a penalty or stipulated damages, see note to Madler v. Silverstone, 34 L.R.A. (N.S.) 4.

Crow, J., delivered the opinion of the court:

There is no serious dispute as to the facts in this action. On April 15, 1909, defendants' predecessors in interest, as landlords, executed and delivered to plaintiff's predecessor in interest, as tenant, a five-year lease upon an apartment house in the city of Seattle for a rental of \$36,000, payable from the 1st to the 5th of each month in advance instalments of \$600 each. At the commencement of the term the lessee made the first payment, and also deposited with the lessors the sum of \$1,200, relative to which the lease contained the following material stipulations: "Party of the second part hereby agrees at the time of the execution of this lease to pay to the parties of the first part the sum of twelve hundred (\$1,200) dollars, which sum shall be held by the parties of the first part to indemnify them against any loss or damage which they may sustain by reason of any violation on the part of the party of the second part of the terms, covenants and agreements contained in this lease as liquidated damages. If said party of the second part faithfully performs and complies with all the conditions, stipulations, and agreements contained in this lease on his part to be performed, then the parties of the first part agree to apply said twelve hundred (\$1,200) dollars in payment of the monthly rental due for the last two months of the part of this lease." Defendants have succeeded to all rights and liabilities of the original lessors, and plaintiff has succeeded to all rights and liabilities of the original lessee. All monthly instalments of rent were paid until December 6, 1910, at which time plaintiff made default. On December 6, 1910, defendants as lessors served upon plaintiff as lessee the statutory three-day notice to pay rent or surrender the premises. Plaintiff continued in default. On December 10, 1910, the lessors commenced an action of unlawful detainer, and obtained a writ of restitution. Thereupon the lessee surrendered the premises and commenced this action to recover the \$1,200 deposit. Defendants as lessors asserted their right to retain the \$1,200 in satisfaction of their liquidated damages as agreed in the lease, while plaintiff insisted that the deposit was made as security for payment of rent only, and not to satisfy liquidated damages. The trial court held with plaintiff, found she was liable for ten days' rent in December, 1910, deducted the same from the deposit, and entered judgment in her favor for \$1,000, interest and costs. The defendants have appealed.

The question before us is whether the 40 L.R.A. (N.S.)

deposit was to be applied in payment of appellants' liquidated damages. We hold that it was. Respondent contends that the deposit was to secure payment of the monthly instalments of rent as they matured; that appellants themselves terminated the lease; that thereafter they were entitled to no rent; that they resumed possession; that they succeeded to the occupancy and use of the property; and that they cannot retain possession and appropriate the \$1,200 as liquidated damages. Respondent's position leads to the conclusion that she as lessee would be entitled to remain in possession without payment of rent until her defaults amounted to a sum equal to the \$1,200 deposit, and that appellants would be required to permit such default without terminating the tenancy, as they could apply the deposit in satisfaction of the delinquent rent. This construction would read into the lease a stipulation which it does not contain. Had appellants thus applied the deposit, and had the default continued until it was exhausted, they would have been without security for future rent, or for damages which might result from a further breach, and thereafter would have been subjected to a constant liability of losing their lease for the remainder of the term, without certainty of obtaining another tenant at an equally remunerative figure. They would also have been subjected to any damages they might sustain in recovering possession, and by reason of depreciation in rental value for the remainder of the term. It was respondent's duty to make the stipulated monthly payments. Her failure constituted an unquestioned breach of the contract, which subjected her to a termination of the lease and payment of the stipulated liquidated damages. When her breach occurred, appellants were entitled to give the statutory notice to terminate the tenancy in the event of her continued default, and thereafter retain the deposit in satisfaction of their liquidated damages. They were not required to permit a continuance of the default, and thus increase their damages to such an extent that the liquidated sum would be insufficient to protect them. The contract had no such purpose in view. It is manifest that the parties agreed upon liquidated damages because their exact measurement could not be readily made. The sum agreed upon is not unreasonable in view of the value and importance of the entire lease. The term had more than three years to run when respondent's default occurred. At the date of the lease, and also at the date of respondent's breach, it was impossible to determine the exact damages appellants might thereafter sus-

tain in loss of rentals or by reason of their inability to secure another tenant for a portion of the terms, at as remunerative a rental. Realizing this difficulty of making an exact measurement of such damages should a breach occur, and appreciating the fact that appellants might incur expense in recovering possession, in securing new tenants, in the possible necessity of making expensive changes or improvements as a condition precedent to obtaining a new tenant, and also in the possible depreciation of rental value, the parties agreed upon \$1,200 as liquidated damages.

Respondent, in support of her contention that the \$1,200 was deposited as security only, and that it could in no event be retained by appellants as liquidated damages, cites *McDaniels v. Gowey*, 30 Wash. 412, 71 Pac. 12. The instrument upon which that action was brought did not purport to stipulate any particular sum as liquidated damages, but was held to be an indemnity bond imposing a penalty. In an action on an instrument of that character, such damages only could be recovered as would be susceptible of proof by ordinary rules of evidence. In *Madler v. Silverstone*, 55 Wash. 159, 34 L.R.A. (N.S.), 104 Pac. 165, we said: "Generally speaking, it may be said that when the damages arising from the breach of the contract which the obligation is given to secure are uncertain in their nature, and not readily susceptible of proof by the ordinary rules of evidence, and are not so disproportionate to the probable damages suffered as to appear unconscionable, and it is reasonably clear from the whole agreement that it is the intention of the parties to provide for liquidated damages, and not a penalty, such a stipulation will be held to be one for liquidated damages."

The fallacy of respondent's argument lies in her assumption that the \$1,200 was advanced as security only. She ignores the probable contingency that a loss of the tenancy might cause damages to appellants difficult of ascertainment, whether termination of the tenancy resulted from a wrongful and voluntary surrender by respondent, or from respondent's default in payment of rent, coupled with appellants' election to then terminate the lease.

By exercising their election to terminate the lease, appellants did not waive their right to retain the liquidated damages. The default which caused such termination originated with respondent. Stipulations of the lease which this court had under consideration in *Dutton v. Christie*, 63 Wash. 372, 115 Pac. 856, are not identical in form of expression with those of the lease now before us. Yet similar prin-

ciples were involved in that case, and the doctrine there announced is controlling here. There the lease expressly recited that it was executed in consideration of the payment of the deposit, as well as for other considerations. That form of expression is not used in the lease now before us, yet the \$1,200 here involved was paid at the date of the lease, was necessarily a part of its consideration, and was one of the moving causes for its execution. Unquestionably it would not have been made without the deposit of \$1,200 coupled with the stipulation that it should be applied as liquidated damages in the event of the lessee's breach. Appellants were entitled to retain the \$1,200 in satisfaction of their liquidated damages.

Reversed and remanded, with instructions to dismiss.

Parker, Chadwick, and Gose, JJ., concur.

MICHIGAN SUPREME COURT

EX PARTE ELVIN W. CRANE.

(— Mich. —, 136 N. W. 587.)

Divorce — remarrying — contempt.

Going into another state, marrying, and immediately returning to one's domicile, is not punishable as a contempt of the court rendering a divorce decree and forbidding the divorcee to remarry within a specified time, as required by a statute, if the penalty provided by statute for such remarriage is punishment for bigamy.

(McAlvay and Brooke, JJ., dissent.)

(June 12, 1912.)

PETITION for a writ of habeas corpus to secure the release of petitioner from custody of the sheriff of Genesee County, to which he had been committed for an alleged contempt. Petitioner discharged.

Note. — Marrying out of state contrary to decree as contempt of court.

As to the validity of such a marriage, see notes in 11 L.R.A. (N.S.) 1082, 17 L.R.A. (N.S.) 800, 26 L.R.A. (N.S.) 179, and 28 L.R.A. (N.S.) 753.

Although the reports furnish abundance of authority as to the validity of marriages of divorced persons celebrated out of the state contrary to decree of court, or in violation of statutory prohibitions against the remarriage of persons divorced on certain grounds, the precise question which forms the subject of this note seems to have been but seldom before the courts for adjudication.

Statement by Ostrander, J.:

3 Comp. Laws, § 8658, reads as follows: "The court granting a decree of divorce may provide in such decree that the party against whom any divorce is granted shall not marry again within such time as shall be fixed by the court, which time shall be set out in the decree: Provided, that such time shall not exceed the period of two years from the time such decree is granted. And in case any person shall marry contrary to the time set out in such decree, said party shall be deemed to have committed the crime of bigamy, and shall be subject to the pains and penalties therefor."

In the circuit court, in chancery, for the county of Genesee, Michigan, January 29, 1912, one Allie Crane was granted a decree of divorce from petitioner; the decree specifying that the defendant (petitioner here) should not remarry for a period of two years from and after the date of said decree. Less than one month thereafter petitioner was a party to a marriage ceremony performed at Windsor, Ontario, February 22, 1912, according to which ceremony he

was married to one Anna Henniger by a clergyman licensed to celebrate marriages. Petitioner and said Anna Henniger returned to Flint, Michigan, the former and present domicil of petitioner, where they have since lived as man and wife. Certain friends of the said court presented therein a petition advising the court that its decree had been thus disregarded, and praying that the petitioner be proceeded against as for a contempt.

Such proceedings were thereafter had that the court found and determined that the said acts and doings of petitioner were calculated to and did impair the respect due to the authority of the court, and tended to prejudice the court in the enforcement of its orders and decrees and to interfere with its rights and lessen its dignity, and that the petitioner was guilty of contempt. He was sentenced and committed to the common jail of the county for a period of thirty days. Petitioner applied to the court for a writ of habeas corpus, which was allowed. The sheriff of the county of Genesee returns that he holds petitioner by

So far as the reported cases reveal, the earliest decision on the subject was rendered by the supreme court of New York in *Marshall v. Marshall*, 48 How. Pr. 57, 4 Thomp. & C. 449, in that case the plaintiff was applying for a divorce from his second wife, to the same court which had granted his first wife a divorce for his adultery, and by its decree had prohibited his remarriage during her lifetime. Prior to her death the plaintiff and defendant, both residents of the state of New York, went into the state of Pennsylvania, and contracted a marriage valid by the laws of that state, and returned immediately to New York, where they continued to reside. The court, after reaching the conclusion that the language of the statute allowing the decree was broad enough to prohibit and avoid the marriage, decided that, regardless of the question of the validity of the marriage, the case could be disposed of on the ground of contempt, and in denying the plaintiff relief said: "It would not, it is fully conceded, be the exercise of a sound judicial discretion to hold that a party in contempt has no right to bring any action in this court, but whilst conceding this it is maintained with equal earnestness that when a party seeks relief from an act which he has been forbidden to do, the court to which such application is addressed has a right to withhold the remedy asked. This, we submit, is the exercise of a sound judicial discretion, and is neither arbitrary nor unreasonable. Mr. Marshall had been forbidden by the solemn judgment of this court from contracting a second marriage. This suit is founded upon his disobedience of the command. By it we are informed that our mandate has been disregarded and our power defied, and whilst communicating this information we

are told that that which we have forbidden to be done is valid and legal despite the forbidding, and that we are compelled to use the power which the law has conferred upon us to aid him in the offense he has committed.

We cannot consent thus to stultify ourselves. We cannot so hold; and we decide that this is a proper case to refuse the relief sought, and we now place such a refusal among the penalties of such contempts, if it never has been before so adjudicated."

The authority of that case on the point, however, has been nullified by a decision of the court of appeals in *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189, on which the court in *EX PARTE CRANE* seems to base its decision. There the facts were practically the same as in *Marshall v. Marshall*, supra, with the exception that the parties went into the state of Pennsylvania for the avowed purpose of evading the prohibition contained in the decree of the New York court. The language of the statute allowing the decree was the same in substance as that of the statute considered in *Marshall v. Marshall*, and the counsel for the defendant contended that, notwithstanding the validity of the plaintiff's marriage, he was in contempt for marrying contrary to the court's decree, and should be denied relief from the obligation so incurred, as was done in the earlier case. But the court was of the opinion that, since the statute allowing the decree was penal in nature, and did not expressly prohibit marriages in another state, neither it nor the decree could have any effect outside the state, and refused, therefore, to adjudge the plaintiff in contempt, and granted him the relief prayed for.

W. W. A.

virtue of an order of the said court, a copy of which is given.

The facts are not in dispute. The validity of the decree of divorce is not denied. The contention of petitioner is that, because the act of remarrying took place in a foreign jurisdiction, no contempt can be predicated thereon. The argument which is made is in substance that the statute provides an exclusive penalty for such a remarriage, which can have no extraterritorial effect; that the Canadian marriage is valid in Canada, and therefore is valid everywhere; that consequently petitioner is not guilty of bigamy, nor, in contracting a valid marriage, is he guilty of contempt. It is a further contention that the statute (1 Comp. Laws, § 1098), in which is recognized (if not conferred) the power of a court to punish as for a criminal contempt "wilful disobedience of any process or order lawfully issued or made by it," does not include disobedience of a final decree of the court. On the other hand, it is contended, not that the Canadian marriage is void, but that, whether it is or is not a valid marriage, the power of the court imposing the restriction upon petitioner, to punish the wilful disobedience of its decree, is clear, and is a power inherent in the court.

Mr. William V. Smith, for petitioner:

The defendant is not in contempt for a remarriage in a foreign state.

Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189; Haines v. Haines, 35 Mich. 144.

Messrs. Guy W. Selby, and Daniel Helms, for respondent:

Courts have inherent power to punish for contempt, and the statutes relative to contempt are simply declaratory of common law on the subject.

Langdon v. Wayne Circuit Judge, 76 Mich. 367, 43 N. W. 310; Re Chadwick, 109 Mich. 588, 67 N. W. 1071; Cartwright's Case, 114 Mass. 230; Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; State v. Morrill, 16 Ark. 384.

The statute under which the decree was granted is constitutional and valid, and the decree made thereunder is also valid, and has extraterritorial effect.

Lanham v. Lanham, 136 Wis. 360, 17 L.R.A. (N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787; Pennegar v. State, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; Carmena v. Blaney, 16 La. Ann. 245; Hills v. State, 57 L.R.A. 170 (note); McLennan v. McLennan, 31 Or. 480, 38 L.R.A. 863, 65 Am. St. Rep. 835, 50 Pac. 802; Smith v. Fife, 4 Wash. 702, 17 L.R.A. 573, 30 Pac. 1059; Stull's Estate, 183 Pa. 625, 39 L.R.A. 539, 63 Am. St. Rep. 40 L.R.A. (N.S.)

776, 39 Atl. 16; Williams v. Oates, 27 N. C. (5 Ired. L.) 535.

Ostrander, J., delivered the opinion of the court:

It is apparent that the power of the court to impose the restriction upon petitioner is derived from, and is in execution of, the statute. The force and effect of the statute cannot be extended by the decree. Therefore, if for any reason the action of petitioner was not in violation of the statute, neither was it in disregard of the decree. I conceive that the case would be different if the court had the power, independent of statute, to impose the restriction. Courts of equity not infrequently made decrees controlling the conduct of parties in any jurisdiction into which they may go. In the instant case the decree is effective as the statute is effective, and not otherwise. I am of the opinion, therefore, that the conviction of petitioner cannot be sustained if his marriage is considered to be valid.

It is impossible, I think, to consider the disregard of the decree separate from the disobedience of the statute. Petitioner has not disregarded the decree if he has not also disobeyed the statute. The court by virtue of the statute commanded the petitioner not to remarry. The consequences of a remarriage are stated in the statute, and are: "In case any person shall marry contrary to the time set out in such decree, said party shall be deemed to have committed the crime of bigamy, and shall be subject to the pains and penalties therefor." I conclude that, whether the Canadian marriage was valid or was invalid, the court had no jurisdiction to punish petitioner as for a criminal contempt. An order will be entered discharging petitioner from custody.

While I have found it unnecessary to determine the scope of the statute, it is not improper to direct attention to the fact that it seems to be penal in character; a fact which must be considered in any case in determining its effect. Statutes imposing restrictions upon the remarriage of divorced persons are not uncommon, and in some jurisdictions are operative without the aid of an express restriction in the decree of divorce. Manifestly, if a statute is so drawn that prohibitions must be considered as applying only to marriages solemnized within the state, divorced persons may with impunity remarry in a foreign jurisdiction, and return to and live in the state. On the other hand, if a statute is so drawn as to clearly disclose a state policy which regards as void all marriages in disregard of the statute restriction, wherever the mar-

riages are celebrated, the courts must determine the rights of parties accordingly.

It was held in *New York*, in *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, approved in *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189, that a provision of the Revised Statutes prohibiting the second marriage of a person divorced on the ground of his or her adultery, during the life of the former husband or wife, and declaring such marriage void, had no application, as they are in the nature of a penalty, and have no effect outside of the state, in the absence of the express terms of the statute showing legislative effect to give them that effect. And in the case last referred to, in which a divorced person who was within the terms of the statute had remarried in another state, and was applying for a divorce from the person he had so married, it was held that the fact that in remarrying he had disregarded the terms of the former decree of divorce was not ground for refusing him relief. The answer to the contention that he was in contempt was that neither the decree nor the statute which authorized it had any effect outside the jurisdiction of the state. In Wisconsin the statute considered was: "It shall not be lawful for any person divorced from the bonds of matrimony by any court of this state to marry again within one year from the date of the entry of such judgment or decree, and the marriage of any divorced person solemnized within one year from the date of the entry of any such judgment or decree of divorce shall be null and void." Laws 1901, chap. 271, amended by Laws 1905, chap. 456.

In *Lanham v. Lanham*, 136 Wis. 360, 17 L.R.A. (N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787, the court considered the application of a widow to have support out of the estate of her alleged deceased husband. It appeared that she had been divorced in Wisconsin from a former husband, and had within a month remarried in Michigan, with the purpose of evading the Wisconsin law. It was held that the Michigan marriage was void, and in reaching this conclusion the court declared the statute was not a penal law, and that the law was a declaration of the policy of the state to regard such marriages, wherever celebrated, as invalid in Wisconsin. Other cases to which reference may be made are *Pennegar v. State*, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; *McLennan v. McLennan*, 31 Or. 480, 38 L.R.A. 863, 65 Am. St. Rep. 835, 50 Pac. 802; *Stull's Estate*, 183 Pa. 625, 39 L.R.A. 539, 63 Am. St. Rep. 776, 39 Atl. 16; *Smith v. Fife*, 4 Wash. 702, 17 L.R.A. 573, 30 Pac. 1059; *State v. Shattuck*, 69 Vt. 403, 40 L.R.A. 428, 60 Am. 40 L.R.A. (N.S.)

St. Rep. 936, 38 Atl. 81. Also see 14 Cyc. 729; 26 Cyc. 829.

Steere and Bird, JJ., concurred with *Ostrander, J.*

McAlvay, J.:

I cannot concur in the opinion of Mr. Justice Ostrander, which discharges petitioner from custody for a contempt of court committed purposely and probably under advice. In my opinion the decree prohibited absolutely the marriage of petitioner within a period of two years. The statute was intended by the legislature declaratory of the policy of the state prohibiting the marriage of a divorced party anywhere. The statute in declaring a party who marries contrary to its provisions guilty of bigamy does not necessarily require a construction that such act will deprive the court of the inherent power to punish as for contempt a disobedience of its decree.

No authorities are cited that go to this extent. The legislature could not have intended such a result, and no rule of construction should obtain which necessarily deprives the courts of powers which have always been recognized.

In my opinion this statute should receive that same construction given by the supreme court of Wisconsin to a statute of like import.

The writ should be denied.

Brooke, J., concurred in result reached by *McAlvay, J.*

NORTH CAROLINA SUPREME COURT.

R. R. COTTON, Appt.,

v.

J. M. MOSELEY et al.

(— N. C. —, 74 S. E. 454.)

Deed — Shelley's Case — deed to man and wife — remainder to heirs of wife.

A conveyance to a man and wife for life, remainder to the heirs of the wife, vests the fee in the wife subject to the husband's life estate.

(April 3, 1912.)

APPEAL by plaintiff from a judgment of the Superior Court for Pitt County in defendants' favor in an action brought to

Note. — See note to the Rule in *Shelley's Case*, in 29 L.R.A. (N.S.) 963, and especially page 995, as to joint and successive estates.

determine title to certain real estate. Reversed.

Statement by Walker, J.:

This case was heard below upon the following admitted facts: On September 13, 1871, William Gardner, being then the owner in fee of the tract of land in controversy, containing 140 acres, conveyed the same by deed "to Henry C. Gardner and his wife, Martha Jane Gardner, during their natural lives, afterwards to Martha Jane's heirs forever." The said grantees entered into possession of the land on that day, and continued in the possession until January 2, 1886, when they conveyed the land in fee by their deed duly executed to the plaintiff, R. R. Cotton, and he contracted to sell and convey the same in fee by deed, good and sufficient for the purpose, to the defendants J. M. Moseley and W. B. Wooten. Plaintiff tendered a deed to them for the premises, and they declined to accept it and pay the purchase money, because the title is defective, as by the terms of the deed of William Gardner to Henry C. and his wife, Martha Jane, they acquired only a life estate, with remainder to the heirs of Martha Jane, who, it is alleged, take by purchase, and not by descent, and that the said heirs now claim the land accordingly, subject to the life estate of Henry C. Gardner, who is now living, his wife, the said Martha Jane, being dead. The heirs of Martha Jane Gardner are defendants in this case. The court held, and so adjudged, that the deed of William Gardner to Martha Jane Gardner did not convey the fee, but only a life estate, and therefore the plaintiff's deed will not convey a fee-simple estate to Moseley and Wooten. Plaintiff appealed.

Messrs. F. G. James & Son and Aycock & Winston, for appellant:

The wife has the fee.

1 Fearn, Contingent Remainders, 32-34; 1 Co. Inst. 378; 1 Preston, Estates, 315; Modestia, Law Lectures, 590; Pearson, Law Lectures, 146; 25 Am. & Eng. Enc. Law, 643, 644, note 1; Fuller v. Chamier, L. R. 2 Eq. 682, 35 L. J. Ch. N. S. 772, 12 Jur. N. S. 642, 14 Week. Rep. 913; Walker v. Taylor, 144 N. C. 175, 56 S. E. 877; Sessoms v. Sessoms, 144 N. C. 121, 56 S. E. 687; Jones v. Ragsdale, 141 N. C. 200, 53 S. E. 842; Morrisett v. Stevens, 136 N. C. 160, 48 S. E. 661; Whitfield v. Garriss, 131 N. C. 148, 42 S. E. 568; Starnes v. Hill, 112 N. C. 1, 22 L.R.A. 598, 16 S. E. 1011; 2 Washb. Real Prop. 648; 4 Kent, Com. 255, 256; Hess v. Lakin, 7 Ohio S. & C. P. Dec. 300; Merrill v. Rumsey, 1 Keble, 888; Frogmorton ex dem. Robinson v. Wharrey, 3 Wils. 144; Den ex dem. Trickett v. Gillet, 2 T. R. 40 L.R.A. (N.S.)

431, 1 Revised Rep. 516; Note in the rule in Shelley's Case, 29 L.R.A. (N.S.) 1069; White v. Clark County Nat. Bank, 22 Ky. L. Rep. 932, 59 S. W. 505; Quick v. Quick, 21 N. J. Eq. 13; Patterson v. Patterson, Dayt. 288, 3 Laning Ohio Cyc. Dig. 5865; Kepler v. Reeves, 7 Ohio Dec. Reprint, 34; Badgley v. Hanford, 12 N. J. L. J. 75.

Messrs. W. A. Finch and C. O. Pierce, for appellees:

Husband and wife, in law, are but one person. They are seised of joint estates *per tout, et non per my*.

Den ex dem. Motley v. Whitmore, 19 N. C. (2 Dev. & B. L.) 537; Bruce v. Nicholson, 109 N. C. 202, 26 Am. St. Rep. 562, 13 S. E. 790; 2 Jarman, Wills, § 157; Den ex dem. Needham v. Branson, 27 N. C. (5 Ired. L.) 426, 44 Am. Dec. 45; Co. Litt. 107; 1 Fearn, Contingent Remainders, p. 40.

It is only when the fee is limited to the joint heirs of husband and wife that the rule in Shelley's Case will apply.

Shaw v. Robinson, 42 S. C. 342, 20 S. E. 161; 1 Kerr, Real Prop. § 501.

Walker, J., delivered the opinion of the court:

The question in the case is whether the limitation of the estate to husband and wife for their natural lives, afterwards to the heirs of the wife forever, is sufficient to pass the fee under the rule in Shelley's Case. The principle embodied in this rule, which, perhaps, was first formally and authoritatively announced by all the judges during the reign of Elizabeth, in the case from which it takes its name (1 Coke, 88b), was of far more remote origin, and for many years had been called "an ancient dogma of the common law." The principal and most forceful reasons advanced for adopting the rule were to prevent the abeyance or suspension of the inheritance, and to facilitate the alienation of land, throwing it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life and the heir was declared a purchaser. "Therefore," said Justice Blackstone, "where an estate was limited to the ancestor for life, and afterwards (mediately or immediately) to his heirs, who are uncertain till the time of his death, the law considered the ancestor as the first and principal object of the donor's bounty; and therefore permitted him (who, as it is said, Co. Litt. 22, beareth in his body all his heirs, and who had the only visible and notorious freehold in the land) to sell it, devise it, where the custom would permit, or charge it with his debts and encumbrances. And however narrow and illiberal

the original establishment of this rule, or the adhering to it in later times, may have been represented in argument, I own myself of opinion that those constructions of law which tend to facilitate the sale and circulation of property in a free and commercial country, and which make it more liable to the debts of the visible owner, who derives a greater credit from that ownership,—such constructions, I say, are founded upon principles of public policy altogether as open and as enlarged as those which favor the accumulation of estates in private families by fettering inheritances till the full age of posterity now unborn, and which may not be born for half a century.” [Perrin v. Blake, Hargrave’s Law Tracts, 500]. The rule has also been fiercely assailed by some and mildly criticized by others, as being at war with our free institutions and policy, and as founded upon subtle and artificial reasons and extremely technical considerations. Whether it is an arbitrary rule which is calculated to defeat rather than to execute the intention of the grantor we are not at liberty to inquire, as it has been firmly established in our jurisprudence as a rule of law, which we must enforce whenever applicable.

The question before us is as to the legal effect of the deed of William Gardner to Henry C. and his wife, Martha Jane Gardner. Did it convey the fee to Martha, under the rule in Shelley’s Case? We are of the opinion that it did. The defendants contend that the subsequent limitation must be to the heirs of the person who takes the particular estate,—that is, in this case, the second limitation should have been to the heirs of both husband and wife, as they were seised of the entirety, and did not take by moieties; but such is not the true operation of the rule.

If the limitation had been to the wife for life, remainder to the heirs of the husband and wife, the freehold being in the wife alone, the limitation over would be a contingent remainder, and their heirs would take as purchasers, because the heirs of the husband would not necessarily be the heirs of the wife. 2 Washb. Real Prop. 5th ed. p. 649; Frogmorton ex dem. Robinson v. Wharrey, 3 Wils. 125. As Fearne (page 38) says: “Every person may so far be supposed to carry his own heirs, etc., in himself during his life, as that a limitation to them where he takes a preceding freehold may vest in himself; yet no person can be supposed to include in himself the heirs, etc., of himself and of somebody else.” Coke (p. 26a) refers to this passage from Littleton: “If tenements be given to a man and to his wife, and to the heirs of the bodie of the man, in this case the

husband hath an estate in generall taile, and the wife but an estate for terme of life. Also if lands be given to the husband and wife, and to the heires of the husband which he shall beget on the body of his wife, in this case the husband hath an estate in especiall taile, and the wife but an estate for life. And if the gift be made to the husband and to his wife, and to the heires of the body of the wife by the husband begotten, there the wife hath an estate in especiall taile, and the husband but for terme of life. But if lands be given to the husband and the wife, and to the heires which the husband shall beget on the body of the wife, in this case both of them have an estate taile, because this word (heires) is not limited to the one more than to the other.” Commenting upon this passage, Coke says: “This word (heires) is *nomen operaticum*. To which of the donees it is limited, it createth the estate taile; but if it incline no more to the one than to the other, then both doe take, as here Littleton putteth the case.” In pleading seisin of such an estate (when the inheritance inclines to the wife), “it shall be alleged that they were seised together and to the heirs of the body of the wife in her right; and not that they were seised of the freehold or fee tail.” 1 Co. Litt. § 28, and note 1. And Fearne (page 39) tells us that “the same distinction was particularly relied on” in Reps v. Bonham, Yelv. 131, “where, upon a feoffment to the use of R. and his wife for their lives, remainder to the use of the first, second, and third son of the body of the wife, and afterwards to the heirs of the body of the wife by R. to be begotten, it was held that the inheritance was only in the wife, because the word ‘heirs,’ which made the inheritance, was annexed only to the body of the wife; but that, if it had been to the heirs which the husband shall beget on the body of the wife, it would have been an estate tail in them both.” In the official report of this case it is stated to have been held that R. had an estate for life and his wife an estate tail, and “thus was adjudged by all of the court, without any scruple.” In a note to that case it is said that, to whichever body the word “heirs” inclines by the limitation, it creates a descendible estate in such person; but if it be not more particularly limited to the body of one than the other, but inclines to each alike, then it creates a descendible estate in each of them. 3 Bacon, Abr. Bouviers’ ed. p. 439. It is not necessary that the limitation to the heirs should be enjoyed immediately upon the death of the first taker. Nor will it have any effect to exclude the rule that the remainder cannot by possibility vest as a remainder in the lifetime of the ancestor,

as where the limitation was to A and B and the heirs of him who should die first. So, if the remainder be limited on a contingency which does not happen in the ancestor's lifetime, nevertheless the heirs will take by descent. The mere circumstance that the remainder was contingent does not prevent the operation of the rule the moment the remainder vests. Thus an estate limited to A for life, and if A survives B, then to his heirs, would be a contingent remainder in A, depending upon his surviving B. If he does, his estate becomes at once vested, and his term for life merges in the inheritance. *Starnes v. Hill*, 112 N. C. 1, 22 L.R.A. 598, 16 S. E. 1011.

As a consequence from the foregoing principles, whoever has a freehold which, by the terms of the limitation, is to go to his heirs, may alien the estate, subject only to such limitations as may have been created between his freehold and the inheritance limited to his heirs. Thus, where the limitation is to A for life, and after his death to B for life, and after his decease to the heirs of A, A practically has two estates,—one in possession, the other in remainder; the first for life, the other in fee, divided by the estate to B. And if B were to die in the life of A the latter's estate would merge, and he would at once become the unlimited tenant in fee of the estate. 2 Washb. Real Prop. 5th ed. p. 650. There are many cases in the books where it has been held that if an estate is limited to several persons for or during their lives, with remainder to the heirs of one of them, that one will take a fee, subject, of course, to the life estates of the others. See exhaustive note on the rule in *Shelley's Case* to Price v. Griffin, and other cases, in 29 L.R.A. (N.S.) 935. The rule is said to act "upon the words of inheritance, and does not affect the rules for determining the quantity of estate conveyed, or the number and connection of the owners of the land." The very question presented in this case has been decided in other jurisdictions. In *Hess v. Lakin*, 7 Ohio S. & C. P. Dec. 300, where the grant was to a man and a woman during their natural lives, then to the woman's heirs at law, it was held that the woman took a fee in the whole tract of land, expectant as to one moiety, or subject to that life estate; and the court said: "It must be conceded the rule only applies when the subsequent limitation is to the heirs of him to whom the preceding estate was given, but nowhere has it been affirmed in express terms, by either a court or a text-writer, that the ancestor must take the whole of the preceding estate, or, if there is more than one preceding estate, he must have all of them. There is just as much

reason for requiring him to have all of them when several antecede the remainder as there is for requiring him to have the entire preceding estate when only one precedes the remainder." The rule is learnedly discussed in that case, and was held to apply to a limitation similar to the one in the *William Gardner* deed. The two cases are strikingly alike in their facts, for in *Hess v. Lakin* it was decided that the wife acquired a fee simple, subject to her husband's life estate, and, having purchased that estate, she held the entire fee, which was therefore conveyed by her subsequent deed. The following authorities are cited in support of the decision: 1 *Preston, Estates*, 337-340; *Fearne, Contingent Remainders*, 36; *Fuller v. Chamier*, L. R. 2 Eq. 682, 35 L. J. Ch. N. S. 772, 12 Jur. N. S. 642, 14 Week. Rep. 913; *Bullard v. Goffe*, 20 Pick. 252. The court gives the following extract from *Wooddeson* [Lectures, vol. 2, p. 207, note]: "If the particular estate be to A and B jointly for their lives, remainder to the heirs of the body of B, this would be an estate tail in B, executed *sub modo* [in B] so as to make the inheritance not grantable, . . . [distinct from the particular estate of freehold] by way of remainder, but, on the other hand, not to sever the jointure, or entitle the wife of B to dower." *Preston, Estates*, 338. This corresponds with what is said in *Fearne* on *Contingent Remainders* at page 36. The same was decided in *Kepler v. Reeves*, 7 Ohio Dec. Reprint, 34, in which there was a grant to husband and wife for their lives, remainder to the heirs of the wife. Judge Avery, delivering the opinion of the court, said: "Where either husband or wife singly has an estate for life, and the subsequent limitation is to the heirs of the two, it is widely different from where the life estate is in the two, with a limitation singly to the heirs of one. No person can be supposed to include in himself the heirs of himself and some other person, and yet may so far be supposed to carry his own heirs in himself during life that a limitation to them, where he takes a preceding freehold, will vest in him. That the preceding freehold may be taken jointly by himself with others seems, according to the authorities, not to make a difference. It is laid down that the subsequent limitation to the heirs must be confined to those of the ancestor who takes a particular estate, but at the same time that, if the heirs be confined to those of the persons taking a particular estate, it matters not whether the estates of the ancestors be several (so they all take) or joint, nor whether the remainder over be to the heirs of all, or only of some of such ancestor, *Watkins, Descents*, p. 162; *Fearne*,

Contingent Remainders, 36; 1 Preston, Estates, 315-320; 2 Preston, Estates, 442; Rogers v. Downs, 9 Mod. 292; Wiscot's Case, 2 Coke, 61. In Fuller v. Chamier, L. R. 2 Eq. 682, 35 L. J. Ch. N. S. 772, 12 Jur. N. S. 642, 14 Week. Rep. 913, it was held that [an estate] to A, B and C in equal shares during life, and after decease unto the next lawful heir of A forever, was a limitation within the rule of Shelley's Case, and that A took an estate in fee simple. In Bullard v. Goffe, 20 Pick. 252, upon a conveyance to the use of husband and wife for their lives, and the life of the survivor, and after their decease to the use of H for life, and after decease of H to the use of the heirs of the wife forever, it was held that a fee simple in the land vested in the wife, in the case of her surviving her husband and H. This last case furnishes a precedent precisely in point, and will be followed." So in Patterson v. Patterson, Dayt. 288 (cited in Laning, Ohio Cyc. Dig. 5865), it was held that "where title to lands is derived by deed limiting it to a person and her husband during their lives, and to the heirs of her body forever, the grantees in the deed take an estate tail [for their lives] under the rule, and the children take by descent, and not by purchase, and the husband is entitled to the estate by curtesy, and there can be no partition." In Griffiths v. Evan, 5 Beav. 241, 11 L. J. Ch. N. S. 219, a devise of a freehold estate to testator's daughter for life and the life of her husband, and after their deaths to the use of the lawful issue of the body of the wife forever, the testator empowering and authorizing the daughter, for want of such issue, to settle and dispose of the estate as she should think fit by will, was held to create an estate tail in the daughter, with a power of appointment. Under a deed by which lands were conveyed to a man and his wife during the term of their natural lives, and to the heirs of the wife and her assigns forever, to have and to hold unto the said husband and wife during the term of their natural lives, and to the heirs of the wife and their assigns forever, it was held that the wife took a fee simple. Badgley v. Hanford, 12 N. J. L. J. 75. The court said (by Van Syckel, J.) that where the particular estate is granted to two, with a limitation to the heirs or heirs of the body of one of them, the inheritance is executed in the person to whose heirs it is limited. And it was further said: "This case, I think, is not excluded from the rule in Shelley's Case by the fact that the husband was entitled to the use of the property during the joint lives of himself and wife. Washburn v. Burns, 34 40 L.R.A.(N.S.)

N. J. L. 18; Bolles v. State Trust Co. 27 N. J. Eq. 308. That is an incident of the marriage relation necessarily flowing from the unity of husband and wife. Each was in law, however, seised of the entirety, and all the conditions were fulfilled which are necessary to bring it within the rule in Shelley's Case. The particular estate and the remainder in her were created by the conveyance from Simpson."

It is the form of the second limitation which determines the application of the rule, and it is so held in Crockett v. Robinson, 46 N. H. 461. Under the rule in Shelley's Case, the court said: "It is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. If the limitation were to A for life, remainder to his heirs in fee simple, without other qualifying words, the actual intention would undoubtedly be that A should take an estate for life only and have no power to dispose of the remainder in fee, and negative words saying that A should take for life only would add nothing to the clearness of the first words. The material inquiry is, What was taken under the second devise? If those who take under the second devise take the same estate that they would take as his heirs or as heirs of his body, the rule applies. However clear the intention may be to create an estate in A for life, remainder to his heirs, so that the estate shall go to those persons who are the heirs of A, and descend to his heritable blood in line of descent, the policy of the law, which established the rule in Shelley's Case, did not allow such a limitation. By that rule no person was permitted to raise in another an estate of inheritance, and at the same time make the heirs of that person purchasers. 6 Cruise, Real Prop. 325, 326, 328; Fearnle, Contingent Remainders, 196; Hargrave's Law Tracts, 551; Kent, Com. 208, 214; Denn ex dem. Webb v. Puckley, 5 T. R. 299, 303; Richardson v. Wheatland, 7 Met. 172." This passage was cited with approval in Nichols v. Gladden, 117 N. C. at page 502, 23 S. E. 459, in which the court said that "the material inquiry is, What is taken under the second devise?"

As H. C. Gardner survived his wife, the limitation is the same, in legal effect, as if it had been to his wife for life, then to him for life, and ultimately to the heirs of his wife. She acquired a fee simple, subject to his life estate, and, as he joined with her in the deed to R. R. Cotton, the entire estate in fee passed to the latter. Wooddeson Lectures, 205. The judgment of the court was therefore erroneous.

WASHINGTON SUPREME COURT.
(Department No. 1.)

ROTHCHILD BROTHERS

v.

NORTHERN PACIFIC RAILWAY COMPANY.

(68 Wash. 527, 123 Pac. 1011.)

Carrier — delivery of contents of car — entry for removal.

1. A delivery of the contents of a car by the carrier to the consignee is effected by placing the car on the delivery track, and its entry by the consignee for the purpose of removing the contents after the surrender of the bill of lading, although the property has not in fact been taken from the car.

Note. — Carriers: when goods deemed delivered to the consignee before removal from car.

It is not the purpose of this note to consider the question as to when the transportation of freight is complete, so that the carrier's liability as such terminates, and its liability as warehouseman begins; but the scope of the note is limited to the question as to when delivery of a shipment of goods to the consignee is complete, so as to relieve the carrier from all further responsibility, either as carrier or as warehouseman, although the goods in fact remain in the car in which they have been transported.

Generally, as to when the liability of a railway carrier of goods ceases to be that of a carrier, see note to East Tennessee, V. & G. R. Co. v. Kelly, 17 L.R.A. 691; and as to what is a reasonable time for the removal of goods by the consignee, after which the liability of the carrier as such terminates, see notes to United Fruit Co. v. New York & B. Transp. Line, 8 L.R.A.(N.S.) 240; North Yakima Brewing & Malting Co. v. Northern P. R. Co. 16 L.R.A.(N.S.) 935; and Lewis v. Louisville & N. R. Co. 25 L.R.A.(N.S.) 938.

As to what constitutes delivery of freight to a carrier, see note to Kansas City, M. & O. R. Co. v. Cox, 32 L.R.A.(N.S.) 313.

And upon the question whether the permitting, by a common carrier, of the inspection of property, amounts to a delivery thereof, see Dudley v. Chicago, M. & St. P. R. Co. and note thereto in 3 L.R.A.(N.S.) 1135.

Delivery of a carload shipment of goods to the consignee is complete when the carrier has placed the car containing the goods upon a house track for unloading by the consignee, and an agent of the latter, after verifying the goods in the car, has signed and delivered to the carrier a receipt in full therefor, preliminary to unloading (Kenny Co. v. Atlanta & W. P. R. Co. 122 Ga. 365, 50 S. E. 132); or the agent of the consignee has been notified of the placing 40 L.R.A.(N.S.)

Proximate cause — loss of shipment — negligence of carrier — waiver.

2. The transportation by a carrier of a car loaded with spirits, with one package broken and leaking, and the tender of it to the consignee in that condition, is not the proximate cause of loss of the spirits by fire after they had been delivered to the consignee, but before they were removed from the car, if the consignee was notified of the facts, and accepted the delivery with the package in bad condition, since the negligence of the carrier was waived.

Carrier — burning of shipment — liability.

3. A consignee of proof spirits which accepts a delivery with a container leaking, and in removing the spirits from the car exposes them to risk of fire, cannot hold the carrier liable for the loss due to a consequent conflagration.

of the car, has surrendered the bill of lading to the carrier, and a reasonable time has elapsed in which to have removed all of the goods. (Arkadelphia Mill. Co. v. Smoker Merchandise Co. 100 Ark. 37, 139 S. W. 680).

So, where the car containing a shipment of goods has been delivered on a spur track next to the consignee's warehouse, and he has accepted the goods and sold and removed some of them, and has put his own lock on the car, there is a complete delivery of the shipment by the carrier to the consignee, although the most of it still remains in the car for the convenience of the consignee. Vaughn v. New York, N. H. & H. R. Co. 27 R. I. 235, 61 Atl. 695.

And delivery of a shipment of goods to the consignee is complete, although the goods are still in the car, where the carrier, at the request and direction of the consignee, has placed the car on a delivery switch built solely for him, under an arrangement that cars so placed should not be guarded by the carrier, but that the consignee had the right even to break any seals placed on the doors of the cars and to remove goods without any superintendence by the carrier, and the consignee has surrendered to the carrier the bill of lading for the goods in the car in question, and has begun to remove them. Whitney Mfg. Co. v. Richmond & D. R. Co. 38 S. C. 365, 37 Am. St. Rep. 767, 17 S. E. 147.

Where, under a contract between the lessees of a grain elevator and a railroad company, the latter, for a certain consideration, switches cars from the termini of all railroads in the city with which it has track connections to the elevator, its delivery of the contents of such cars to the consignees is complete when it has placed the cars in such places as may have been designated by the persons in charge of the elevator, whether in the elevator building for unloading or on adjacent spur tracks, where they are in the care of a watchman employed by the consignees to see to the safety of the grain until it can be unloaded,—although the carrier is under the further duty of placing

Principal and agent — transfer company — agent of consignee.

4. A carting company which undertakes to remove a consignment of freight from the railroad station to the store of the consignee, although an independent contractor with respect to strangers, is the agent of the consignee for the purpose of receiving notice of the condition of the consignment, and the consignee is therefore bound by notice given him.

(May 24, 1912.)

CROSS APPEALS from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover the value of a carload of spirits which were destroyed by fire; plaintiff appealing from the refusal of the court to render judgment in its favor for the full value of the property destroyed; and defendant appealing from the judgment holding it liable for the destruction of the property. Reversed.

The facts are stated in the opinion.

Messrs. Preston & Thorgrimson, for plaintiff:

If the act of an intervening third party could, or in the exercise of ordinary prudence should, have been foreseen, the original act still remains the proximate cause of the injury.

cars inside of the elevator to be unloaded when directed by the persons in charge of the elevator, and of removing empty cars from the elevator premises and returning them to the several railroad termini from which they were received. *Paddock v. Toledo & O. C. R. Co.* 11 Ohio C. D. 789, 21 Ohio C. C. 628.

And complete delivery of a carload of goods to a vendee of the consignee, to whom the consignee has ordered the goods delivered by the carrier without presentation of the bill of lading, is effected by the carrier's placing the car, at the request of the vendee, on a certain side track designated by him as the most convenient place for unloading, and by notifying the vendee that it has thus placed the car. *Anchor Mill Co. v. Burlington, C. R. & N. R. Co.* 102 Iowa, 262, 71 N. W. 255.

But the mere placing of a car of goods by the carrier on a certain side track at the station of its destination, without any notice whatever to the consignee that it has been so placed, cannot, in the absence of a course of dealing or an express agreement dispensing with such notice, be treated by the carrier as a complete delivery of the goods, although the consignee has been in the habit of receiving freight shipped by this carrier on this particular side track, or has instructed the carrier so to deliver all goods shipped to him. *Pindell v. St. Louis & H. R. Co.* 34 Mo. App. 675.

Where, however, goods are shipped to a point on the carrier's line where there is no

Olson v. Gill Home Invest. Co. 58 Wash. 151, 27 L.R.A.(N.S.) 884, 108 Pac. 140; *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64; *Hyatt v. Murray*, 101 Minn. 507, 112 N. W. 881; *Foster v. Chicago, R. I. & P. R. Co.* 127 Iowa, 84, 102 N. W. 422, 4 Ann. Cas. 150; *Oulighan v. Butler*, 189 Mass. 287, 75 N. E. 728; *McDowell v. Preston*, 104 Minn. 263, 18 L.R.A.(N.S.) 190, 116 N. W. 470; *Lane v. Atlantic Works*, 111 Mass. 136; *Jacobson v. Merrill & R. Mill Co.* 107 Minn. 74, 22 L.R.A.(N.S.) 309, 119 N. W. 510; *Williams v. Ballard Lumber Co.* 41 Wash. 347, 83 Pac. 323; *Lucasco Oil Co. v. Pennsylvania R. Co.* 2 Pittsb. 477; *Memphis Consol. Gas & Electric Co. v. Creighton*, 106 C. C. A. 98, 183 Fed. 552.

The recovery should have been for the full value of the shipment, inasmuch as it was alleged and proved that the loss was occasioned by a specific act of negligence on the part of the carrier.

Everett v. Norfolk & S. R. Co. 138 N. C. 68, 1 L.R.A.(N.S.) 985, 50 S. E. 557; *Stringfield v. Southern R. Co.* 152 N. C. 125, 67 S. E. 333; *Savannah, F. & W. R. Co. v. Sloat*, 93 Ga. 803, 20 S. E. 219; *Georgia R. & Bkg. Co. v. Keener*, 93 Ga. 808, 44 Am. St. Rep. 197, 21 S. E. 287; *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85, 47 Am. Rep. 781, 16 N. W. 497;

agent, depot, or warehouse, and this is distinctly understood by the consignee at the time of the shipment, and is not unreasonable in view of the condition of the carrier's business, a complete delivery of the goods is effected by the carrier's safely delivering the car containing them on the side track at its destination (*South & North Ala. R. Co. v. Wood*, 66 Ala. 167, 41 Am. Rep. 749); especially where the consignee also assumes control of the car and its contents, by proceeding to unload a part of the goods, and by locking the car with a lock of his own, upon leaving it for the night partly unloaded (*Southern R. Co. v. Barclay*, 1 Ala. App. 348, 56 So. 26).

And actual delivery of a carload of lumber consigned to a station to which the carrier has no agent is shown by evidence that the car was placed on the side track at the station of its destination in the presence of the agent of the consignee, and that he or some of his employees jumped on the car, and, pulling out a piece of lumber, said, "This is the lumber we have been waiting for." *Armistead Lumber Co. v. Louisville, N. O. & T. R. Co.* — Miss. —, 11 So. 472.

In *Weyl v. Southern P. Co.* 156 Ill. App. 493, it was held that delivery of a carload of goods to the consignee was complete, where the carrier, in compliance with the instructions and request of the consignee's receiving clerk, given at the time that he was notified of the arrival of the goods, had placed the car on a switch track in the rear of the consignee's place of business, upon

Baughman v. Louisville, E. & St. L. R. Co. 94 Ky. 150, 21 S. W. 757; Ficklin v. Wabash R. Co. 117 Mo. App. 211, 93 S. W. 861; Hanson v. Great Northern R. Co. 18 N. D. 324, 138 Am. St. Rep. 768, 121 N. W. 78; Pittsburgh, C. C. & St. L. R. Co. v. Sheppard, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61; Pennsylvania Co. v. Kennard Glass & Paint Co. 59 Neb. 435, 81 N. W. 372; Kansas City, St. J. & C. B. R. Co. v. Simpson, 30 Kan. 645, 46 Am. Rep. 104, 2 Pac. 821; Southern P. R. Co. v. Maddox, 75 Tex. 300, 12 S. W. 815; Black v. Goodrich Transp. Co. 55 Wis. 319, 42 Am. Rep. 713, 13 N. W. 244; United States Exp. Co. v. Backman, 28 Ohio St. 144; Southern Exp. Co. v. Owens, 146 Ala. 412, 8 L.R.A.(N.S.) 369, 119 Am. St. Rep. 41, 41 So. 752, 9 Ann. Cas. 1143; Jolliffe v. Northern P. R. Co. 52 Wash. 433, 100 Pac. 977; Bartlett v. Oregon R. & Nav. Co. 57 Wash. 16, 135 Am. St. Rep. 959, 106 Pac. 487.

Mr. C. H. Winders for defendant.

Fullerton, J., delivered the opinion of the court:

The plaintiff, Rothchild Brothers, a corporation, brought this action against the defendant, the Northern Pacific Railway Company, to recover the value of a car-

load of high proof spirits which were shipped by distillers at Peoria, Illinois, to the plaintiff at Portland, Oregon, and destroyed at the last-named place by fire on June 27, 1907. Judgment went for the plaintiff in the court below for the value of the spirits at the rate of \$.60 per proof gallon, being the value to which they were released, as the court found, in the contract of shipment. In its complaint the plaintiff claimed the full market value of the spirits, namely \$1.28 per proof gallon, plus the cost of transportation from the distillery to the place of delivery. Both parties appeal from the judgment entered: the plaintiff from the refusal of the court to render a judgment in its favor for the full value of the property destroyed, and the defendant from the general judgment holding it liable for the destruction of the property.

The facts material to be considered in determining the controversy are in the main undisputed. The spirits were billed by the distillery company to Portland, Oregon, and routed over the Chicago, Rock Island, & Pacific Railway Company. They were carried by the last-named company to Minneapolis, Minnesota, in one of its own cars. As the company did not allow its cars to be sent west of Minneapolis

which the consignee customarily received freight consigned to him by rail, although the car was thus placed at an hour after he had closed his place of business for the day, on Saturday, and the goods were destroyed by fire on the following day, before consignee had notice of the delivery or an opportunity to unload the goods within business hours.

But in Missouri P. R. Co. v. Wichita Wholesale Grocery Co. 55 Kan. 525, 40 Pac. 899, it was held that a carload of goods was not delivered to the consignee, so as to relieve the carrier from liability as such for the loss thereof by fire, although the carrier had placed the car upon a spur track at the rear of consignee's warehouse, at the exact place where the consignee was accustomed to receive and unload its freight, where the car was so placed on Sunday afternoon, and it was consumed by fire before business hours on Monday morning. In this case, the court said: "It [the carrier] cannot make a constructive delivery except at a time when the plaintiff might reasonably be required to receive it, and that could only be during business hours of a business day, where there was no custom or agreement to receive at any other time."

And a shipment of goods is not delivered by the carrier to the consignee, although the car containing the goods is placed on a certain side track at the request of the consignee, if it is so placed at or after sundown on Saturday, and the consignee refuses to

receive the goods then, on the ground that it is too late as it would take three or four hours to remove them from the car, and the agent of the carrier retains the key of the car and the manifest. Eagle v. White, 6 Whart. 505, 37 Am. Dec. 434.

There is no delivery of a carload of goods by the carrier, where it merely places the car containing them on the unloading track, where such cars are usually placed, and notifies the person for whom the goods are intended, who, without the knowledge or consent of the carrier, and without authority from the consignee, breaks the seal of the car, inspects the goods, and refuses to accept them, or to pay the draft attached to the bill of lading therefor. Yuille-Miller Co. v. Chicago, I. & L. R. Co. 164 Mich. 58, 128 N. W. 1099.

Nor is there a delivery of a carload of apples by the carrier, to one whom the waybill and the bill of lading contain a memorandum to notify and to allow to inspect, where the carrier merely places the car upon a switch track alongside of such person's warehouse, and he, without the knowledge or consent of the carrier, while its agent is keeping the car open for ventilation, takes four barrels of apples from the car and delivers them to a customer on an order previously taken, but subsequently takes them back and replaces them in the car. Schopp Fruit Co. v. Missouri P. R. Co. 115 Mo. App. 352, 91 S. W. 402.

A. C. W.

it became necessary to transfer the spirits of another railway whose cars did run west of that point, and the car was turned over to the Minnesota Transfer Company to make the transfer. This company transferred the property to a car of the defendant. While doing so, it discovered that one of the barrels in which the spirits were contained was in bad order; that a stave had broken, leaving an opening in the barrel out of which something more than one half of the original contents of the barrel had escaped. The barrel was loaded into the car in its broken condition, the car delivered to the defendant company and transported by it to its destination at Portland, Oregon. The car reached Portland some time in the day of June 24, 1907. On that day or the next it was entered and inspected by an agent of the defendant, who discovered, if the company did not then already know, the broken condition of the barrel. After looking over the contents of the car and noting the condition in which the spirits had arrived, he caused the car to be resealed without taking any steps to reconvert the broken barrel or otherwise make more secure its contents.

The plaintiff had employed the Holman Transfer Company to receive the spirits from the railway company and haul them to its warehouse, and had delivered to the transfer company the bill of lading representing the property. As was his custom, a representative of the transfer company called at the railroad yard on the morning of the 25th of June to ascertain what freight had arrived, and was told of the arrival of the carload of spirits, and told further that the car would be spotted on the team or delivery tracks ready for unloading by the next morning. The agent of the transfer company then produced and delivered up the original bill of lading representing the shipment, which his company had received from the plaintiff. On the next morning, June 26th, the representative of the transfer company again appeared and was told that the car had been spotted the night before and was ready to be unloaded. He then stated that he would send his teams for the spirits on the next morning. Either on this morning or the day before he was told of the broken condition of the barrel and of the fact that some of its contents had escaped. On the morning of June 27th, the transfer company sent teams in charge of three of its men to receive the contents of the car and haul them to the plaintiff's warehouse; it also informed the man put in charge of the work of the broken condition of the barrel. The men with the teams reached

the car at about the hour of 7 o'clock in the morning. The seal on the door was immediately broken, and one of the men entered the car, and another got as far as the door, when the spirits in the broken barrel burst into flame. The flame soon communicated itself to the other barrels, and the entire car load was consumed.

The trial judge, among other findings of fact, made the following: "That within a proper and reasonable time after the arrival of the car at Portland, Oregon, the defendant gave notice of its arrival to the transfer company at Portland, which transfer company was employed as an independent contractor by the plaintiff to haul all goods shipped by rail to the plaintiff at Portland, Oregon, from the railroad tracks to plaintiff's place of business in Portland, Oregon. Thereafter, within a proper and reasonable time, said Portland transfer company sent its men and teams to the railroad yards for the purpose of loading onto their wagons and hauling to plaintiff's place of business the contents of said car. Those men entered the car for that purpose, and almost immediately following such entry the contents of the car burst into flames and were entirely destroyed by fire. Such spirits were well known to be and were in fact highly inflammable. The court is unable to determine what was the immediate cause for the spirits breaking into flame. The contents of the car and the inside of the car were in fact then in a highly inflammable condition owing to the broken condition of said barrel of spirits, both from fumes and from spilled contents of the broken barrel. The proximate cause of the happening was the negligence of the defendant in transporting over its line and bringing to Portland the car in its then dangerous condition. The testimony in the case upon the subject of the immediate cause of the fire the court finds is not credible."

A large space in the briefs of counsel has been given up to a discussion of the liability of the defendant for the failure of the Minnesota Transfer Company to reconvert the broken barrel of spirits prior to sending it forward on the defendant's line, it being conceded that it was an act of negligence to fail to do so. But it has seemed to us that, under the facts shown, this is not a very material question. No harm resulted from the act except perhaps the loss of a small quantity of spirits from the broken barrel by evaporation while on the way from Minneapolis to Portland, for which no claim is made in this proceeding. If it were necessary to reconvert the barrel of spirits before delivery in order

to avoid liability for their destruction by fire, the defendant had that opportunity after the property reached its destination and prior to the time they were so destroyed, and the defendant's liability to the plaintiff must be the same whether it was or was not liable for the negligent act of the Minnesota concern.

Neither have we found it necessary to follow counsel in their discussion as to the nature of the liability of the defendant for the spirits after they reached the Portland yards, that is to say, whether it was liable as a carrier or as warehouseman, as it has seemed to us that this also is an immaterial question. As we view the facts, there was an actual delivery of the property to the consignee immediately preceding its destruction, and that the defendant's liability to the appellant at that time was neither that of a carrier nor warehouseman. Not only had the bill of lading been surrendered and the car been spotted on the defendant's delivery tracks for delivery, before the fire occurred, but the plaintiff's agents had actually reached the car with teams, had broken the seal of the car, and had opened and entered it for the purpose of removing the property. This clearly constitutes a delivery. There was not only a surrender of the right of possession of the property by the defendant, but there was an actual surrender of the property itself by the defendant, and an actual taking of the property by the plaintiff. Delivery could have been no more complete had the wagons been actually loaded and started on their way to the plaintiff's warehouse. *Kenny Co. v. Atlanta & W. P. R. Co.* 122 Ga. 365, 50 S. E. 132; *Whitney Mfg. Co. v. Richmond & D. R. Co.* 38 S. C. 365, 37 Am. St. Rep. 767, 17 S. E. 147; *Anchor Mill Co. v. Burlington, C. R. & N. R. Co.* 102 Iowa, 262, 71 N. W. 255; *Vaughn v. New York, N. H. & H. R. Co.* 27 R. I. 235, 61 Atl. 695.

It follows from the foregoing considerations that the act found by the court to be the proximate cause of the loss of the property was not in fact its proximate cause. Undoubtedly the carriage of the spirits from Minneapolis to its destination at Portland with one of its containers in a broken condition was an event in the sequence of events that led up to the loss of the property, but it was no more the proximate cause of the loss than was the shipment of the original carrier from the place of manufacture to Minneapolis, or perhaps any other act committed in reference to the property prior to its loss.

If any act of the defendant could be said to be the proximate cause of the loss of the property, it was the act of tender-

ing and delivering the property to the plaintiff in an unsafe and dangerous condition. This unquestionably would have been negligence if it had been done without notice to the plaintiff of such condition, and if the fire had occurred for want of care induced by lack of knowledge of its condition. But such was not the case. As we have said, not only was the agent of the plaintiff made aware of the broken condition of the barrel prior to the time the property was tendered for delivery, but the immediate servants of the agent sent to receive the property were also made aware of its condition prior to being so sent. Undoubtedly the plaintiff could, without liability on its part, have refused to receive the property until the broken barrel was properly repaired or the property otherwise made safe for handling. But when it consented to receive it after being made aware of its unsafe condition, it waived its right to insist upon a delivery in proper condition, and took upon itself the risk of loss of the property arising from the act of removing it in its unsafe condition. Since, therefore, the property was burned while in the possession of the plaintiff through no fault of the defendant other than the fault that the plaintiff consented to waive, the loss of the property must be borne by the plaintiff.

It can be gathered from the finding of fact which we have quoted, that the trial court thought that the fire causing the loss of the spirits was of spontaneous origin, or originated from the sudden bringing of the escaping fumes into contact with the air, but, if this be the meaning of the finding, it has no support in the record. It was shown by the evidence, if indeed the fact be not generally known, that the fumes or vapors arising from an open barrel of high proof spirits, although highly inflammable, will not burn unless they are brought into contact with fire in some form; that contact with the air alone tends to dissipate and render them innocuous, rather than cause them to burst into flame. Moreover, the plaintiff was warned of the condition of the spirits, and was bound to handle them with care in consonance with such condition, and, if it exposed them in such manner as to cause them to burn, the fault is its, not the defendant's. Since we find that there was a delivery of the property prior to its burning, it is not necessary that we inquire into the immediate origin of the fire. But a very satisfactory explanation of its origin is contained in the record showing that it originated from perfectly natural causes.

The court found that the Holman Trans-

fer Company, whom the plaintiff appointed to receive the property, was an independent contractor, and it is argued that, because of this fact, the relation of principal and agent did not obtain between the plaintiff and the transfer company and hence notice to the transfer company of the broken condition of the barrel was not notice to the plaintiff. But we cannot accept this doctrine. It may be that the transfer company was so far an independent contractor that its acts of negligence resulting injuriously to third persons, even though while in the immediate work of making the transfer of the property, would not give such third persons a right of action against the plaintiff, but as between the plaintiff and the defendant the transfer company was clearly the plaintiff's agent with reference to receiving the property from the defendant, and consequently notice to it was notice to the plaintiff. This view of the questions presented requires a different judgment from that entered in the court below.

The order will be, therefore, that the judgment appealed from be reversed, and the cause remanded to the court below, with instructions to enter a judgment in favor of the defendant to the effect that the plaintiff take nothing by its action.

Dunbar, Ch. J., and Mount, Parker, and Gose, JJ., concur.

Petition for rehearing denied October 8, 1912.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ANNIE E. HUNT

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.
(Two cases.)

(212 Mass. 102, 98 N. E. 787.)

Carrier — terminal station — beginning of passenger's relation.

1. The relation of one purchasing a ticket at the station of a terminal corpora-

tion, and the carrier whose train he is to take and which is by law compelled to use such terminal, does not become that of passenger and carrier until he is about to enter the carrier's car.

Same — negligent use of terminal — liability.

2. A carrier using the tracks of a terminal company which has statutory authority to make rules for the use of its station and approaches is liable for injuries to persons awaiting at the station, by its failure to obey the rules, which results in backing a train through a fence among waiting passengers, so as to cause a panic among and injury to them.

Same — joint liability of carrier and terminal company.

3. A terminal company whose tracks a railroad company entering a city must use, which negligently gives an order as to the handling of a train, and the railroad company which negligently obeys the order, may both be held liable for a resulting injury to a waiting passenger.

Appeal — instruction — joint defendants — single recovery — error.

4. A passenger, having a right of action against a carrier and a terminal corporation, cannot be said to have suffered no injury by a direction in an action to hold both liable for his injury, that a recovery could be had against one defendant only, because he recovered a judgment against the terminal company, if it has not been satisfied.

(May 24, 1912.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Middlesex County made during the trial of actions brought to recover damages for personal injuries to plaintiff, Annie E. Hunt, and for expenses incurred by her husband in consequence of the injuries, which resulted in a verdict for defendant. Sustained.

The facts are stated in the opinion.

Messrs. E. P. Saltonstall and A. M. Beale, for plaintiff:

Plaintiffs were passengers of the New York, New Haven, & Hartford Railroad Company at the time when Mrs. Hunt was injured.

Warren v. Fitchburg R. Co. 8 Allen, 227, 85 Am. Dec. 700; Caswell v. Boston & W. R. Corp. 98 Mass. 194, 93 Am. Dec.

Note. — One at union station or union terminal as a passenger.

Generally, as to the degree of care required toward passenger at station, see the note to St. Louis, I. M. & S. R. Co. v. Woods, 33 L.R.A. (N.S.) 855.

As to the liability of a union depot company for the negligence of its own or carrier's employees, see Union Depot & R. Co. v. Londoner, 33 L.R.A. (N.S.) 433, and note. 40 L.R.A. (N.S.)

In Chicago, R. I. & P. R. Co. v. Stepp, 22 L.R.A. (N.S.) 350, 90 C. C. A. 431, 164 Fed. 785, affirming, 151 Fed. 908, it is held that a person at a station for the purpose of taking passage upon the train of one of several companies using the station jointly has the rights of a passenger, not only as to the road upon which he is intending to take passage, but as to other carriers operating trains through the station grounds as well.

151; *Chaffee v. Boston & L. R. Corp.* 104 Mass. 108; *Young v. New York, N. H. & H. R. Co.* 171 Mass. 33, 41 L.R.A. 193, 50 N. E. 455; *Kuhlen v. Boston & N. Street R. Co.* 193 Mass. 341, 7 L.R.A. (N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815; *Frazier v. New York, N. H. & H. R. Co.* 180 Mass. 427, 62 N. E. 731.

The jury would have been warranted in finding verdicts against both defendants, and the court erred in instructing them as a matter of law, that they could not do so.

White v. Fitchburg R. Co. 136 Mass. 321.

Messrs. John L. Hall and Joseph Wentworth for defendant.

Rugg, Ch. J., delivered the opinion of the court:

These are two actions of tort, both of which were tried together with two similar actions brought by the same plaintiffs against the Boston Terminal Company. The action of Annie E. Hunt (who will hereafter be referred to as the plaintiff) is for the recovery of damages for personal injuries sustained by her, and that of George W. Hunt, who is her husband, for his expenses in consequence of the injury to his wife. There was evidence tending to show that the plaintiff, having bought a ticket of the defendant for transportation over its line of railroad on a special train, was waiting in the south terminal station in Boston for the train on which

the ticket entitled her to ride. The excursion train, instead of stopping at the usual place upon the track, came through the bumper and fence at the end of the track, about 10 feet into the space reserved for passengers. In the resulting confusion among the waiting crowd, the plaintiff was thrown down and received injuries. The south terminal station, and all tracks converging there for a distance of about half a mile, were owned by the Boston Terminal Company, a corporation organized under Stat. 1896, chap. 516, and all trains, cars, and engines were operated over the tracks so owned solely by the Boston Terminal Company. The New York, New Haven, & Hartford Railroad Company used the south terminal station in accordance with Stat. 1896, chap. 516, as the Boston terminal for its trains, and the locomotive and cars which ran over the bumper on the day in question were the property of the New York, New Haven, & Hartford Railroad Company. Among the rules of the Boston Terminal Company in force respecting its station at the time were these:

"Conductors, enginemen, and other train men in the employ of the company owning or operating a train will remain in charge of the train while passing over the track of this company.

"In backing train into station great care must be exercised by enginemen and men in charge of train not to strike bump-

In *Seymour v. Chicago, B. & Q. R. Co.* 3 Biss. 43, Fed. Cas. No. 12,685, where plaintiff was injured by slipping on pieces of ice left on the platform, as she was descending from the steps of defendant's train to find an employee to let her into the palace car, after having deposited her luggage in another car, it was held that defendant was liable to her as a passenger, though the depot was owned by another company, with which defendant had an arrangement for its joint use.

In *Kansas City Southern R. Co. v. Watson*, — Ark. —, 144 S. W. 922, it appeared that while plaintiff was on the platform of a station, owned by one of defendants but used jointly by both companies, having purchased a ticket from the agent of the company not owning the depot, he was injured through the negligence of an employee of the company owning the depot, and both companies were held liable for the injury; plaintiff being described by the court as a passenger of the company over whose road he was about to take passage.

In *Louisville, N. A. & C. R. Co. v. Treadway*, 142 Ind. 475, 40 N. E. 807, 41 N. E. 794, plaintiff went to a union depot maintained at the junction of defendants' roads, for the purpose of taking passage on one of them for which she held a ticket. While

waiting for her train she fell, because no light was maintained, from that part of the platform running along the track of the road over which she did not intend to take passage; and it was held that, upon her arrival at the station, she became entitled to all the rights, privileges, and protection of a passenger from the road over which she intended to travel, and that it was liable to her for failure to exercise the care due a passenger in lighting the platform. As to the other road, however, it was held that it owed no duty to plaintiff other than that which it owed to the public generally.

In *Gulf, C. & S. F. R. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. 278, it is held that a passenger of a railroad which uses jointly a station owned by another road retains the relation of passenger to the road over which she has been carried, while passing from the depot to the street over the premises jointly used.

Frazier v. New York, N. H. & H. R. Co. 180 Mass. 427, 62 N. E. 731, which was an action for injuries sustained by a passenger in falling over an obstruction on the floor of a station owned by a terminal company, after leaving his train in safety, is discussed sufficiently in *HUNT v. New York, N. H. & H. R. Co.*

R. L. S.

ing post or cars that may be standing on track.

"The train must come to a stop 10 feet away from bumping post or stationary cars before backing up to proper position.

"In addition to these rules, train men, enginemen, and other employees will comply with the rules or special orders of their respective companies when such do not conflict with the rules of this company."

The plaintiff contends that she was entitled to an instruction to the effect that she had the rights of a passenger against the present defendant. Ordinarily, one who has bought a ticket of a railroad company and is waiting for the train in the station, either of the company from whom the ticket was bought, or of another company whose station the first company is using voluntarily, is a passenger and entitled to all the protection of a passenger. This general rule does not apply in its full scope to the Boston terminal station, as was decided in *Frazier v. New York, N. H. & H. R. Co.* 180 Mass. 427, 62 N. E. 731. It was held there that the railroad companies using that station have no option respecting it, but are compelled by act of the legislature to use it, and that the effect of the statute is to require the railroad companies using "a union station owned and operated by a separate corporation" to "deliver its passengers to the care of the owner of the union station, and that" the railroad company's liability to its passenger "is at an end when the passenger alights in safety from its cars on to the platform of the station of the terminal company." Although the facts in that case were nearly the converse of those presented in the present case, the governing rule of law must be the same. The rights of a passenger do not accrue to one, having a ticket and intending to board the train of a railroad using the station, earlier than the moment when, standing upon the platform adjacent to the train, the ticket holder is about to step upon the train. The plaintiff was not, therefore, entitled to the protection of a passenger as against the present defendant. The reasons for this are set forth at length in the *Frazier Case*, and need not be repeated.

The trial judge instructed the jury, subject to the plaintiff's exception, that she was not entitled to a verdict against both the railroad company and the terminal company, and left it to the jury to say which one of the two corporations caused her injury. Plainly there was evidence as to the negligence of the terminal company, and the verdict of the jury has settled 40 L.R.A.(N.S.)

that its negligence was a cause contributing to the plaintiff's injury.

The question whether a railroad company using the south terminal station can be held responsible for an accident occurring while its trains are being drawn over the tracks of the terminal company was left undecided in *Frazier v. New York, N. H. & H. R. Co.* 180 Mass. 427, 431, 62 N. E. 731. That point is now presented for decision. Sections 8 and 9 of Stat. 1896, chap. 516, give to the terminal company authority to make reasonable rules and regulations for the use of the station and its approaches, which shall be binding upon the corporations using the same. Therefore the rules which have been quoted were binding upon the defendant railroad. Although the trains were operated by the terminal company, its rules required all train men, including the engineers of the several railroad companies, to continue in charge of each train while passing over the tracks of the terminal company. The effect of this rule was not to suspend their employment by the railroad companies, and to transfer them wholly into the service of the terminal company during the period when the train was upon its tracks. The rule does not purport to go so far. The servants of the several railroad companies remain their servants under the responsibilities of their general employment. There is superadded to their duties as railroad employees the obligation to observe the rules and to obey the directions of the terminal company as to the management of trains while upon the terminal company's property. The signals and switches which regulate the movements of trains into and out of the terminal station are in the charge of the terminal company, and in this sense all trains are operated solely by it; but the specific control of a locomotive belonging to the defendant coming into the terminal station still remains in its servants and agents, and its employees are subject to all its rules and orders so far as they do not conflict with the rules of the terminal company. Its trains are in the custody of its own servants and are manned by them, although the general direction of their movements is vested in the terminal company. These being the respective duties and obligations of the terminal company and the defendant, there was evidence enough to support a finding that the negligent act of the defendant's servants, either in applying too much power from the locomotive, or in driving the train at too high speed against the bumper, or in failing properly to inspect the brakes and other appliances for governing the train, may have concurred with the negli-

gent act of the terminal company in giving signals for the speed of the train and its position in the station, to produce the derailment and panic which resulted in the plaintiff's injury. *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69; *Feneff v. Boston & M. R. Co.* 196 Mass. 575, 82 N. E. 705; *D'Almeida v. Boott Mills*, 209 Mass. 81, 95 N. E. 398.

The case does not necessarily present the instance of a general employer who lends his servant absolutely and unqualifiedly into the service of another so that the latter becomes in fact the master concerning direction of all his movements and conduct. Hence, *Coughlin v. Cambridge*, 166 Mass. 268-277, 44 N. E. 218, and *Rourke v. White Moss Colliery Co.* L. R. 2 C. P. Div. 205, 46 L. J. C. P. N. S. 283, 36 L. T. N. S. 49, 25 Week. Rep. 263, are not decisive.

The facts call rather for the application of the principle illustrated by cases like *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252, and *Waldock v. Winfield* [1901] 2 K. B. (C. A.) 596, where a servant remains in the general employ of the defendant, who hires, discharges, pays, and, except as required by the terms of a definite arrangement giving a qualified authority for certain purposes to another, has the direction of his conduct. In such case the general employer may be liable for the negligence of the servant. It is akin to the cases where the owner of a horse and vehicle or of an automobile lets the instrument of carriage, together with driver or chauffeur, to another, who has the power of direction as to the route of travel. Responsibility still remains, for most purposes, in the general employer. *Hussey v. Franey*, 205 Mass. 413, 137 Am. St. Rep. 400, 91 N. E. 391; *Shepard v. Jacobs*, 204 Mass. 110, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392. Each case turns upon the terms of the agreement between the two employers. There is nothing in the nature of things which prevents both being responsible. A negligent order and a negligent execution of the order may concur in causing harm to a third person. In such case the sufferer may hold both the one responsible for the order and the one responsible for its execution, and collect his compensation where he chooses from among those liable. The present case belongs to that class. It was error to rule that a verdict could be found against one only of the two defendants. *Cain v. Hugh Nawn Contracting Co.* 202 Mass. 237, 88 N. E. 842; *Berry v. New York C. & H. R. Co.* 202 Mass. 197, 88 N. E. 588.

The plaintiff cannot be said to have suffered no injury by reason of this misdirection.

The recovery of the judgment against the terminal company without satisfaction is no bar to the recovery of the judgment against the defendant, whose wrongful act may have been found concurrently to have contributed to the plaintiff's injury. *Cameron v. Kanrich*, 201 Mass. 451, 87 N. E. 605. The trial judge did not pursue the policy of submitting a special question to the jury to find the damages of the plaintiff, as was done in *Burke v. Hodge*, 211 Mass. 156, 97 N. E. 920, and therefore the plaintiff is entitled to a new trial against this defendant upon all issues.

Exceptions sustained.

NEBRASKA SUPREME COURT.

E. D. McCALL, Receiver of Hog Raisers' Mutual Insurance Company.

v.

RICHARD BOWEN et al., Appts

(— Neb. —, 135 N. W. 1014.)

Writ — insurance — receiver — stockholders' liability.

1. An action by the receiver of a mutual insurance company, organized under chapter 46, Laws 1899, against the members to recover an assessment made by the court in order to pay the liabilities of the insolvent corporation, may properly be brought in a court of equity in the same manner as an action by the receiver of a stock corporation against its stockholders for like purpose; and in such case summons may be issued out of the county in which the action is brought to any other county in the state in which a defendant resides or may be summoned.

Insurance — stockholders' liability — assessment — bar.

2. Where the directors of such a corporation, before it was declared insolvent, levied certain assessments which were invalid because not made in accordance with law, and which were afterwards set aside by the district court in the proceedings to wind up the affairs of such corporation, the cause of action against members for assessments made by the receiver under the direction of the court was not barred, although the invalid

Headnotes by *LETON, J.*

Note. — Jurisdiction of equity to enforce liability of mutual insurance company.

As to the right to maintain a single suit in equity to enforce separate liability of members of an insolvent association, see *Burke v. Scheer*, 33 L.R.A.(N.S.) 1057, and note thereto.

As to the jurisdiction of equity on the ground of preventing a multiplicity of suits

assessments were made more than four years before the latter.

(April 20, 1912.)

APPEAL by defendants from a judgment of the District Court for Lancaster County in plaintiff's favor in an action brought to recover assessments made by the plaintiff receiver, under direction of the court, necessary to pay the liabilities of the insolvent corporation. Affirmed.

The facts are stated in the opinion.

Messrs. E. F. Holmes, G. L. DeLacy, J. F. Fufts, Tibbets, Anderson, & Baylor, J. C. McNerney, and E. R. Hitchcock, for appellants:

The right to sue and recover judgment against these defendants is barred by the statute of limitations.

Cooke v. Pomeroy, 65 Conn. 466, 32 Atl. 935; Wardle v. Hudson, 96 Mich. 432, 55 N. W. 992; Mills v. Whitmore, 12 Ohio C. D. 338, 22 Ohio C. C. 467.

to enforce liability of members in a club or corporation, see note in 28 L.R.A. (N.S.) 743.

Aside from *Burke v. Scheer*, the question of equity jurisdiction to enforce the liability of an insurance company seems to have been raised in no other case except some South Carolina decisions, which are distinguishable.

It is to be noted that *McCALL v. BOWEN* bases the jurisdiction of equity to enforce the liability of members of a mutual insurance company upon the rule obtaining in that state that equity has jurisdiction of an action by a receiver against all the stockholders of a corporation jointly, to enforce their contract or statutory liability. Some of the cases asserting this rule are referred to in the note to 28 L.R.A. (N.S.) 743. As shown in that note, there is a diversity of opinion among the courts on that question, but the weight of authority is against the doctrine of the Nebraska cases; at least, where the right to invoke equity jurisdiction rests entirely upon the claim that a multiplicity of suits is thereby saved; but, as pointed out in that note, equity has jurisdiction where the proceeding is in the nature of a creditors' bill, and the relief sought is the ascertainment of the amount required to be contributed by the stockholders in order to liquidate the debts of the corporation, and the payment of such amount, and distribution thereof among the creditors.

And this is one of the reasons influencing the court in *Wetmore v. Scalf*, 85 S. C. 285, 67 S. E. 298, to assume jurisdiction of an action by the receiver of an insolvent mutual insurance company against the members to ascertain and adjudicate their liabilities as members, and to enforce a statutory lien on the land of such members for the amount found against them. The court points out that if each member had a right 40 L.R.A. (N.S.)

Messrs. F. A. Berry, F. D. Hunker, W. L. Kirkpatrick, and J. W. Purinton also for appellants.

Mr. E. J. Clements for appellee.

Letton, J., delivered the opinion of the court:

The Hog Raisers' Mutual Insurance Company of Lincoln, Nebraska, was organized in April, 1899, under chapter 46, Laws 1899. It did business from its organization until June, 1900, during which time it issued about 560 policies. Losses were sustained which were adjusted, audited, and allowed by the company. On the 6th day of June, 1900, there was more than \$6,000 due and unpaid on the same. Judgment was recovered by a policy holder on an unpaid loss, and an execution issued thereon, which was returned wholly unsatisfied. Afterwards, the creditor began an action in the district court of Lancaster county, alleging the insolven-

to demand a separate suit, the receiver would have to bring hundreds of separate suits, in each of which he would have to establish anew the debts of the company, the inadequacy of the assets, and the amount assessed might be varied in each succeeding suit, according to his success or failure in obtaining judgments in suits against other members. And it is said that when all the members are made parties to the one suit to wind up the affairs of the company, the court ascertains the debts of the company and adjusts all the legal and equitable rights of the members once for all. This it would be practically impossible to accomplish in separate suits against the individual members. The decisions also in part based upon the doctrine of *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673, holding that equity has jurisdiction to bring in all the stockholders of an insolvent corporation and establish their several liabilities in one suit. It is to be noted, however, that in South Carolina, as part of the relief sought is the establishment and enforcement of a lien upon the insured property for the amount of the liability of the insured for the debts of the insolvent company, the proceeding to ascertain and enforce this liability in this manner is an equitable proceeding. *Farmers' Mut. Ins. Asso. v. Berry*, 53 S. C. 129, 31 S. E. 53; *South Carolina Mut. Ins. Co. v. Price*, 56 S. C. 407, 34 S. E. 696.

While the question whether or not an action in equity against several of the members of a defunct insurance company is multifarious is not discussed in *Farmers' Mut. Ins. Asso. v. Berry*, supra, the action was sustained against one of the members by name, "and all other defendants in like cases in said county." That such an action is not multifarious is settled in *Wetmore v. Scalf*, supra, A. G. S.

cy of the company, the issuance and return of the execution, that the officers of the company have failed and neglected to enforce statutory liability of the members, or to collect from them the necessary funds to pay the judgment and the other unpaid losses, and praying for the appointment of a receiver.

Pursuant to this application, the plaintiff was appointed receiver, and was authorized to make any and all assessments necessary to pay all valid obligations existing against the company, including the costs and expenses of the receivership, and to collect the assessments by suit or otherwise. In the receivership proceedings claims to the amount of \$8,721 were presented, heard by the court, and allowed. Afterwards, the receiver, in pursuance of an order of the court, made an assessment upon each of the members for his proportionate share of the amount necessary to defray the losses and expenses. This assessment was approved, adopted, and confirmed by the court, and the receiver was ordered and directed to collect the same. A number of members paid the assessment, but a large number refused to pay. This suit is brought to recover this assessment.

The petition herein alleges that the assessments as made would be sufficient to meet all claims and assessments, but that certain of the defendants have removed from the state, and others are insolvent, and that it is necessary that a court of equity take into account the losses that will necessarily result from these facts, and that, upon rendition of judgment for the full amount of the assessment, the court should determine whether execution should issue for the full liability, or whether, in the first instance, an execution for a part only will be adequate for the collection of the necessary amount. It is further alleged that this action is ancillary to the suit brought to wind up the affairs of the company, that separate and independent suits against each of the members would require a multiplicity of suits and excessive and unnecessary expenses, and that the plaintiff is without an adequate remedy at law. The prayer is that a several judgment be entered against each of the defendants, that the court ascertain the amount for which execution shall issue in the first instance against each defendant, and for such other relief as may be equitable. A large number of the defendants live and were served in Lancaster county, but many are residents of other counties. Judgment was entered by default against a number of defendants. Trial was held as to the others who were

served, and judgments rendered against them. Eighty defendants have appealed to this court. Special appearances objecting to the jurisdiction were made, and demurrers were filed by a number of defendants residing in other counties than Lancaster, upon three grounds. These demurrers for the most part set forth, first, a general demurrer; second, that the statute of limitations had run; third, that the causes of action were improperly joined. The special appearances and demurrers were overruled, but the same objections were carried forward into the answers. The answers pleaded certain assessments made by the directors while in control of the company, that such assessments were sufficient to cover and pay the losses sustained and the expenses incurred up to their respective dates, that the assessments now sought to be collected are to cover the same losses as the assessments made by the directors, and that the cause of action is barred by the statute of limitations. In reply the plaintiff alleged that the assessments attempted to be made by the directors were void, and, further, that the prior assessments were by the court declared invalid and set aside, and all payments made upon the same were credited to the member so paying.

The appellants argue and rely upon the propositions that the court erred in overruling the special appearances and the demurrers for the lack of jurisdiction over the persons of defendants, that the cause of action is barred, and that, there being no proof of signature to the application, the evidence does not sustain the judgment.

The question as to whether the court erred in overruling the special appearances and the demurrers depends upon the question whether this is a proceeding in equity, in which all of the defendants have a common interest, and where the powers of the court may be invoked to increase or diminish the amount each defendant may be compelled to contribute in order to pay the losses and expenses, or whether it is an action at law, in which each defendant is entitled to a jury trial. This question must be determined from a consideration of the statute under which the corporation was organized, and whereby the rights, duties, and liabilities of its members were fixed. If the policy holders in a mutual insurance company organized under the act of 1899 are, in point of fact, stockholders in the corporation, although not so denominated either in the suit or in other dealings with the company, their rights and liabilities are fixed by that relation. Under § 2 of the act all persons

who take insurance in the company become and continue members during the period their insurance is in force, and no longer; and it is provided that they shall sign an application obligating themselves to pay all assessments made for losses and expenses while they continue members. Section 4 provides, in substance, that each member may vote in person or by proxy for as many persons as there are members to be elected, or to cumulate his votes or distribute them as he may think fit; § 9, that a member may be sued for failure to pay an assessment for thirty days after personal notice of the same; § 14, that any member may withdraw by giving notice of the surrender of his policy, "and paying his or her share of all unpaid claims or liabilities of such company for losses or expenses accruing while a member." Section 15: "Bodies corporate.—Such company shall be deemed a body corporate with succession, and shall possess the usual powers and be subject to the usual duties of corporations within the limitations of this act." The liabilities of a member of a company organized under this act are fully as great as those of a stockholder in an ordinary stock corporation. It is immaterial whether the members of this body corporate be designated as members or stockholders, because during the term that their policy of insurance covers they are as essentially members of the corporate body as owners of stock in a stock corporation are of such a corporation. 2 May, Ins. 4th ed. §§ 548, 549; Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135, 7 Ann. Cas. 400; Commonwealth Mut. F. Ins. Co. v. Hayden Bros. 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; Morgan v. Hog Raisers' Mut. Ins. Co. 62 Neb. 446, 87 N. W. 145; Swing v. Karges Furniture Co. 123 Mo. App. 367, 100 S. W. 662.

Having reached the conclusion that the policy holders are, in their relation to the corporation and in respect to their liabilities thereto, virtually stockholders, and that they occupy with respect to the unpaid assessments the same position with reference to the corporation debts that stockholders whose subscriptions are unpaid do in stock corporations, the question as to the proper method of collecting funds to pay the liabilities after the corporation is insolvent and has passed into the hands of a receiver is easily solved. In this jurisdiction it is settled law that such an action must be brought in equity by the receiver against all of the stockholders jointly. It would be a useless repetition

to set forth at length the reasons for this rule. They may be found plainly set forth in the opinions in the following cases: Farmers' Loan & T. Co. v. Funk, 49 Neb. 353, 68 N. W. 520; German Nat. Bank v. Farmers' & M. Bank, 54 Neb. 593, 74 N. W. 1086; Emanuel v. Barnard, 71 Neb. 756, 99 N. W. 666; Brown v. Brink, 57 Neb. 607, 78 N. W. 280; Van Pelt v. Gardner, 54 Neb. 701, 74 N. W. 1083, 75 N. W. 874; Fremont Package Mfg. Co. v. Storey, 2 Neb. (Unof.) 325, 96 N. W. 416; Reed v. Burg, 2 Neb. (Unof.) 117, 96 N. W. 414. Appellants rely upon the opinion of this court in Burke v. Scheer, 89 Neb. 80, 33 L.R.A.(N.S.) 1057, 130 N. W. 962, but that case is not in point. The insurance company involved in the Scheer Case was organized under a different statute, which limits the liabilities of the members to the amount of the obligations expressed in the application, which provided that members could not be compelled to pay more, and also prescribed the form of action by which such liability could be enforced. We are satisfied that a court of equity is the proper forum, and that summons may issue out of the district court in Lancaster county to any county in this state wherein one of the defendants resides or may be summoned, and that proper service therein will vest the district court of Lancaster county with jurisdiction.

It is next contended by a number of the appellants that the statute of limitations had run upon the cause of action against each of said defendants. The argument is made that because the directors in 1899 and 1901 made certain assessments for the purpose of paying some of the same claims which were allowed by the court, and to pay which the assessment sued upon was levied, the cause of action accrued, and that to the amount of such assessment the bar of the statute has fallen. These assessments were not paid by the appellants. The record discloses that the assessments made by the directors did not comply with the requirements of the statute, in that they did not confine the liability of each member to the losses sustained during the time covered by his policy, and that, recognizing this fact, the attempt to enforce their payment was afterwards abandoned. The assessment was one which the board of directors had no power to make, and which they could not compel a member to submit to if he chose to resist the payment. Such an assessment could have no binding force, and cannot be set up as a defense against an attempt by the receiver to collect sufficient funds to pay the just debts of the corporation. Davis v. Parcher & J. & A. Stewart Co. 82 Wis. 488, 52

N. W. 771; Great Western Teleg. Co. v. Burnham, 79 Wis. 47, 24 Am. St. Rep. 698, 47 N. W. 373; Bowen v. Kuehn, 79 Wis. 53, 47 N. W. 374; Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441. Moreover, upon a showing made by the receiver in the principal case and upon his application, the district court found "that all the assessments made by the defendant upon its members were irregular and not in conformity with the provision of the statute of Nebraska, and should be and the same are hereby set aside." We are of opinion that, this finding and decree having been made in a direct proceeding to which the corporation was a party, it is binding upon all of its members, and cannot be collaterally attacked in this ancillary proceeding. The appellants are as much bound by the proceedings of the district court in this respect as they are with respect to the allowance of claims against the corporation and to the amount of the assessments necessary to be made. We are of opinion that the statute of limitations is no bar to this proceeding in this respect.

From an examination of the pleadings and the evidence, we are satisfied that the claim that there is not sufficient proof that the defendants signed the application is untenable. We think it unnecessary to set out at length the pleadings referred to or the evidence, but it is sufficient to satisfy us that the decree of the district court in this respect is correct.

We find no error in the record, and the judgment of the District Court is affirmed.

WYOMING SUPREME COURT.

LILLIE POWERS, Plff. in Err.,
v.

JOHN W. PENSE et al.

(— Wyo. —, 123 Pac. 925.)

Homestead — advance to relieve from mortgage — priority.

One advancing money to redeem from a foreclosure sale under a purchase-money mortgage on a homestead is entitled to priority over the homestead rights, although they are not expressly released in the mortgage given to secure such advance, where it discloses an intention to effect the release.

(May 24, 1912.)

Note. — As to right of one advancing money to redeem from a foreclosure sale under a mortgage to be subrogated to the lien of the mortgage, see note to Handford v. Edwards, 23 L.R.A. (N.S.) 190.
40 L.R.A. (N.S.)

ERROR to the District Court for Sheridan County to review a judgment in defendants' favor in an action brought to quiet title to certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Camplin & O'Marr, with Messrs. Burgess & Kutcher, for plaintiff in error.

Messrs. S. P. Cadle and Tinley & Mitchell, for defendants in error:

The mortgage given on July 12, 1906, was an obligation contracted for the purchase price of the premises, and is paramount to the homestead right of the mortgagors.

Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740; Dillon v. Byrne, 5 Cal. 455; Hopper v. Parkinson, 5 Nev. 233; McWilliams v. Bones, 84 Ga. 203, 10 S. E. 724; Jones v. Parker, 51 Wis. 218, 8 N. W. 124; Kaiser v. Lembeck, 55 Iowa, 244, 7 N. W. 519; Murray v. Davis, 9 Ky. L. Rep. 507, 5 S. W. 569; Kibbey v. Jones, 7 Bush, 243; Acruman v. Barnes, 66 Ark. 442, 74 Am. St. Rep. 104, 51 S. W. 319; Johnston v. Arrendale, 30 Tex. Civ. App. 504, 71 S. W. 45; Ayres v. Probasco, 14 Kan. 175; Foster Lumber Co. v. Harlan County Bank, 71 Kan. 158, 114 Am. St. Rep. 470, 80 Pac. 49, 6 Ann. Cas. 44; Nichols v. Overacker, 16 Kan. 54; Lane v. Collier, 46 Ga. 580; Hawks v. Hawks, 46 Ga. 204; Magee v. Magee, 51 Ill. 500, 99 Am. Dec. 571; White v. Wheelan, 71 Ga. 533; Dixon v. National Loan & Invest. Co. — Tex. Civ. App. —, 40 S. W. 541; Prout v. Burke, 51 Neb. 24, 70 N. W. 512, Hughes v. United States, 4 Wall. 232, 18 L. ed. 303.

Potter, J., delivered the opinion of the court:

This action was brought in the district court by the plaintiff in error to quiet her title to certain real estate. She alleged that she was in possession of the property and the owner thereof in fee simple. The answer of each defendant alleged the execution and delivery of two mortgages by the plaintiff in error and her husband, the first on May 6, 1904, and the second on July 12, 1906; the foreclosure of the first mortgage, which was given for the purchase money of the land; the redemption from the sale upon that foreclosure with money advanced for that purpose by the defendant J. D. Powers, the holder of the second mortgage; the foreclosure of said second mortgage; and the purchase of the property at the foreclosure sale by the defendant John

As to whether a mortgage to secure money advanced to purchase property may be regarded as a purchase-money mortgage, see note to Marin v. Knox, ante, 272.

W. Pense, and the issuance to him of a certificate showing such sale and purchase. The case is here upon the pleadings, the findings of fact, conclusions of law, and the judgment; the evidence not being brought into the record.

The facts as found by the trial court are substantially as follows:

On May 6, 1904, the property was purchased by Alex Powers, the husband of the plaintiff, for the sum of \$1,250. He paid at that time \$200 in cash, and executed and delivered to the grantors a mortgage upon the property, in which the plaintiff joined, to secure the payment of the balance of the purchase price. That mortgage was a purchase-money mortgage, and the court so found. The property became the homestead of Alex Powers and his wife, the plaintiff, from the fact that they resided upon it and claimed it as their homestead. The mortgage aforesaid was duly assigned to the defendant J. D. Powers, and, upon default in the payment of the debt thereby secured, the mortgage was foreclosed by advertisement under the power of sale therein contained, and upon the foreclosure sale occurring January 13, 1906, Lizzie Holstein and James W. Kirkpatrick purchased the premises and received a certificate of sale issued by the sheriff, who made the sale, which certificate was duly filed for record. It is recited in the findings that "the indebtedness secured by said mortgage was thereby paid, and said mortgage released and discharged." It was probably intended by that finding to show that the money received by the officer upon the sale was paid to the mortgagee, for it is stated as a finding of fact, and not as a conclusion of law, and at that time the mortgagors had themselves paid nothing to satisfy the amount due upon the mortgage.

On July 12, 1906, Alex Powers and his wife, the plaintiff herein, borrowed from said J. D. Powers the sum of \$1,650, and signed, executed, and delivered to the Bank of Commerce of Sheridan, Wyoming, for the use and benefit of said J. D. Powers, a note and a mortgage upon the property aforesaid for that amount. The court found that said money was borrowed and the mortgage executed for the purpose of redeeming said premises from the foreclosure sale above mentioned, and that the money "was received by said Alex Powers, and by him used to redeem said premises, and by him paid to said Lizzie Holstein and James W. Kirkpatrick." This mortgage was duly recorded, and thereafter, together with the note, duly assigned to J. D. Powers, and the assignment was duly recorded. A default occurred in the payment of the amount so borrowed and secured, and the

mortgage was foreclosed by advertisement and sale in the manner prescribed by law, the sale occurring November 1, 1909, and at said sale the defendant John W. Pense purchased the property for \$2,460, and a certificate of sale was issued to him as required by law. There was no clause in this mortgage or in the certificate of acknowledgment showing an express waiver or release of the right of homestead by Alex Powers. But the mortgage contained a clause reading as follows: "And the said Lillie Powers, wife of said Alex Powers, upon the consideration aforesaid, does hereby and forever quitclaim unto the said party of the second part, its successors and assigns, all her rights of dower and homestead in and to the above granted premises." And in the certificate of acknowledgment it was recited that Lillie Powers, wife of said Alex Powers, was first examined separate and apart from her said husband in reference to the signing and acknowledging of such deed; that the nature and effect of the deed was explained to her; and that, being fully apprised of her right and the effect of signing and acknowledging the instrument, she signed the same while separate and apart from her husband, and acknowledged that she freely and voluntarily signed and acknowledged the same for the uses and purposes therein set forth, and "expressly waived and released all her rights and advantages under and by virtue of all laws of said state of Wyoming relating to the exemption of homesteads." Alex Powers and his wife had continued to reside upon the premises, and claimed the same to be their homestead when this mortgage was executed, and since that time the plaintiff has resided upon the premises with her family, claiming it to be her homestead. Some time subsequent to the date of said last-mentioned mortgage Alex Powers deserted and abandoned his wife, and thereafter the plaintiff brought an action against her said husband in the district court, the reply of the plaintiff showing that the action was for a divorce, and that a decree of divorce was entered in the action, and the court found that by the judgment in that action "all right, title, claim, and interest of the said Alex Powers in and to the said premises, together with the improvements thereon, were duly transferred, conveyed, and set over to this plaintiff, Lillie Powers." The value of the premises is found to have been as follows: On May 6, 1904, the date of the purchase, \$1,250; on July 12, 1906, the date of the last mortgage, \$1,650, which was the amount of that mortgage; and on November 1, 1909, the date of the last foreclosure sale, \$2,460, the amount of the accepted bid at that sale.

Upon these facts, the court found as conclusions of law: First. That the mortgage of May 6, 1904, was paramount to the homestead rights of Alex Powers and Lillie Powers, the same being a purchase-money mortgage. Second. That the mortgage of July 12, 1906, was paramount to said homestead rights, and that the premises were not exempt from sale under such mortgage. Third. That said last-mentioned mortgage was an obligation contracted for the purchase of said premises, and was valid notwithstanding defective execution, and that the defendant Pense is entitled to a deed for the premises therein described. Judgment was thereupon rendered in favor of the defendants, and the title was quieted in the defendant John W. Pense. The findings of fact were not excepted to, but exception was taken to each conclusion of law, and it is here contended that such conclusions and the judgment are contrary to law, and not sustained by the findings of fact. It is argued in support of this contention, that the absence of a clause in the mortgage of July 12, 1906, expressly waiving or releasing the homestead right of Alex Powers, rendered it invalid or insufficient as a release of the homestead, that such right was therefore retained unencumbered, and that by the provision in the divorce decree above mentioned the plaintiff has succeeded to all the right and title of her former husband, and is the owner of the property free from any lien or claim of the defendants.

The Constitution of this state declares that a homestead as provided by law shall not be alienated without the joint consent of husband and wife when that relation exists. Article 19, sub. "Homesteads," § 1. It is provided by statute that the owner of a homestead may voluntarily sell, mortgage, or otherwise dispose of or encumber the same, but that every such sale, mortgage, disposal, or encumbrance shall be absolutely void, unless the wife of the owner or occupant, if he have any, shall, separate and apart from her husband, freely and voluntarily sign and acknowledge the instrument conveying, mortgaging, disposing of, or encumbering the homestead. Comp. Stat. § 3662. Also, by the statute prescribing a sufficient form for deeds and mortgages of real estate, it is provided that, when the grantor or grantors in any such deed or mortgage desires to release or waive his, her, or their homestead rights therein, they or either of them may release or waive the same by inserting in the form of deed or mortgage so prescribed, in substance, the following words: "Hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state." 40 L.R.A. (N.S.)

Laws 1895, chap. 93, § 3; Comp. Stat. § 3668. And that no deed or other instrument shall be construed as releasing the right of homestead, unless the same shall contain a clause expressly releasing or waiving such right, and in such case the certificate of acknowledgment shall contain a clause substantially as follows: "Including the release and waiver of the right of homestead,"—or other words which will expressly show that the parties executing the deed or other instrument intended to release such right; and that no release or waiver of the right of homestead by the husband shall bind the wife unless she join in such release or waiver. Laws 1895, chap. 93, § 5; Comp. Stat. § 3662. By further express provision of the statute a homestead is not exempt from attachment or sale upon execution for the purchase money thereof. Comp. Stat. § 4764. And the Constitution, in the section above cited (article 19, "Homesteads," § 1), provides that no property shall be exempt from sale "for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon." At the time the mortgage in question was executed a homestead was provided for by law as follows: "Every householder in the state of Wyoming, being the head of a family, shall be entitled to a homestead, not exceeding in value the sum of \$1,500 exempt from execution and attachment arising from any debt, contract, or civil obligation entered into or incurred." Rev. Stat. 1899, § 3901. "Such homestead shall only be exempt . . . while occupied as such by the owner thereof, or the person entitled thereto, or his or her family." Id. § 3902. And the statute continues to so provide, except that the homestead right is now also extended to every resident of the state who has reached the age of sixty years, whether the head of a family or otherwise. Comp. Stat. 1910, § 4755. Real estate sold upon execution or the foreclosure of a mortgage may be redeemed by the debtor or mortgagor at any time within six months from the sale. Laws 1895, chap. 95, §§ 3 and 12; Id. chap. 113, § 1; Comp. Stat. 1910, §§ 4735, 4745, 3678. Upon the proper payment of the amount necessary to effect a redemption, within the time allowed, it is declared that the sale and the certificate granted thereon shall be null and void. Laws 1895, chap. 95, § 3; Comp. Stat. 1910, § 4735. And in such cases a certificate of redemption is required to be issued and recorded. Laws 1895, chap. 95, § 13; Comp. Stat. 1910, § 4744. A certificate of sale is assignable by indorsement thereon, and the assignee becomes entitled to the same benefits in every respect as the person named

in the certificate would have been entitled to if it had not been assigned. Laws 1895, chap. 95, § 8; Comp. Stat. 1910, § 4741. At the expiration of the redemption period, if the property has not been redeemed, the purchaser is entitled to a deed. Laws 1895, chap. 95, §§ 5, 9-11; Comp. Stat. 1910, §§ 4738, 4742, 4743. Provision is also made for redemption by judgment creditors within a limited period after the expiration of the time allowed the debtor to redeem; but those provisions are not here material.

It then appears that when the mortgage of July 12, 1906, was executed and delivered, the property had been regularly sold upon a foreclosure sale under a valid mortgage given for purchase money, and that the mortgagors were allowed but one more day in which to redeem, for the redemption period would have expired on July 13, 1906. The mortgage was given for the express purpose of procuring the money with which to redeem from such sale, and the money so procured and secured by the mortgage was actually used for that purpose.

Without a statutory provision excepting purchase-money obligations from the exemption laws, it is a principle of equity that a purchase-money mortgage given at the same time as the deed, or as a part of the same transaction, has precedence over any prior general lien, and that, for the same reason which gives it that precedence, it is superior to the homestead right of the mortgagor. And that is so although the wife or husband of the vendee does not join in the execution of the mortgage, or the right of homestead is not expressly waived or released by a recital to that effect in the mortgage or in the certificate of acknowledgment. In such case a statute requiring an express waiver or release of the homestead right to be contained in the instrument to create a lien upon the premises as against such right does not apply. A like precedence is also given to a mortgage executed by the grantee to a third person as security for money loaned for the purpose of being used in paying the purchase price. Pom. Eq. Jur. 3d ed. §§ 725, 726; Waples, Homestead & Exemption, 331-346; 1 Jones, Mortg. 6th ed. §§ 468-470; 27 Cyc. 1180-1182; 15 Am. & Eng. Enc. Law, 626; Nichols v. Overacker, 16 Kan. 54; Stow v. Tift, 15 Johns. 458, 8 Am. Dec. 266; Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740; Jones v. Parker, 51 Wis. 218, 8 N. W. 124; Kaiser v. Lembeck, 55 Iowa, 244, 7 N. W. 519; Austin v. Underwood, 37 Ill. 438, 87 Am. Dec. 254; Magee v. Magee, 51 Ill. 500, 99 Am. Dec. 571; Roby v. Bismarck Nat. Bank, 4 N. D. 156, 50 Am. St. Rep. 633, 59 N. W. 719; Thomas v. Hanson, 44 Iowa, 651; Roush v. Miller, 39

W. Va. 638, 20 S. E. 663; Cowardin v. Anderson, 78 Va. 88; Clark v. Munroe, 14 Mass. 351; Stewart v. Smith, 36 Minn. 82, 1 Am. St. Rep. 651, 30 N. W. 430; Thompson v. Lyman, 28 Wis. 266; New Jersey Bldg. Loan & Invest. Co. v. Bachelor, 54 N. J. Eq. 600, 35 Atl. 745. In some of the cases cited, the right of dower was asserted against the mortgage, and in others prior or intervening liens of other creditors were sought to be enforced. But whether the claim made in opposition to the mortgage be that of dower or homestead, or a creditors' lien, the reason for the application of the equitable principle stated is substantially the same. As was said in Stewart v. Smith, 36 Minn. 82, 1 Am. St. Rep. 651, 30 N. W. 430: "The doctrine which gives precedence in such cases to a purchase-money mortgage is one of equity, and not of statutory origin, and applies to any claim to or lien upon the property arising through the mortgagor." Change in the form of the security, or the substitution of a new mortgage for the one given at the time of the purchase, does not affect the operation of the rule. 2 Pom. Eq. Jur. §§ 725, 719, and note; 1 Jones, Mortg. 6th ed. § 927a; Jones v. Parker, 51 Wis. 218, 8 N. W. 124; Bradley v. Curtis, 79 Ky. 327; Roush v. Miller, 39 W. Va. 638, 20 S. E. 663; Waples, Homestead & Exemption, 346, 348; Dillon v. Byrne, 5 Cal. 455. And the principle is not rendered inapplicable by the fact that the new or substituted mortgage is executed to a third party for money advanced or loaned for the purpose of paying off the original mortgage. Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740; Swift v. Kraemer, 13 Cal. 526, 73 Am. Dec. 603; McWilliams v. Bones, 84 Ga. 203, 10 S. E. 724; Bankers' Loan & Invest. Co. v. Hornish, 94 Va. 608, 27 S. E. 459; Zinkeison v. Lewis, 63 Kan. 590, 66 Pac. 644; Allen v. Caylor, 120 Ala. 251, 74 Am. St. Rep. 31, 24 So. 512; Ogden v. Totten, 17 Ky. L. Rep. 1390, 34 S. W. 1081. The ground upon which it is held in some of the cases that a mortgage executed to a third party for money loaned at the time of the purchase for the purpose of paying the purchase price is a purchase-money mortgage is that equity, regarding substance rather than mere form, will consider the transaction the same as if the property had been conveyed by the vendor to the lender, and by the latter to the purchaser. And so where the money is borrowed for the purpose of paying the original purchase-money mortgage, upon the giving of a new mortgage to the lender to secure the amount, since the lender might have first taken an assignment of the first mortgage, and re-

leased it upon receiving a new mortgage in its place, the transaction may be regarded in equity as if that had been done, where the intention appears to have been to substitute the new for the old mortgage, giving the new mortgagees the same lien.

We do not understand these principles to be disputed by counsel, but it is contended that they are inapplicable to the facts in the case at bar, for the reason that the purchase-money mortgage had been discharged by the foreclosure sale, and the debt secured thereby extinguished by the payment of the proceeds to the mortgagees. The argument does not hold good where the former mortgage is paid by the use of the borrowed money, as held in *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740; for it was argued in that case that the payment and release of the original mortgage discharged the debt and lien. In that case a decree of foreclosure had been obtained upon a mortgage given for the purchase price, and the premises had been advertised for sale under the decree. On the day set for the sale the mortgagor borrowed money of another to be applied in payment of the decree and mortgage, and executed to him a mortgage upon the property. The money was so applied. The court said: "It cannot be doubted that, if the note and mortgage of Gordon had been renewed, the homestead would have continued bound. Can it make any difference in equity whether the first debt be renewed, or another debt—if it be another—for the same sum created, to raise money to pay off the first? A clear title to the homestead could not vest until the payment of the purchase money. In equity and in effect the advance of the money by Carr, under the circumstances, to pay off the purchase money due, was equivalent to so much purchase money. The debt was, to all intents and purposes, the same, though the creditor was changed. The authorities cited by the respondent, and especially 1 Dall. 164, *Kauffman v. Myer*, 6 Watts, 134, 7 Watts, 362; *Scott v. Fields*, and *Dillon v. Byrne*, 5 Cal. 455; *Marsh v. Rice*, 1 N. H. 168, support this view; and if we could find no case to support it, the sense and apparent justice of the rule would go far towards inducing us to adopt it."

In the case at bar it is true the sale upon the foreclosure had occurred, and the money was borrowed and used to redeem from the sale. It is true also that, as a personal obligation of the mortgagors, the debt had been extinguished. It is proper, therefore, to consider the effect of the sale upon the rights of the parties, and the relation of the purchasers to the mortgage foreclosed, the lien thereof, and the land. 40 L.R.A. (N.S.)

It cannot be denied that the purchasers at the sale acquired all the lien of the mortgage, or that such lien was superior to the homestead right. The purchasers had at least a lien equal to that of the mortgage, the foreclosure proceedings and sale being regular; and, if the sale was irregular or invalid for any reason, they would be entitled to be subrogated to the rights of the mortgagee, and the mortgage would be regarded as assigned to them. 1 Jones, *Mortg.* 6th ed. § 74; 2 Jones, *Mortg.* 6th ed. §§ 1654, 1661, 1897, 1802; *Cavanaugh v. Sanderson*, 162 Mich. 11, 115 N. W. 955. But they had something more than a mere lien, for the only right of the mortgagors was the statutory right of redemption. Mr. Freeman says that the right of the purchaser at an execution sale during the period of redemption seems more like an inchoate title, though it is also a lien. 3 Freeman, *Executions*, § 323. The question has been considered in Minnesota with relation to the right of a purchaser under the foreclosure of a junior mortgage to redeem from a sale under a prior mortgage. And it was said: "The title of the mortgagor does not pass by the foreclosure till his right of redemption expires. . . . The foreclosure sale attaches this condition to his title: That it will pass at the end of a year from the sale unless he, his heirs, [executors] administrators, or assigns redeem. . . . The lien of the mortgage is not extinguished until it merges in the legal estate, when that passes by lapse of time. It has passed indeed to the purchaser,—that is, to the amount of the purchase price,—so that, if he go into possession under the foreclosure, even though it be invalid, he is regarded as a mortgagee in possession." It had been indicated in a former case that the purchaser was not a creditor with a lien entitling him as such a creditor to redeem, but the court, referring to that case, further said: "We think, however, on reflection, that the term 'creditor,' as used in the statute, ought not to be construed as having the limited sense of a personal creditor. There may be a creditor, so far as concerns the land alone, without the personal relation of debtor and creditor, in the ordinary sense, existing." And it was held that the purchaser, within the meaning of the redemption statute, was a creditor having a lien. *Buchanan v. Reid*, 43 Minn. 172, 45 N. W. 11. In Indiana, after referring to previous decisions of the court, it was said: "These decisions close the question as to the nature of the right of the holder of a sheriff's certificate, and establish the rule that he has a lien, and not a title. . . . We adjudge that the holder of a sheriff's certificate acquires a

lien, and that he has a right to redeem as a lienholder, but not as an owner." *Robertson v. Van Cleave*, 129 Ind. 217, 15 L.R.A. 68, 28 N. E. 899, 29 N. E. 781. And in Illinois, where a junior mortgagee had redeemed from a foreclosure sale under the senior mortgage, the court said: "By the redemption, the sale and certificate, as the statute declares, became null and void, but upon familiar principles of equity McCarthy became subrogated to the rights of the purchaser to the extent of having a first lien on the land redeemed for reimbursement of the redemption money." *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563. See also *Herdman v. Cooper*, 138 Ill. 583, 28 N. E. 1094. While the purchaser does not have the legal title until the redemption period has expired, and is not until then entitled to a deed or possession, and during the period allowed for redemption has only a lien which may ripen into full legal title, his title when he receives a deed will relate back to the time of the execution of the mortgage, and take effect by virtue of the original deed or mortgage, so as to cut off all subsequent liens and interests created by the parties. 2 Jones, Mortg. §§ 1661, 1664, 1897.

If it may be rightly said that the mortgage debt was extinguished by the sale and before the estate of the mortgagors could pass to the purchasers by a deed, that would be true only in the sense that it had ceased to be the personal obligation of the mortgagors. It remained for the purpose of supporting the lien of the purchasers, though a personal judgment could not have been recovered upon it, and, after the sale, to the extent of the amount paid by the purchasers upon the sale, it was a conditional obligation attached to the right of redemption, for the property could not be redeemed from the sale except by the payment of that amount. While no duty to redeem rested upon the mortgagors, they were entitled to do so, but only upon the payment of the amount required by law in such case; and the mortgage debt determined the character and dignity of the lien acquired by the purchasers. Where one had purchased land subject to a mortgage, and afterwards took an assignment of the mortgage, and the widow of the former owner who had given the mortgage claimed dower, it was said: "The debt, even if discharged so that an action could not be sustained against the original promisor, still subsists in the nature of a charge or lien upon the land, and upholds the mortgage title as against anyone who ought not in justice to take the land from the mortgagee without paying the money." Speaking of the situation of the owner respecting

the title, immediately preceding the remarks just quoted, the court said: "It is true he holds all the title that Adams had, and all the title that Parrott [the mortgagee] had, and the two titles, therefore, unite in him. Now by this, *prima facie*, the mortgage debt is extinguished. . . . But that is not considered as done without regarding the equities of the parties." And so it was held that the widow was entitled to dower only upon contributing her due proportion of the mortgage debt. *Adams v. Hill*, 29 N. H. 202.

Unquestionably, therefore, the purchasers under the foreclosure sale had a lien upon the property including the homestead right, —a lien which, through the failure to redeem within the period allowed therefor, would ripen into an absolute title. It was the lien of the mortgage, as much so as if the mortgage had been assigned to the purchasers, and necessarily was a lien for purchase money created by the mortgage. For the purpose of discharging that lien the money was borrowed from the defendant Powers, and the mortgage in question was executed and delivered to him; and it is contended that by this transaction a homestead right was acquired in the property, though it had not been paid for except with money borrowed upon the security of this mortgage. It was well said by the supreme court of Wisconsin: "Exemption and homestead laws are liberally construed to effect their beneficent purpose, but they will not be construed so as to accomplish positive frauds, if such a result can be avoided." *Lashua v. Myhre*, 117 Wis. 18, 93 N. W. 811. We are not called upon in this case to determine what the effect of the transaction or the rights of the parties would have been, if the money had been loaned solely upon the personal obligation of Alex Powers and his wife, without any agreement or understanding for a lien upon the premises as security therefor, and therefore the question to be decided does not wholly depend upon the technical meaning of the term "purchase money," or the words of the Constitution, "obligations contracted for the purchase of said premises;" for here security was given under circumstances clearly showing an intention to secure the payment of the money loaned by a first lien upon the property.

While the point does not appear to have been contested, a transaction like that in this case, *viz.*, money loaned, secured by a trust deed on the property, to redeem from a foreclosure sale, was regarded by the courts in Illinois as preserving the lien of the mortgage for the purchase money, and upon a sale of the property to satisfy the claims of other creditors, the amount of

such lien was first paid out of the proceeds, though the property had been conveyed to the wife upon the payment by her of the money so loaned. *Frederick v. Emig*, 186 Ill. 319, 78 Am. St. Rep. 283, 57 N. E. 883; *Frederick v. Ewrig*, 82 Ill. 363. The money which the mortgage was given to secure was in fact borrowed and used to pay the purchase price of the property. J. L. Powers, who loaned the money and to whom the mortgage was executed, had been the assignee and holder of the original mortgage for the purchase price, and had foreclosed it by a sale of the property. He was again requested to assist the parties in preventing the loss of their interest in the property, and to do so, as he did not have sufficient funds for the purpose, he borrowed \$300, a part of the amount required, from the Bank of Commerce, which accounts for the execution of the new mortgage to that bank for the benefit of Powers. Disregarding the mere form of the transaction, it is impossible to understand it in any other light than that Alex Powers and his wife wanted to secure further time to pay for their property, and arranged for the loan for that purpose. They had not paid for it up to that time, and if they paid for it at all, it was with the money loaned to them on July 12, 1906, for which the mortgage of that date was given. Under these circumstances, is it the duty of the court to grant the relief demanded by the plaintiff by entering a decree removing as a cloud upon her title the lien claimed by these defendants, by reason of the omission from the mortgage of a clause expressly waiving the homestead right of Alex Powers? We think not, even if it would be improper to regard the mortgage as one given for purchase money. Assuming that the mortgage was one in which an express release of the homestead by both parties was necessary to authorize it to be construed as barring the homestead right, the facts of the case, in our opinion, bring it within the operation of the principle of equitable assignment by subrogation, which, as observed by Mr. Pomeroy, speaking of the doctrine in relation to mortgages, "is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party and for his benefit. Such a person is in no true sense a . . . volunteer." 3 Pom. Eq. Jur. § 1212; *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437; *Motes v. Robertson*, 133 Ala. 630, 42 So. 225; *Boevink v. Christiaanse*, 69 Neb. 256, 95 N. W. 652; *Wardford v. Hankins*, 150 Ind. 489, 50 N. E. 468; *Ogden v. Totten*, 17 Ky. L. Rep. 1390, 40 L.R.A. (N.S.)

34 S. W. 1081; *Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708; *Ileuser v. Sharman*, 89 Iowa, 355, 48 Am. St. Rep. 390, 56 N. W. 525; *Re McGuire* (D. C.) 137 Fed. 967.

The following statement of the rule is found in the opinion of the court delivered by Judge Thayer in the case of *Cumberland Bldg. & L. Assn. v. Sparks*, 49 C. C. A. 510, 111 Fed. 647: "Where money is advanced to a debtor in pursuance of an express agreement that it is to be used to retire existing liens or encumbrances on his property, and that the creditor who loans the money is to have a first lien upon the property to secure its repayment, such creditor may be subrogated to the rights of the encumbrancer or lienor whose debt has been paid, not only as against the borrower, but as against any one else who subsequently acquires an interest in the property with knowledge of the circumstances under which the money to pay off the encumbrances or liens was advanced. They [the authorities] further hold that, if money is advanced to a debtor to discharge an existing first mortgage upon his property, and in pursuance of an agreement that the lender is to have a first lien upon the property for the repayment of the sum loaned, the lender is entitled, as against a junior encumbrancer, to be treated as the assignee of the first mortgage which has been paid off and discharged with the money loaned, whenever it becomes necessary to do so to effectuate the agreement with the lender, and to prevent the junior encumbrance from being raised accidentally to the dignity of a first lien, contrary to the intention of the parties. The species of subrogation mentioned in both of these instances is what has been termed 'conventional subrogation,' and does not depend upon the establishment of any privity of contract."

While the rule is more generally stated in a form requiring an express agreement that the lender should have a first lien upon the property, many authorities sustain the proposition that, in the absence of an express agreement, one may be implied. *Gans v. Thieme*, 93 N. Y. 225; *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374; *Rachal v. Smith*, 42 C. C. A. 297, 101 Fed. 159. And in the notes to the Georgia case cited in 84 Am. St. Rep. 233, it is said: "One who lends money to discharge liens on real property and who discharges them at the request of the debtor, expecting that his securities will of record take the place of that which he discharged, is not a volunteer. Therefore he may be subrogated to the liens discharged." In *Rachal v. Smith* the court says: "If a person pays a debt at the

instance, request, or solicitation of the debtor, he is neither a volunteer, stranger, or intermeddler; nor is the debt regarded as extinguished, if justice requires that it should be kept alive for the benefit of the one advancing the money, who thereby becomes the creditor. . . . We decide that on the facts of the case, in the absence of any agreement on the subject, the Alliance Trust Company [the new mortgagee] is subrogated to the rights of the mortgagees whose claims it advanced the money to discharge." The theory is that the agreement that the lender is to be secured by a first mortgage on the property will be treated in equity as an agreement that the lien to be discharged shall become security for the loan, that such is the substance of the transaction, and equity will effectuate the real intention of the parties, where no injury is done to an innocent party. *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161.

In *Lashua v. Myhre*, 117 Wis. 18, 93 N. W. 811, the rule was stated as follows: "Where one loans money to another upon the agreement that it is to be used to pay off an existing mortgage on property, and that a new mortgage is to be executed to the lender therefor, the lender is entitled to be subrogated to the rights of the prior mortgagee in case the borrower fails to execute a new mortgage, or in case the new mortgage, when executed, proves to be invalid or defective." And the rule was applied where a chattel mortgage upon exempt property was defective for the reason that the signature of the wife, who was required by law to sign such an instrument, was not witnessed by two witnesses as required by the statute; the mortgage having been given for money borrowed to pay off an existing mortgage on the property. The suit was brought by the husband and wife to remove the cloud upon the title, of the apparent lien of the mortgage. The court said: "The owner of the property having borrowed money of the defendant under his agreement that it should be used to pay off a valid mortgage thereon, and that defendant should have a new one in place thereof, and the money having been in fact so used, a court of equity would doubtless keep alive the valid mortgages for the defendant's protection to meet the very contingency of the wife's refusal to sign." And it was held that upon proof of such facts the plaintiffs would not be entitled to have the apparent lien of the second mortgage set aside, except upon condition that the amount due upon the valid mortgages, "now equitably owned by the defendant," be first paid.

The findings, it is true, do not expressly

state that the new mortgage was executed pursuant to an agreement to secure the loan by a lien on the property; but it is impossible to construe the transaction as shown by the findings otherwise than as the result of a prior agreement to secure the loan by a first-mortgage lien, and thereby substitute a new mortgage for the lien of the first mortgage, then held by the purchasers under the foreclosure sale. The court found that for the purpose of redeeming the property from the sale the money was borrowed and the mortgage executed. The money was loaned and the mortgage executed at the same time. The fact that the mortgage was given shows an understanding that one would be given. The note was signed by both the plaintiff and her husband. The mortgage contained covenants that the property was free from all encumbrances; that the mortgagors were seized in fee simple; that they had a good and lawful right to convey the property; and that they would warrant and defend the same against all lawful claims and demands whatsoever. And the plaintiff, by a clause inserted therein, expressly waived and released her homestead right. Does not this show an intention to give a first and valid lien upon the premises? It seems to us that it does. In Louisiana it is held that such a waiver by the wife alone is sufficient to show the intention of both parties to waive the homestead, and a similar mortgage was held to constitute a waiver by both parties, on the ground that the waiver by the wife alone would be meaningless, since she had no homestead to waive independently of her husband. *Coleman v. Wax*, 120 La. 877, 45 So. 926. Whether that would be a correct ruling or not under our statutes, we are satisfied that the mortgage itself discloses that the parties intended to execute a mortgage properly waiving the homestead; and, in connection with the other facts, justifies us in concluding that it was executed pursuant to an agreement to substitute, for the lien to be discharged, another security of equal effect. Another persuasive fact is that the note signed by the plaintiff and her husband, which was given at the time of the mortgage for the money loaned, contained a clause stating that the makers waived all benefit of stay and exemption laws; and upon the margin was written: "Secured by Real Estate Mtg." It is to be remembered, also, that the property was worth but a small amount over \$1,500, the amount of a homestead exemption, that the lender had held and foreclosed the prior mortgage, and it would be most unreasonable to suppose that he would advance a larger sum, made necessary by the expense

of the foreclosure, upon the understanding that he was to have a lien only upon the small excess above the value of the homestead exemption, when it appears that he was to have a mortgage upon the property, and one was executed without the express reservation of any interest of the mortgagors or others.

Holding that the defendants would be entitled to be subrogated to the prior lien, if the mortgage under which they claim was invalid or defective, and that such prior lien was a lien for purchase money, it is clear that, not having paid or offered to pay at least the amount that would be necessary to satisfy the prior lien, the plaintiff was not entitled to the relief she asked for.

But since the lien to which the defendants would be subrogated, if necessary, was a purchase-money lien, we see no objection to considering the mortgage in question as one for purchase money; and, in that view of it, the manner of its execution and the provisions contained therein would be sufficient to bar the homestead right. We think, indeed, that it might properly be held to have been a purchase-money mortgage; for there appears to us to be no substantial distinction in that respect between a mortgage given for money loaned to pay off a prior purchase-money mortgage and one given to secure a loan made for the purpose of redeeming from a foreclosure sale under such mortgage.

The judgment will be affirmed.

Beard, Ch. J., and Scott, J., concur.

WASHINGTON SUPREME COURT.
(Department No. 2.)

STATE OF WASHINGTON EX REL.
GREAT NORTHERN RAILWAY COMPANY

v.

SUPERIOR COURT FOR SNOHOMISH
COUNTY et al.

(68 Wash. 572, 123 Pac. 996.)

Statute — sufficiency of title — railroad grade.

1. A title, "An Act to Provide for the

Note. — Eminent domain. Power of railroad to condemn property to obtain construction material.

The question decided in *STATE EX REL. GREAT NORTHERN R. CO. v. SUPERIOR CT.*, whether a railroad may, under the power of eminent domain, secure property from which to get materials for construction and repair, has been directly discussed in but few 40 L.R.A. (N.S.)

Formation of Corporations," is sufficient to cover a provision allowing railroad companies to change the grade or location of their roads for reasonable causes, and to appropriate the necessary materials therefor. Eminent domain — securing material for grading railroad.

2. Securing property from which to take materials to raise the grade of a railroad track and strengthen the embankment, which had been injured by floods, for the convenience, safety, and security of the public, is a public use for which the power of eminent domain may be employed.

(May 31, 1912.)

PETITION for a writ to review the action of the Superior Court for Snohomish County dismissing an application for the condemnation of certain real estate under the right of eminent domain to secure earth for use in grading petitioner's right of way. Reversed.

The facts are stated in the opinion.

Messrs. F. V. Brown and F. G. Dorety, for relator:

The title is sufficient.

Marston v. Humes, 3 Wash. 267, 28 Pac. 520; State ex rel. Olsen v. Board of Control, 85 Minn. 165, 88 N. W. 533; Lancey v. King County, 15 Wash. 9, 34 L.R.A. 817, 45 Pac. 645; Percival v. Cowychee & H. W. Irrig. Dist. 15 Wash. 480, 46 Pac. 1035; State use of Rathbone v. Wirt Co. 37 W. Va. 808, 17 S. E. 379; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Ewing v. Seattle, 55 Wash. 229, 104 Pac. 259; Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; State, Coward, Prosecutor, v. North Plainfield, 63 N. J. L. 61, 42 Atl. 805; Pinkerton v. Pennsylvania Traction Co. 193 Pa. 229, 44 Atl. 284; People ex rel. Deneen v. People's Gaslight & Coke Co. 205 Ill. 482, 98 Am. St. Rep. 244, 68 N. E. 950; Ryan v. Louisville & N. Terminal Co. 102 Tenn. 111, 45 L.R.A. 303, 50 S. W. 744; Lewis's Sutherland, Stat. Constr. 2d ed. § 131.

The material which the railway company seeks to obtain from this land is "material for construction."

Lewis, Em. Dom. 3d ed. § 403; Hopkins v. Philadelphia, W. & B. R. Co. 94 Md.

cases, although statutes extending the power of eminent domain to cases of this nature have been enacted in a good many jurisdictions.

In *Hopkins v. Florida C. & P. R. Co.* 97 Ga. 107, 25 S. E. 452, it was held that a statute conferring power "upon a railroad company 'to take,' for obtaining gravel and other material, as much land as may be necessary for the proper construction, opera-

257, 51 Atl. 404; *Bell v. Maish*, 137 Ind. 226, 36 N. E. 358, 1118; *Atchison, T. & S. F. R. Co. v. McConnell*, 25 Kan. 310; *Preston v. Dubuque & P. R. Co.* 11 Iowa, 15.

The appropriation of land for the construction, maintenance, and operation of railroads includes the taking of such lands for the purpose of securing material for such construction, maintenance, and operation.

Lewis, Em. Dom. 3d ed. § 263, note 9; *Saginaw, T. & H. R. Co. v. Bordner*, 108 Mich. 236, 66 N. W. 62; *Minneapolis & St. L. R. Co. v. Nicolin*, 76 Minn. 302, 79 N. W. 304; *State ex rel. Harlan v. Centralia-Chehalis Electric R. Power Co.* 42 Wash. 632, 7 L.R.A. (N.S.) 198, 85 Pac. 344.

Such use is a public use.

tion, and security of its railroad," included the power to condemn, for the purposes indicated, lands lying contiguous to its right of way, and necessary for the purpose of securing gravel, sand, and other material necessary for the construction, operation, and security of its line of railroads in the state. The court said, after referring to the provision in the United States Constitution that private property shall not be taken for public use without compensation: "The Constitution of the state of Georgia, ¶ 1, § 3, art. 1, Code, § 5024, provides that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.

. . . It was early held that it was the province of the legislature to determine what objects are or are not of such public importance as to justify them in appropriating property. See *Mims v. Macon & W. R. Co.* 3 Ga. 338. In the same case it was held that the appropriation of private property to a railroad company for the purpose of building a railroad, under the right of eminent domain conferred by its charter, was the exercise of that power for a public use; and by the same decision of this court it was held that the state could lawfully delegate the power to corporations chartered, like railroad companies, for a great public use. . . . Our courts have uniformly held that the right of eminent domain was lawfully exercised when the power was conferred upon railroad companies, in the construction of these great channels of travel, to appropriate private property for their necessary uses."

Vermont C. R. Co. v. Baxter, 22 Vt. 365, arose under the Vermont statute giving a railroad power to enter upon any lands contiguous to said railroad or its works, and to carry away and use such stone, gravel, earth, and other material as might be necessary for building or repairing said road. In a note to the case, *Redfield, J.*, who delivered the opinion, said: "Since the decision of this case, it has been somewhat questioned, by some, whether the company itself has any right to take materials for building its road, beyond the limits of the 40 L.R.A. (N.S.)

Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; *Milwaukee & St. P. R. Co. v. Milwaukee*, 34 Wis. 271; *Reusch v. Chicago, B. & Q. R. Co.* 57 Iowa, 687, 11 N. W. 647; *Valley R. Co. v. Bohm*, 34 Ohio St. 114; *Vermont C. R. Co. v. Baxter*, 22 Vt. 365; *State ex rel. Harlan v. Centralia-Chehalis Electric R. Power Co.* 42 Wash. 632, 7 L.R.A. (N.S.) 198, 85 Pac. 344.

Messrs. Arctander, Halls, & Jacobsen for respondents.

Mount, J., delivered the opinion of the court:

The relator brought an action in the court below to condemn a certain tract of land belonging to the respondents *Christian Joergenson and wife*. The railway com-

survey. That question was not made or considered by the court in this case, and, if it be a question, is one involving constitutional considerations of a character which might require serious discussion and grave inquiry. But at present I should be inclined to suppose it must depend upon the necessity for taking such materials, and that it is therefore a question of fact mainly."

Most of the cases on the subject of condemnation by railroads for the purpose of obtaining construction material relate to the extent of the powers granted by the legislature, and take for granted the legislative authority.

In *New York & C. R. Co. v. Gunnison*, 1 Hun, 496, the court, in denying the railroad the right to condemn lands for the purposes of taking gravel therefrom when it was shown that the railroad had another gravel pit within 5 miles, said: "The right of condemnation is the exercise of an extraordinary power reserved by the state, in hostility to the private rights of citizens. It must therefore be expressly granted, when exercised by a private or municipal corporation. The grant will not be extended by inference or implication. Nor can anything be taken, except by virtue of the law, for the benefit of the public, and under an indispensable necessity in the construction and maintenance of the road. It is not sufficient that it is convenient or cheaper for the road. Because such a rule would apply to ties, fuel, or outside soil for the purposes of embankments. It follows that the railroad company cannot acquire the right to this land for the purpose of excavating the soil and carrying it away for many miles, under the doctrine of eminent domain, by virtue of the statutes now in force."

Where, under the statute, a railroad had power to take land within certain limits, which should be necessary for the purpose of making and maintaining the railway and works, it was held that a railroad could not condemn land for purposes of material, even though contiguous to its line, without showing that good and sufficient soil could not be obtained by them else-

pany seeks the land for the purpose of removing the earth therefrom, in order to fill and raise the grade of its railway between the stations of Silvana and Burlington, a distance of about 22 miles. The tract of land sought lies between these stations, and adjoins the right of way of the railway company. The object for which the land is sought is stated in the petition as follows: "The obtaining of materials for construction and maintenance of the railroad of your petitioner as hereinafter described, and for the security and safety of the public in the construction, maintenance, and operation of said railway. That your petitioner owns and is now operating a line of railroad from the city of Vancouver, in the Province of British Colum-

bia, Dominion of Canada, to the city of Seattle, in the state of Washington, and through the state of Washington to the cities of St. Paul and Duluth, in the state of Minnesota, and that it operates trains over said railway and other tracks to the city of Portland, in the state of Oregon. That the said railway of petitioner serves the towns of Burlington, in the county of Skagit and Stanwood, and Silvana, in the county of Snohomish, which towns have stations situated upon the main line of your petitioner between Vancouver, British Columbia, and all other points mentioned herein, and that the property herein sought to be appropriated immediately adjoins the right of way of said railway. That for several years last past, and par-

where at a convenient distance. It is not clear, by the case, but that the railroad might have been allowed to take less than the fee for this purpose, but it was suggested that they desired to take the fee merely to exchange it for another piece of land, where they could get the material desired. *Eversfield v. Mid-Sussex R. Co.* 3 DeG. & J. 286, 28 L. J. Ch. N. S. 107, 5 Jur. N. S. 776, 7 Week. Rep. 102.

In *Watson v. Northern R. Co.* 5 Ont. Rep. 550, it was held that a railroad, under ordinary circumstances, could not take land for a gravel pit. There was in the statute a possible permission by implication to take gravel, but the court did not pass on this, as the mere right of taking was not what was desired by the railroad.

In *Valley R. Co. v. Bohm*, 34 Ohio St. 114, it was held that where a railroad wished to proceed to condemn lands for the purpose of securing materials for construction, under the statute permitting such condemnation, the petition should be so specific in its description of the use intended as to leave no doubt as to the extent of the interest sought to be acquired.

In *Saginaw, T. & H. R. Co. v. Bordner*, 108 Mich. 236, 66 N. W. 62, where the statute authorized the condemnation of gravel beds, a railroad which owned two gravel pits separated by a narrow strip of land was allowed to condemn this strip, on the ground that it was more convenient for the railroad to be able to use its gravel pits by connecting them by a single line with its main line than by two lines, and that the trouble and expense, etc., was a question of necessity for the jury.

In *Chicago, M. & St. P. R. Co. v. Mason*, 23 S. D. 564, 122 N. W. 601, it was held that the statute which provides: "That a railway corporation shall have power to lay out its road not exceeding 100 feet in width, and to construct the same, and, for the purposes of obtaining gravel, to take as much land as may be necessary for the proper construction, operation, and security of the road,"—sufficiently authorizes a railway corporation to condemn land for the purpose of obtaining gravel to keep its road-

bed in a safe condition for use. The court held that the legislature had delegated to the railroad the right and discretion as to what land should be taken, and that there was in this case no oppression in the exercise of that right, it appearing that the railroad desired to take about 34 acres along its right of way, and that it had no other gravel beds within 100 miles.

In *Smith v. Cleveland, C. C. & St. L. R. Co.* 170 Ind. 382, 81 N. E. 501, where the purpose of the proceeding was to make local alterations and to raise grade, the court said: "Railroad companies are not authorized to lay out their roads in general exceeding 6 rods wide, but for the purpose of 'cuttings, embankments, and procuring stone and gravel' they may take as much more land, within the limits of their charter, as may be necessary for the proper construction and security of the roads. . . . The circumstance that appellee's predecessor has heretofore appropriated a strip of land from 100 to 110 feet in width for the purpose of constructing a fill or embankment upon the tract now owned by appellant does not debar appellee from appropriating lands to an additional width for the purpose of raising such embankment so as to make it answer the present requirements of the company's needs."

In *Milwaukee & St. P. R. Co. v. Milwaukee*, 34 Wis. 271, where the question arose as to taxation of property of the railroad under the exempting statute, the court held that the statute of exemption of railroads was similar to that of condemnation, and that under the statute providing that a railroad might take a strip of land 100 feet wide, and other lands beyond the limit of 100 feet which its chief engineer should certify to be necessary for the purpose of obtaining earth, gravel, stone, or other materials for embankments, structures, or superstructures necessary to, or for the construction, repair, or renewal of said road,—all lots or parcels of land necessarily used by the company for the preservation and protection of its roadbed, or for the purpose of obtaining gravel and earth therefrom for its road (the same being adjacent

ticularly in November, 1909, and November, 1911, the said railway of your petitioner, between said towns of Silvana and Burlington, for a distance of approximately 6 miles to the south of the property herein sought to be condemned, and for approximately 16 miles to the north of said property, has been damaged and washed away by floods which have delayed traffic upon said railroad and interfered with the security and safety of the public, and that it is necessary for your petitioner to raise the embankment upon which its railroad is constructed between said towns of Silvana and Burlington, and to secure additional earth to construct said embankment. That your petitioner owns no land or earth from which materials for constructing or raising said embankment can be conveniently and economically removed and used by your petitioner for the purposes above mentioned, and that the object for which the said lands, real estate, and premises are sought to be appropriated, condemned, and acquired by your petitioner, is the obtaining of materials therefrom for the purposes aforesaid. That said object and use is a public object and use, and the public interest requires the prosecution of the aforesaid enterprise of your petitioner, and

to the railroad) were also exempt from taxation.

In *Minneapolis & St. L. R. Co. v. Nicolin*, 76 Minn. 302, 79 N. W. 304, where a railroad had secured the right to remove gravel from a gravel pit, and operated a spur track from its main line to a point less than 300 feet from said pit, it was held authorized to condemn the right of way to extend its spur to the pit, under a statute which provided: "The power to condemn hereby granted shall embrace all roadways, spur and side tracks, rights of way, railroad crossings, depot grounds, yards, grounds for machine shops, warehouses, elevators, station houses, water tanks, and all other buildings and structures, rights, privileges, and easements necessary to the construction, or necessary or convenient to the operation, of any of said railroads; also all lands, rights, privileges, and easements that are or may become necessary or convenient to the full enjoyment, use, maintenance, and operation of any of said railroads." It may be noted that in this case *Canty, J.*, gave the following concurring opinion: "I concur, but do not want it to be implied that a railroad company may not also condemn land to be used as a stone quarry for the purpose of obtaining stone to use in railroad construction. It is not practicable to purchase gravel in the open market. Gravel must be obtained at the nearest and most accessible points, so that it may be moved and handled at the least possible expense; otherwise, it 40 L.R.A. (N.S.)

that said lands, real estate, premises, and property sought to be appropriated herein, are required and necessary for the purposes of such enterprise." The respondents filed a denial of the allegations of necessity, and also a motion to dismiss the action upon the ground that the petition did not state facts sufficient to authorize a condemnation of the property sought. The lower court sustained this motion, and dismissed the petition, whereupon the relator sued out this writ of review. No question is made here as to the method of review, and we shall therefore assume, without deciding, that this is a proper method, and proceed to the merits of the case.

It is contended by the relator that the land sought is a proper subject of condemnation for the use stated, under the provisions of Rem. & Bal. Code, § 8738, and also under the provisions of § 8740. The respondents concede that § 8738 gives authority to the relator to condemn the land for the purpose described, but contend that this section is void because it was enacted in a law the title of which was insufficient. The statute is as follows: "Any corporation may change the grade or location of its road or canal, not departing from the

would increase enormously the cost of railroad construction."

In *Smyth v. Canadian P. R. Co.* 1 Sask. L. R. 165, where there was no question raised but that the railroad might have condemned the land that it wished under the statute, but it had taken gravel from land without leave or proceedings, the court held that the statute authorizing a company to take from adjacent public land gravel, etc., for the construction of its railway, did not permit it so to take it for the maintenance of the right of way.

In *Parsons v. Howe*, 41 Me. 218, where the defendant railroad went without permission upon the land of a person which had not been taken for their right of way or condemned in any way, and took from it construction material, the court, in giving judgment for the plaintiff for damages, stated that the defendant's charter "authorizes that corporation to purchase, or take and hold, so much of the land of private persons or other corporations as may be necessary for the location, construction, and convenient operation of said railroad; and the right to take, remove, and use, for the construction and repair of said railroad and appurtenances, any earth, gravel, stone, timber, or other materials on or from the land so taken;" but said that this did not permit the defendant to go upon the lands not taken under the charter, and take material therefrom against the will and without the consent of the owners of such lands. B. B. B.

general route specified in the articles of incorporation, for the purposes of avoiding annoyances to public travel, or dangerous or deficient curves or grades, or unsafe or unsubstantial grounds or foundation, or for other like reasonable causes, and for the accomplishment of such change shall have the same right to enter upon, examine, survey, and appropriate the necessary lands and materials as in the original location and construction of such road or canal." This statute was first enacted by the territorial legislature, in 1869, as § 3 of chapter 3 of an act entitled "An Act to Provide for the Formation of Corporations." The section was re-enacted under the same title in 1873, and again in 1881. The organic act of the territory provided that "every law shall embrace but one object, and that shall be expressed in the title." U. S. Rev. Stat. § 1924. It is argued that the title of this act is insufficient to authorize the section quoted, and for that reason the section is void. Many cases decided by this court are cited to sustain this contention, among them being *Harland v. Territory*, 3 Wash. Terr. 131, 13 Pac. 453; *Percival v. Cowychee & H. W. Irrig. Dist.* 15 Wash. 480, 46 Pac. 1035; *Armour & Co. v. Western Constr. Co.* 36 Wash. 529, 78 Pac. 1106; *State v. Clark*, 43 Wash. 664, 86 Pac. 1067, and other cases. But we think none of these cases are controlling upon the question here presented. This provision of the organic act above referred to was not intended to require details and particulars to be stated in the title of acts. We have many times held that this provision and the same provision from our Constitution do not require the title of an act to furnish an index of the whole act. *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728. "A statute, in the nature of an enabling act, which embodies a general scheme of incorporation, may embrace the greatest variety of subjects germane to corporations, under a title couched in the most general form of words, such as an act concerning private corporations. In treating of railroad corporations, it may confer upon them the power to condemn land for right of way, and to receive subscriptions of municipalities to their stock, and all this without coming within such a constitutional inhibition. An Act 'to Revise the Laws Providing for the Incorporation of Railroad Companies' does not violate such a constitutional provision by including the substantial provisions of a former law which imposes a liability upon railroad companies 40 L.R.A. (N.S.)

for injuries resulting from neglecting to fence their tracks. 'An Act to Authorize the Organization of Annuity, Safe Deposit, and Trust Companies' may properly embrace a provision granting to such corporations the power to act as guardians of the estates of insane persons." 10 Cyc. p. 188, ¶ "g." So in this case, under a title, "An Act to Provide for the Formation of Corporations," we would expect to find the powers and duties of the corporations defined, and among these powers the right of eminent domain would naturally be included, because such right is germane to the creation or formation of corporations. The statute is therefore not void on account of the title.

It is argued with much force by counsel for respondents that the use of respondents' property sought in this case is a private, and not a public, use. The case of *Re Rhode Island Suburban R. Co.* 22 R. I. 457, 52 L.R.A. 879, 48 Atl. 591, is relied upon to sustain this position, and is quoted at length in the briefs. It is there stated: "The true test of such use is whether the taking is essential to the service of the public franchise, or whether it pertains only to the private interests of the company in the details of its business. The former constitutes a public use, and the latter does not." The petition in this case alleges in substance that the railway, for a distance of approximately 22 miles, has been damaged and washed away by floods which have delayed traffic upon said railway and interfered with the security and safety of the public; that it is necessary to raise the embankments upon which the railroad is constructed; that the public interest and safety require the prosecution of said enterprise; and that this land is necessary therefor. These allegations must be taken as true in this case, and, being so, it seems to follow that the use of the soil sought is essential to the service and use of the public franchise in order to provide for the safety of the public, and is not to provide for the private interests of the company. *State ex rel. Harlan v. Centralia-Chehalis Electric R. Power Co.* 42 Wash. 632, 7 L.R.A. (N.S.) 198, 85 Pac. 344.

For these reasons we are of the opinion that the court erred in dismissing the petition. The judgment is therefore reversed, and the cause is reinstated for further proceedings.

Ellis, Morris, and Fullerton, JJ., concur.

**UNITED STATES CIRCUIT COURT
OF APPEALS, SEVENTH CIRCUIT.**

**LOUISVILLE & NASHVILLE RAILROAD
COMPANY, Appt.,**

v.

F. W. COOK BREWING COMPANY.

(96 C. C. A. 322, 172 Fed. 117.)

Interstate commerce — suit — jurisdiction.

1. A suit to compel an interstate carrier to receive property for transportation from one state to another is within the jurisdiction of the courts, and not of the Interstate Commerce Commission.

Courts — jurisdiction — extraterritorial matters.

2. The courts of a state in which a carrier is doing business are not deprived of jurisdiction of a suit to compel it to receive property for transportation into another state, on the theory that it involves property and rights of the carrier beyond the territorial reach of the court.

Note. — Duty of carrier to accept liquor for transportation to points where its sale is prohibited or restricted.

This note is confined to cases where the question of the carrier's duty to accept intoxicating liquors for transportation has arisen out of the carrier's refusal to accept them.

In *LOUISVILLE & N. R. Co. v. F. W. COOK BREWING Co.*, it is held that a common carrier may not decline to receive intoxicating liquor for transportation into a section of another state where prohibition obtains.

In *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, which arose before the Wilson act of 1890, the action was brought against a common carrier for damages for refusing to ship beer from Illinois to Iowa. The defense of the railroad was based on the statute of Iowa which provided a punishment for any common carrier who knowingly brought within the state any intoxicating liquors from any other state or territory of the United States without first having been furnished with a certificate under the seal of the county auditor of the county, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell intoxicating liquors in such county. The court below overruled a demurrer to the answer of the defendant setting up the statute, but the Supreme Court of the United States reversed the judgment, holding that the statute was an infringement of the Constitution as a regulation of interstate commerce beyond the power of the state.

It may be noted that it is held that the Wilson act "was not intended to and did 40 L.R.A.(N.S.)

Interstate carrier — conflict of laws — refusal of shipment.

3. A state statute forbidding carriers to bring intoxicating liquors into localities where prohibition laws exist is no defense to a proceeding instituted in a suit against the carrier to compel it to accept liquors for transportation to such localities, and it is immaterial that the carrier was chartered in the former state and has covenanted to obey its laws.

Carrier — rules — discrimination.

4. A rule of a carrier that it will not carry intoxicating liquors to dry counties of a state, when it undertakes to carry to wet counties, is unreasonable and void.

(April 13, 1909.)

A PPEAL by defendant from a judgment of the Circuit Court of the United States for the District of Indiana in plaintiff's favor in a suit to compel defendant to receive property for transportation from one state to another. Affirmed.

The facts are stated in the opinion.

Argued before Grosscup, Baker, and Seaman, Circuit Judges.

not cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee." *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, quoted in *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633.

In *Crescent Liquor Co. v. Platt*, 148 Fed. 894, it was held that an express company could not justify its refusal to receive packages of liquor either open or C. O. D. for transportation between points within the state, or to decline to receive C. O. D. packages for transportation from points out of the state to points within the state, because of a state statute providing that "any agent or employee of any person, firm, or corporation carrying on the business of a common carrier, or any other person who, without a state license for dealing in intoxicating liquors, shall . . . deliver to any person, firm, or corporation any package containing such intoxicating liquors, shipped 'collect on delivery' or otherwise, except to a person having a state license to sell the same, or to the bona fide consignee thereof, who has in good faith ordered the same for his personal use, shall be deemed to have made a sale thereof contrary to law, and guilty of a misdemeanor." The court took the position that the statute, as applied to interstate shipments, was a violation of the commerce clause, and as applied to intrastate shipments, was in violation of the 14th Amendment.

But in *Danciger v. Wells, F. & Co.* 154 Fed. 379, where the defendant express company did not deny that it must accept for transportation interstate shipments of liquors to "prohibited" states, the court de-

Mr. Phillip W. Frey for appellant.

Mr. George A. Cunningham, for appellee:

Where a court has jurisdiction of the parties, especially in cases of injunction and specific performance, it will grant relief even though the property to be affected is in another state. Even proceedings in the courts of one state may be enjoined by courts of another state, where the latter have jurisdiction of the parties.

1 High, Inj. 4th ed. §§ 103, et seq.; 6 Pom. Eq. Jur. § 670; *Eingartner v. Illinois Steel Co.* 59 Am. St. Rep. 859, note; *Hawkins v. Ireland*, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73; *Hayden v. Yale*, 45 La. Ann. 362, 40 Am. St. Rep. 232, 12 So. 633; *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.* 34 Fed. 481; *Hutchinson, Carr.* 3d ed. § 149; *Bluthenthal v. Southern R. Co.* 84 Fed. 920; *Elliot, Railroads*, 2d ed. § 1564; *Danciger v. Wells, F. & Co.* 154 Fed. 379; *Crescent Liquor Co. v. Platt*, 148 Fed. 897.

declined to enjoin it from refusing to take and transport liquor C. O. D., holding that the defendants were not bound to carry C. O. D. at common law, and that therefore the matter must rest upon contract. The court distinguished the *Crescent Liquor Company* decision as involving the right to require the carrier to perform the common-law obligations to carry at all, and not directly the right to require the carrier to engage in the C. O. D. business.

And in *Davis Hotel Co. v. Platt*, 172 Fed. 775, the judge, who decided the *Crescent Liquor Case*, while considering the questions at issue as somewhat similar to those in that case, and expressing himself as in accord with all the propositions of law therein decided, nevertheless gave the defendant an opportunity to take testimony to show that it declined to receive C. O. D. packages of liquor from any shippers, and that such was a reasonable regulation of its business.

And in *Burke v. Platt*, 172 Fed. 777, the same judge held that it was not unreasonable for a carrier to refuse to receive any liquor C. O. D., this rule applying to all shippers, and to all localities where the carrier operated.

So, in *Royal Brewing Co. v. Adams Exp. Co.* 15 Inters. Com. Rep. 255, it was held by the Interstate Commerce Commission that it was not an unreasonable regulation by carriers to refuse to accept liquor for transportation C. O. D.

In *United States ex rel. Friedman v. United States Exp. Co.* 180 Fed. 1006, mandamus was issued compelling a common carrier to accept in Arkansas goods containing intoxicating liquors, for shipment to that part of Oklahoma formerly known as the Indian territory. The court 40 L.R.A. (N.S.)

Baker, Circuit Judge, delivered the opinion of the court:

On bill and answer a decree was entered restraining appellant from refusing to accept interstate shipments tendered by appellee. The facts from which arise the questions necessary to be answered are these: Appellee is an Indiana corporation operating a brewery at Evansville. Appellant is a Kentucky corporation doing business as an interstate carrier on an interstate railroad extending through Indiana and Kentucky. In 1906 Kentucky passed an act declaring it to be unlawful for carriers to bring intoxicating liquors into any county or district where the sale of such liquors had been legally prohibited. In 1907, shortly before appellee filed its bill, appellant published a circular, posted it in stations, and filed it with the Interstate Commerce Commission, directing appellant's agents to refuse to accept shipments of intoxicating liquors, whether intrastate or interstate, destined to points within Kentucky prohibition territory. Before this, appellant shipped beer for ap-

particularly considered in this case the question whether the intercourse act of 1897, and the act enabling Oklahoma to become a state, controlled or could control the general law as to interstate commerce, and held that the matter was one of general law and was covered by the United States statute of 1887, which provided: "That it shall be unlawful for any common carrier subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever."

For cases on what is sufficient to terminate interstate transportation of intoxicating liquors, see the notes to *State v. Intoxicating Liquors*, 11 L.R.A. (N.S.) 550; *State v. Intoxicating Liquors*, 23 L.R.A. (N.S.) 1020; and *State v. Intoxicating Liquors*, 29 L.R.A. (N.S.) 745.

For constitutionality of statute forbidding the carrying of intoxicating liquors into prohibition districts, see the note to *State v. Williams*, 17 L.R.A. (N.S.) 299.

For a case where an injunction was refused, which would have prevented a carrier from receiving liquors out of the state to export them into the state, see *Gulf, C. & S. F. R. Co. v. State*, 28 Okla. 754, 35 L.R.A. (N.S.) 456, 116 Pac. 176.

For injunction against bringing intoxicating liquor into a prohibition district, excluding the interstate commerce question, see the note to *United States Exp. Co. v. State*, 35 L.R.A. (N.S.) 879. B. B. B.

pellee to all Kentucky points on its line (from which fact we deduce that appellant had duly made and published proper classifications and rates for such shipments). After the issuance of the circular aforesaid, appellant refused to accept appellee's beer shipments to prohibition points, though the full freight charges were tendered in advance, but continued to accept such shipments to nonprohibition points. Appellee filed its bill in the state court at Evansville.

The contention that appellee's remedy, if any, was limited to proceedings before the Interstate Commerce Commission, we deem untenable. No complaint was made that the beer rates were unreasonable, either in themselves or on comparison with rates for other commodities, or that appellee was subjected to any undue disadvantage in its competition with other brewers, or that Evansville was discriminated against. Any such complaint would go to the Commission. But the suit here was based on appellant's refusal to carry under any circumstances goods of a class for which appellant had made generally a classification and rate. Whether the refusal to carry the property in question, like a refusal to carry some person, was justified or not, we believe is a question of common law, not an interpretation and application of any provision of the interstate commerce act (Act Feb. 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154). And the act itself provided that nothing therein should in any way abridge the remedies at common law. See *Danciger v. Wells, F. & Co.* (C. C.) 154 Fed. 379.

Jurisdiction (resting upon the original jurisdiction of the state court) is further assailed on the ground that the decree affects property and rights of appellant beyond the territorial reach of the court. The state court, and the Federal court on removal, had full jurisdiction of appellant's person. The suit was *in personam*. The act complained of was appellant's refusal in Indiana to accept in Indiana goods for shipment into Kentucky. That part of the decree which directs the performance of acts in Indiana is beyond the scope of the attack. Therefore the decree should not be vacated (nor modified, since no motion to modify was made), even if there were any merit in the contention that the command to make deliveries in Kentucky was erroneously included in the decree.

We find nothing in the case to justify appellant's refusal. Beer is recognized by the law of the land as a commodity in which persons may deal as freely as in other commodities, except to the extent

that such traffic is restrained or prohibited by express legislation. The Kentucky legislation was effective only as an exercise of local police power. As a regulation of interstate commerce it was utterly void. *Cincinnati, N. O. & T. P. R. Co. v. Com.* 126 Ky. 563, 104 S. W. 394; *Heyman v. Southern R. Co.* 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130. And under the Wilson act (Act Aug. 8, 1890, chap. 728, 26 Stat. at L. 313, U. S. Comp. Stat. 1901, p. 3177) the local police power could not attach until after delivery of the beer to the Kentucky consignee. *Foppiano v. Speed*, 199 U. S. 501, 517, 50 L. ed. 288, 291, 26 Sup. Ct. Rep. 138; *Heyman v. Southern R. Co.* *supra*.

In support of its reliance upon the Kentucky statute, appellant in its answer alleged that as a Kentucky corporation it had covenanted with Kentucky to obey the Kentucky laws. If, as between Kentucky and appellant, the promise was meant to include void statutes, the right of Indiana citizens to require appellant to perform fully its duty as an interstate carrier under the laws applicable to interstate commerce could not be thereby altered or diminished. For otherwise appellant would be endowing the Kentucky legislature with a power forbidden it by the Federal Constitution.

The answer attempted a further justification on the ground that the promulgation and enforcement of appellant's aforesaid circular was "in the exercise of its power as a common carrier to make reasonable rules and regulations as to the kind of goods and commodities which it would transport and carry as such common carrier." Conceding the power to the full extent stated in the numerous authorities cited by appellant (see 5 Am. & Eng. Enc. Law, 2d ed. 162, as illustrative), we find no facts, either in the answer or the bill, on which to base the reasonableness of the promulgated rule. As a mere transportation problem there was no difference between carrying a case of beer to a "wet" Kentucky county and carrying one to the adjoining "dry" county. Appellant did not claim that it was not equipped or did not choose to carry that class of property. On the contrary appellant's general practice was to accept such traffic. In argument it was suggested that a good reason for making the difference between beer shipments to "wet" and to "dry" counties might be found in the damage to its business which appellant might suffer from fines, costs, withdrawal of patronage, punitive regulations, etc., if it should fail to obey the void Kentucky statute. That is speculation for which we find no warrant in the record. The bill averred that the

statute, so far as it affected interstate commerce, was held void in the first case that arose, and that all the railroads in Kentucky except appellant had been carrying beer to "dry" counties without any prosecutions being instituted. The answer merely stated that appellant "would render itself liable to prosecution." Appellant did not even allege a belief that prosecutions would be undertaken, much less that they would end in fines, or that other evil consequences would follow. And such an apprehension, if speculation is to be indulged, would probably be groundless, unless appellant should voluntarily go beyond its province of carrier and make itself a party to illegal sales after the transportation was ended,—a thing conceivable in "wet" as well as in "dry" counties. So the reasonableness of the rule really comes back to rest on appellant's mere desire to carry out the policy exhibited in the void, as well as in the valid, part of the Kentucky statute. While this may be not uncommendable in appellant as a Kentucky corporation, at the same time appellant as an interstate carrier should not overlook the fact that the paramount congressional policy stands expressed in the Wilson act.

The decree is affirmed.

Affirmed by the Supreme Court of the United States, January 22, 1912 (223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189).

SOUTH DAKOTA SUPREME COURT.

RE A. SHERIN.

(27 S. D. 232, 130 N. W. 761.)

Attorney — disbarment — criminal charge — necessity of criminal proceedings.

1. Disbarment proceedings should not be begun against an attorney for a crime not

Note. — Extortion or robbery as affected by right, or belief in right, to property sought to be secured.

Extortion.

There seems to be an irreconcilable conflict of authority as to whether good faith or lack of corrupt intent is good defense to a charge of extortion, though as pointed out in RE SHERIN, such conflict may in some cases be due to a difference in the wording of the statutes under which the charge is brought.

—threats.

In State v. Logan, 104 La. 760, 29 So. 40 L.R.A. (N.S.)

connected with his work as an attorney, until after the matter has been disposed of by a proper criminal proceeding.

Same — immoral conduct — past transaction.

2. Immoral conduct is no ground for disbarring an attorney where for several years after it occurred he has lived an exemplary life.

Same — extortion — compelling transfer of property by threats.

3. Threatening a man who had deserted his wife and was living in adultery with another woman in another state, with criminal prosecution and extradition unless he secured the release of an attachment of property left by him in the state, under a note which he had given his paramour, and gave his wife a bill of sale, and paid her the sum of money to which she was justly entitled, is extortion for which an attorney may be disbarred, where the statute defines extortion as obtaining property from another with his consent, induced by the wrongful use of force or fear.

On Rehearing.

Evidence — privilege — attorney's letters to husband.

4. The privilege accorded communications between husband and wife does not extend to letters written by the wife's attorney, by her authorization, to the husband.

(McCoy, J., dissents.)

(March 29, 1911.)

PROCEEDINGS for disbarment of A. Sherin. Decree of suspension modified.

The facts are stated in the opinion.

Mr. W. A. Morris for the Court.

Messrs. Sherin & Sherin and Lee Stover for respondent.

Whiting, J., delivered the opinion of the court:

This is an original proceeding brought in this court, seeking to have this court strike from the roll of its bar the name of A. Sherin, respondent. The accusation filed herein charged the respondent with

336, it was held that act 63 of 1884, which provides that "any person" who "shall threaten to kill, . . . with intent to extort money, . . . shall upon conviction, be imprisoned," etc., applies to cases where the taking or obtaining is under claim of right.

Under the section of the Penal Code making it an offense for one to send to another a letter threatening to accuse him of a criminal offense with a view of extorting money, etc., one would be guilty though there is a just debt owing by the party to whom the letter is sent. Cohen v. State, 37 Tex. Crim. Rep. 118, 38 S. W. 1005.

Compelling, by threats of violence, payment of money bona fide claimed to be due,

(1) prosecuting certain criminal cases and afterwards appearing for the defendants in the same cases; (2) being a person morally unfit to be a member of the bar of this court; (3) having been guilty of the crime of perjury; and (4) having been guilty of extortion when acting as a member of the bar of this court. The respondent answered the accusations herein, and a referee was appointed to try the issues and report the evidence, with his findings and conclusions thereon, to this court. The issues were tried before such referee, and he reported to this court the evidence offered and received before him, together with his findings and conclusions thereon, which findings and conclusions were all in favor of respondent. After the filing of such re-

port, orders to show cause issued, requiring, upon the one hand, the prosecution to show why the report of the referee should not be in all things confirmed, and, upon the other hand, the respondent to show cause why such report should not be set aside and findings made and conclusions rendered against the respondent. A hearing was had upon such orders to show cause, and the matter is now before us for final determination.

It is claimed by the respondent, and conceded by the prosecution, that the rule laid down in *Re Elliott*, 18 S. D. 264, 100 N. W. 432, is the settled law as to the amount of evidence required to sustain the charges in disbarment proceedings, which rule is that the charges in such cases must be established by a clear, undoubted prepon-

is within the meaning of the section of the act which provides for the punishment of malicious threats with intent to extort money or property, or with intent to compel the person threatened to do some act against his will. *State v. Hollyway*, 41 Iowa, 200, 20 Am. Rep. 586.

Nor may one whose property has been stolen maliciously threaten to accuse one of an offense, or to injure his person or property, to compel him to compensate him for the property. *State v. Bruce*, 24 Me. 71. The court said that the statute does not make the offense "to consist in the effect which the threats may have had upon the person, or in the fact that property was thereby obtained; but in maliciously threatening to accuse him of an offense, or to injure his person or property, with intent to extort money or pecuniary advantage, or with intent to compel him to do an act against his will."

But, on the other hand, it has been held that a statute against sending threatening letters for purpose of extorting money does not extend to cases where the purpose is to compel payment of money actually due and owing. *People v. Griffin*, 2 Barb. 427. It was said that "in order to constitute the offense created by this statute [which is set out in *RE SHERIN*], the letters must be sent, etc., with a view or intent to extort or gain money or property, etc., belonging to another. . . . The end, as well as the means employed to obtain it, must be wrongful and unlawful."

And in *State v. Hammond*, 80 Ind. 80, 41 Am. Rep. 791, it was held that a threat to prosecute for crime if a debt justly due was not paid, was not embraced in a statute which provides that "whoever, either verbally or by any letter or writing or any written or printed communication, demands of any person, with menaces of personal injury, any chattel, money, or other valuable security; or whoever accuses or threatens to accuse, or knowingly sends or delivers any letter or writing or any written or printed communication, with or without a name subscribed thereto, or signed with a fictitious name; or with any letter, mark,

or designation, accusing or threatening to accuse any person of any crime punishable by law, or of any immoral conduct, which, if true, would tend to degrade and disgrace such person, or in any way to subject him to the ridicule or contempt of society; or to do any injury to the person or property of anyone, with intent to extort or gain from such person any chattel, money, or valuable security, or any pecuniary advantage whatsoever; or with any intent to compel the person threatened to do any act against his will, with the intent aforesaid,—is guilty of blackmailing, and shall," etc.

And so a statute providing that "whoever verbally accuses any person of a crime punishable by law, with intent to extort or gain from such person any chattel, money, or valuable security, or any pecuniary advantage whatsoever, shall be, etc.," should not be construed as covering a case of an owner who demands from an offender a reasonable compensation for property which he has taken maliciously and criminally destroyed, and accompanies his demand with a threat to accuse defendant of crime, where the accusation threatened was not to accuse him of any crime contemplated by the criminal statutes. *Mann v. State*, 47 Ohio St. 556, 11 L.R.A. 656, 26 N. E. 226.

Nor should an injured party who, in good faith, makes an accusation of adultery against another to obtain satisfaction for injury really believed to have been inflicted, be found guilty of extortion. *McMillen v. State*, 60 Ind. 216.

Extortion cannot be predicated upon threats to do certain things where object is to compel delivery of something honestly believed to be due and owing. *Reg v. Coghlan*, 4 Fost. & F. 316.

—taking of illegal fees.

In *State v. Pritchard*, 107 N. C. 921, 12 S. E. 50, it was held that in a trial of an indictment for extortion it is essential to prove that fees were not demanded through any mistake of law or fact.

And in *Cutter v. State*, 36 N. J. L. 125, a trial of an indictment against a justice

derance of the testimony. In the consideration of the evidence we have recognized and followed the above rule.

The referee finds, and it is unquestioned herein, that the respondent is now, and has been for some twenty-six years last past, a duly licensed and practising attorney at law in the courts of this state, practising first at Britton, and since April, 1899, at Watertown, and that the practice of law is his sole occupation and means of livelihood.

The referee finds the evidence insufficient to sustain the charge of aiding in the prosecution of criminal cases and afterwards appearing for the defendants therein, and the said referee was clearly right in such finding.

of the peace for extortion for taking fees to which he was not entitled, under an act which declares "that no justice or other officer of this state shall receive or take any fee or reward to execute and do his duty and office but such as is or shall be allowed by the laws of this state, and that 'if any justice, etc., shall receive or take, by color of his office, any fee or reward whatsoever, not allowed by the laws of this state, for doing his office, and be thereof convicted, he shall be punished,' etc." it was held that the defendant had the right to prove to the jury that the moneys which it was charged he had taken extorsively were received by him under a mistake as to his legal rights. It was said: "In morals it is an evil mind which makes the offense; and this, as a general rule, has been at the root of criminal law. The consequence is that it is not to be intended that this principle is discarded merely on account of the generality of statutory language. It is highly reasonable to presume that the lawmakers did not intend to disgrace or to punish a person who should do an act under the belief that it was lawful to do it."

And also in *Leeman v. State*, 35 Ark. 438, 37 Am. Rep. 44, it was held that as a corrupt intent was lacking, a judge of the probate court who took a fee unauthorized by law, under the belief that by law he was entitled to it, was not guilty of extortion under a statute providing that "if any officer shall charge, demand, or receive any more or greater fees for his services than are allowed by law . . . shall . . . be subject to an indictment for extortion," citing with strong approval, *Cutter v. State*, 38 N. J. L. 125. In this case the provision of the act allowing this fee had been repealed, and the court said that defendant might honestly, but mistakenly, have believed that it "was an emolument of his office of which he could not be deprived during his term; and though his ignorance of the repealing act or of its effect would not alone excuse him, there would be wanting, if he so supposed, that bad motive or evil intent necessary to make the act of demanding or taking it criminal." 40 L.R.A. (N.S.)

The charge of perjury related to a matter not connected with respondent's professional duties; it being charged that, when a witness upon the stand in a criminal cause on trial in one of the courts in this state, the respondent testified falsely to material matters involved in such cause. The evidence upon this charge is conflicting, and the referee was justified in finding with respondent thereon. In passing we wish to state that, while courts undoubtedly have the right to allow disbarment proceedings to be brought when based upon charges of crimes not connected with the accused's professional duties or work, yet such proceedings should be discouraged, and ordinarily the complainant should be required to first submit the charges in a criminal

But the defense of ignorance of the law, and that he acted in perfect good faith, and was guilty of nothing more than an honest error of judgment, was said not to be good in law, in *Levar v. State*, 103 Ga. 42, 29 S. E. 467, where it was held that a constable who collected costs on a peace warrant before the same had been returned to the superior court and acted upon by the presiding judge, was guilty of extortion under the Penal Code, in that he unlawfully took, by color of his office, money not due to him. The court further said that "the intention does not in this kind of a case, as in some others, constitute the gist of the offense. . . . It would never do to hold that one who commits an act which the law declares to be criminal and indictable could be excused upon the idea that he honestly and in good faith misunderstood or misconstrued the law. . . . Case after case would arise, and instances would be multiplied almost without limit, where persons who had committed criminal acts would escape on the ground that they were ignorant of, or did not understand the meaning of, the law which they had violated. There would be no end to such defenses, and the courts would soon find it impossible to efficiently enforce the criminal statutes."

That one honestly believed the law to be that he could charge fees is no defense to an indictment against a mining recorder, found under a statute providing that "mining recorders are allowed the same fees for recording and making copies of records in their custody as are allowed by law for the services to county recorders, . . . and for receiving larger fees for such services than those herein provided, such mining recorder shall be deemed guilty of a misdemeanor, and, upon conviction, be subject to the penalties," etc. *People v. Monk*, 8 Utah, 35, 28 Pac. 115.

The court distinguished those cases holding good faith and honest belief to be a good defense as being cases where the act sought to be punished arose through a mistake of fact, rather than a mistake of law.

And also in *State v. Merritt*, 5 Sneed, 67, as under the act of 1856, chap. 264,

proceeding. In the future, whenever it shall be brought to the attention of this court that charges preferred against an attorney in disbarment proceedings relate to an alleged crime not connected with his work as an attorney, this court, except where special circumstances may be shown justifying different action, will not consider such charges until after the matter has been disposed of under a proper criminal proceeding.

The charge of immorality unfitting the respondent to be a member of the bar was, in the original accusation, based upon several specifications. Prior to the commencement of the trial, the prosecution asked leave to amend the original accusations by adding thereto four other speci-

cations setting forth acts of alleged immorality. One of these, setting forth a matter of recent date, was allowed, and evidence received in support thereof. The other three were refused by the referee, one of the grounds for such refusal being that the alleged misconduct occurred so long in the past that it should not be considered at this time; the other ground for excluding such matter we need not consider, as we believe the above-mentioned ground sufficient. While the charges made in these proposed specifications were, if true, sufficient to show that respondent was, at the time referred to, not only unfitted to be a member of an honorable profession, but absolutely unfitted for the society of respectable people, yet it is and should be

which prescribes and regulates the fees of officers, a constable is entitled to no fee for levying an execution, a constable who, without right, demanded and received a fee for levying an execution, was held guilty of extortion though, as the court said, he undoubtedly honestly believed that he was entitled to the fee.

And in *State v. Critchett*, 1 Lea, 271, 3 Am. Crim. Rep. 83, it was said that it was settled in *State v. Merritt*, supra, that even an honest belief that an officer is entitled to a fee will not shield him, as he is bound to know the legal fees he is entitled to.

In *State v. Dickens*, 2 N. C. (Hayw.) 406, in holding that a belief in the right to fees exacted is no defense in a trial for extortion, it was said: "Every officer is bound to know what the law is upon the subject of fees to be taken by himself,—he cannot excuse himself from taking more than the legal fee by saying he was misled by the rates published or by the advice of an attorney, nor by any other excuse he can make. If such or the like excuses were admitted, it would hardly ever be possible to convict an officer of extortion,—he might always contrive to ground his conduct on misapprehension or improper advice." And this case was cited with approval in a dissenting opinion to *State v. Pritchard*, 107 N. C. 921, 12 S. E. 50.

In *Rex v. Seymour*, 7 Mod. 383, custom or usage was held to be no defense to an information for extorting illegal fees.

But in *Republica v. Hannum*, 1 Yeates, 71, it was held that information would not be granted against a justice of the peace for extortion and oppression, where he has taken the usual fees, though illegal, and there was no criminal intention.

In *Holt v. State*, — Ga. App. —, 74 S. E. 560, a deputy sheriff directed to arrest certain persons charged with crime, without right, accepted a cash bond for their appearance, under the belief that as an officer he had the right to accept a cash bond. It was held that, as the evidence showed that he deposited the money in the bank for the court, and never had claimed any interest in it, as an officer or otherwise, 40 L.R.A. (N.S.)

nor used the money, he was not guilty of extortion under the section of the Penal Code defining extortion as "any public officer's unlawfully taking by color of his office, from any person, any money or anything of value that is not due to him or more than due." For even though the acceptance of the cash bond was without right, yet it was a mistake of law, and though not an excuse, yet as there can be no offense except there be a joint union or operation of an act and intent, the act of an officer in taking a cash bond, though not authorized by law, certainly was without criminal intent.

And so, also, in actions of debt to recover a penalty for taking illegal fees, good faith of an officer in demanding and receiving fees in excess of those allowed by law for services rendered constitutes no defense. *Cobbey v. Burks*, 11 Neb. 167, 38 Am. Rep. 364, 8 N. W. 386.

And also in *Miller v. Lockwood*, 17 Pa. 248, it was held that in a civil action for taking illegal fees, an officer is liable though the charge was made by mistake and without intention to extort.

That a justice of the peace believed that he had a legal right to charge certain fees which were excessive, constitutes no defense to an action to recover the statutory penalty under a statute which declares "that the fees and salaries in this act provided shall be all the compensation by law allowed such officers, for all services which they are required to or by law can perform as such officers. Any such officers who shall receive any fee or reward or salary not specifically provided for by law shall be liable," etc. *Leggatt v. Prideaux*, 16 Mont. 205, 50 Am. St. Rep. 498, 40 Pac. 377. The court said, "It would be most dangerous to the welfare of society if an officer elected to administer the law could violate it to his own pecuniary advantage, and escape the consequences of his act by pleading ignorance of the statute he had violated."

Custom or usage in the taking of illegal fees by a justice of peace cannot be allowed against law, or in a case where statute is express. *Johonnet's Case*, 5 Dane, Abr. 199.

the policy of the law to forgive one his errors long since past, and not to allow the same to be resurrected, where there is nothing to show but that for several years after such wrongdoing the party may have lived an exemplary life.

We come now to the remaining accusation, that the respondent, while acting as an attorney at law and a member of the bar of this court, had been guilty of the crime of extortion. The findings of the referee in relation to this charge are as follows, omitting from them the full name of the parties therein mentioned:

"(10) In regard to specification E, being the charge of extortion, your referee finds that the said A. Sherin wrote and mailed the letters, copies of which are set

out in complaint, to Floyd L. C. at Great Falls, Montana, and Wallace, Idaho. That at the time the said letters were written the said Floyd L. C. had deserted his wife, Florence C., and his children, and was living at Great Falls, Montana, and Wallace, Idaho, and that his relations with one Rose S. were very intimate and apparently improper. That an action was begun by Mrs. C. against Rose S. for alienation of affection, and that a judgment obtained against her on that ground. That Mrs. C. was living in Watertown, South Dakota, with her children, and part of the time in Wisconsin. She had no money and property for her support. That Mr. Sherin was her attorney and started a divorce suit for her against her husband, which was dropped

And in an action of debt under the statute 1795, chap. 41, known as the fee bill, for extortion for demanding and receiving greater fees than were allowed by said statute, it was held that the practice of other officers was no defense. *Lincoln v. Shaw*, 17 Mass. 410; *Shattuck v. Woods*, 1 Pick. 171.

In an action to recover a penalty for receiving illegal fees, evidence of the general practice to charge such fees should be excluded. *Henry v. Tilson*, 17 Vt. 479.

But good faith and an honest belief that he had a legal right to charge and collect the fees he did was held a good defense in an action for a penalty in *Crawford v. Joslyn*, 83 Vt. 361, 76 Atl. 108, Ann. Cas. 1912 A, 428. The court held that "knowingly," in the statute providing for a penalty where one "knowingly" collects illegal fees, should be construed to mean "intentionally."

And also in *Haynes v. Hall*, 37 Vt. 20, an action against a sheriff to recover for charging and receiving fees not enumerated in the statute, it was held that he was not liable, because there was no illegal intent, as he supposed he was doing only what he had a legal right to do.

And so, also, an officer who in good faith taxed and received fees for 20 miles of travel where the actual distance was 19 miles, should not be liable to a penalty imposed for exacting illegal fees, where there is no evidence that the overcharge was knowingly made, but, on the contrary, it was evident that he used the best means at hand for obtaining the actual distance traveled. *Weightman v. Jones*, 73 Vt. 353, 50 Atl. 1101.

And in *Millar v. Douglass*, 42 Tex. 288, it was held that an officer must knowingly demand a greater sum than that authorized by statute, to incur the penalty of the statute, which provides that "every assessor and collector, or his deputy, who shall exercise or be guilty of any extortion or wilful oppression under color of this act, or shall knowingly demand other or greater sums than are authorized by this act, etc., shall be liable to pay a sum not exceeding 40 L.R.A. (N.S.)

double the amount of damages occurring to the party injured."

And see also *Triplett v. Munter*, 50 Cal. 644, where it was held that an officer could not be removed from office and fined for charging fees in excess of those which he was entitled to charge, where it was found "that defendant charged and collected said illegal fees under an honest conviction that he was legally entitled thereto," as it was not intended to punish an officer, by removal and fine, for mere error in judgment in the honest discharge of his duties.

—question for jury.

In *Vogel v. Brown*, 201 Mass. 261, 87 N. E. 686, it was held that whether a justice of the peace was acting wilfully and corruptly in exacting illegal fees in solemnizing marriages under the circumstances disclosed by an agreed statement was a question of fact for the judge who tried the case without a jury.

In *People v. Whaley*, 6 Cow. 661, a trial of an indictment for extortion as justice of the peace, it was held that the motives of the justice, whether corrupt or whether he acted through a mistake of law, were a proper question for the jury.

Robbery.

This note does not include cases where one used force to compel payment of a debt; for such cases, see note in 10 L.R.A. (N.S.) 745. The inquiry here is simply whether one is guilty of robbery under such circumstances; and the question whether he is guilty of another offense, *e. g.*, assault, is not within the scope of the note.

One is not guilty of robbery who takes his own property from another, though by violence. *Barnes v. State*, 9 Tex. App. 128; *Smedly v. State*, 30 Tex. 214 (*obiter*); *Higgins v. State*, — Tex. App. —, 19 S. W. 503; *People v. Vice*, 21 Cal. 344.

And the same principle was upheld in *Triplett v. Com.* 122 Ky. 35, 91 S. W. 281, where it was held that one who took from the court's receiver property which had been

afterwards when her husband returned to her. That Mr. C. had given Rose S. a note and she had assigned it to her aunt, Mrs. S. Mrs. S. had sued on the note and attached the furniture and fixtures in the restaurant left by Mr. C. That Mrs. C. had made a claim for this property as her exemptions for herself and children. These letters were written by Mr. Sherin as the

attorney for Mrs. C., at her request. They were answered by Mr. C. direct to his wife, except the one he wrote to Sherin, which is in evidence. The statements made in the letters are true. Mr. Sherin gained nothing personally by the writing of these letters, and he did not expect to. The bill of sale was delivered by Mr. C. to Mrs. C., but the release was not obtained from Mrs. S.

taken from him under a process was not guilty of robbery, in the absence of evidence of felonious intent.

In *Gant v. State*, 115 Ga. 205, 41 S. E. 698, it was held that a charge that it is not robbery for a loser at cards to compel the winner, by force and violence, to return the money, was correct.

And in *Sikes v. Com.* 17 Ky. L. Rep. 1353, 34 S. W. 902, and *Thompson v. Com.* 13 Ky. L. Rep. 916, 18 S. W. 1022, it was held that, as under statute money won at gambling does not pass to the winner, the loser in such game was not guilty of robbery in compelling the winner, at point of revolver, to return money lost.

So, a bona fide belief in right to property taken is a good defense to an indictment for robbery.

Thus, there can be no robbery where one takes property under the bona fide belief that it is his own. *State v. Wasson*, 126 Iowa, 320, 101 N. W. 1125; *Glenn v. State*, 49 Tex. Crim. Rep. 349, 92 S. W. 806, 13 Ann. Cas. 774; *State v. Woodward*, 131 Mo. 369, 33 S. W. 14; *State v. Smith*, 174 Mo. 586, 74 S. W. 624, 14 Am. Crim. Rep. 616; *State v. McLain*, 159 Mo. 349, 60 S. W. 736; *State v. Fordham*, 13 N. D. 494, 101 N. W. 888; *State v. O'Connor*, 105 Mo. 121, 16 S. W. 510.

And so in *Triplett v. Com.* 122 Ky. 35, 91 S. W. 281, it was held that one from whom cattle had been taken under a process, who took same from court's receiver under the belief that he had a right to them, was not guilty of robbery.

And also one who having set wires which, with the game caught, were, under statute, seized by the gamekeeper for the use of the lord of the manor, forcibly recovers them under a bona fide impression that they were his property, is not guilty of robbery. *Rex v. Hall*, 3 Car. & P. 409.

And in *Brown v. State*, 28 Ark. 126, where the evidence showed that there was a dispute as to ownership of property taken, it was held error to refuse an instruction in effect that if defendant took the property under the bona fide opinion that the property was his own, he was not guilty of robbery.

In *People v. Hughes*, 11 Utah, 100, 39 Pac. 492, a trial of an indictment against one who, having lost money at gambling, took the money at the point of a revolver from the table and also from one in charge of the game, it was held error to refuse an instruction "that if they should find that the defendant acted under a bona fide impression and honest belief that the money

taken was his own, and that he had a right to it, they render a verdict of not guilty."

In *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221, it was said that the claim of good faith in one's forcibly taking from another property claimed to have been taken without warrant depends upon whether he meant to get back what he believed to be his own.

But in *Black v. State*, 3 Yerg. 588, a prosecution for entering a dwelling and forcibly taking property from the possession of one therein, it was said: "Men are not permitted to redress their own wrongs, or to restore themselves to lost rights at their own will and pleasure. . . . The process of the law and courts are open to them, and to these resort must be had, not to force and acts of violence."

In *Blain v. State*, 34 Tex. Crim. Rep. 448, 31 S. W. 368, the defense that property taken was money won at gambling was held not good on the trial of an indictment for robbery; especially so where the money has voluntarily been paid over under the rules of the game. It was said that as in such case, in a civil suit, the law would leave the parties *in statu quo*, it would not in a criminal charge recognize a retaking of property which involved all the elements of a premeditated robbery.

And in *Carroll v. State*, 42 Tex. Crim. Rep. 30, 57 S. W. 99, where one, claiming he had been swindled in a game of cards, believed that he had the right to forcibly retake the money voluntarily paid over to winner, a conviction of robbery was sustained, following the decision in *Blain v. State*, *supra*.

But in *Carr v. State*, 55 Tex. Crim. Rep. 352, 116 S. W. 591, where the facts were that defendant and prosecuting witness were engaged in a game of cards, and it was sharply controverted as to who was entitled to the money, and defendant forced prosecuting witness, by duress and threats, to turn the money over to him, it was held that because of the peculiar facts of the case the question should have been pertinently presented to the jury as to whether or not the defendant had any fraudulent intent, or that he honestly believed the money had been fairly and properly won and belonged to him. The court, however, said that a claim of ownership is not always or necessarily a defense in cases of robbery.

And see *Re Lewis*, 83 Fed. 159, where it was held that one who participates in a search of premises and seizure under a warrant technically insufficient is not guilty of robbery.

J. H. B.

There were sufficient grounds to believe that Mr. C. was living in open adultery with Rose S. at the time. The motive for writing the letters on the part of A. Sherin was good. Mr. C. afterwards returned to Watertown, South Dakota, and his family, and all suits were dismissed.

"(11) Your referee finds that the letters set out in the complaint were not sent with intent to extort any money or other property from Floyd C."

The evidence submitted fully supports finding No. 10; and, as we view this matter, there is nothing before us but a question of law, because, as it appears to us beyond all possible question of doubt, the referee was wrong in finding No. 11, as it fully and clearly appears that the respondent did write and send the letters in question with an intent then and there upon his part to obtain money and other property from the party to whom such letters were addressed and from the paramount of such party; the only question being whether, under the undisputed facts, the obtaining of money through the means used would be extortion. It will be unnecessary to reproduce the letters in full, but the following parts of two of the letters show all that is material herein. We have omitted the surname of the parties mentioned in such letters:

Office of A. Sherin, City Attorney, Watertown, S. D.

Watertown, S. D., Aug. 28, 1907.

Mr. Floyd L. C.,

Great Falls, Mont.

Dear Sir:—

I inclose you some papers that we want you to sign and return here at once. I have been looking after the business for your wife since you left, and we have known that Rose S. was with you for some time at Great Falls. We know just how you were living and all about it; we know you were about to leave Great Falls, but until you settle things with your wife you can't leave. The officers there are instructed to arrest both of you, if either of you attempt to leave until we are ready. Not only did we get this information from officers and others there, but Rose S. wrote your wife a letter a few weeks ago and told the whole story herself. She said you were passing her as your sister-in-law, but that you and she roomed together and worked together. She wrote the letter in an attempted disguised hand, but as we had other letters of hers the attempt to disguise was a bad one. We submitted the letters to experts and they are ready to swear she wrote the letters. I then sent the letters to Great Falls and had them investigated 40 L.R.A.(N.S.)

there, and had them returned with the information that she alone wrote the letter. It was evidently done with the purpose of making your wife mad, so she would get a divorce from you and she would have you. It was a bold move on her part, and she must have thought your wife rather green.

. . . What I want is this bill of sale from you, and then I want Rose S. to sign this other paper to drop these suits and let your wife have the property. If this is not done, this whole business will be dragged into court and everything exposed. George C. is the attorney for Mrs. S. and he wants to keep it going. In addition to this notice that Rose will sign, she wants to write to her mother to drop these suits and turn the property over. If she don't we will bring you and she back here with warrants under a criminal charge and face these letters she has written, all right. If you will sign this bill of sale and she signs the other paper, and you send your wife \$100, we will let the matter go, and you and she can go on if you want to, but you will not leave Great Falls until you do, as the officers there are on your tracks awaiting a wire from us any minute. When this is done you had better shake that woman and go to work some place, and your wife will join you if you will treat her right. She can make trouble for both of you any time she wants to, but she says she will let it go if you comply with these requests. I have had a number of letters from different people there during the past few weeks, and know every move you people make. Trusting that we will hear from you without delay and that these papers will be signed and that you will send your wife some money I remain,

Yours truly,
A. Sherin.

Office of A. Sherin, City Attorney, Watertown, S. D.

Watertown, S. D., November 7, 1907.

Mr. Floyd L. C.,

Wallace, Idaho.

Dear Sir:—

. . . Your wife has just been in here, and when she heard what had been going on and that you were still keeping Rose posted on everything that was said and done, and she was sending it to her mother, she said that she would now insist on the paper being sent her from Rose S. and you, to have these goods turned over to her at once, and if this is not done within ten days she will swear out a warrant for both of you and send out there after you. Now, Floyd, I don't want to see you get into any trouble, but you have not used your wife right, and unless you send that

paper from Rose S. to have these goods turned over at once, there will certainly be a warrant sent out there after both of you. . . . Now, to save any trouble, you send me a paper from Rose S., and have her write to her mother a letter authorizing her to turn over that property to your wife, or else you and she will hear from us in another way. There is not enough property to fight about, and if it goes through court Mrs. S. will not get enough out of it to be of any use to her, as it will be all eat up in attorney's fees. Now, don't delay in this matter, but attend to it at once. We know where Rose is and all about what is going on out there, and will insist upon something being done within ten days, or else there will be trouble.

Yours truly,
A. Sherin.

The respondent in his brief, among other statements, uses the following language: "What attorney would not make such an effort to get a little property for a deserted woman and two little children? He would not be doing his duty to his client if he did not use every effort and every persuasion to get something for her and her children. . . . There was no professional ethics violated in the writing of these letters. In fact, any person who knows all the facts and circumstances connected with this outrageous affair would not think that the defendant went far enough to recover what belonged to the wife. There is nothing in that charge upon which any attorney should be disbarred." We are unable to agree with counsel in the above statement. This court cannot set the seal of its approval upon the methods used by respondent, no matter how just his motives, nor whether the statutes have made such methods criminal. The very least that can be said in relation to an officer of the court resorting to such means to gain an end is that it is grossly unprofessional, and such as calls for severe censure from the courts. In *Hackett v. King*, 6 Allen, 58, it was decided that, though a person was arrested under a legal warrant, and by a proper officer, yet, if one of the objects of the arrest was to extort money, or enforce the settlement of a civil claim, such arrest is a false imprisonment by all who have directly or indirectly procured the same or participated therein for any such purposes; and a release and conveyance of property obtained by means of such arrest is void. In *Taylor v. Jaques*, 106 Mass. 294, the court, in speaking of a certain instruction given by the lower court, said: "We do not concur in that view of the law. If he had embezzled their funds,

they had a right to have him prosecuted. If he owed them a debt, they had a right to accept security for it. But they would have no right to make use of criminal process for the collection of a debt. An arrest, even upon a legal warrant, and upon a criminal charge, to compel the payment of a mere debt, would be a misuse of legal process; and the threat of such an arrest may constitute unlawful duress." And if the acts were criminal, it certainly must be conceded that it was a most serious breach of "professional ethics" for an officer of a court, acting as such officer, to wilfully violate the criminal laws of his country.

Section 633 of the Revised Penal Code of this state reads as follows: "Extortion is the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right." Section 634 of such Code reads in part as follows: "Fear such as will constitute extortion may be induced by a threat either (2) to accuse him or any relative or member of his family of any crime; (4) to expose any secret affecting him or them." Section 638 of such Code reads as follows: "Every person who, with intent to extort any money or other property from another, sends to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in § 634, is punishable in the same manner as if such money or property were actually obtained by means of such threat." Section 190 of such Code reads as follows: "Every person who, having knowledge of the actual commission of a crime or violation of statute, takes any money or property of another, or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, express or implied, to compound or conceal such crime or violation of statute, or to abstain from any prosecution therefor, or to withhold any evidence thereof, is punishable as follows. . . ."

To our minds the evidence proves beyond all possible doubt that the respondent, acting as an attorney at law, wrote the letters in question with an intent to, and hoping thereby to, obtain both money and other personal property from said C. and his paramour. It clearly appears to us that the respondent hoped and trusted that the threats contained in such letters would induce in the minds of such parties such fear as would result in their complying with the demands of such letters. This fear it was sought to induce by these threats was the fear of being arrested and prosecuted for the commission of crime. It might be claimed on the part of the re-

spondent that, where the motive was to obtain money or property which justly belonged to his client, it would not be extortion, because in that case there was no "wrongful use of force or fear." The word "wrongful," as used in this statute, has no reference whatever to the question of the justness of the ultimate result sought, but relates solely to the methods used to obtain such result. Furthermore, it is certainly clearly implied from the language of these letters that, if the demands therein contained were complied with, no prosecutions of the crimes of which the parties might have been guilty would follow; or, in other words, the writer of these letters impliedly offered to compound all the crimes of which these parties might have been guilty. Offering to compound crimes is certainly a wrongful appeal to one's fears. As was said in *Eadie v. Slimmon*, 26 N. Y. 12, 82 Am. Dec. 395: "Either the accusation which the defendant brought against Eadie was entirely unfounded, or he was seeking to compromise a criminal offense. If he knew that a crime had been committed by Eadie, he had no right to compromise it in this way."

From the findings of the referee, it might be inferred that he considered it material that the respondent herein was not seeking to obtain this property for himself and would not be benefited by the obtaining of same. That certainly is absolutely immaterial. If, as claimed by the respondent himself, these letters were written by him with the full knowledge of his client, the respondent, in assisting her, by advising and writing the letters to carry out the scheme, rendered himself jointly guilty with her of the crime of extortion, if, under such facts, she would be guilty. It might be claimed that, inasmuch as the charges contained in such letters were true, no crime was committed by respondent. The offense before us lies, not in making the charges of wrongdoing upon the part of C. and his paramour, but in making threats of prosecution based upon such charges. The fact that they were guilty of the crimes charged would not render the writing of the letters less criminal. The state of California has identically the same statutes in relation to extortion as §§ 633, 634, and 638 quoted above, and in the case of *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068, in discussing the question as to whether or not the truthfulness of the charges made by the defendant was a defense to the charge of extortion, the court said: "Under that kind of menace which consists in a threat of injury to the character of a person, it is entirely immaterial whether such person is guilty

or innocent of the crime to be charged. It certainly would be no defense to the accusation of extortion that the charges or publications threatened to be made by the defendant, and by which he obtained valuable property, were true. The truth or falsity of these matters forms no element in establishing the guilt or innocence of a defendant charged with extortion." See also *People v. Choynski*, 95 Cal. 640, 30 Pac. 791.

It is therefore clear to this court that finding No. 11 should be set aside, and that in lieu thereof this court must find that the letters in question were written with intent to extort money and other property from said Floyd L. C. and Rose S., unless the obtaining of this particular property and particular money would not constitute extortion, owing to the fact that, for all that appears herein, the property rightfully belonged to respondent's client, and the \$100 was justly due her from her husband. For the purposes of this cause it must be presumed that the wife was justly entitled to the property and money.

This presents to us squarely a question upon which there seems, at first glance, to be an unreconcilable conflict of authority. One line of decisions, commencing with *People v. Griffin*, 2 Barb. 427, holds that, in order for the taking of property to amount to extortion, it must be property to the possession of which the taker did not make an honest claim of right; and this court also held that an attempt to collect what the party believed to be an honest debt could not be held to be done with an "intent to extort." This case is followed in *State v. Hammond*, 80 Ind. 80, 41 Am. Rep. 791; *McMillen v. State*, 60 Ind. 216; *Mann v. State*, 47 Ohio St. 556, 11 L.R.A. 656, 26 N. E. 226. Owing to difference in the wording of the statutes of the above states from that of this state, we think these cases are of little weight as authority. Moreover, we believe that the courts of Indiana and Ohio overlooked a material difference between their statute and that of New York. The New York statute before the court in the *Griffin Case* provided: "Every person who shall knowingly send or deliver, or shall make, and for the purpose of being delivered or sent, shall part with the possession of, any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, or with any letter, mark, or other designation, threatening therein to accuse any person of any crime, or to do any injury to the person or property of anyone, with a view or intent to extort or gain any money or property of any description, belonging to another, shall, upon conviction, be adjudged

guilty of an attempt to rob, and shall be punished by imprisonment in a state's prison not exceeding five years." It will be noted: (1) That the intent is to "extort or gain;" (2) "property belonging to another;" and (3) the offense is designated an "attempt to rob." Under a statute so worded there certainly was reason to hold that the word "extort" was used with a restricted meaning. Section 287 of the Rev. Penal Code of South Dakota states: "Robbery is the wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear," and it is universally held that robbery is forcible larceny. It is thus seen that in robbery there must always be not only the force or fear, but there must be a larcenous or wrongful taking. It thus follows that under the New York statute it clearly appeared that, in order for there to be an offense, the attempted taking of the property, as well as the means resorted to to achieve such taking, must be wrongful. It is universally held that there can be no robbery by a person of his own property to which he is lawfully entitled to possession; it is held by the great weight of authority that there can be no robbery of goods to the possession of which the taker honestly believes himself entitled; and the courts of several states hold that it is no robbery to take property where the taker honestly believes he has a right to same for the payment of a debt due him. See cases referred to in note following *Glenn v. State*, 13 Ann. Cas. 775, 776. In Ohio and Indiana the offense now before us is not spoken of in the statutes as an attempt to rob and the statutes do not state that the property taken shall be that "belonging to another;" but the statutes of those states use the phrase "extort or gain," and it might well be said that in using the word "extort" in connection with "gain" it was intended to provide that the party taking the property must "gain" something in the sense of securing profit.

Section 638 of our Penal Code uses the phrase, "with intent to extort any money or other property from another." Neither is the word "gain" used, nor does the statute provide that the property to be extorted shall be that "belonging to another." Looking now to § 633 of our Code for the definition of extortion, we again find that the property to be obtained is not restricted to property "belonging to another." It seems clear to us that under our statutory definition of extortion, we have a very comprehensive crime, including within its express terms, as a small part thereof, everything that comes under the definition of

robbery, so that robbery is, under our statute, but a high degree of extortion. This is further shown by § 635 of our Penal Code, which provides: "Every person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force or any threat such as is mentioned in the last section, is punishable by imprisonment in the state prison not exceeding five years," thus clearly showing that there can be both extortion amounting to robbery and extortion not amounting to robbery. Analyzing our definitions of extortion and robbery, it is apparent that to rob there must be a "wrongful taking,"—that is, a taking of property the possession of which a person would not be entitled to recover in an action brought to secure same; while to extort it is not necessary that the "obtaining" of the property be wrongful in the sense that the party be not lawfully entitled to the possession thereof, but it is only necessary that the means used to obtain the property be wrongful. Thus extortion under our statute includes any "obtaining of property," wrongful or otherwise (that is, the "obtaining of property" to which the party may or may not be lawfully entitled), whenever such property is obtained through the "wrongful use of force or fear."

It might be claimed that the term "extort" in itself implies the getting of something to which a party is not entitled as distinguished from getting that to which a party is entitled, and that therefore, by the use of that word, it clearly appears that in order to constitute "extortion" the property obtained must be that to which the taker is not honestly and legally entitled. This is certainly a mistaken idea of the meaning of the word "extort." Webster's New International Dictionary states that the word is derived from the Latin word "extortus," meaning "to twist or wrench out," and defines the word: "(1) To wrest from a person by physical force, menace, duress, torture, or any undue or illegal exercise of power or ingenuity; to wring (from); to exact; to take or receive by extortion; also, rarely, literally, to wrench or tear away (from); as, to extort bribes; to extort contributions from the vanquished; to extort confessions of guilt; to extort a promise; to extort payment of a debt." The above definitions and illustrations of use of term clearly show that one can extort that to which he is rightfully entitled, as well as that to which he is not entitled, and show that the word is properly used to denote the method used to obtain the thing sought, rather than to limit the thing to be obtained in accord-

ance with title or right of possession thereto.

Turning now to the decisions of other courts. In *State v. Bruce*, 24 Me. 71, the court said: "The instructions 'that, if the defendant made the threat maliciously and with intent thereby to extort property from Lyon, it was not essential in the case whether the said Lyon had been caught by the said Bruce in the act of stealing the property of the said Bruce or not,' were also correct. A person whose property has been stolen cannot claim the right to punish the thief himself without process of law, and to make him compensate him for the loss of his property by maliciously threatening to accuse him of the offense, or to do an injury to his person or property, with intent to extort property from him. A threat made by one whose goods had been stolen, that he would prosecute the supposed thief for the offense, if there were grounds to suspect him to be guilty, could not be considered as made maliciously and with intent to extort property, unless there were other proofs of malice and intended extortion. Nor do the instructions so state. The testimony to prove the malice and intended extortion is not presented; and it must be presumed to have been sufficient and satisfactory, especially after the defendant has been found guilty by two juries."

In *Com. v. Coolidge*, 128 Mass. 55, the court said: "The first instruction asked that the defendant must have maliciously intended to obtain that which in justice and equity he knew he had no right to receive, and the other, which differs only in form from that, that the defendant was not guilty if he believed that Chapin actually owed him, could not properly have been given without qualification; and the language of the presiding judge was entirely accurate when he said that the law did not authorize the collection of just debts by the malicious threatening to accuse the debtor of a crime."

In *State v. Logan*, 104 La. 760, 29 So. 336, the court said: "In this state the technical offense known to the common law as 'extortion' was punishable under § 868, Revised Statutes,—which, by its terms, applied exclusively to officers. *State v. Lubin*, 42 La. Ann. 79, 7 So. 68. By act 63 of 1884 it was declared that 'any person' who 'shall threaten to kill . . . with intent to extort money . . . shall, upon conviction be imprisoned, etc.' This statute has been held to be constitutional in an opinion in which Mr. Justice Miller, as the organ of the court, said: 'It defines the offense of attempting to extort money by threats or other unlawful devices.' 40 L.R.A. (N.S.)

State v. Rushing, 49 La. Ann. 1532, 22 So. 799. There is no question, then, of the application of the law to the defendant, and we can find no sufficient reason for holding that it does not apply to the act which he is charged with having committed, since the threats charged against him are within its terms, whether he claimed that the money demanded was due to him or not. Cases decided in other states in which it is said that a contrary view has been held are, perhaps, based upon the language of particular statutes, which may have admitted of the exceptions for which the defendant's counsel here contends."

In *Cohen v. State*, 37 Tex. Crim. Rep. 118, 38 S. W. 1005, the court said: "'Extort' means 'to obtain from a holder desired possessions or knowledge by force or compulsion; to wrest from another by force, menace, duress,' etc. See *Century Dict.* In the law dictionaries the word 'extort' is not found, and 'extortion' is applied to officers 'who, by color of office, unlawfully take any money or thing of value that is not due him, or more than is due, or before it is due.' See 7 *Am. & Eng. Enc. Law*; 1 *Bouvier's Law Dict.*; and 1 *Rapalje & L. Law Dict.* We apprehend that our statute, in using the word 'extort,' had reference to its meaning in its broader sense, as given above from the *Century Dictionary*. We do not construe this statute to mean, by the use of the term 'extorting,' to be only applicable to cases where there is no debt existing between the parties. On the contrary, under this article a party may be guilty of the offense of sending or delivering a letter threatening to accuse another of a criminal offense, with the view of extorting money, although the party may be justly indebted to the sender of such letter. One object of the statute, as we take it, is to prevent persons from sending such letters, and using the criminal laws of this state to collect debts that might be due and owing them."

We believe that our statute was enacted to prohibit just such acts as those of the respondent; that in writing and sending the letters he came clearly and fully within the provisions of said § 638, and that finding No. 11 of the referee was error. The referee, as conclusions of law, found: "The evidence submitted does not prove the said A. Sherin guilty of any crime, misdemeanor, or statutory offense, and does not show him to be of such immoral character as would justify his disbarment or suspension from practice." In lieu of the above this court finds as a conclusion of law: "The evidence submitted proves the said A. Sherin, while acting as an officer of this court, to have been guilty of the

crime of writing letters with the intent to extort money and other property from others, as defined in § 638, Rev. Penal Code, which conduct demands the condemnation of this court, and requires this court to either suspend or disbar respondent from practising as a member of the bar of this court."

This court fully realizes the severity of a judgment depriving one of the right to pursue a chosen profession, which profession may be the only means open for the procurement of a livelihood, especially where the person has long since abandoned other fields for that of his chosen profession. We are satisfied in this case that, while the means used by respondent were clearly criminal, and grossly unprofessional, even if they had not been criminal, yet the ultimate end sought by him was undoubtedly just. It further appears to our satisfaction from the testimony of the members of the bar in respondent's home city that the respondent, in general, has so conducted himself as an attorney that he stands well among his fellow attorneys. While such misconduct as proven in this matter cannot be overlooked, we believe the respondent will in the future conduct himself as befits a member of an honorable profession, and we believe the ends of justice will best be subserved by the temporary suspension of respondent from the practice of his profession, rather than by his disbarment; therefore it is the order of this court that the respondent be suspended from the practice of the profession of law in all of the courts of this state for a period of six months from the date of the formal judgment herein, and until he shall have paid the costs of this proceeding, to be taxed by the clerk of this court.

Let judgment be entered accordingly.

McCoy, J., took no part in this decision.

A petition for rehearing having been filed, Haney, J., on December 15, 1911, handed down the following opinion (— S. D. —, 133 N. W. 701):

In its former decision, this court concluded: "The evidence submitted proves the said A. Sherin, while acting as an officer of this court, to have been guilty of the crime of writing letters with the intent to extort money and other property from others, as defined in § 638, Rev. Penal Code, which conduct demands the condemnation of this court, and requires this court to either suspend or disbar respondent from practising as a member of the bar of this court." *Re Sherin*, 27 S. D. 232, ante, p. 801, 130 N. W. 761. On the rehearing, it was contended (1) that the letters re-

ferred to in such decision were not admissible, for the reason they were communications between a husband and wife, and (2) if admissible, respondent was not guilty of conduct for which he should be either disbarred or suspended.

The letters in question were written and mailed by the respondent, who was the attorney of the wife of the person to whom they were sent. They were signed "A. Sherin." They did not purport to have been written by the wife, or to be her letters. An attempt was made to show that they were in fact her letters, but she, as a witness for respondent, testified on cross-examination as follows: "Q. You say that you dictated these letters to Mr. Sherin that he wrote to your husband while he was away? A. I didn't say I dictated. I said I authorized him to do what he thought was right." So the letters were not in any sense letters of the wife to her husband. They were precisely what they purported to be,—communications between the wife's attorney and her husband,—and as such were not privileged under the statute in this state, or under the rules of evidence in any jurisdiction, so far as our research has extended. In all the decisions cited by the respondent, the communication was either a conversation between husband and wife, or a letter written and signed by one or the other. The question here involved is not whether every communication "made by one to the other during the marriage" (Rev. Code Civ. Proc. § 486) is privileged, regardless of the nature of the communication. On that question no opinion is expressed. Whether the phrase "any communication" was intended to mean only confidential communications, as construed by some courts, need not now be determined. Neither the statute nor the common law extends the privilege under discussion to communications made by a third person to either the husband or wife. No reason exists for so extending it. "The essence of the privilege is to protect confidences only." 4 Wigmore, Ev. § 3336. The statute does not, by its terms or by implication, exclude communications made by the attorney of one spouse to the other. Such were the communications in this case. If these letters, though written by the respondent, were signed by the wife—if they were in fact her letters—the situation would be substantially different. Though she may have known their contents before they were sent, may have approved of the same, and may have expressly authorized the respondent to send them, they were not her letters; they were the letters of her attorney, and were not communications made by her within the meaning of the

statute excluding communications between husband and wife. For this reason, they were clearly admissible on the trial of this proceeding, notwithstanding the wife testified that she had not consented to their introduction. It, therefore, is unnecessary to consider whether or not they were admissible for the further reason that they had passed into the hands of third persons, who produced the copies which were received in evidence.

After a careful reconsideration of the record, the court adheres to the conclusion announced in its former decision concerning the means employed by the respondent to induce his client's husband to comply with her demands. Such demands may have been just; the wife may have been entitled to all respondent sought to obtain for her; but this court, as indicated in its former decision, cannot approve of the methods employed by the respondent to secure his client's rights. It clearly appears that he intended to induce the husband to accede to his wife's demands through fear of being accused of a crime; and that he intended the husband to understand that he would not be prosecuted for such crime if he did accede to such demands. The fact that such demands were just, that the object sought was a laudable one, does not render the means employed any less unprofessional, though that fact should be considered in determining whether defendant ought to be disbarred or only suspended. In view of all the circumstances disclosed by the record, it is the conclusion of the court that the respondent should be suspended for thirty days from and after the filing of this decision.

As respondent has been compelled to incur considerable expense in defending numerous charges embraced by the accusation, which were not proven, neither party will be allowed to recover any costs or disbursements in this court.

McCoy, J., dissenting:

Unless the accused was guilty of extortion, or of aiding or abetting the same, in writing the letters to Carey, there is no ground for censure, no ground for suspension from practice. The day and age of the world has gone by when an accused should be convicted upon "general principles" without evidence sufficient to sustain conviction. It is impossible for me to conclude that the evidence submitted in this case is sufficient to constitute the offense of extortion. Formerly extortion could only be committed by a public officer for exacting property or payment of money for fees to which he was not entitled. If the officer was entitled to the sum exacted, the

offense did not exist. Subsequently the offense of extortion was extended so as to include persons, not officers, who extorted money by means of threatened criminal prosecution. Legal extortion means to exact money or property from another to which you are not entitled. It is the illegal, unlawful, and wrongful intent to gain property from another, by means of threats of criminal prosecution, that constitutes the gist of the offense. In the case of *People v. Griffin*, 2 Barb. 427, a much-cited case from New York on this subject, it was held that the statute against sending threatening letters with intent of extorting money applied only to those cases where the intent was to obtain that to which the writer was not entitled, and that it did not apply to cases where the person threatened actually owed the writer the sum claimed by him; the court saying that a person cannot extort money which is justly his due. In the case of *State v. Hammond*, 80 Ind. 80, 41 Am. Rep. 791, where the creditor by letter threatened to prosecute the debtor for having obtained money under false pretenses, if not repaid within a certain time, the court in rendering the opinion said: "We are of opinion that a threat to prosecute for an alleged . . . offense connected with the creation of a debt, where the object of the threat is merely to secure the payment of the debt due from the person threatened to the person making the threat, does not come within the spirit or purpose of the statute." In the case of *Mann v. State*, 47 Ohio St. 556, 11 L.R.A. 656, 26 N. E. 228, where defendant claimed that one Bingham had poisoned two colts of defendant, and the defendant wrote a letter, threatening criminal prosecution, unless Bingham paid for the colts, it was held not to constitute extortion, and the court said: "To constitute the offense described in the statute, there must be an intent to extort or gain the objects therein specified. Extortion is a wrongful exaction. . . . An honest effort on the part of a creditor to collect a just debt by accusing or threatening to accuse the debtor of a crime with which the debt is connected or out of which it arose, does not, in our opinion, come within the purview of the statute; nor should the statute be construed as covering the case of an owner who demands from the offender a reasonable compensation for property which he has maliciously . . . destroyed, and accompanies his demand with a threat to accuse the offender of the crime." I have been wholly unable to find any decision or any authority in conflict with the principle laid down in these three decisions, but, on the contrary, have found many other cases,

although not as directly in point, holding to the same view.

In the case at bar, the accused attorney wrote a letter to Carey, demanding that Carey pay to Carey's wife, whom he had deserted and abandoned and left penniless with small children, the sum of \$100 for her support, and that if this sum was not paid the accused would see to it that a criminal prosecution was commenced against Carey, who was then living in open adultery with another woman, not his wife. The accused wrote this letter at the instigation of and as attorney for the deserted wife. Under the law of this state, Carey was legally obligated to support his wife and children, and there was nothing demanded in this letter, other than that to which the wife was legally entitled. There was no intention or attempt to exact or extort money to which the wife was not lawfully entitled. There is no possible inference that can be drawn from the contents of this letter that the accused, or his client, intended to gain anything by means of this letter to Carey to which the client was not lawfully entitled. If Sherin had written to Carey and accused him of leading a criminal life, and demanded the payment of \$100 as hush money not to prosecute him, with the intent to thus secure \$100 for his own use and benefit, that would undoubtedly constitute extortion. But in this case the demand was not for \$100 as a consideration for refraining from such prosecution, but was for \$100 to support the abandoned wife and children, to which they were justly entitled under the law of this state; and the fact that this lawful demand for support for the abandoned wife had coupled with it a threat to prosecute would not constitute extortion, because the demand made was lawful, and there was no attempt made or intent to gain or exact property they were not entitled to. There was no unlawful exaction in the circumstances. It was the unlawful exaction of fees to which an officer was not entitled that constituted the original offense of extortion, and the word "extort" still has the same meaning. The offense of obtaining money or property by means of false pretenses is kindred and somewhat analogous to the offense of extortion. We apprehend that one could not be successfully prosecuted for obtaining money by means of false pretenses, where it was shown that the money thus obtained was justly due to the alleged offender, no matter how false the representations might be. False representations alone, unless coupled with an intent to thereby unlawfully obtain the money of another, do not constitute a criminal offense. It is the obtaining of the

property of another to which you are not justly entitled that constitutes the substance of the crime. Neither will a threat of criminal prosecution alone, not coupled with an unlawful intent to thereby obtain another's money, constitute the offense of extortion.

The evidence in this case conclusively shows there was an honest effort on the part of Mrs. Carey and her attorney, the accused, to have the criminal husband furnish her \$100 to assist in her means of support to which she was lawfully entitled, and nothing more. That was the intent with which the letter was written, and not for the purpose of unlawful exaction or gain. It is an elementary principle that a criminal intent is always necessary to constitute a crime, and where such criminal intention does not appear then the act complained of cannot be deemed criminal. It is always a good defense for one charged with larceny to show that the defendant honestly and in good faith believed, under circumstances warranting such belief, the property to be his own, although mistaken in such belief, for the reason that evidence of that character relieves him of criminal intent. And, where the act may be construed lawful as well as criminal, the intent must be presumed lawful. The referee in this case has found that there was no criminal or unlawful intent on the part of the accused in writing the said letter to Carey, but, on the contrary, found that it was written from good and justifiable motives. We should not disturb this finding, unless it is opposed by a clear preponderance of the evidence. In my judgment, all the evidence there is in the case is in favor of this finding of the referee, who saw and heard the witnesses testify, and it should not be set aside.

WISCONSIN SUPREME COURT.

MINNIE MASSY, Admr., etc., of Hugh Massy, Deceased, Appt.,

v.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Resp't.

(143 Wis. 220, 126 N. W. 544.)

Master — electric apparatus — electrician and lineman — fellow servants.

An operator charged with the duty of connecting and disconnecting an electrical current from wires is not a fellow servant

Note. — Upon the general question who are fellow servants of linemen, see note to *Shank v. Edison Electric Illuminating Co.* 30 L.R.A. (N.S.) 46.

of a lineman whose duty is to work on the wires, so as to relieve the master from liability for injury to the latter by the negligence of the operator in turning current on a wire upon which he was at work.

(May 24, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in defendant's favor in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by defendant's negligence. Reversed.

Statement by Dodge, J.:

On May 13, 1907, plaintiff's decedent, then twenty years of age, had been employed for a month as lineman's helper by the defendant, his work consisting in the handling of apparatus and materials to facilitate the lineman; deceased working on the ground and the lineman both on the ground and on the poles. Deceased had never handled live wires. On that date decedent's lineman and some other employees went to West Allis to readjust the wires and change brackets in a certain region. The wires included a "feed wire" ordinarily carrying electricity to the dangerous extent of 2,300 volts. Deceased and his lineman went to a substation, where was an operator who controlled the switchboard connecting and disconnecting wires. They found there the assistant superintendent of the lighting department, and requested that the feed wire might be killed during their operations; that is, disconnected from the current. They were informed that it was already dead, and in their presence the assistant superintendent directed the operator of the switchboard, Waldmann, not to turn electric current into that feed wire until he received direct word from the decedent's lineman. It appeared that a certain other employee, Dietz, having certain repairs or adjustments to make in the substation, had previously, the same day, requested Waldmann to disconnect this feed wire; that Dietz finished his job at about half past 1 of the same day, and notified Waldmann of that fact, remarking, "You can call up Commerce street, and tell him to put the current on the line again." Waldmann did so, and switched into connection said feed wire, momentarily forgetting the instruction to keep the wire dead for the protection of the line crew of which deceased was one. Deceased at that mo-

ment, two or three blocks away, had hold of the wire with his bare hands, and was instantly killed. At the close of the plaintiff's evidence a judgment of nonsuit was entered, from which the plaintiff appeals.

Messrs. Houghton, Neelen, & Houghton and Samuel Wright, for appellant:

It was defendant's duty to instruct Massy as to the danger, and provide him with mittens.

Promer v. Milwaukee, L. S. & W. R. Co. 90 Wis. 215, 48 Am. St. Rep. 905, 63 N. W. 90; McMahon v. Ida Min. Co. 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; Bain v. Northern P. R. Co. 120 Wis. 412, 98 N. W. 241; Rinkel v. Buckstaff-Edwards Co. 138 Wis. 442, 20 L.R.A. (N.S.) 1180, 120 N. W. 269; Halwas v. American Granite Co. 141 Wis. 127, 123 N. W. 789; Salmons v. Norfolk & W. R. Co. 162 Fed. 722; Portance v. Lehigh Valley Coal Co. 101 Wis. 579, 70 Am. St. Rep. 932, 77 N. W. 875; Zentner v. Oshkosh Gaslight Co. 128 Wis. 196, 105 N. W. 911, 132 Wis. 447, 112 N. W. 449; 2 Joyce, Electric Law, 2d ed. 652a, p. 1053.

Whether or not a workman is the fellow servant of another workman depends upon the character of the act performed, which may be a question for the jury.

Kronzer v. Spencer-Kellogg Co. 109 Minn. 392, 124 N. W. 6; Eingartner v. Illinois Steel Co. 94 Wis. 70, 34 L.R.A. 503, 59 Am. St. Rep. 859, 68 N. W. 664; Jarnek v. Manitowoc Coal & Dock Co. 97 Wis. 537, 73 N. W. 62.

The duty to warn was the duty of the defendant company.

Hamann v. Milwaukee Bridge Co. 127 Wis. 550, 106 N. W. 1081, 7 Ann. Cas. 458; Portance v. Lehigh Valley Coal Co. 101 Wis. 574, 70 Am. St. Rep. 932, 77 N. W. 875; Williams v. North Wisconsin Lumber Co. 124 Wis. 328, 102 N. W. 589; Scott v. Iowa Teleph. Co. 128 Iowa, 524, 102 N. W. 432.

The duty delegated by the defendant company to Waldmann was a direct, personal, and absolute obligation, from which nothing but performance could relieve it.

Lewis v. Seifert, 116 Pa. 628, 2 Am. St. Rep. 631, 11 Atl. 514; Prevost v. Citizens' Ice & Refrigerating Co. 185 Pa. 617, 64 Am. St. Rep. 659, 40 Atl. 88; Casey v. Pennsylvania Asphalt Paving Co. 198 Pa. 348, 47 Atl. 1128; Johnson v. Western N. Y. & P. R. Co. 200 Pa. 314, 49 Atl. 794.

The servant to whom is delegated such a duty of the master becomes thereby a

In the last subdivision of that note are collected the cases upon the special phase of the general question, namely, lineman as fellow servant of employee in control of

the current, including, *inter alia*, MASSY v. MILWAUKEE ELECTRIC R. & LIGHT CO., in which a motion for rehearing was then pending which has since been overruled.

vice principal, for whose negligence or failure the master is absolutely responsible.

Zentner v. Oshkosh Gaslight Co. 126 Wis. 196, 105 N. W. 911.

Mr. Clarke M. Rosecrantz, for respondent:

The test of fellow-servantship is not the respective rank of the servants, but the nature of the act in the performance of which injury is inflicted.

Dwyer v. American Exp. Co. 82 Wis. 307, 33 Am. St. Rep. 44, 52 N. W. 304; Hartford v. Northern P. R. Co. 91 Wis. 374, 64 N. W. 1033.

The defendant furnished a safe place to work, but the injury was caused by the negligent act of a fellow servant.

Dahlke v. Illinois Steel Co. 100 Wis. 431, 76 N. W. 362; Williams v. North Wisconsin Lumber Co. 124 Wis. 328, 102 N. W. 589; Miller v. Centralia Pulp & Water Power Co. 134 Wis. 316, 13 L.R.A.(N.S.) 742, 113 N. W. 954.

The employer's duty does not require that he anticipate and take precaution, by warning or otherwise, against the great variety of dangers to which the misconduct of a trusted and competent servant may possibly subject his fellows.

Dahlke v. Illinois Steel Co. 100 Wis. 431, 76 N. W. 362.

The duty of the master to furnish the servant a safe place to work does not make the master an insurer against injury arising from the negligent conduct of a fellow servant in respect to the use of an appliance after the master has originally furnished a safe place and safe appliances.

Ft. Wayne Iron & Steel Co. v. Parsell, 168 Ind. 223, 79 N. E. 439; Southern Indiana R. Co. v. Harrell, 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262; Hermann v. Port Blakely Mill Co. 71 Fed. 853; Sofield v. Guggenheim, 64 N. J. L. 605, 50 L.R.A. 417, 46 Atl. 711; Dwyer v. American Exp. Co. 55 Wis. 453, 13 N. W. 471; Dwyer v. American Exp. Co. 82 Wis. 307, 33 Am. St. Rep. 44, 52 N. W. 304; Hartford v. Northern P. R. Co. 91 Wis. 374, 64 N. W. 1033; Haskell & B. Car Co. v. Przedziankowski, 170 Ind. 1, 14 L.R.A.(N.S.) 972, 127 Am. St. Rep. 352, 83 N. E. 626.

Dodge, J., delivered the opinion of the court:

This case presents a situation not unfamiliar, but of rather recent development since the greatly enlarged use of electricity transmitted over wires for the creation of light and power at various and remote places. There, as we know, men are constantly employed in stringing, connecting, repairing, and rearranging such wires, sometimes on one post and sometimes on an-

other. When the wires on or about which such men must work are highly charged with electricity, they endanger the men. The place of work becomes in some degree unsafe. On whom rests the risk from such danger if it is unreasonable? There are two well-established rules of the common law which, in the early stages of industry, were quite distinct and unlikely to conflict. We have, first, the rule that the employer owes the duty to provide a reasonably safe place to work and reasonably safe appliances to work with, and is liable for the proximate consequences to the servant from omission so to do. On the other hand, we have the rule that the employee assumes the ordinary risks of the business which he knows, or, as an ordinary careful and intelligent man, ought to anticipate; among those risks is the likelihood of human infirmity in his fellow workmen, so that they may be careless. Hence the concrete rule that a master is not liable to his servant for negligence of a fellow servant in the common employment. As the size of industrial enterprises increased, complications arose. The master did not by his own hand build or equip the place for his employees, nor even personally supervise the doing of such things, but hired men to do them; especially so in case of corporations, which can act only through some employee or delegate. The question at once presented itself, are persons so employed to perform the master's duty toward other employees fellow servants of the latter within the rule above stated? and, broadly stated, the answer of the courts has been negative, but the line of distinction has been most difficult of definition, and has been crowded to one side or the other of individual situations by different courts, and sometimes by the same court within very clear coherence of reason. The layers of the track over which the trainmen are to run have been held to be fellow servants in the common enterprise of operating the railway, instead of representatives of the master in performing the latter's duty to provide a safe track for the trainmen to perform the particular work of running their train. Cooper v. Milwaukee & P. du Ch. R. Co. 23 Wis. 668. The same view is held as to a switchman who fails to keep turned a switch, and thereby allows a train to run upon a car repairer at work on the switch. Smith v. Chicago, M. & St. P. R. Co. 91 Wis. 503, 65 N. W. 183. Other situations located upon the same side of the line are Okonski v. Pennsylvania & O. Fuel Co. 114 Wis. 448, 90 N. W. 429; Williams v. North Wisconsin Lumber Co. 124 Wis. 328, 102 N. W. 589; Miller v. Centralia Pulp & Water Power Co. 134 Wis. 316, 13

L.R.A.(N.S.) 742, 113 N. W. 954. Some cases presenting the antithetic condition where the negligent employee was held not to be a fellow servant engaged in common undertaking, but the representative of the master in performing or failing to perform the latter's duty to the plaintiff, are *Cadden v. American Steel Barge Co.* 88 Wis. 409, 60 N. W. 800; *Eingartner v. Illinois Steel Co.* 94 Wis. 70, 80, 34 L.R.A. 503, 59 Am. St. Rep. 859, 68 N. W. 664; *McMahon v. Ida Min. Co.* 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; *Jarneke v. Manitowoc Coal & Dock Co.* 97 Wis. 537, 73 N. W. 62; *Zentner v. Oshkosh Gaslight Co.* 126 Wis. 196, 105 N. W. 911; *Smith v. Milwaukee Electric R. & Light Co.* 127 Wis. 253, 106 N. W. 829; *Rankel v. Buckstaff-Edwards Co.* 138 Wis. 442, 20 L.R.A. (N.S.) 1180, 120 N. W. 269; *Halwas v. American Granite Co.* 141 Wis. 137, 123 N. W. 789. It is undeniable that some of these decisions and many others in other jurisdictions have extended the meaning of the community of service essential to coemployeehip vastly beyond the original conception of a relation which gave opportunity for mutual acquaintance and watchfulness between fellow servants greater than exists between master and servant. We now confront an industry relatively new, at least in present development, where constantly employees must work in places which are rendered safe or unsafe by other agents or employees hired to do the determining act for the very purpose of creating the safety,—employees with whom the exposed workmen have no contact or community save that both are employed to carry on the general business of generating and distributing the master's merchandise, as are traveling salesmen and the janitor or elevator operator in his master's store. Reasons which may have led to classing as fellow servants men employed in conduct of railroads may fail to control situations in this field, though apparently closely analogous. One distinction is in the sudden and unavoidable nature of the peril from a failure to take the proper and easy precautions, as in this case. A man at one moment is handling a cold and harmless wire which it is the duty of his master to keep so. The next he is in contact with a deadly peril, unforeseeable and unescapable, by reason of the act of another whom his master has employed to perform the duty resting on the latter to make and keep safe the place of work. We think reasons to hold that the persons so employed are agents performing a nondelegable duty are very apparent. We think, too, that they are recognized and applied in such cases as *Zentner v. Oshkosh Gas-* 40 L.R.A.(N.S.)

light Co. 126 Wis. 196, 105 N. W. 911, and *Smith v. Milwaukee Electric R. & Light Co.* 127 Wis. 253, 106 N. W. 829, and that they should control this situation, although no very clear distinction may exist in principle from *Williams v. North Wisconsin Lumber Co.* 124 Wis. 328, 102 N. W. 589, and *Miller v. Centralia Pulp & Water Power Co.* 134 Wis. 316, 13 L.R.A.(N.S.) 742, 113 N. W. 954. It is at least apparent that this court has not yet established by clear precedent how far the recognized principles of coemployment extend in their application to the particular situations existing in this industry. They have, we think, been carried in some industries to the full extent compatible with either reason, public policy, or humanity; but such precedents should not lead to further extension to new conditions, even though a pretty close analogy appear. We hold, therefore, that a distinct and independent employee to whom is delegated the duty to disconnect and make safe the wires on which others must work is ordinarily a vice principal, and not a fellow servant, with the lineman and other like workmen. Whether *Waldmann* was such in this case was at least susceptible of affirmative answer by the jury, as also whether the place or appliances furnished decedent were rendered not reasonably safe by failure of the master's duty intrusted to *Waldmann*. It was error, therefore, to enter judgment of nonsuit.

Judgment reversed and cause remanded for new trial.

Petition for rehearing denied October 4, 1910.

IDAHO SUPREME COURT.

STACY W. HUMPHREYS et al., Appts.,
v.

IDAHO GOLD MINES DEVELOPMENT
COMPANY, Resp't.

(21 Idaho, 126, 120 Pac. 823.)

Judgment — default — opening — fault of agent.

1. Where an action was commenced against a foreign corporation, and summons

Headnotes by AILSHIE, J.

Note. — *Acquiring title to mining claim by adverse possession.*

In addition to the cases set out in *HUMPHREYS v. IDAHO GOLD MINES DEVELOPMENT Co.* and in this note, see those discussed in subdivision XIV. c, of the note to *Dwinnell v. Dyer*, 7 L.R.A.(N.S.) 783.

This discussion is, of course, confined to

was served upon B., who had been designated in conformity with law as the statutory agent upon whom service of process might be made in this state, and B. did not notify the corporation or any officer thereof of the pendency of the action, and took no steps to defend in the action, and a judgment by default was thereafter entered, and the officers of the corporation subsequently learned of the pendency of the action and the entry of judgment, and, immediately upon learning such fact, moved to set aside the judgment and open up the default, and asked leave to answer to the merits of the case, and accompanied such application with a showing to the effect that B., when he was appointed as statutory agent of the corporation, was a stockholder and an officer in the corporation, and that he thereafter sold his stock and ceased to be an

officer of the corporation or in any way connected therewith, and that he thought he was no longer the statutory agent of the corporation, and that he was confined to his home by sickness at the time service was made upon him, and that he took no steps to advise the corporation of the pendency of the action, and the trial court upon such showing entered an order vacating and setting aside the judgment and default,—held, that there was no such abuse of the discretion of the trial court in granting the application as would require or justify a reversal of the order.

Appeal — opening default — presumptions.

2. Where a judgment has been entered by default, and a timely application is made to set aside the default and permit an answer to the merits to be filed, and such

cases in which it is held or assumed that the person claiming by adverse possession had occupied the premises for the statutory period, and in which the contest is upon other points.

And this note does not include cases dealing with the question whether adverse possession alone, without compliance with local mining usages or without compliance with the statutes in reference to location, etc., will, apart from the statute of limitations, initiate any rights which are paramount either to those of a subsequent occupant of a portion of the premises who relies upon possession alone, or those of one whose occupancy is coupled with a compliance of local usages or with statutory requirements.

The note does not include cases in which the existence of title by adverse possession is denied because the peculiar relation between the parties is such that the possession of one of them could not be adverse to the other. This applies to cases like *Union Consol. Silver Min. Co. v. Taylor*, 100 U. S. 37, 25 L. ed. 541, 5 Mor. Min. Rep. 323, which denies that the defendant had title by adverse possession, upon the ground, among others, that the parties were cotenants and that the possession of one cotenant is not adverse to the other.

Generally, as to location of mining claim, see the note in 7 L.R.A. (N.S.) 763.

Generally, as to relocation of mining claim as abandoned or forfeited, see the note in 68 L.R.A. 833.

As to whether possession taken under a mistaken belief that the land is a part of the public domain is adverse to the true owner, see the note in 31 L.R.A. (N.S.) 153.

As to when a mining claim becomes segregated from the public domain so as to be no longer subject to the requirements as to assessment work, or liable to relocation, see the note in 38 L.R.A. (N.S.) 1121.

The present question involves in most instances § 2332 of U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 1433, which provides: "Where such person or association, they and their grantors, have held and worked their claim for a period equal to the time prescribed by the statute of limitations for 40 L.R.A. (N.S.)

mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto, under this chapter, in the absence of an adverse claim."

Operation of limitation in favor of prior occupant.

Some of the cases disclose no attempt to invoke § 2332, U. S. Rev. Stat., the claim apparently being asserted merely under the local statutes of limitation.

Thus, it is held that where one has been in possession of mineral land for a period equal to that of the state statute of limitation in respect of real property, he is presumptively the owner thereof, and has rights superior to a location attempted subsequently to the running of the statute. For example, see *Risch v. Wiseman*, 36 Or. 484, 78 Am. St. Rep. 783, 59 Pac. 1111, 20 Mor. Min. Rep. 409, where there had been an occupation for twenty years, and *Gropper v. King*, 4 Mont. 367, 1 Pac. 755, where there had been possession for ten years.

And it was held in *Walsh v. Erwin*, 115 Fed. 531, that the performance of the required work for a period of sixteen years before overlapping locations were made would, under the laws of California, give the first locator a prescriptive right to the premises, which would avail against those seeking to initiate a new claim to the same property,—in fact against all but the government itself.

But the California supreme court, upon the theory that the statute of limitations will not run against the government, held that no portion of the period of occupation of land by one person, which preceded another's entry thereof in the land office as a placer mining claim, could be availed of by the former for the purpose of proving title by prescription against the latter. *Nessler v. Bigelow*, 60 Cal. 98; *McTarnahan v. Pike*, 91 Cal. 540, 27 Pac. 784.

There is likewise a difference of opinion as to the effect of § 2332, U. S. Rev. Stat.

answer discloses upon its face a good and meritorious defense, as a general rule, if there be any reasonable doubt on the matter, it will be resolved in favor of granting the application and allowing a trial upon the merits of the case, and on an appeal from an order granting such an application, every reasonable presumption will be indulged in support of the order opening default and allowing a trial on the merits of the case.

Same — discretion — question of fact.

3. Where an application is made to set aside a judgment entered by default and permit an answer to be filed, if the facts disclosed by the showing involve purely a question of law, it will involve no discretion on the part of the court, and must be determined solely upon the question of law raised; but where it presents a question of

fact as to the diligence of the party, or his having been taken by surprise, or being mistaken in a matter of fact, the application will appeal to the discretion of the court, and an appellate court will not disturb the exercise of that discretion, unless a clear abuse thereof is shown.

Mine — adverse possession — dispensing with proof — statute.

4. Under the provisions of § 2332 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1433), the claimant to mineral lands in the United States, who has been in the open, exclusive, adverse possession of a claim for a continuous period equal to that required by the local statute of limitations governing adverse possession of real estate, is relieved of the necessity of making proof of posting and recording a notice of location and such

It is held in California that where the adverse possession relied upon to give title under § 2332, U. S. Rev. Stat., has continued for the period prescribed by the state statute before there was an adverse claim, either by location or otherwise, then the occupier may claim a patent under the provisions of § 2332, at least where his occupation was as a successor in interest of one who had previously attempted a location. *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.* 114 Cal. 100, 45 Pac. 1047, 18 Mor. Min. Rep. 410.

But the Montana supreme court takes the view that § 2332, U. S. Rev. Stat., was enacted merely to prevent an applicant from failing to obtain his patent for defect in his claim when he had held a long undisputed possession, and no one had opposed him, and held that the words "adverse claim" in that provision had reference to the land office "adverse claim;" and that an adverse at the time of the application for patent was sufficient to defeat the right thereto, under § 2332, notwithstanding the applicant had been in continuous and notorious adverse possession of the claim for the statutory period of limitation before seeking a patent. *McCowan v. Maclay*, 16 Mont. 234, 40 Pac. 602.

Speaking *obiter* in *Cleary v. Skiffich*, 28 Colo. 362, 39 Am. St. Rep. 207, 65 Pac. 59, 21 Mor. Min. Rep. 284, and citing *McGowan v. Maclay*, *supra*, the court said that § 2332 was intended merely to permit a party to make a *prima facie* case before the land office upon application for patent, and was not available in an action brought in support of an adverse against an application for a patent, based on possession, since the language of the act implied that such possession in the applicant for the statutory period was of no avail as against an adverse claim based upon a conflicting location. The court, however, citing *Harris v. Equator Min. & Smelting Co.* 3 McCrary, 14, 8 Fed. 863, 12 Mor. Min. Rep. 178, said that possibly in such an action possession would be sufficient upon which to presume that all steps necessary to effect a location of the claim had been taken. In the 40 L.R.A. (N.S.)

Harris Case, the court, admitting that a purchaser might be in a position different from that of the locator of a claim, not as against the general government, against which nothing could avail but strict compliance with the law regulating location, but as against other citizens seeking to locate the same ground,—held that a purchaser in possession of a mining claim under a conveyance regular in form occupies by color of title, which in time, under the statute of limitations, will ripen into a perfect right, superior to the rights of one who seeks to initiate a new claim to the same thing. The court said that this position did not entail the conclusion that the regulations respecting locations were at all relaxed, nor that any condition on which the estate was held was set aside, but that a presumption was indulged that the location was regularly made in the first place, and that the party in possession should be allowed to remain so long as he complied with the conditions on which he held the estate.

In *Reavis v. Fianza*, 215 U. S. 16, 54 L. ed. 72, 30 Sup. Ct. Rep. 1, it was held, under § 45 of the act of July 1st, 1902, for the Philippine Islands, which is substantially the same as § 2332, U. S. Rev. Stat., that where natives and their ancestors had held possession and worked mining claims for the period required by that section, which continued until the bringing of the suit, no adverse claim which would defeat their right to a patent under the statute could be based upon entry and staking of claim and filing notice of location. And it was further held in this case that the possession and working of the mining claim need not have been under a claim of title in order to establish a right to the patent,—this being placed not upon general principles of law, but upon the assumed intention of Congress, to respect native occupation of public lands.

The Department of the Interior has held that laches in prosecuting an application for a patent to completion defeats the applicant's right to invoke § 2332, U. S. Rev. Stat., as against one who relocated the

other proofs as are usually furnished by the county recorder; or, in other words, he is relieved of furnishing the evidence of record title.

Same — discovery — assessment work — necessity of proof.

5. One who asserts his right to a mineral claim by adverse possession must show compliance with the statute in the matter of discovery and the performance of the annual assessment work, and, before he can acquire a patent therefor, must also show that he has done the required amount of work on such claim to entitle him to a patent therefor.

(January 8, 1912.)

A PPEAL by plaintiffs from an order of the District Court for Ada County setting aside a judgment and opening up a default in an action brought to quiet title to certain mining claims. Affirmed.

The facts are stated in the opinion.

claim after the lapse of the period of publication,—the secretary saying that the presumption that no adverse claim exists, which § 2325 declares shall prevail if no adverse is filed during the period of publication, continues to exist only during the reasonable time which the applicant is accorded for the prosecution of his claim to completion; and that after such time the applicant can have no rights except those which he may create by initiating a new location. *Barklage v. Russell*, 29 Land Dec. 401, citing *Cain v. Addenda Min. Co.* 29 Land Dec. 62, and overruling *Stewart v. Rees*, 21 Land Dec. 446, in which the acting secretary had been at pains to point out that the pendency of adverse proceedings against a mill site justified the postponement of the entry of the mining claim, and prevented the same from becoming laches; and which held that the possession and working of a claim for the period prescribed by the local statute of limitation entitled the claimant to a patent in the absence of any intervening adverse claim, even though it might appear that the claimant had failed through oversight to make the requisite statutory expenditure.

Upon the authority of *Barklage v. Russell*, supra, and upon the assumption that that case overruled *Stewart v. Rees*, supra, upon the further point made therein that failure to make the statutory expenditure will not prevent the claimant from invoking § 2332 as against one who relocated subsequently to the running of the statute, it is held that § 2332 does not dispense with the requirement of § 2325, that there shall be certain annual expenditure as a prerequisite to the issuance of the patent (*Capital No. 5 Placer Min. Claim*, 34 Land Dec. 462); nor with the necessity for the performance of the annual assessment work required by § 2324 "until the patent shall

Messrs. Jackson, Quarles, & Taylor, for appellants:

Such carelessness, negligence, or inattention as could not be predicated of a good, careful business man, in matters of material concern to him, is not sufficient to authorize the setting aside of the default judgment.

Coleman v. Rankin, 37 Cal. 247; *Garner v. Erlanger*, 86 Cal. 60, 24 Pac. 805; *Samborn, V. & Co. v. Centralia Furniture Mfg. Co.* 5 Wash. 150, 31 Pac. 466; *Harr v. Knight*, 18 Idaho, 53, 108 Pac. 539; *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33; *Holland Bank v. Lieuallen*, 6 Idaho, 127, 53 Pac. 398; *Holzeman v. Henneberry*, 11 Idaho, 428, 83 Pac. 497; *Western Loan & Sav. Co. v. Smith*, 12 Idaho, 94, 85 Pac. 1084; *Beck v. Lavin*, 15 Idaho, 369, 97 Pac. 1028; *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151.

Respondent failed to show a meritorious defense.

be issued" (*Upton v. Santa Rita Min. Co.* 14 N. M. 96, 89 Pac. 275). This, it will be observed, accords with the **HUMPHREYS CASE**.

Operation of limitation against prior occupant.

It has been held that the statute of limitations does not begin to run against a prior locator or his successors in interest, before the patent issues. *Tyee Consol. Min. Co. v. Langstedt*, 69 C. C. A. 548, 136 Fed. 124, adopting the principle applicable to questions of public lands generally, that the statute of limitations will not run against the entryman of public lands until after he has acquired title, and approving those cases which hold that title does not pass to the entryman until the patent issues; and reasoning that since there can be no adverse possession while title is in the government, there can be no disseisin of a locator until the patent issues. The doctrine of this case was recognized in *Tyee Consol. Min. Co. v. Jennings*, 70 C. C. A. 393, 137 Fed. 863, which, however, upheld the title of the occupant upon the ground that his occupancy had continued for the statutory period. This rule is laid down in *South End Min. Co. v. Tinney*, 22 Nev. 221, 38 Pac. 401.

By the application of this principle, it was held in *Miser v. O'Shea*, 37 Or. 231, 82 Am. St. Rep. 751, 62 Pac. 491, that a prescriptive right to dump tailings from a mine into a stream could not, as against the owner of a lower mine, be acquired until after the lapse of the statutory period of limitation, beginning with the issuance of the patent.

And it was held in *King v. Thomas*, 6 Mont. 409, 12 Pac. 865, that, in view of § 1851, Rev. Stat., providing that a state or territorial legislature cannot interfere with the primary disposal of the soil, the

Van Buren v. McKinley, 8 Idaho, 93, 66 Pac. 936, 21 Mor. Min. Rep. 690; Dunlap v. Pattison, 4 Idaho, 473, 95 Am. St. Rep. 140, 42 Pac. 504; McBurney v. Berry, 5 Mont. 300, 5 Pac. 867; McCowan v. Maclay, 16 Mont. 234, 40 Pac. 602; Berg v. Koegel, 16 Mont. 266, 40 Pac. 605; Harr v. Knight, 18 Idaho, 53, 108 Pac. 539; Culver v. Mountain Home Electric Co. 17 Idaho, 669, 107 Pac. 65; Pearce v. Butte Electric R. Co. 40 Mont. 321, 106 Pac. 563; Scilley v. Babcock, 39 Mont. 536, 104 Pac. 677.

Messrs. Karl Paine and Fremont Wood, for respondent:

The facts presented make such a case of excusable neglect as will protect the defendant and give it an opportunity for a hearing upon the merits.

Andrus v. Smith, 133 Cal. 81, 65 Pac. 320; Nicoll v. Weldon, 130 Cal. 666, 63 Pac. 63; Buell v. Emerich, 85 Cal. 116, 24 Pac. 644; Harbaugh v. Honey Lake Valley Land

& Water Co. 109 Cal. 70, 41 Pac. 792; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Pease v. Kootenai County, 7 Idaho, 735, 65 Pac. 432; Grady v. Donahoo, 108 Cal. 211, 41 Pac. 41; Watson v. San Francisco & H. B. R. Co. 41 Cal. 17; Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102; Tripp v. Cook, 26 Wend. 152; Barto v. Sioux City Electric Co. 119 Iowa, 179, 93 N. W. 268; Beck v. Lavin, 15 Idaho, 369, 97 Pac. 1028; Francis v. Cox, 33 Cal. 323; Gracier v. Weir, 45 Cal. 53; Butte Butchering Co. v. Clarke, 19 Mont. 306, 48 Pac. 303; Gilchrist Transp. Co. v. Northern Grain Co. 204 Ill. 510, 68 N. E. 558; Roberts v. Wilson, 3 Cal. App. 32, 84 Pac. 216; Glaesser v. St. Paul, 67 Minn. 368, 69 N. W. 1101; Stretch v. Montezuma Min. Co. 29 Nev. 163, 86 Pac. 445; Evans v. Terrell, — Tex. Civ. App. —, 95 S. W. 684; Dalgarno v. Trumbull, 25 Wash. 362, 65 Pac. 528; Utah Commerical & Sav. Bank v.

statute of limitation would not begin to run against the locator of a mine until after the issuance of the patent. This case was followed in Weibbold v. Davis, 7 Mont. 107, 14 Pac. 865. And while not commending this rule, the Montana supreme court, in Mayer v. Carothers, 14 Mont. 274, 36 Pac. 182, adopted it upon the ground that it had become a rule of property which should not be changed. Rule reiterated on the authority of the foregoing cases in Clark v. Barnard, 15 Mont. 176, 38 Pac. 834.

Operation of statute in favor of junior locator and against relocater.

In view of § 2332, U. S. Rev. Stat., the failure of a senior locator for the period of limitation prescribed by the Utah statute, to bring an action against a junior locator for the recovery of possession, was held in Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 22 Mor. Min. Rep. 610, to bar the former's right to bring such action, and to make the junior locator's right superior in respect of the area of conflict, to a relocation initiated by a third person after the statute of limitations had run, and after the senior location had become forfeited for failure to do the assessment work. Another reason entering into the decision was that the senior locator had waived his right by failing to adverse the junior locator's application for a patent.

The decision in the Lavagnino Case was affirmed by the United States Supreme Court (198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716) upon the broad ground, irrespective of any question as to limitation, that the relocater could not in adverse proceedings assail the title of the junior locator in respect of the area of conflict that had previously existed between 40 L.R.A.(N.S.)

that location and the abandoned or forfeited senior location. The position of the state court as to the effect of the statute of limitations is not discussed as independent question, and is referred to only in connection with the point that it did not have the effect to render the decision on the Federal question unnecessary, and so defeat the jurisdiction. The position of the Federal Supreme Court on the Federal question was discussed in the note in 68 L.R.A. 842, and has since been materially modified, if not practically overruled. (See Farrell v. Lockhart, 16 L.R.A.(N.S.) 162, and note; and see also Swanson v. Sears, 224 U. S. 180, 56 L. ed. 721, 32 Sup. Ct. Rep. 455.)

That question is, of course, entirely outside the scope of this note, and the case is referred to in this connection merely for the purpose of suggesting that the subsequent modification of the position of the Federal Supreme Court does not necessarily affect the position of the state court holding the junior location superior to the relocation, so far as it rested upon the ground that any claim of the senior locator as against the junior location had become barred by lapse of time prior to the relocation, especially in view of the statement in Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510, that under § 2332, U. S. Rev. Stat., that the junior locator would have been entitled to a patent if he had held possession or worked the claim to the exclusion of others for the required time.

Miscellaneous cases.

Land which has been patented as placer ground does not fall within the meaning of the words "mining claim" in a statute which provides that no action for the recovery of mining claims shall be main-

Trumbo, 17 Utah, 198, 53 Pac. 1033; Williams v. Breen, 25 Wash. 666, 66 Pac. 103; Peglerinelli v. McCloud River Lumber Co. 1 Cal. App. 593, 82 Pac. 695; Pearson v. Drobaz Fishing Co. 99 Cal. 425, 34 Pac. 76; Taylor v. Pope, 106 N. C. 267, 19 Am. St. Rep. 530, 11 S. E. 257; Nicholson v. Cox, 83 N. C. 44, 35 Am. Rep. 556; Douglass v. Todd, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623; Baxter v. Chute, 50 Minn. 164, 36 Am. St. Rep. 633, 52 N. W. 379; Wicke v. Lake, 21 Wis. 411, 94 Am. Dec. 552; Bradford v. Coit, 77 N. C. 72; Huebschman v. Baker, 7 Wis. 542; Bertline v. Bauer, 25 Wis. 486; Stafford v. McMillan, 25 Wis. 566; Thomas v. Morris, 8 Utah, 284, 31 Pac. 446; Jensen v. Barbour, 12 Mont. 566, 31 Pac. 592; Crebier v. Eidelbush, 24 Wis. 162.

Allshie, J., delivered the opinion of the court:

This is an appeal from an order setting aside a judgment and opening up a default. The action was commenced by the plaintiffs, who are appellants herein, for the purpose of quieting their title to the Exchequer No. 1 and Exchequer No. 2 lode mining claims. The complaint was filed on February 9, 1911. Summons thereupon issued and was served the following day. Default was entered on March 9th following. Proofs were thereafter made, and judgment was entered on March 13, 1911. The defendant, respondent herein, is a foreign corporation, and had designated a

resident agent, in conformity with the statute, on whom service of process might be had. The service of summons was made on the designated agent. On the 1st day of June following, the respondent, through its attorney, made a motion to vacate and set aside the judgment and open up the default, and supported the motion by affidavits, and tendered an answer and cross complaint. After a hearing on the motion and application, the court granted the same, vacated and set aside the judgment, and allowed the defendant to answer. The plaintiff thereupon prosecuted this appeal.

Two questions are presented: First, the sufficiency of the showing to constitute either mistake, inadvertence, surprise, or excusable neglect, as contemplated by the provisions of § 4229 of the Revised Codes; and, second, the sufficiency of the answer to constitute a defense.

1. It is admitted that C. J. Bassett was the statutory agent of the respondent corporation, and that he was duly served in Boise City on February 10, 1911. It further appears that he never notified the corporation, or any of its officers, of the service of process, or that an action was pending, and that the corporation was never apprised of the pendency of the action or of the entry of judgment against it, until about the 13th day of April, 1911, when Fremont Wood, as attorney for respondent, was making an examination of the records of Ada county for the purpose of investi-

tained unless the plaintiff was seised or possessed of such claim within one year before the commencement of the action. Horst v. Shea, 23 Mont. 390, 59 Pac. 364.

Having failed to comply with the location statute, one who asserts the right to a full claim upon the basis of possession alone can claim, as against a subsequent locator, only so much of the claim as he actually occupied before such location. Armstrong v. Lower, 6 Colo. 581, 15 Mor. Min. Rep. 458.

A license from the government to enter mineral land is revoked when the fee passes from the government to another party; and a mere possessory right under such license is not adverse to, but is void against, the grantee of the government. Omaha & G. Smelting & Ref. Co. v. Tabor, 13 Colo. 41, 5 L.R.A. 236, 16 Am. St. Rep. 185, 21 Pac. 925, 16 Mor. Min. Rep. 184.

Where there has been a protracted dispute as to the boundary between two mining claims, neither the continued operations upon that subsequently located, elsewhere than on the overlap, nor merely the digging by the owners of such claim of a shaft upon the overlap under protest by the owner of the senior location, constitutes a possession of the overlap which is adverse to the owner of the senior location. 40 L.R.A. (N.S.)

Baine Boy's Tunnel Co. v. Boston Tunnel Co. 37 Cal. 40, 12 Mor. Min. Rep. 247.

In Original Consol. Min. Co. v. Abbott, 167 Fed. 681, the ground of the holding that there was no title by adverse possession as against the holder of the patent which was issued before such possession commenced was that, since the occupation by the predecessor of the person claiming title by adverse possession was as a tenant at will, such possession might be deemed to have continued in subordination to the patentee's title, and could not become adverse until some act of hostility was committed.

A claimant of unpatented mining lands who places a deed thereof in escrow to secure a note loses the rights he would have had upon the assumption that the same was an equitable mortgage, through laches and the five-year-statute of limitations, where for twelve years he permits, without objection, the person named as grantee to occupy the premises and do the annual assessment work, the latter having taken possession upon the delivery of the deed to him for nonpayment of the note, and in pursuance of the terms of the escrow. Bradley v. Johnson, 11 Idaho, 689, 83 Pac. 927.

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gating the condition of the title to the property involved in this action, with a view to commencing an action on behalf of the respondent, and discovered that this action had been instituted and service had been had and judgment entered thereon. He thereupon communicated with Bassett, who advised him that "he had been served with complaint and summons in an action, but that there was some mistake, as he, the said Bassett, was not an officer of or other agent of the corporation;" that Judge Wood "thereupon advised said Bassett of his mistake, and said Bassett immediately brought to deponent (Judge Wood) a copy of the summons and copy of complaint in the action; and thereupon further investigation was made and action taken with a view to procuring an order vacating and setting aside the default and permitting an answer to be interposed." Bassett's affidavit, among other things, states that he was one of the original incorporators of the company, and was an owner of a small amount of stock in the corporation, and was, soon after the incorporation thereof, designated as the statutory agent of the corporation, and that such designation was filed with the secretary of state and the auditor of Ada county; that in the year 1906 he (Bassett) sold all of his stock in the corporation, and thereupon ceased to be either a director or officer of the corporation, "and that deponent assumed that his connection with the defendant corporation was entirely severed, and he had no further thought of his appointment and designation as resident statutory agent of the corporation, upon whom service of process might be legally made; that on the 10th day of February, 1911, deponent was served with a copy of the summons and complaint in the above-entitled action, at his residence in Boise City, in Ada county, Idaho; that at the time of said service deponent informed the officer making the same that he was not an officer of the defendant corporation, and was not in any way connected therewith, and that service upon him would not be good; that, nevertheless, the said officer afterwards, and on the same day, returned to deponent's residence, and delivered to him and left with him a copy of the summons and complaint in said action; that deponent was sick and indisposed at the time and for some time thereafter, and was confined to his house with a severe case of la grippe; that he had at the time entirely forgotten that he was the designated resident agent of the defendant corporation, and he did not recall such fact until he was subsequently advised of the record of the appointment in the office of the secretary of state; that deponent's at-

tention was thereafter first called to the matter on or about the 14th day of April, 1911, when he was advised by Fremont Wood that a judgment had been secured against the defendant corporation upon such service, and that deponent was the authorized designated agent of the defendant corporation. Deponent then delivered the said complaint and summons to said Wood; that . . . he took no action in the matter, because he actually and in good faith believed at the time that he had no connection with said defendant corporation, and because he had entirely forgotten the fact of his appointment as resident agent thereof. Deponent further says that, if he had recalled or in any way realized that he was the agent of the defendant corporation for the service of process or otherwise, that he should have forwarded said papers to the proper officers of the company, but, for the reasons above given, deponent retained said summons and complaint, and advised no officer of the company in relation thereto, until his attention was called to the matter by said Wood."

Appellants submit the following self-evident proposition: "That foreign corporations must be held to the same diligence as are our own citizens, and must not be held to have any advantage over them in this respect;" that is, in the matter of service of process. And from this proposition counsel argues that the showing made by Bassett would not be a showing of inadvertence, mistake, or excusable neglect such as would justify vacating a judgment and opening a default, were the action one prosecuted directly against Bassett; and that as a consequence the showing is not sufficient to excuse the corporation represented by him. We have no hesitancy in stating as a rule by which the courts of this state should be guided in such matters, that a foreign corporation must be held to the same diligence in all respects as a domestic corporation or as an individual citizen, and so a rule that is applicable to domestic corporations or to the individual is applicable to a foreign corporation. It must also be conceded that service upon the statutory agent is service upon the corporation, and that the action of the agent in reference to the subject of his agency is the action of the principal. The only fact shown by Bassett's affidavit which in any manner tended to raise the question of mistake, inadvertence, surprise, or excusable neglect, and to bring the defendant within the discretion of the court, is the fact that Bassett thought his agency ceased when he disposed of his interest in the corporation, and ceased to be an officer thereof. This,

it is true, was a mistake and misapprehension of the effect of his action, and yet it is a mistake or misapprehension which might be honestly and fairly entertained by one who had been connected with a corporation in the manner that Bassett had been associated with this corporation. In this respect, and with reference to this fact, the parallel between an individual and a corporation cannot fairly be drawn, because an individual would have to be crazy or mentally unsound in order to not know his own identity, while an agent might in good faith erroneously conclude that his agency had ceased, and thereby fail to represent his principal in a matter in which he is the agent and ought to act, and in which the principal would be greatly injured and damaged if no relief could be granted. The mere fact of the negligence of the statutory agent of a corporation is not of itself sufficient to entitle the principal to relief under the provisions of § 4229, but that fact, coupled with the further fact, as shown in this case, that the agent honestly, though erroneously, thought that his agency no longer existed, and that the company took action as soon as it learned of the mistake, was a slight evidence at least on which to set in action the discretion of the trial court in opening up the default. The showing of mistake and excusable neglect is very slight in this case and extremely meager on which to rest the order.

On the other hand, however, under the rule so uniformly recognized, not only by this court, but by many other courts, that every reasonable doubt in such cases will be resolved in favor of a trial upon the merits, and that every fair presumption will be indulged in support of an order opening a default and allowing a trial upon the merits, we would not feel justified in disturbing the order of the trial court in this case. He finds, in effect, that the failure to appear and answer was due to mistake, surprise, and excusable neglect, and that finding, being in favor of a trial on the merits, should not be disturbed where there was any evidence presented tending to support the order. *Holzeman v. Henneberry*, 11 Idaho, 428, 83 Pac. 497; *Western Loan & Sav. Co. v. Smith*, 12 Idaho, 105, 85 Pac. 1084; *Pease v. Kootenai County*, 7 Idaho, 734, 65 Pac. 432; *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932; *Nicoll v. Weldon*, 130 Cal. 666, 63 Pac. 63; *Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41; *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

Neither the facts of this case nor the rule of law upon which it is decided should 40 L.R.A.(N.S.)

be confused with that class of cases where the showing fails to present any fact which can appeal to the discretion of the court. *Hall v. Whittier*, 20 Idaho, 120, 116 Pac. 1031, and cases cited. In other words, showings which raise only questions of law must appeal to the legal judgment of a court, and not to the discretion of the court, and must be decided purely upon the law. But where they present facts which appeal to the discretion of the court, the appellate court will hesitate to disturb the exercise of that discretion, unless a clear abuse thereof is shown. See cases, *supra*.

2. The other question presented in this case is the sufficiency of the answer. The appellant contends that the answer is not sufficient to raise an issue.

The defendant by its answer alleges a prior location of the ground covered by the Exchequer No. 1 and No. 2 claims, and sets up copies of the location notices, and alleges a discovery and the performance of all the acts and things necessary to be done under the law, in order to hold a mining claim.

As a further defense, the defendant alleges that it has been in the open, exclusive, and adverse possession of the claims prior to the initiation of the claim of plaintiff, for a period exceeding that prescribed by the statute of limitations of this state for adverse possession, and that during such time it continuously occupied and worked the property and placed valuable improvements thereon and did all the work necessary to hold a mining claim.

Appellant urges that, in the first place, the respondent's location notices are insufficient, in that the description therein does not sufficiently identify the property, and that it does not sufficiently tie the property to any natural object or permanent monument as prescribed by the statute, and that the affidavit to the notice was taken by a person who is not authorized to administer an oath. The view we have reached on the question of adverse possession renders it unnecessary for us to pass upon the sufficiency of the notices and affidavits; but, waiving that, we would not feel inclined to hold the notices as they come to us insufficient, for the reason that the questions raised as to the sufficiency of the notices are subject in a measure to be influenced by the admission of oral testimony. It has frequently been held that the sufficiency of the description of the property or the tie to a natural object or permanent monument is open to explanation by other evidence to show whether or not the property could be definitely identified from such description. *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955, 22 Mor. Min.

Rep. 69; Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co. 14 Idaho, 518, 95 Pac. 14. Evidence as to the nature of the object or monument and the physical condition of the country is often admissible in such cases.

The affidavit was taken before H. W. Dorman, but the location notice in the record does not show the official position held by Dorman. Neither does it show the character of the purported seal with which he attested his jurat. In the place where the seal should have been affixed, the following words are typewritten in parentheses: "Seal of Dep. Min. Rec." There is also attached a certificate signed by "H. W. Dorman, Deputy," in which he certifies that he received the instrument on a certain day and hour, and duly recorded the same in book 3 of Quartz Claims, at page 112. This is immediately followed by a certificate signed by the county recorder of Boise county, certifying that he received the same from H. W. Dorman and filed it for record in his office, etc. The inference would be that H. W. Dorman was a deputy county recorder, in which event he would have the authority to administer an oath. If, as a matter of fact, he was not such an officer as could administer an oath, that fact may be shown. *Van Buren v. McKinley*, 8 Idaho, 93, 66 Pac. 936, 21 Mor. Min. Rep. 690.

Passing now to the other question, we find it stated thus in appellant's brief: "There can be no valid location of a mining claim in the state of Idaho as against the right of adverse claimants, except by compliance with the mining acts of Congress and of the state of Idaho." Appellant thereupon cites a number of cases and enters into a very able argument in support of the contention that, under the provisions of § 2332 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1433), a mining claim cannot be held by adverse possession as against another locator, even though that possession has continued during the full period prescribed by the statute of limitations for the commencement of such actions, unless such claimant has posted and recorded a notice of location as required by law. Appellant places special reliance upon *McCowan v. Maclay*, 16 Mont. 234, 40 Pac. 602, and *Cleary v. Skiffich*, 28 Colo. 362, 89 Am. St. Rep. 207, 65 Pac. 59, 21 Mor. Min. Rep. 284. Appellant's contention is supported by the authority of the foregoing cases, but the great weight of authority seems to be to the contrary. The supreme court of New Mexico in *Upton v. Santa Rita Min. Co.* 14 N. M. 96, 89 Pac. 275, had occasion to consider this question, 40 L.R.A. (N.S.)

and there reached the conclusion which is stated as follows by the court, speaking through Mr. Justice Pope: "We believe that the true rule on the subject is succinctly stated in *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.* 114 Cal. 100, 45 Pac. 1047, 18 Mor. Min. Rep. 410, where it is said that 'working for the statutory period before the adverse right exists is equivalent to a location, under the act of Congress,' and in *Belk v. Meagher*, 104 U. S. 279, 287, 26 L. ed. 735, 738, 1 Mor. Min. Rep. 510, where it is declared to be the 'equivalent of a valid location.' In other words, a party who has done such work occupies the status and possesses the rights of a locator, no more and no less. As in the case of a holder of a valid location, he has good title as against all but the government, so long as he does the annual labor. . . . When such party comes to apply for patent, his occupancy must be proven under certain regulations of the department (2 Lindley, Mines, 1714), and, when so proved, if there be no adverse claimant, they are sufficient, as the statute says, 'to establish a right to a patent.' But in this he stands on the same basis as the holder of a location whose application is uncontested. The holder of such a possession, no less than the holder of a location, must possess the necessary qualifications as to citizenship. *Anthony v. Jillion*, 83 Cal. 296, 23 Pac. 419, 16 Mor. Min. Rep. 26. He must prove, as well as the locator, the possession of \$500 worth of labor or improvements before he can secure patent. *Capital No. 5 Placer Min. Claim*, 34 Land Dec. 462." It will be seen that the New Mexico court and the authorities there cited hold in substance that continuous, open, adverse possession of mining ground for the full period required by the local statute of limitations, accompanied by an annual performance of the work or improvement on the claim required by the statute, obviates the necessity of making proof of the posting and the recording of a location notice, and supplies the place of record title. Mr. Snyder in his work on Mines (vol. 1, § 672), in discussing the application of § 2332 of the Revised Statutes of the United States to the statute of limitations and the method of acquiring title thereby, says: "The effect of this statute is to relieve the applicant from the necessity of proving his location of the claim, the location by his predecessors, or the furnishing of an abstract of title, as in other cases, but he is required to furnish a duly certified copy of the statute of limitations of the state or territory, together with his own sworn statement showing the facts as to the origin of his

title and continuation of his possession of the ground applied for, the area thereof, the nature and extent of the work done, whether there has been any opposition to or litigation regarding his possession of the ground, and, if so, when the same ceased, whether such cessation was the result of compromise or judicial decree, and any other facts bearing upon the question.

. . . This provision relates solely to the procedure relative to proving title. All other steps in the matter of application are the same as heretofore outlined. And where an adverse claim is filed in the land office, the applicant is obliged to defend his rights in a court of competent jurisdiction the same as though his application were based upon a valid location; but upon the trial, as in the land office, proof of possession and work for a period equal to the statute of limitations would be equivalent to a location. It would seem that he ought also to furnish proof that the claim was actually marked upon the ground by him or his predecessors, and that such markings correspond substantially with the description of the claim as surveyed and applied for. His status, however, if an adverse claim is filed, is not so clear. If the owner's boundaries are plainly marked and an actual adverse possession maintained, it would seem to be equally conclusive against the adverse claimant. But that is an independent fact, and the adverse claim must rest upon its own merits. The statute simply undertakes to dispense with many of the formalities in the way of proof in the absence of an adverse claim." Mr. Lindley in volume 2 of his work on Mines, at § 688, takes substantially the same view, and in support thereof places special reliance on the opinion of Judge Sawyer in 420 Min. Co. v. Bullion Min. Co. 3 Sawy. 634, Fed. Cas. No. 4,989, 11 Mor. Min. Rep. 608, 9 Nev. 240, 1 Mor. Min. Rep. 114. To the same effect, see *Harris v. Equator Min. & Smelting Co.* (C. C.) 3 McCrary, 14, 8 Fed. 863, 12 Mor. Min. Rep. 178, 37 Land Dec. 772, and *Snyder on Mines*, §§ 155 and 357. It seems to us that the provisions of § 2332 of the Revised Statutes of the United States are intended to obviate the necessity for proof of posting and recording a notice of location in cases where the claimant to mineral ground has been in the actual, open, and exclusive possession of the ground for a period equal to that required by the local statute of limitations governing adverse possession of real estate. The adverse possession referred to in the statute is intended to supply the place of an abstract of title and such proofs as are furnished by the county recorder.

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It still remains, however, for the person who asserts claim by adverse possession to have made a mineral discovery, and to have performed the annual assessment work, and to have had the boundaries of his claim so marked and indicated as to afford actual notice of the extent and boundaries of his claim and possession, and to have maintained an actual possession and excluded all adverse claimants for the full period prescribed by the statute, and to have likewise maintained his possession and occupancy during the subsequent period of time in which the adverse locator attempted to initiate his right by locating the claim.

We conclude that the order vacating the judgment and setting aside the default should be affirmed, and it is so ordered. Costs awarded to respondent.

Stewart, Ch. J., and Sullivan, J., concur.

ILLINOIS SUPREME COURT.

JOHN SCHOBERT, Appt.,

v.

PITTSBURG COAL & MINING COMPANY et al.

(254 Ill. 474, 98 N. E. 945.)

Mine — lease — right to use spaces to move coal.

A grantee of coal in place, with license irrevocable to mine and remove it, has, until the coal is all removed from the land granted, the right to use the space created by the removal of coal to move coal mined on his adjoining land across the land of the grantor to a shaft where it is brought to the surface.

(June 21, 1912.)

Note. — *Right of grantee of coal in place to transport coal from adjoining tract.*

It is generally held that a grantee of coal in place, with license to mine and remove it, in the absence of express stipulation may, at any time before the coal is all removed, use the passages opened for its removal for the transportation of coal from his adjoining lands. *Consolidated Coal Co. v. Schmisser*, 135 Ill. 371, 25 N. E. 795; *SCHOBERT v. PITTSBURG COAL & MIN. CO.*; *Moore v. Indian Camp Coal Co.* 75 Ohio St. 493, 80 N. E. 6; *Lillibridge v. Lackawanna Coal Co.* 143 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035, 17 Mor. Min. Rep. 412; *Webber v. Vogel*, 189 Pa. 156, 42 Atl. 4, 19 Mor. Min. Rep. 639.

So, a lessee of certain coal lands for mining purposes, whose rights are to continue until all the merchantable coal shall

A PPEAL by plaintiff from a decree of the Circuit Court for St. Clair County, dismissing a bill filed to enjoin defendants from using space in a coal mine, and for an accounting for the use of such space. **Affirmed.**

The facts are stated in the opinion.

Messrs. Turner & Holder, for appellant:

A clause in a deed or contract conferring the privilege of mining for coal under a tract of land means nothing more or less than the right to enter on the land and remove the coal; and when the coal is all removed, the right conferred will cease.

Sholl v. German Coal Co. 139 Ill. 21, 28

N. E. 748; Leavers v. Cleary, 75 Ill. 349, 2 Mor. Min. Rep. 618.

A grant of coal under a tract of land, with the right to mine and remove the same, does not convey any interest or estate in the land after the coal is removed.

Griffin v. Fairmont Coal Co. 59 W. Va. 480, 2 L.R.A. (N.S.) 1115, 53 S. E. 24; Leavers v. Cleary, supra; Matthiessen & H. Zinc Co. v. La Salle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; Moore v. Price, 125 Iowa, 353, 101 N. W. 91; Junction Min. Co. v. Springfield Junction Coal Co. 222 Ill. 600, 78 N. S. 902.

Defendant Fournie is hauling his coal through entries under complainant's land,

be exhausted by actual mining, cannot be charged a rental for the use of the gangways on the demised premises in transporting coal from adjoining properties. New York & P. Coal Co. v. Hillside Coal & I. Co. 225 Pa. 211, 74 Atl. 26.

Naturally this rule applies with even more certainty and force when the grant of coal makes express provision for such further use of the granted premises.

Accordingly, under a lease of coal lands for mining purposes, providing for the payment of royalty to the lessor as long as the mine shall be operated, not exceeding twenty-five years, with right of way over the surface for railway tracks to shaft and dumps, and stipulating that "if the second party desires to use the right of way upon the land after the coal has been exhausted from first party's land, they may continue to do so" for a certain rental, the lessee may, at least, until the coal in the granted premises is exhausted, and within twenty-five years, use the entries, shafts, and surface right of way for the removal of coal from adjoining lands leased by the same lessee. Madison v. Garfield Coal Co. 114 Iowa, 56, 86 N. W. 41, 21 Mor. Min. Rep. 358.

And the grantee of coal with mining rights and "with the privilege of mining and removing through any entries made in said coal, other coal belonging or which may hereafter belong" to him, has the right to bring coal from his adjoining lands through entries in the mine excavated in the granted premises to the bottom of the shaft therein, and there to raise it to the surface of the grantor's land. Potter v. Rend, 201 Pa. 318, 50 Atl. 821, 22 Mor. Min. Rep. 1.

Likewise, under a lease conveying coal in place, with the right to mine and remove the same through any shafts, slopes, or tunnels that may be dug, together with the right to use the openings, buildings, and fixtures used in mining said coal for mining, preparing, and forwarding coal from any adjoining or contiguous lands until such lands shall be exhausted, the grant in connection with the adjoining lands is one of present enjoyment, and there is nothing to show that this privilege is to be made use of only after the coal conveyed is exhausted. 40 L.R.A. (N.S.)

Under such a lease the lessee has a present right to mine coal from adjoining lands by means of the openings upon the leased land. Genet v. Delaware & H. Canal Co. 122 N. Y. 505, 25 N. E. 922.

Also, in case of a grant of coal with the privilege of mining and a right of way for railroads over the surface, together with the privilege of "forever hereafter running their coal from other lands through the entries and railways made and used in taking out the coal above granted," where, because of a ravine, the coal from the adjoining lands can be transported through the entries under the granted land only after connecting such entries with the coal by means of a surface road, the grantee has the right, as incident to the one granted, to build such a road. McCracken v. Gumbert, 131 Pa. 36, 18 Atl. 1068, 17 Mor. Min. Rep. 279.

And under a lease stipulating that the lessee may use any slopes, headings, entries, and passageways through, over, and across the lands leased for the purpose of reaching, giving access to, or mining on any other lands which he may lease or buy, "provided said lands are within 2,500 feet of the main slope opened on the lands embraced in the lease," the lessee may use such passageways for the transportation of coal mined on adjoining lands, the nearest boundary of which is within the stipulated distance. St. Louis Union Trust Co. v. Galloway Coal Co. 193 Fed. 106.

Although a grantee of coal with mining rights, together with the privilege of mining through the granted premises other coal belonging to him, may take out coal from other lands through openings made under the surface of the granted premises, and to the surface through a shaft, he may not appropriate a right of way over the surface of the granted premises, and build thereon a coal railroad for the purpose of transporting through a coal shaft located on another farm, to a point of shipment on a third farm, coal mined and brought out through that shaft. Farrar v. Pittsburgh & E. Coal Co. 28 Pa. Super. Ct. 280.

On the other hand, the grant of coal may expressly exclude the right to such extra use.

in violation of the spirit of the contract of sale of coal by Ammel to Gundlach, and is taking an undue advantage of complainant, which it is proper for a court of equity to restrain him from doing.

Leavers v. Cleary, supra; *McGuire v. Boyd Coal & Coke Co.* 236 Ill. 69, 86 N. E. 174; *Junction Min. Co. v. Springfield Junction Coal Co.* 222 Ill. 600, 78 N. E. 902; *La Salle v. Matthiessen & H. Zinc Co.* 16 Ill. App. 69, affirmed in 117 Ill. 411, 2 N. E. 406, 8 N. E. 81.

Messrs. Schaefer & Kruger, for appellees:

When there are no restrictions in the grant, reservation, or exception which creates the estate, the space which may be left by the removal of the mineral and by

the removal of so much of the containing strata as may be reasonably required for the operation of mining remains a part of the property of the mine owner until the exhaustion of the mine, and may be used by him during the continuance of the estate as he may see fit, provided that such user does no injury to the surface.

Moore v. Indian Camp Coal Co. 75 Ohio St. 493, 80 N. E. 6; *Lillibridge v. Lackawanna Coal Co.* 143 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035, 17 Mor. Min. Rep. 412.

Farmer, J., delivered the opinion of the court:

This action is a bill in chancery filed by the appellant against the appellees,

Thus, under a grant of coal to be mined, providing that no coal from other properties shall be mined through the workings on the demised premises excepting certain named deposits, and adding that if coal be so mined accurate returns of it shall be made, only the excepted deposit may be mined through the workings on the leased premises. *Rockafellow v. Hanover Coal Co.* 12 Pa. Co. Ct. 241.

And in *Beck v. Economy Coal Co.* 149 Iowa, 24, 127 N. W. 1109, under the maxim that the expression of one thing is the exclusion of another, it is held that under a lease of coal for mining purposes, providing for the mining of coal from other lands through a shaft located on the leased land, and also providing for the removal of coal from the leased premises through a shaft located on any other land, the lessee has no right to carry coal from other lands through entries on the leased land and up a shaft on still other land. Two judges out of six dissent, on the ground that since, in the absence of any particular stipulation, the general rule is otherwise, in order to avoid its operation there must be some stipulation in the lease indicating an intention to avoid it.

Also a grantee of coal with mining rights and the right to use 2 acres of surface land for a shaft and other appliances, the conveyance stipulating that at cessation of mining operations grantee shall remove all buildings and shafts, and fill up the holes, has no right to carry coal from his adjoining lands through the grantor's land and up the shaft located thereon, and to dump the waste on the land of the grantor. *Moore v. Price*, 125 Iowa, 353, 101 N. W. 91.

Likewise, a grant of coal with mining privilege and with the use of railroad fixtures and other property specified, which is then being used in and about the mine, conveys the use of such property only in connection with the coal sold; and the grantee has no right to use the property for the purpose of taking out other coal of which he is the owner. *McCloskey v. Miller*, 72 Pa. 151.

In *Webber v. Vogel*, 159 Pa. 235, 28 Atl. 40 L.R.A. (N.S.)

226, it was said that under the provisions of a grant conveying certain coal with right of way for the purpose of mining and carrying it away, the grantee has no right to carry coal from an adjoining tract through an open pit upon the granted premises, and to a public road over the right of way upon the surface. In a later appeal of this case (189 Pa. 156, 42 Atl. 4, 19 Mor. Min. Rep. 639), the court states that the first decision was not intended to overrule *Lillibridge v. Lackawanna Coal Co.* 143 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035, 17 Mor. Min. Rep. 412, the decision in the *Webber Case* dealing, not with the right to transport coal from other land through underground passageways in leased land, but with the question of trespass upon the surface of such land.

Under a lease or deed of land reserving the mines therein and a right to work them, with right of way to and from the same, it has been held that the lessor may use the underground passage in such mines for any purpose whatever, including the carrying through it of coal taken from adjoining premises. *Proud v. Bates*, 34 L. J. Ch. N. S. 406, 11 Jur. N. S. 441, 6 New Reports, 92, 13 L. T. N. S. 61, 15 Mor. Min. Rep. 227; *Hamilton v. Graham*, L. R. 2 H. L. Sc. App. Cas. 166; *Batten Pooll v. Kennedy* [1907] 1 Ch. 256, 76 L. J. Ch. N. S. 162.

But often, under a reservation of mines in grants of particular lands, the right to use the passageways therein is held to be limited to the mines thus reserved.

Thus, under a deed of lands reserving coal mines therein, with mining privileges and right of way to and from the mines over the land, no easement is reserved except for the purpose of getting coal under the lands conveyed; and the grantor may not carry along the right of way coal got in another tract of land, even though the coal in both tracts is a part of the same mineral field. *Dand v. Kingscote*, 6 Mees. & W. 174, 2 Eng. Ry. & C. Cas. 27, 9 L. J. Exch. N. S. 279.

And in *Ramsay v. Blair*, L. R. 1 App. Cas. 701, it was held that under grants of land reserving the coal therein, with power

praying for an injunction and an accounting. The facts out of which the litigation arose are as follows: Prior to August 30, 1887, Martin Ammel owed in fee simple the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 16, township 1 N., range 8 W., St. Clair county. On said 30th day of August, 1887, Ammel and wife conveyed by warranty deed to Philip M. Gundlach the coal "in, under, and throughout" the land above described, except $1\frac{1}{2}$ acres previously conveyed to Antoine Fournie, "with license irrevocable to mine and remove said coal," except the coal under a part of said land (described by metes and bounds) upon which the residence and other buildings of the grantor were located. On the 29th of July, 1903,

Gundlach conveyed to Prosper Fournie a strip of coal underlying the southwest corner of the premises above described. Said strip was described by metes and bounds, was 435 feet long north and south by 81.8 feet wide east and west, and comprised a little less than one acre. On the 11th day of March, 1905, Ammel, by warranty deed and without any reservation, conveyed, the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 16, except the Antoine Fournie acre, to the appellant. The Antoine Fournie acre lay along the north line of the last above described tract. Prosper Fournie owns land adjoining appellant's lands on the south and west. On Fournie's land adjoining appellant's on the west, the Pitts-

to dig and carry away the same, the grantor has no right to carry over or through that land coal dug from other lands.

And in *Durham & S. R. Co. v. Walker*, 2 Q. B. 940, 2 Gale & D. 326, 3 Eng. Ry. & C. Cas. 36, 11 L. J. Exch. N. S. 440, 17 Eng. Rul. Cas. 599, where a deed of land reserved to the grantor the mines thereon, with the right to work them, right of way to them, and to or from any other mines, and all necessary and convenient ways, passages, and powers for the purposes aforesaid, it is held that this right of way was meant to be used only in connection with the mines reserved; and a railroad built thereon could not be used for the purpose of carrying coal belonging to the grantor, but gotten elsewhere than on the demised premises.

The right of transporting coal from adjoining lands through or over leased land exists, however, only so long as the coal conveyed is in good faith being mined. It would be a perversion of the intention of the parties to use such passageways merely and only for the purpose of reaching other coal, and besides, such use would be a continual menace to the stability of the surface. If such use were allowed, no owner of the land could tell when his estate would cease to be disturbed by workings underneath. The rule laid down in the above cases is not intended, therefore, to give the grantee of coal an undisputed and perpetual right of way under another's land. The owner of the land above and below has a right to the reversion of the space occupied by the coal within a time contemplated by the parties when that coal is removed. *Webber v. Vogel*, 189 Pa. 156, 42 Atl. 4, 19 Mor. Min. Rep. 639.

So, when the grantee of coal in place has ceased to mine that coal to any appreciable extent, he may not, without an express grant of such right, extend the openings to the mines to adjacent lands, mine large quantities there, and use the grantor's land for loading and transporting such coal. *Hooper v. Dora Coal Min. Co.* 95 Ala. 235, 10 So. 652.

But it has been held that where a grant

of coal in place, with mining privileges, and with provisions for the termination of the agreement, also stipulates that the grantee shall have the right of way through, over, or under said land to transport coal from adjoining lands, these covenants are independent of each other, and the grantee may use the gangway of the mine as a means of reaching coal on an adjoining tract, notwithstanding mining operations on the granted tract have ceased. *Stewart v. Northwestern Coal & I. Co.* 147 Pa. 612, 23 Atl. 882.

And where a grant of certain coal with mining privileges provides that for any coal that the grantee shall remove from other lands through or over the granted premises he shall have all the rights then possessed by the grantor, and where, at the time, the grantor had the right to use the entries upon the land granted for the purpose of removing coal from other lands, with the privilege, after those mines should be exhausted, of continuing such use of the entries by paying a certain rental, these provisions authorized the grantee to transport coal from his adjacent lands through the entries upon the granted premises, even after the coal upon the latter is exhausted. The court remarks, by way of illustrating the general rule, that a man who rents a farm adjoining his own may, during the lease, haul the produce of his own land across the leased land without any license from his landlord. *Wadsworth Coal Co. v. Silver Creek Min. & R. Co.* 40 Ohio St. 559.

Such a grantee having agreed to sink a shaft for the purpose of mining the coal contained in the land, and to pay a certain royalty, with no allusion in the contract to mining elsewhere, may not, after sinking such a shaft, abandon the coal in the granted premises, and use the shaft exclusively for working a mine on adjoining premises. *Leavers v. Cleary*, 75 Ill. 349, 2 Mor. Min. Rep. 618.

And under a mining lease providing simply for a certain royalty to the lessor, the lessee may not operate the leased premises simply enough to avoid a forfeiture, and

burg Coal & Mining Company had its coal shaft, through which it is taking coal underlying appellant's land, and also Fournie's coal under the land lying south of appellant's. In order to get the coal from the Fournie land lying south of appellant's to the shaft, it is taken through a space from which the coal has been removed in the strip conveyed by Gundlach to Fournie.

All these facts are set out in the bill, and it is alleged that at the time and prior to the conveyance of the coal by Ammel to Gundlach, with license to remove the same, it was understood and agreed in writing between the parties that nothing was included in the conveyance except the coal in place, with license to remove it, and that, when it was removed, the space formerly occupied by the coal, and the rooms, entries, and tunnels left by its removal, should revert to the grantor and his assigns. The bill further alleges that prior to and at the time of the conveyance of the premises to appellant, the Pittsburg Coal & Mining Company was operating a shaft for hauling coal from the bottom to the surface of the land owned by Prosper Fournie, lying west and south of appellant's land, and that said Fournie purchased the acre of coal under appellant's land from Gundlach with the design and intention of using the space made by removing coal therefrom for the purpose of taking coal from under the land of Fournie which lies south of appellant's land to the surface through the shaft of the Pittsburg Coal & Mining Company, located on the land of Fournie immediately west of appellant's land. The bill charges an un-

lawful combination and confederation between Fournie and the Pittsburg Coal & Mining Company, and in pursuance of which an illegal contract was made and entered into between them, by which Fournie has received a large sum of money from the Pittsburg Coal & Mining Company for the right of using the space, tunnel, or entry under the said acre for conveying coal under appellant's land from Fournie's land lying south of his to the shaft; that, in pursuance of the said agreement, the Pittsburg Coal & Mining Company is in now using, and will continue to use, said space in said acre for said purpose, to the prejudice of appellant, unless enjoined therefrom. The bill charged that the appellees were unlawfully using the premises of appellant, and that Fournie was deriving large profits therefrom, and, if permitted to continue such use, appellant will be forever deprived of his own just rents, gains, and profits, and be irreparably damaged. There is no averment in the bill that Fournie has removed all the coal bought by him from Gundlach, but the charge is that he and the other appellees are using a space cut through said coal to transport coal from Fournie's lands south of appellant's to the shaft of the mine. The prayer is for an injunction, and that said Fournie be required to account to appellant for what he has received from the Pittsburg Coal & Mining Company for the use of the space, entries, and rooms under said acre. A demurrer to the bill was sustained, and, appellant electing to stand by his bill, a decree was entered dismissing the same for want of equity, and an

use the land, shafts, and entries chiefly to mine and ship coal from adjoining land. *Peters v. Phillips*, 63 Iowa, 550, 19 N. W. 662.

Since in the case of Crown manors the copyholders have an estate in the soil throughout, except the trees and minerals, which remain the property of the Crown, and since, if the Crown removes the minerals, the copyholder becomes entitled to the possession of the space where the minerals were, and is entitled to use it as he wishes, it follows that under a lease from the Crown of the coal mines in such a manor, even though provision is made therein for the conveyance of coal from adjoining land through the pits or passages in the lands of the manor, such user is a trespass against the copyholder, and the lessee may not use for such purposes either underground passages or surface railways. *Eardley v. Granville*, L. R. 3 Ch. Div. 826, 45 L. J. Ch. N. S. 669, 34 L. T. N. S. 609, 24 Week. Rep. 528, 17 Eng. Rul. Cas. 458.

But it has been held that under a grant from the lords of a manor of the coal mines therein, the grantee has a right to make 40 L.R.A. (N.S.)

a tramway through the subsoil of the copyhold of the manor, and to carry along this tramway coal dug beyond the limits of the manor, in order to bring it to the surface within the manor. *Bowser v. Maclean*, 2 De G. F. & J. 415, 30 L. J. Ch. N. S. 273, 6 Jur. N. S. 1220, 3 L. T. N. S. 456, 9 Week. Rep. 112, 17 Eng. Rul. Cas. 453.

Under an act of Parliament reserving to the bishop of a see, as lord of the manor, all mines under certain commons, with mining privileges and right of way in and over the same, also the right of working mines belonging to the see wheresoever they may be, and the right to carry away the coal from those mines, or out of any other lands or grounds whatsoever, he may carry over the land coal gotten from those commons, and also coal from any other mines of the see, although not mined through shafts sunk within the particular commons. But he may not carry over those lands coal gotten from mines not belonging to the see. *Midgley v. Richardson*, 14 Mees. & W. 595, 15 L. J. Exch. N. S. 257.

H. C. Sh.

appeal has been prosecuted direct to this court.

Appellant contends that the deed from Ammel to Gundlach for the coal was a conveyance of the coal with the right to remove it, and, when the coal was removed, all rights of Gundlach ceased, and the space from which the coal was removed became and was the property of the grantor and his assigns. We think the sufficiency of this bill must be determined from a consideration of the legal effect of a conveyance of coal under the surface of land, without any reference to the allegations that at and prior to the time of the conveyance from Ammel to Gundlach it was understood and agreed in writing between them that nothing passed by the grant except the coal and the right to remove it, and that, when removed, the rooms, entries, and tunnels should revert to the grantor and his assigns. If there was such a writing, it is not set out in the bill nor made an exhibit to it, nor is it alleged that it was contemporaneous with the execution of the deed, but the allegation is that the writing existed prior to and at the time the deed was made. Neither is there any allegation that such a writing was recorded, or that Fournie had notice of its existence when he bought the acre of coal from Gundlach.

We regard the principle announced in *Consolidated Coal Co. v. Schmisseeur*, 135 Ill. 371, 25 N. E. 795, as in point. In that case Mrs. Schmisseeur sold and conveyed to the Schuremans the coal underlying 159 and a fraction acres owned by her, and, for the purpose of enabling the grantees to sink shafts and mine and remove the coal, she leased to them and their legal representatives for the term of thirty-five years, "unless the said coal shall be sooner exhausted, in which event said lease and the right to mine said coal shall cease and expire," certain portions of the land described, containing in all seven acres. The grantees sunk a shaft, opened a mine, and mined coal for some years, and then sold out to the Consolidated Coal Company. That company acquired from other parties the coal under 100 acres of land adjoining the land of Mrs. Schmisseeur, and proceeded to mine and remove the coal from that land through entries and openings made in the land of Mrs. Schmisseeur by removing coal therefrom, and hoisting the coal so removed from other lands through the shaft on the land leased from Mrs. Schmisseeur, who thereupon filed a bill to enjoin transporting coal from other land across or over her land which was not mined from her land. The position of Mrs. Schmisseeur was stated by the court in the 40 L.R.A. (N.S.)

following language: "It is insisted, and with much force, that a court of equity should interfere, by way of injunction, to prevent appellant from using its entries and the pit and shaft upon the leased premises for the purpose of removing and delivering coal mined upon its adjacent lands, for the reason, as is alleged, that it is in violation of the contract and a breach of its conditions." The court said Mrs. Schmisseeur, if she had seen proper to do so, might have restricted the use of her land by express stipulation, and required the lessees to agree not to use it for any purpose she deemed detrimental to her interests; but, not having done so, a court of equity would not interfere to prevent the use that was being made of her land by the Consolidated Coal Company until the expiration of the term of the lease, or until all the coal had been mined from underneath her land.

The same question involved in this case was before the supreme court of Ohio in *Moore v. Indian Camp Coal Co.* 75 Ohio, 493, 80 N. E. 6. It was there said: "The empty space is therefore not merely property which may be used as an incident to the removal of the mineral included in the grant, but, as suggested by the author cited above [MacSwinney on Mines], he may use the space created by removal of mineral within the grant as a way for the carriage of minerals from his adjoining lands, or, if he prefers to do so, he may cut a passage through the minerals and use it for the carriage of minerals from his other lands. MacSwinney on Mines, 67, 68. In creating a separate mining right, grantor may, of course, protect himself by restrictions; but, in the absence of such restrictions, we think that the rulings in [citing numerous cases, including *Consolidated Coal Co. v. Schmisseeur*] are sound law and should be followed."

The same question was before the supreme court of Pennsylvania in *Lillibridge v. Lackawanna Coal Co.* 143 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035, 17 Mor. Min. Rep. 412. In that case a bill was filed to enjoin defendant from removing coal belonging to it on a tract of land adjoining the plaintiffs' through a tunnel made by the defendant through coal underlying plaintiffs' land, which had been purchased from plaintiffs and conveyed by them to defendant. The contention of the plaintiffs was stated by the court in this language: "The argument is that it was not within the intention of the parties that such a right should be granted or exercised, and that, whether it was or not, the plaintiffs have such a property in the chamber or space left by the mining operations

that it cannot be used without their permission." The opinion is an elaborate one, reviewing many authorities, and denies plaintiffs' right to the writ. Among other things it was said: "If, then, the coal in place is a pure corporeal hereditament, the title, in fee simple, to which passes to a purchaser by apt conveyance, there would be no more propriety in claiming a title in the grantor to the space it occupies than there would be in claiming a similar right in a vendor of the surface to the space developed by the vendee in digging the cellar and foundations of a house. We are altogether unwilling to adopt any such view of the rights of the parties in either of such cases. . . . According to the averments of the bill, the tunnel or way is cut through a vein of coal 200 feet below the surface, and is 12 feet high, and extends in the vein all the way from the one side to the other of the tract. In this way or chamber the plaintiffs, as owners of the surface, have no right or title. They have no access to it; they cannot use it; they are in no manner obstructed or injured by it."

We think it must be conceded the foregoing decisions are in point, and we have been referred to no cases so nearly analogous, or where the precise question has been involved, holding a contrary view.

We are therefore of opinion the decree of the Circuit Court was in accordance with the law, and the decree is affirmed.

MISSISSIPPI SUPREME COURT.

ERNEST E. PARKER, Appt.,

v.

W. C. WOOD LUMBER COMPANY.

(— Miss. —, 54 So. 252.)

Master — simple tool — inspection — cant hook.

1. A cant hook designed to handle logs, which is formed of a long handle with an

Note. — Liability of master for injury from defect in simple tool.

The earlier cases upon this subject are collected and discussed in notes to *Vanderpool v. Partridge*, 13 L.R.A. (N.S.) 668, and *Sheridan v. Gorman Mfg. Co.* 13 L.R.A. (N.S.) 687, and this note is supplementary thereto.

As is shown in the earlier notes, the cases generally hold that the duty of the master is somewhat modified in respect to furnishing and keeping in repair simple tools used by employees in the course of their employment.

The basis of the simple tool rule is well stated in *Williams v. Garbutt Lumber Co.* 40 L.R.A. (N.S.)

iron cuff near one end, to which is fastened a hook which grapples and turns the log when the handle is used as a lever, is not a simple tool within the rule which relieves the master from the duty of inspecting such tools, although they are intended for the use of his servant.

Same — contributory negligence.

2. An employee is guilty of contributory negligence in attempting to use a cant hook containing a defect of which he knows, or by the exercise of ordinary care ought to have known.

Evidence — negligence of servant — handling tools.

3. Upon the question whether or not an employee injured by the use of a defective cant hook ought to have known of its defective condition, evidence should be considered as to the use he had made of it and his familiarity with such tools.

Trial — jury — negligence of servant.

4. Whether or not an employee injured by the use of a defective cant hook knew or should have known of its defective condition is, under all the evidence in the case, a question for the jury.

(February 13, 1911.)

APPEAL by plaintiff from a judgment of the Circuit Court for Covington County in defendant's favor in an action brought to recover damages for personal injuries received by plaintiff while in the employment of defendant. Reversed.

Plaintiff was required to place timbers on rollers to be carried to a saw for cutting. For this purpose tools known as "cant hooks" were used. The cant hook was a large handle made of wood to which a hook was fastened by an iron cuff a few inches from the bottom. The hook was fastened into the cuff by a bolt so as to give it play. The tool in question was defective by reason of the screw which fastened the cuff on the handle having come out, causing the cuff to slip, so that when plaintiff attempted to use it he was thrown, and his leg injured so that amputation was necessary.

Mr. R. N. Miller for appellant.

132 Ga. 221, 64 S. E. 65, where the court said: "The general rule requires a master to use ordinary diligence to furnish the servant with appliances reasonably suited to the use for which they are intended, and to use like diligence in inspecting and keeping them in proper condition for use. To this general rule some courts of other states have declared that there exists what has been denominated an exception as to 'simple tools.' The basis on which this has been placed by some of the courts is that where a tool or instrumentality is so entirely simple in its nature and character that its condition can be seen at a glance, or that one who uses it has as good an opportunity as the master for knowing its condition, the

Messrs. Flowers, Fletcher & Whitefield, for appellee:

There is no duty resting on an employer to inspect during their use common tools and appliances which everyone is conversant with.

Miller v. Erie R. Co. 21 App. Div. 45, 47 N. Y. Supp. 285; Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; Wachsmuth v. Shaw Electric Crane Co. 118 Mich. 275, 76 N. W. 497; Lynn v. Glucose Sugar Ref. Co. 128 Iowa, 501, 104 N. W. 577.

Any testimony which might be offered to show knowledge on the part of the master would of necessity prove it more conclusively on the part of the servant.

Houston & T. C. R. Co. v. Scott, — Tex. Civ. App. —, 62 S. W. 1077; Burlington &

C. R. Co. v. Liehe, 17 Colo. 280, 29 Pac. 175; Illinois C. R. Co. v. Price, 72 Miss. 862, 18 So. 415; Holt v. Chicago, M. & St. P. R. Co. 94 Wis. 596, 69 N. W. 352; Louisville, E. & St. L. Consol. R. Co. v. Allen, 47 Ill. App. 465; 1 Labatt, Mast. & S. § 405.

Plaintiff is chargeable with all the information which he should have possessed by the exercise of reasonable care and caution.

Jones & A. Co. v. George, 227 Ill. 64, 81 N. E. 4, 10 Ann. Cas. 285; Christiansen v. William Graver Tank Works, 223 Ill. 142, 79 N. E. 97, 7 Ann. Cas. 69; 1 Labatt, Mast. & S. § 388; Holt v. Chicago, M. & St. P. R. Co. 94 Wis. 596, 69 N. W. 352; Stork v. Charles Stolper Cooperage Co. 127 Wis. 318, 106 N. W. 841, 7 Ann. Cas. 339; Ol-

servant cannot recover on the ground that the master did not inspect it. In some of the decisions there is a broad announcement that the master is under no duty to inspect such simple tools. It will be found, however, that in most of the cases where this rule or exception was applied, the controversy was between the master and the servant to whom he furnished the tool, and where the defect and danger were so apparent that the servant was guilty of negligence in using the tool, or where he knew of its condition, or had equal opportunity with the master for knowing it. The apparent hardship of holding the master to a high degree of diligence relatively to his servant in regard to inspecting very simple things, the condition of which must be patent to the person using them, appears also to have had weight in some instances."

So, in American Car & Foundry Co. v. Nachand, 47 Ind. App. 204, 93 N. E. 1083, the court said: "There is no duty resting upon the master to inspect such tools while they are in the possession and use of the servant, and his failure to make such inspection for the purpose of discovering defects caused by use is not negligence. . . . The reason for the rule just stated is that, where the tool is simple in construction, so that defects therein can be discovered without special skill or knowledge and without intricate inspection, the servant is as well qualified as anyone else to detect defects and to judge of the probable danger of using such tool while defective; and, the tool being in the possession of the servant, his opportunity for inspection is better than that of the master."

"The cases have established a limitation on the duty of the master to inspect tools and implements used by his servants, and to mend or repair the same with reasonable care. A distinction is drawn between common and ordinary tools used by ordinary workmen, who, by the nature of their employment, may fairly be considered competent to ascertain and remedy their defects resulting from use and wear, and tools of special construction which, for their maintenance in safe and proper condition, re-

quire the attention of men skilled in the inspection and repair of similar appliances. To fasten on the master the duty of inspection with respect to such common and ordinary tools would place an undue and frequently insupportable burden on his shoulders, unreasonable to require and forbidden by the exigencies of business." O'Hara v. Brown Hoisting Mach. Co. 96 C. C. A. 350, 171 Fed. 394.

And in Flaig v. Andrews Steel Co. 141 Ky. 391, 132 S. W. 1015, the court said: "Where the mode of operating it (an implement) is so simple that a person of ordinary intelligence or care can at once perceive the safe and proper mode of operating it, there is no duty resting upon the master to instruct him."

The simple tool rule has been applied in the following cases to the implement noted: Duncan v. Gernert Bros. Lumber Co. 27 Ky. L. Rep. 1039, 87 S. W. 762 (ladder); Blundell v. Wm. A. Miller Elevator Mfg. Co. 189 Mo. 552, 88 S. W. 103 (ladder); Smith v. Green Fuel Economizer Co. 123 App. Div. 672, 108 N. Y. Supp. 45 (ladder); Kelly v. National Starch Co. 142 App. Div. 286, 126 N. Y. Supp. 979 (ladder); Mathis v. Kansas City Stock Yards Co. 185 Mo. 435, 84 S. W. 66 (plank used to stand on); Isaacson v. Wisconsin Teleph. Co. 138 Wis. 63, 119 N. W. 804 (rope used as part of platform); Goure v. Storey, 17 Idaho, 352, 105 Pac. 794 (ropes and pulley, and wheelbarrow); Cunningham v. Peirce, 112 App. Div. 65, 98 N. Y. Supp. 60 (wheelbarrow); Sterling Coal & Coke Co. v. Fork, post (shovel); Post v. Chicago, B. & Q. R. Co. 121 Mo. App. 562, 97 S. W. 233 (scythe); Flaig v. Andrews Steel Co. supra (iron rod used to handle steel rods); Smith v. Long Island R. Co. 129 App. Div. 427, 114 N. Y. Supp. 228 (iron poker used to raise manhole cover); Longpre v. Big Blackfoot Mill. Co. 38 Mont. 99, 99 Pac. 131 (cant hook); PARKER v. W. C. WOOD LUMBER CO. (cant hook); Consolidated Barb Wire Co. v. Maxwell, 116 Ill. App. 296 (spoon-shaped tool for cutting groove in revolving wheel); Blankenship v. A. M. Hughes Paint & Glass Co. 154 Mo. App. 483, 135 S. W. 970 (high-

son v. Doherty Lumber Co. 102 Wis. 264, 78 N. W. 572.

Messrs. McIntosh Brothers also for appellee.

Whitfield, C., filed the following opinion:

It is earnestly insisted by the appellee, which obtained a peremptory instruction in the court below after the evidence for the plaintiff was in, that the cant hook in question is a tool of so simple and common and ordinary use as that the servant had equal opportunity of ascertaining any defect in it with the master, and that consequently, with respect to such simple tool, of such ordinary and common use, the rule requiring the master to inspect tools furnished the servant does not apply. For a full discussion of this doctrine, see Labatt on Master and Servant, vol. 1, §§ 405, 406, 407. From that discussion, it will be seen that this doctrine is said to be well settled in some jurisdictions; but it is also expressly laid down that it has no application in

ly tempered coopering tool); American Car & Foundry Co. v. Nachand, supra (punch); O'Hara v. Brown Hoisting Mach. Co. 96 C. C. A. 350, 171 Fed. 394 (sledge); Golden v. Ellis, 104 Me. 177, 71 Atl. 649 (hammer); Rahm v. Chicago, R. I. & P. R. Co. 129 Mo. App. 679, 108 S. W. 570 (hammer); Mercer v. Atlantic Coast Line R. Co. 154 N. C. 399, 70 S. E. 742, Ann. Cas. 1912a, 1002 (hammer); Dunn v. Southern R. Co. 151 N. C. 313, 66 S. E. 134 (hammer); Lehman v. Chicago, St. P. M. & O. R. Co. 140 Wis. 497, 122 N. W. 1059 (pick or hammer used by locomotive fireman for breaking coal); Vandalia R. Co. v. Adams, 43 Ind. App. 664, 88 N. E. 353 (crowbar); McMillan v. Minetto Shade Cloth Co. 134 App. Div. 28, 117 N. Y. Supp. 1081 (board used for smoothing rollers in factory); Cole v. Spokane Gas & Fuel Co. 66 Wash. 393, 119 Pac. 831 (pan used for carrying coke); Beckman v. Anheuser-Busch Brewing Asso. 98 Mo. App. 555, 72 S. W. 710 (skid); Bookman v. Masterson, 83 App. Div. 4, 81 N. Y. Supp. 962 (a push stick used to move cars off a side track by placing it between the car and an engine on the main track); Masich v. American Smelting & Ref. Co. 44 Mont. 36, 118 Pac. 764 (a pine stick 3 feet long, 1 inch wide, and $\frac{1}{2}$ inch thick, used in an ore crushing machine).

In Ft. Worth & D. C. R. Co. v. McCrummen, — Tex. Civ. App. —, 133 S. W. 899, the court said that they knew of no case or legal principle that makes it the duty of the master to inspect ordinary cord wood for splinters, knots, or other protuberances, or to smooth the same in any way for the ordinary use to which such wood is to be put.

In House v. Southern R. Co. 152 N. C. 397, 67 S. E. 981, it was held that a rail-40 L.R.A.(N.S.)

the case of such simple tool, except where the defect in the tool is obvious or patent.

We call special attention to two extracts from that discussion, found at the close of § 407. It is there said: "As a matter of ultimate analysis, it will be found that the logical basis of the doctrine which thus places the master and the servant upon different footings in regard to imputed knowledge of risks is to be found in the fact that it is the special and appropriate function of the former to furnish and supervise the instrumentalities of his business, and the special and appropriate function of the servant to use those instrumentalities. The duty of making a reasonably careful examination of the instrumentalities is a natural and necessary incident of the former function, but not of the latter." "In the opinion of the present writer, the practice of comparing the master's and the servant's means of knowledge has been productive of much confusion of thought, which is apt to operate to the servant's disadvantage, by imposing upon him too high a standard of care. It would have been far preferable to

way company was not liable for injuries to an employee engaged in washing the windows of a car, caused by her hand slipping and going through the window, notwithstanding that the "pull" provided by the defendant for use in raising the window had become worn smooth and for that reason caused the plaintiff's hand to slip.

In House v. Southern R. Co. supra, it was held that the rule requiring the master to supply his employees with implements and appliances reasonably safe and suitable for the work in which they were engaged more usually obtains in the case of machinery more or less complicated, and more especially when driven by mechanical power, and does not as a rule apply to the use of ordinary everyday tools nor to ordinary everyday conditions requiring no special care, preparation, or provision, where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result.

In Post v. Chicago, B. & Q. R. Co. 121 Mo. App. 562, 97 S. W. 233, the court said: "A scythe is a simple tool used by mankind from remote ages to the present for the cutting of grass, grain, and weeds, and it would be absurd to treat as an issue of fact the propriety of its use for such purposes on any kind of ground where the mower could stand."

In Goure v. Storey, 17 Idaho, 352, 105 Pac. 794, the court said: "It is clear from the allegations that all of those appliances and the wheelbarrow were of simple construction and easily understood by mere casual observation by the most inexperienced workman, and that if the using of that kind of appliances was negligence *per se* on the part of defendants, as plaintiff claims it was, then for the plaintiff to con-

refrain from importing into the discussions in this class of cases an element which is wholly unnecessary, inasmuch as the ultimate question in every instance must be, simply, whether a person who had the same natural and acquired capacities for observation, and had been placed in the same position as the servant, would have discovered the danger by the exercise of ordinary care. The extent of the obligatory knowledge of the master under the given circumstances seems to be a wholly irrelevant consideration."

Again, it is said in *Magee v. North Pacific Coast R. Co.* 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114, that the true rule has been stated by *Shearman & Redfield on Negligence*, 4th ed. § 217, as follows: "It has been often said that the master is not liable for defects in such things, to a servant whose means of knowledge thereof were equal to those of the master. But this is an erroneous statement. The master has no right to assume that the servant will use such means of knowledge, because it is not part of the duty of the servant to inquire

into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire; and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them. The true definition is that, when circumstances make it the duty of the servant to inquire, it is contributory negligence on his part not to inquire."

It is true *Labatt* criticizes this to some extent, but in our opinion it states the rule logically and correctly. Even in the case of a simple tool, the question comes to this: Did the servant know of the defect in the tool, or ought he to have known of it by the use of ordinary care? The doctrine so called does not seem to us to be any new doctrine, properly considered, but merely a new application of the very old doctrine of contributory negligence. In the twentieth volume of the second edition of the *American & English Encyclopedia of Law*, at pages 82, 83, and 84, instances are cited from a large number of cases, of tools not deemed simple within the meaning of this

tinue work with those appliances for a month, during which time the complaint shows he was at work with them, was contributory negligence on his part, and, under well-recognized rules of law, prevents a recovery, as he assumed the risk."

In *Longpre v. Big Blackfoot Mill Co.* 38 Mont. 99, 99 Pac. 131, where the injury was caused by a defective cant hook, the court said: "This duty arises only when the appliance is of such a character that a man of ordinary prudence would, under the same circumstances, make the inspection as a precaution against injury to his servant. The master is not required to inspect simple appliances, such as hammers, saws, spades, hoes, lanterns, push sticks, and the like, the character and use of which are understood by all alike." But in its discussion of the general rule, the court did not discuss the particular characteristics of a cant hook, which have been considered sufficient by other courts to take this tool out of the category of simple tools.

In *Vandalia R. Co. v. Adams*, 43 Ind. App. 664, 88 N. E. 353, the court said: "The fact that as a rule the master has a better opportunity to inspect the machinery or tools, and must use a higher degree of care, than his servant, does not release the servant from exercising care, and this is specially true of so simple a tool as a crowbar placed in the hands of the servant, and which can be as readily, if not more readily, inspected by him than by the master."

In a few cases decided since the preparation of the earlier note, the court refused to apply this rule, upon the ground that the tool in question did not fall within the category of so-called "simple tools," or because the use to which it was put made the rule inapplicable.

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Thus, in *Harris v. Kansas City Southern R. Co.* 146 Mo. App. 524, 124 S. W. 576, it was held that the simple tool rule did not apply to a claw bar where it was not used in the ordinary way, but was driven under the spike to be drawn by means of a maul.

And in *Mulligan v. Colorado Fuel & Iron Co.* 20 Colo. App. 198, 77 Pac. 977, it was held that the court could not say as a matter of law that tongs used for handling red-hot ingots of steel weighting about 3,000 pounds were appliances of such simple character that the servant would be chargeable with notice of their condition.

A belt loses its character of a simple appliance when it is used as an emery wheel. *Horstman v. Staver Carriage Co.* 153 Ill. App. 130.

So, too, in *Houston & T. C. R. Co. v. Patrick*, 50 Tex. Civ. App. 491, 109 S. W. 1097, it was held that it could not be said as a matter of law, and without reference to the use to be made of it, that because a rubber hose is a common and simple appliance the master, when furnishing it to his servant for use, does not owe him the duty to use ordinary care to see that it is reasonably suitable and safe for the servant's use in the particular service to be performed by him. The court went on to say that while the master might not be remiss in his duties if he furnished an old rotten hose to the servant for the purpose of sprinkling a flower bed in the daytime, the court could not so say where the work to be performed by the servant was filling a tank on top of a passenger car in the nighttime.

And in *Williams v. Garbutt Lumber Co.* 132 Ga. 221, 64 S. E. 65, the simple tool rule was held not applicable to a cant hook used to turn or move logs, especially where the servant was a minor, and he was not

rule. In that list of cases are included "chains, hame straps, hammers, hooks, kettles, ladders, mauls, poles, ropes," etc. Surely all these tools just mentioned are much less simple in their structure than the cant hook such as it is shown to be by the testimony in this case. After the most careful consideration, we are of the opinion that the cant hook in this case cannot be classed properly as one of these simple tools within the meaning of this doctrine.

This leaves open for consideration the single inquiry: Was the plaintiff guilty of contributory negligence, barring recovery in this case? We have examined the testimony again and again on this point. It is true that in his direct examination Parker stated that to the best of his knowledge the cant hook by which he was injured was the same hook he had used the day before the injury; and he also said that he had worked with that hook some two or three months, and that he had worked for the mill something over a year, and at another sawmill in Montgomery county for two years, and that he had had considerable experience with cant hooks. But on cross-examination he said twice that he saw nothing wrong with the hook the day before, and that it was apparently a good hook, and finally he said he couldn't swear that he saw this identical hook a day or two before, and at last he said, when asked if

it was the same hook as far as he knew, he said, "Not that I know of." On the particular point, then, as to whether the hook with which he was injured was the same hook he had used the day before, it cannot fairly be said that he admitted that it was the same hook, at least his testimony on this point is in great confusion.

As to the point that the defect, which defect consisted of the fact that there was no nail or bolt in the hole in the top of the cant hook fastening the cuff rigidly to the cant hook, he said as to the point that the defect was patent and obvious, and could be seen at a glance by anyone, when pressed, "Why I don't know, I couldn't say just by a mere glance;" that is, he could not say that he could see the defect at a mere glance. He did say that he supposed a man picking it up and looking for the hole could see it, but he did not suppose that a man just picking it up would. What he did was just simply to pick it up and use it. So far, therefore, as the testimony of the plaintiff himself is concerned, it cannot be said to be clearly established, either that the cant hook with which he was injured was the same one he had used the day before, or that the defect in it was so open and obvious that he could have seen the defect by a mere glance. It is true that Conner, another of plaintiff's witnesses, did say that the cant hook was in such condition

charged with the duty of inspecting the hook.

In *Tibbs v. Deemer Mfg. Co.* 104 C. C. A. 488, 182 Fed. 48, the master was held liable for furnishing defective tongs for handling logs, without any discussion of the simple tool rule.

In *Atchison, T. & S. F. R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343, a brakeman was allowed to recover for injuries caused by his lantern smoking so that it gave a very dim light. No mention is made of the simple tool rule.

In *Higley v. Winnipeg*, 20 Manitoba L. Rep. 22, it was held that a ladder used as a ladder ordinarily is used was part of "the ways, works, and machinery," under the employers' liability act, and consequently the master was liable for defects therein. The simple tool rule was not mentioned.

A different rule has been applied in one case, where a servant was injured by what was admittedly a simple tool, but which was being used by another servant, so that the injured servant was not in a position to know the condition of the tool.

In *thus*, in *Baltimore & O. S. W. R. Co. v. Walker*, 41 Ind. App. 588, 84 N. E. 730, where the plaintiff was injured by a chip flying off of a defective chisel being used by another servant, the court said: "Where an employee, free from contributory negligence, is injured because of the defective condition of an implement placed in the

hands of another employee by the master, and used near the injured servant, however simple it may be in its construction, that simplicity will not of itself deprive the injured servant of a remedy, nor relieve the master from liability. A different rule might prevail if the instrument were used by the party injured."

In Texas the courts do not appear to be inclined to apply the simple tool rule, at least not to the extent to which it is applied in other states.

Thus, in *Southwestern Portland Cement Co. v. McBrayer*, — Tex. Civ. App. —, 140 S. W. 388, it was held that in the case of a ladder used by a carpenter, the trial court should have left to the jury the question whether the master owed the carpenter the duty of inspecting the ladder.

And in *Buchanan v. Blanchard*, — Tex. Civ. App. —, 127 S. W. 1153, the court, in dealing with a steel cutter used to cut off the heads of rivets, said: "No duty of inspection of the tools furnished by the master rests upon the servant," and he assumes no risk of their defective condition, unless he knows of the defects, or the defects are so obvious as to charge him with knowledge of them and of the danger incident to their use. This rule is not limited in its application to complex instrumentalities, but applies to simple tools in ordinary use under many and varying circumstances."

W. M. G.

that it could be discovered by a mere glance at it; but this testimony, like the testimony of the plaintiff, was for the jury.

If, in this case, the defect in the cant hook was so obvious that the plaintiff did know of the defect, or by the use of ordinary care ought to have known of it, then he is precluded from recovery by his own contributory negligence. In determining whether he did know, or by the use of ordinary care ought to have known, of the defect, it is proper to look not only to his testimony directly on that point, but to all the evidence showing the extent of the use he had made of this cant hook, and the extent of his familiarity with cant hooks just like this one. But whether the evidence, all looked to and properly weighed, shows that he did not know, or by the use of ordinary care ought to have known, of the defect, is, we feel constrained to hold, under our decisions, a question of fact for the jury. Therefore we are of the opinion that, on the testimony in this record, the case should have gone to the jury.

Per Curiam:

The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated, the judgment is reversed, and the cause remanded for a new trial.

KENTUCKY COURT OF APPEALS.

STIRLING COAL & COKE COMPANY,
Appt.,
v.

ROBERT FORK.

(141 Ky. 40, 131 S. W. 1030.)

Master — unsafe tool — shovel — Liability.

A master is not liable for injury to a servant through the use of an ordinary shovel furnished by him, the round wooder piece at the top of the handle of which is cracked so that it revolves on the iron rod which supports it, and pinches his hand, causing a wound which is followed by blood poisoning.

(December 2, 1910.)

A PPEAL by defendant from a judgment of the Circuit Court for Hopkins County in plaintiff's favor in an action brought

Note. — As to the liability of the master for injury by defect in common tools, see note to *Parker v. W. C. Wood Lumber Co.* ante, 832, and the earlier notes cited therein.

As to the servant's assumption of risk for defect in simple tool which master has promised to repair or replace, see note to 40 L.R.A. (N.S.)

to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Belcher & Sparks, for appellant:

The plaintiff was using a common implement with which he was perfectly familiar, and engaged in common labor, and therefore a promise to repair upon the part of the master did not prevent the servant from assuming the risk in working therewith.

26 Cyc. 1209, 1213; *Kentucky & I. Bridge R. Co. v. Melvin*, 31 Ky. L. Rep. 959, 104 S. W. 334.

Mr. Letcher R. Fox for appellee.

Carroll, J., delivered the opinion of the court:

The appellee, Fork, a man of mature years and ordinary intelligence, was employed by appellant company to shovel coal slack into a car, and was told to get a shovel that had been used by others who had done the same kind of work. When appellee picked up the shovel, he discovered that the round wooden piece on the top of the handle was cracked in one or two places, so that the wood revolved on the iron rod that was run through it for the purpose of strengthening the handle. He then said to the foreman that he did not want to use that shovel, and thereupon the foreman told him to go ahead and work with it; that others had been using it, and he could do so; and that he would get him another one. This was all that was said about the shovel. Soon after this, and on the same day, appellee's thumb was pinched by the crack in the handle, causing a slight bruised place, but he continued to work during the day. On the next day, his hand became inflamed and blood poisoning set up, with the result that appellee lost considerable time and suffered no little. To recover damages for the injury sustained, as he alleged, by the defect in the shovel, he brought this action, and on a trial was awarded damages in the sum of \$275.

A good part of the record is taken up with the question of whether or not the blood poisoning resulted from the bruise on his thumb or a cut on the hand that he received in another way. But, in view of the conclusion we have reached, it is not

Brouseau v. Kellogg Switchboard & Supply Co. 27 L.R.A. (N.S.) 1052.

As to the liability of master for breach of promise to remedy conditions or furnish other appliances, where they are already reasonably safe, see note to *Coin v. John H. Talge Lounge Co.* 25 L.R.A. (N.S.) 1179.

necessary to discuss the cause of the blood poisoning. The rule has been frequently announced by this court that it is the duty of the master to exercise ordinary care to furnish the servant reasonably safe tools and appliances with which to work, and that if he fails to do this, and the servant is injured by reason of the defective tools or appliances, he may maintain an action in damages to compensate him for the injuries sustained. *Pullman Co. v. Geller*, 128 Ky. 72, 129 Am. St. Rep. 295, 107 S. W. 271; *Rogers v. South Covington & C. Street R. Co.* 33 Ky. L. Rep. 1067, 112 S. W. 630; *Louisville Hotel Co. v. Kaltenbrun*, 26 Ky. L. Rep. 208, 669, 80 S. W. 1163, 82 S. W. 378; *American Tobacco Co. v. Adams*, 137 Ky. 414, 125 S. W. 1067. To this rule there are qualifications and exceptions, growing out of assurances of safety made by the master, promises to repair, and risks assumed by the servant; but we will not go into these branches of the law. We think we may properly put this case upon the ground that the tool furnished to appellee, as well as the use to which he put it, was so simple, and the place it was being used so free from danger, that he should not be allowed to recover for the injury sustained, assuming that it was caused by the defect in the handle.

It must be recognized by everyone that the rule of safe tools and appliances should not be extended to every tool and every appliance that is used by laborers and servants in the ordinary everyday affairs of life. There are few persons engaged in employments of any kind who do not at some time or in some way use implements or tools (using these words in their broadest sense) in the performance of their duties or services. Some of these tools and implements are of the simplest character, and are used in the simplest way, and in the performance of labor or service that is free from danger. There is nothing complicated about many of them, and their nature is such that any person of ordinary intelligence can at once use them without instructions or assistance. It often happens that they get out of repair or become defective by use; but the defects are patent to any person who handles them, and generally can be easily and quickly repaired by the servant who is using them. Implements and tools like these are used in the house, on the farm, and in fact everywhere. They embrace the utensils in the kitchen. many articles used in the ordinary household duties, as well as hoes, rakes, spades, and other like implements in common and daily use on every farm; and it would be going far beyond the reason of the safe-appliance doctrine to extend it to a coffee

pot with a loose handle, in the ordinary household kitchen, or to a house broom with a splintered handle, or a kitchen hatchet that was dull, or a garden hoe that was broken, or a farm spade that was out of repair, or other implements quite as simple in their make and use. If the servants in every possible field of labor should be protected by this rule, and have the right to seek damages in the courts for the most trifling injury suffered in the ordinary and usual use of these simple things, the master in every state of case that can be imagined would be held accountable for accident or injury, and thus a useful and valuable rule would be converted into a constant source of vexation and apprehension. The further effect would be to encourage servants to be entirely indifferent to their own safety, and furnish them an ever-present incentive to litigation; and so we think the line where nonliability begins in a case like this ought to be, in the very reason of the thing, fixed at some place, for to carry the doctrine of liability everywhere, and enlarge it to embrace everything, would verge on the ridiculous.

It must, however, be admitted that it is difficult to draw the line at a place that will be fair and just to the servant and at the same time remove the application of the rule from the field of absurdity to which it might be extended. Every case that comes up involving defective appliances presents different facts, and with these varying states of facts the courts must deal in an effort to be sensible as well as just to both parties. In the solution of this question it would be hazardous, as well as impracticable, to attempt to set down any hard and fast standard by which to determine when the master is liable and when he is not. In view of this condition, we will not undertake to say what states of facts the rule of liability should embrace, and what states of facts it should not. We are content to say that under the facts presented by this record we feel sure of the correctness of our position. It would be difficult to find a simpler tool than a shovel, or one that is in no more common use. There is scarcely a child of five who does not know what a shovel is, nor is there a schoolboy who could not use one with safety. Appellee knew the handle of the shovel was cracked, and, knowing this, he could not well avoid the knowledge that possibly or probably his finger might get pinched. The place at which he worked was entirely free from danger, and he could easily have removed the prospect of injury by putting something around the handle to make it safe.

We have not considered the argument of

counsel in reference to the promise to repair or furnish a better shovel, because the doctrine that protects the servant when he works under an assurance that the thing is safe, or will be repaired, has no application to the facts of this case. *American Tobacco Co. v. Adams*, 137 Ky. 414, 125 S. W. 1067.

Wherefore the judgment is reversed, with directions to dismiss the petition.

NEBRASKA SUPREME COURT.

FRANK H. KAYLOR, Appt.,

v.

S. B. KELSEY et al.

(— Neb. —, 136 N. W. 54.)

Mortgagor — void foreclosure — right of purchaser.

1. One who takes possession of real estate under meane conveyances from a purchaser at a void foreclosure sale of a valid mortgage is entitled to all of the rights of a mortgagee in possession.

Headnotes by BARNES, J.

Note.—*Right of one in possession claiming under void foreclosure sale.*

- I. General rule—purchaser as mortgagee in possession, 839.
- II. Meaning of term and character of mortgagee in possession, 841.
- III. Rights of purchaser as mortgagee in possession.
 - a. In general, 842.
 - b. Right to enforce payment of purchase price or mortgage, 842.
 - c. Right to retain possession until payment.
 1. In general, 843.
 2. As against ejectment action, 843.
 - d. As against partition action, 845.
 - e. Proceeding to quiet title, 845.
 - f. Right to payment for improvements, 845.
 - g. Miscellaneous rights, 846.
- IV. Rights of purchaser as affected by statute of limitations.
 - a. In general, 846.
 - b. When action accrues.
 1. In general, 846.
 2. As affected by nature of title or disability of claimant, 847.
 - c. What statute applicable, 847.
- V. Rights of purchaser as affected by laches of mortgagor, 848.

I. General rule—purchaser as mortgagee in possession.

Although considerably modified in some jurisdictions, especially where a third per-
40 L.R.A. (N.S.)

Same — reimbursement — necessity.

2. Where a valid mortgage has been foreclosed, even though the foreclosure proceedings were void, neither the mortgagor nor a person claiming under him will be permitted to assail the title acquired through the foreclosure proceeding, without offering to pay the amount of the decree and interest.

(May 13, 1912.)

APPEAL by plaintiff from a judgment of the District Court for Dundy County in defendants' favor in an action brought to recover possession of real estate and rents and profits for its alleged wrongful detention. Affirmed.

The facts are stated in the opinion.

Messrs. Ralph D. Brown and Glen N. Venrick for appellant.

Mr. C. E. Eldred, for appellees:

The statute of limitations is a defense which must be pleaded and proven, or it will be considered waived.

McCormick Harvesting Mach. Co. v. Cummins, 59 Neb. 330, 80 N. W. 1049; *Hobson v. Cummins*, 57 Neb. 611, 78 N. W. 295; *Scroggin v. National Lumber Co.* 41 Neb. 195, 59 N. W. 548.

son is the purchaser, it is the general rule that a purchaser at a sale in pursuance of an invalid mortgage foreclosure proceeding, whether he is the mortgagee or a third person, and whether the mortgage constitutes a mere lien on the land or carries the legal title thereto, upon taking possession is entitled to all the rights and is subject to all the duties of a mortgagee in possession.

U. S.—*Brobst v. Brock* (Doe ex dem. *Brobst v. Roe*) 10 Wall. 534, 19 L. ed. 1002; *Bryan v. Kales*, 162 U. S. 411, 40 L. ed. 1020, 16 Sup. Ct. Rep. 802; *Bryan v. Brasius*, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803; *Bryan v. Pinney*, 162 U. S. 419, 40 L. ed. 1023, 16 Sup. Ct. Rep. 804.

Fed.—*Haggart v. Wilczinski*, 74 C. C. A. 176, 143 Fed. 22;

Ark.—*Stallings v. Thomas*, 55 Ark. 326, 18 S. W. 184;

Ariz.—*Bryan v. Brasius*, 3 Ariz. 433, 31 Pac. 519, affirmed in 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803; *Bryan v. Pinney*, 3 Ariz. 412, 31 Pac. 548, affirmed in 162 U. S. 419, 40 L. ed. 1023, 16 Sup. Ct. Rep. 804;

Ga.—*Dutcher v. Hobby*, 86 Ga. 198, 10 L.R.A. 472, 22 Am. St. Rep. 444, 12 S. E. 356;

Ill.—*Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813; *Harper v. Ely*, 70 Ill. 581;

Md.—*Johnson v. Robertson*, 34 Md. 165; Mich.—*Gilbert v. Cooley*, Walk. Ch. (Mich.) 494; *Hoffman v. Harrington*, 33 Mich. 392;

Minn.—*Backus v. Burke*, 63 Minn. 272, 65 N. W. 459; *Johnson v. Sandhoff*, 30 Minn. 197, 14 N. W. 889;

The fact that the statute of limitations may have run against a mortgage does not necessarily deprive the mortgagee of his security.

Neill v. Burke, 81 Neb. 125, 115 N. W. 321.

Possession of mortgaged property acquired under a void foreclosure of a valid mortgage constitutes the person thus acquiring possession a mortgagee in possession, and an action cannot be maintained by the mortgagor to recover possession of the property from such person, without paying or tendering the amount due upon the mortgage indebtedness.

N. Y.—Lockwood v. McBride, 21 Jones & S. 268; Townshend v. Thomson, 139 N. Y. 152, 34 N. E. 891; Miner v. Beekman, 50 N. Y. 337; Winslow v. Clark, 47 N. Y. 261; But see New York cases infra.

N. D.—Boschker v. VanBeek, 19 N. D. 104, 122 N. W. 338;

Or.—Cooke v. Cooper, 18 Or. 142, 7 L.R.A. 273, 17 Am. St. Rep. 709, 22 Pac. 945;

Tenn.—Green v. Stevenson, — Tenn. —, 54 S. W. 1011;

Wash.—Gravelle v. Canadian & A. Mortg. & T. Co. 42 Wash. 457, 85 Pac. 36; Sloane v. Lucas, 37 Wash. 348, 79 Pac. 949.

The New York cases on this question are not easily reconciled. Thus in Watson v. Spence, 20 Wend. 260, the doctrine is asserted that a purchaser of land at a sale in pursuance of a void foreclosure decree cannot claim either as a mortgagee or as an assignee of the mortgagee, he cannot defend an action of ejectment by showing an outstanding title in the mortgagee, and the owner of the equity of redemption is entitled to treat such purchaser as a stranger to the title. This case is cited upon this point and followed in Shriver v. Shriver, 86 N. Y. 575, holding that since such a purchaser is neither the mortgagee nor the assignee of the mortgagee in possession, and cannot in that character defend an ejectment action by the mortgagor or those claiming under him, the possession of such a purchaser is hostile to the owner of the legal title, and the statute of limitations runs in his favor from the commencement of such possession.

On the other hand, in Townshend v. Thomson, 139 N. Y. 152, 34 N. E. 891, the general doctrine is asserted that a purchaser at a mortgage foreclosure sale defective and void as against the owner of the equity of redemption becomes assignee of the mortgage, and if he lawfully enters into possession of the real estate purchased he becomes a mortgagee in possession (citing Robinson v. Ryan, 25 N. Y. 320; Winslow v. Clark, 47 N. Y. 261; and Miner v. Beekman, 50 N. Y. 337). In this case, however, the purchaser at the mortgage foreclosure sale was the mortgagee.

The doctrine is again referred to in Barson v. Mulligan, 191 N. Y. 306, 16 L.R.A. (N.S.) 151, 84 N. E. 75; and although the 40 L.R.A. (N.S.)

Hall v. Cooper, 47 Neb. 113, 66 N. W. 33; Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686; Stull v. Masilonka, 74 Neb. 309, 104 N. W. 188, 108 N. W. 166; Currier v. Teske, 82 Neb. 315, 117 N. W. 712.

Ejectment against a mortgagee in possession cannot be maintained, the mortgage debt remaining unpaid, whether or not the right of foreclosure is barred by the statute of limitations.

Pinkham v. Pinkham, 60 Neb. 600, 83 N. W. 837; Kelso v. Norton, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 896; Cooke v. Cooper, 18 Or. 142, 7 L.R.A. 273, 17 Am. St. Rep. 709, 22 Pac. 945; Nash v. North-

case is not in point as to the facts, the court refers to Townshend v. Thomson, and the doctrine therein asserted is said to be the law. In the latter case the entry of the mortgagee and purchaser was under color of right, and was acquiesced in for many years by the assignee in bankruptcy of the owner of the equity of redemption. But so far as concerns the question of consent by the mortgagor, it may be said that neither in Watson v. Spence nor in Shriver v. Shriver does it appear that the possession of the purchaser was without the consent or acquiescence of the owner of the legal title. Indeed, in the latter case the case is distinguished from Miner v. Beekman, 50 N. Y. 337, on the point that in the Miner Case the entry was by the mortgagee, who was also the purchaser at the sale, and it is said that he thus became a mortgagee in possession, and could defend against the owner of the equity of redemption or his representative, in any action except for an accounting for the rents and profits and to redeem. A third person who purchases at such a sale, however, is said not to be a mortgagee or an assignee of a mortgagee in possession by virtue of the purchase. No point is made of the manner of obtaining possession, but the decision is based upon an alleged distinction between a mortgagee who enters as purchaser under an invalid foreclosure, and a third person thus taking possession.

The rule adopted in Barson v. Mulligan would, however, seem in part at least to reconcile these different cases. It is here asserted that "whenever it appears that the mortgagor has consented, either expressly or impliedly by contract or conduct, to the entry of the mortgagee for purposes or under circumstances not inconsistent with their relative legal rights under the mortgage, the possession of the mortgagee may properly be regarded as lawful. So, on the other hand, when the entry of the mortgagee is effected by the consent of the mortgagor under relation that is hostile to or inconsistent with the legal rights of the parties under the mortgage, then the mortgagee's possession must stand or fall without reference to his mortgage."

And it has been asserted not to follow that, because a foreclosure proceeding is

west Land Co. 15 N. D. 566, 108 N. W. 792; Spect v. Spect, 88 Cal. 437, 13 L.R.A. 137, 22 Am. St. Rep. 314, 26 Pac. 203; Burns v. Hiatt, 149 Cal. 617, 117 Am. St. Rep. 157, 87 Pac. 196; Henry v. Confidence Gold & S. Min. Co. 1 Nev. 619.

Mr. C. H. Boyle also for appellees.

Barnes, J., delivered the opinion of the court:

Action in ejectment to recover the possession of the S. $\frac{1}{4}$ of the S. $\frac{1}{4}$ of section 17, township 2, range 36, west of the 6 P. M. in Dundy county, Nebraska. The petition contained two counts, one for the

invalid, the purchaser of the property thereunder who enters into possession of the property must therefore be regarded as having taken possession in the capacity of a mortgagee, irrespective of his actual intention, and that his seisin and possession are thereafter the seisin and possession of the mortgagor until he notifies the latter to the contrary; but the character of the possession, whether adverse or otherwise, is to be determined from all the facts and circumstances of the case, and particularly with reference to the dominion exercised over the property by the purchaser and by his grantees subsequent to the sale. If the acts done and performed by those in possession are of such a nature as would naturally advise the world that the occupants claimed to be the owners of the fee, and such was their claim in fact, then their possession is adverse. Stout v. Rigney, 46 C. C. A. 459, 107 Fed. 545.

In Missouri the doctrine was stated in an early case that a purchaser under an invalid foreclosure sale, entering into possession under claim of title, may set up the foreclosed mortgage against anyone but the mortgagee or someone claiming under a sale of the land in a subsequent proceeding foreclosing the mortgage. Jackson v. Magruder, 51 Mo. 55. In a later case, however, this doctrine is extended and held to apply to the mortgagee or purchaser at a sale of the same premises under a subsequent foreclosure proceeding of the same mortgage. Schanewerk v. Hoberecht, 117 Mo. 22, 38 Am. St. Rep. 631, 22 S. W. 949.

II. Meaning of term and character of mortgagee in possession.

The term, "mortgagee in possession," means a mortgagee who has possession of the mortgaged premises under such circumstances as to make the satisfaction of his lien a prerequisite to his being dispossessed. Stouffer v. Harlan, 68 Kan. 135, 64 L.R.A. 320, 104 Am. St. Rep. 396, 74 Pac. 610.

A purchaser at a mortgage foreclosure sale, in possession of the mortgaged premises with the implied consent of the mortgagor, is a mortgagee in possession. Bosch-40 L.R.A. (N.S.)

possession of the premises, and the other for the rents and profits thereof from the year 1906 to the commencement of the action. The answer, in addition to a general denial, contained allegations sufficient to constitute the equitable defense available to a mortgagee in possession. The reply was a general denial. The cause was tried to the court without a jury. The trial resulted in a general finding and a judgment thereon for the defendant, and the plaintiff has appealed.

To secure a reversal, plaintiff relies upon the single assignment that "the finding and judgment of the trial court is contrary to

ker v. Van Beek, 19 N. D. 104, 122 N. W. 338.

Possession taken by virtue of a sale under a void foreclosure proceeding, and held by the purchaser or his assignee in good faith, constitutes such purchaser or assignee a mortgagee in possession. Sloane v. Lucas, 37 Wash. 348, 79 Pac. 949; Raggie v. Palm-tag, 155 Cal. 797, 103 Pac. 312.

Where a sale under a mortgage is ineffectual, and has been declared void, the possession of land by the purchaser at such sale is that of a mortgagee in possession. Haggart v. Wilczinski, 74 C. C. A. 176, 143 Fed. 22.

In Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765, it is said that the express or implied assent of the mortgagor that the mortgagee may take possession under or because of his mortgage is of the essence of the term "mortgagee in possession."

This rule is extended in Backus v. Burke, 63 Minn. 272, 65 N. W. 459, holding that when there is a default in the mortgage, and the mortgagee in apparent good faith makes a void foreclosure, and thereafter takes possession under color of the foreclosure proceeding, he will be treated as a mortgagee in possession, although such possession is without the consent, express or implied, of the mortgagor, and although the mortgagor is dead and some of his heirs are minors, incapable of giving their consent or acquiescing in the act of the mortgagee.

And it has been asserted as a general rule that the consent of the mortgagor is not necessary to establish the relation of mortgagee in possession, where possession is taken under an invalid foreclosure proceeding. Investment Securities Co. v. Adams, 37 Wash. 211, 79 Pac. 625. And see cases supra, I., for application of this rule.

In Shriver v. Shriver, 86 N. Y. 575, however, it is said that a third person purchasing at a defective mortgage foreclosure cannot claim the character of either mortgagee in possession or assignee of such mortgagee, that the entry of such person in possession under the deed is hostile and adverse to that of the mortgagor, and such possession may ripen into a title by adverse possession. See New York cases, supra, I.

the evidence and the law applicable thereto."

It appears from the record: That the plaintiff, then an unmarried man, was the owner of the land in question. That in the year 1888, for the consideration of \$500 he executed a mortgage thereon, and immediately thereafter abandoned it; that since that time he has paid no taxes thereon. That he failed to pay either interest on the mortgage debt or the principal thereof, and on the 14th day of March, 1893, one Nancy E. Smith, as trustee, commenced an action in the district court of Dundys county to foreclose the mortgage. That service of summons was made by publication only. That the plaintiff herein, who was made a defendant in that action, then

resided in Chase county, in this state. That he made no appearance, and such proceedings were had that a decree of foreclosure was entered therein, the property was thereafter sold under the decree to Nancy E. Smith, and upon confirmation of the sale a sheriff's deed was executed to her therefor. After receiving her sheriff's deed, the purchaser paid the taxes from year to year, and finally leased the premises to one J. B. Stroup, for the year beginning March 1, 1904, and ending March 1, 1905. That Stroup took possession of the premises under the written lease, fenced the same, and occupied the land until his landlord sold and conveyed it by special warranty deed to one Lars Johnson. That Johnson, on the 26th day of September, 1905, sold

III. Rights of purchaser as mortgagee in possession.

a. In general.

The mortgagee who has lawfully taken possession of the mortgaged premises, although under a void foreclosure proceeding, cannot be ousted or deprived of his rights as a mortgagee in possession by the mere intrusion of the owner of the equity of redemption, against his will or without his knowledge; there must be some act or omission on his part indicating a change in his possession; he is not obliged to stand upon the land with a club to keep off intruders, nor need his possession be of such a character as is required by the statute to create a title by adverse possession; if the land is uninclosed he is not bound to inclose it or cultivate it; having taken possession lawfully, with the assent of the mortgagor or his successor, his relation to the land is not changed until by some act or omission of his he intentionally changes it. *Townshend v. Thomson*, 139 N. Y. 152, 34 N. E. 891.

But *Watson v. Spence*, 20 Wend. 260, while recognizing that a mortgagee in possession under a void foreclosure may retain possession until payment of the mortgage, nevertheless denies that this right extends to a purchaser at such sale, and it is said that such a purchaser is a stranger, and has no right to protect himself against the owner of the equity of redemption by showing an outstanding title in the mortgagee.

And this is also the doctrine of *Shriver v. Shriver*, 86 N. Y. 575, holding that a purchaser at a defective mortgage foreclosure sale may not defend an action by a purchaser for the possession of the land, either as a mortgagee or assignee of the mortgagee, and that a defense of purchase cannot be made, because the foreclosure is void as against the owner of the equity of redemption. But see the New York decisions, *supra*, 1.

The general rule, however, is that where a sale in pursuance of a defective fore-

closure proceeding fails to pass title to the purchaser, it nevertheless operates as an equitable assignment of the mortgage, and the purchaser is subrogated to all the rights of the mortgagee. *Venner v. Denver Union Water Co.* 15 Colo. App. 495, 63 Pac. 1061. And see cases *supra*, 1.

And the relation of a purchaser at an invalid foreclosure sale to the land mortgaged remains the same as though no sale had been made, except that he stands in the place of the mortgagee. *Muir v. Berkshire*, 52 Ind. 149; *Lewis v. Hamilton*, 28 Colo. 263, 58 Pac. 196. He has all the rights of a mortgagee, and may insist upon payment of the mortgage. On the other hand, the mortgagor has the right to redeem from such a purchaser. *Lariverre v. Raines*, 112 Mich. 276, 70 N. W. 583. And generally the latter's rights are subject to whatever rights the mortgagor retains prior to a valid foreclosure. *Lewis v. Hamilton*, *supra*. He acquires no greater or other rights than the mortgagee possessed. *Sawyers v. Baker*, 77 Ala. 461.

b. Right to enforce payment of purchase price or mortgage.

A purchaser at a defective foreclosure sale is entitled in equity to be subrogated to the rights of the mortgagee, and hence he is entitled to be paid the mortgage debt and interest, interest to be computed at the legal rate, rather than the rate stipulated in the mortgage. *Randall v. Duff*, 107 Cal. 33, 40 Pac. 20, same case on prior appeals, 101 Cal. 82, 35 Pac. 440, 79 Cal. 115, 3 L.R.A. 754, 19 Pac. 532, 21 Pac. 610.

If he has gone into possession of the land, by filing proper pleadings in the nature of a cross bill to an action by the mortgagor attacking the validity of the sale, he may be subrogated to the rights of the mortgagee to the extent of the purchase money paid at the foreclosure sale, and may thus put it in the power of the court to compel the plaintiffs to adjust their equitable claims on the land. *King v. Brown*, 80 Tex. 276, 16 S. W. 39.

A purchaser at an invalid mortgage fore-

and conveyed the same by deed of warranty to one Samuel Breeden, who took possession thereof, and on the 7th day of May, 1906, sold and conveyed the same by deed of warranty to the defendant S. B. Kelsey, who was in possession at the time this action was commenced.

The plaintiff testified that he had not sold or conveyed the land to anyone; that after the foreclosure he supposed it was gone, and paid no attention to it until he was induced to bring this suit by one I. R. Darnell, who agreed to pay the costs, to hold the plaintiff harmless, and see that the suit did not cost him anything, in consideration of receiving one half of the results of the litigation.

It may be stated at the outset that the

record sufficiently shows that the decree of foreclosure was void for want of service, and therefore it will be assumed that the general finding for the defendant was founded upon the fact that he occupied the position of a mortgagee in possession, and plaintiff was not entitled to possession of the mortgaged premises until he had paid the mortgage debt. It is strenuously argued that the evidence shows that the purchaser at the foreclosure sale did not take immediate possession of the mortgaged premises, and does not show that she ever took possession thereof, and that a conveyance by a mortgagee not in possession does not operate as an assignment of the mortgage debt. It may be conceded that, if the defendant cannot successfully assert the

closure sale stands in the position of a mortgagee, and may prosecute another foreclosure proceeding. *Robinson v. Ryan*, 25 N. Y. 320; *Morse v. Byam*, 55 Mich. 594, 22 N. W. 54. In equity he is entitled to a lien upon the mortgaged premises for the amount paid, and a decree for a sale of the land in payment thereof. *Green v. Stevenson*, — Tenn. —, 54 S. W. 1011. He may prosecute proceedings to vacate the defective proceedings, and to secure another decree for foreclosure and sale thereunder. *Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625. Or if the sale is thereafter set aside, he may have the original mortgage foreclosed in his behalf. *Dutcher v. Hobby*, 86 Ga. 198, 10 L.R.A. 472, 22 Am. St. Rep. 444, 12 S. E. 356. And unless the mortgagor pays to the mortgagee holding under a void foreclosure proceeding the amount of his mortgage, with interest, the mortgaged property may be resold and the proceeds used to discharge the mortgage lien. *Bruchke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813.

On the other hand, neither the mortgagor nor his heirs will be permitted in equity to take advantage of a void foreclosure of a mortgage, after the mortgagee has gone into possession of the land, without offering to pay the amount equitably due under the foreclosure decree, with interest. *Stull v. Masilonke*, 74 Neb. 309, 104 N. W. 188, 108 N. W. 166.

And a mortgagor is not entitled to any relief against a mortgagee in possession under a void foreclosure, unless he pays or offers to pay the mortgage debt, with interest. *Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625. Payment of the mortgage debt is a condition precedent to relief. *Gravelle v. Canadian & A. Mortg. & T. Co.* 42 Wash. 457, 85 Pac. 36.

But where the foreclosure sale is invalid because unfairly conducted by a trustee, as a condition of relief to the mortgagor the purchaser at such sale is only entitled to payment of the amount actually due upon the mortgage, although he paid more than this as the purchase price. *Littell v. Grady*, 38 Ark. 584, 40 L.R.A. (N.S.)

c. Right to retain possession until payment.

1. In general.

Payment of the mortgage debt is a condition precedent to the right to recover possession of land from the mortgagee in possession under a foreclosure void as to the plaintiff. *Gravelle v. Canadian & A. Mortg. & T. Co.* 42 Wash. 457, 85 Pac. 36; *Haggart v. Wilczinski*, 74 C. C. A. 176, 143 Fed. 22.

Hence, a purchaser at a defective mortgage foreclosure sale, who goes into possession, is entitled to retain his possession until the mortgagor or those claiming under him have refunded the amount paid as purchase price. *Whitney v. Krapf*, 8 Tex. Civ. App. 304, 27 S. W. 843. And an action cannot be maintained for the possession of the land until the debt is paid. *Daniel v. Garner*, 71 Ark. 484, 76 S. W. 1063.

It has been asserted that the only remedy against a mortgagee in possession under an invalid mortgage foreclosure proceeding is by suit in equity to redeem by paying the mortgage debt. *Nash v. Northwest Land Co.* 15 N. D. 566, 108 N. W. 792; *Boschker v. Van Beek*, 19 N. D. 104, 122 N. W. 338; *Shriver v. Shriver*, 86 N. Y. 575.

In Georgia it has been held that a person in possession of land under purchase at a sheriff's sale in pursuance of a security deed is entitled to defend an action by the grantor for the possession of the land, although the sale is defective, where there has been a breach of condition in that the debt secured was not paid at maturity, since under such circumstances the grantee is entitled to possession without reference to foreclosure. *Glover v. Cox*, 130 Ga. 476, 61 S. E. 12.

2. As against ejectment action.

An action of ejectment cannot be maintained against a person in possession of land under a deed from the mortgagee, although no foreclosure is shown. *Jackson ex dem. Minkler v. Minkler*, 10 Johns. 480;

rights of a mortgagee in possession, the judgment must be reversed. But to our minds the record contains sufficient evidence to support the finding that, at the time the purchaser at the void judicial sale conveyed the premises to her immediate grantee, she was in actual possession by and through her tenant, and her conveyance operated as an assignment of the mortgage debt. It follows that each subsequent conveyance of the premises, up to

and including the deed to defendant Kelsey, under which he took possession of the premises, had that effect. *Currier v. Teake*, 82 Neb. 315, 117 N. W. 712; *Id.* 84 Neb. 60, 133 Am. St. Rep. 602, 120 N. W. 1015. It being conceded that he was in possession when the action was commenced, he therefore occupied the position of a mortgagee in possession.

The rule is well settled in this state that in such case the mortgagor will not be

Phye v. Riley, 15 Wend. 248, 30 Am. Dec. 58.

And the rule has been asserted that a mortgagor of land cannot recover in ejectment after breach of condition, or against persons holding possession under the mortgagee, and it is said that persons in possession as purchasers at a defective foreclosure sale come within this rule. *Bryan v. Brasius*, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803; *Bryan v. Pinney*, 162 U. S. 419, 40 L. ed. 1023, 16 Sup. Ct. Rep. 804; *Bryan v. Kales*, 162 U. S. 411, 40 L. ed. 1020, 16 Sup. Ct. Rep. 802; *Cooke v. Cooper*, 18 Or. 142, 7 L.R.A. 273, 17 Am. St. Rep. 709, 22 Pac. 945.

So, too, a person taking possession of land under color of a foreclosure proceeding, however defective it may be, cannot be dispossessed in an action of ejectment by the mortgagor before payment of the mortgage debt. *Stouffer v. Harlan*, 68 Kan. 135, 64 L.R.A. 320, 104 Am. St. Rep. 396, 74 Pac. 610; *Equitable Mortg. Co. v. Gray*, 68 Kan. 100, 74 Pac. 614; *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 896; disapproving *Richards v. Thompson*, 43 Kan. 209, 23 Pac. 106; *LaComte v. Pennock*, 61 Kan. 330, 59 Pac. 641; *Seeley v. Johnson*, 61 Kan. 337, 78 Am. St. Rep. 314, 59 Pac. 631; *Kager v. Vickery*, 61 Kan. 342, 49 L.R.A. 153, 78 Am. St. Rep. 318, 59 Pac. 628.

And ejectment cannot be maintained to recover possession of land in the possession of a mortgagee or purchaser at an invalid foreclosure sale, until the mortgagor has redeemed or at least tendered, the amount due on the mortgage. *Lockwood v. McBride*, 21 Jones & S. 268; *Currier v. Teske*, 84 Neb. 60, 133 Am. St. Rep. 602, 120 N. W. 1015, same case on prior hearing 82 Neb. 315, 117 N. W. 712.

The New York cases are somewhat confusing on this question. Thus the distinction has been made in that court between the right of a mortgagee who enters into possession of the mortgaged land as a purchaser, and a third person thus entering into possession. The former is said to be a mortgagee in possession, and as such entitled to defend his possession as against an ejectment action (*Miner v. Beekman*, 50 N. Y. 337); while a third person purchasing at an invalid foreclosure sale, who enters into possession, has been denied the right of a mortgagee in possession and the right under his purchase to defend an ejectment

action. *Watson v. Spence*, 20 Wend. 260; *Shriver v. Shriver*, 86 N. Y. 575. But later decisions (*Townshend v. Thomson*, 139 N. Y. 152, 34 N. E. 891; *Barson v. Mulligan*, 191 N. Y. 306, 16 L.R.A.(N.S.) 151, 84 N. E. 75) seem to make the rule dependent, not so much on the question whether a purchaser is the mortgagee or a third person, but rather as to the character of the possession, whether adverse or not. Of course there is more ground for holding the possession of a third person purchasing under a void foreclosure to be adverse and hostile to the mortgagor than that of the mortgagee, since the possession of the latter may rest solely upon the mortgage, while the possession of the former, in the first instance at least, is based upon the theory of ownership as purchaser, and not upon any claim as mortgagee, although on the theory of subrogation the latter claim may be asserted by a purchaser; prima facie, however, his possession is not of this character. See discussion of these cases, supra, I., II., and III.

In *Olmsted v. Elder*, 5 N. Y. 144, a purchase of land at a void foreclosure sale is held to confer no rights upon the purchaser to the possession of the land sold, and, even though he obtains possession, the mortgage foreclosed constitutes no defense in his favor to an ejectment action by a mortgagor, or those claiming under him, for the possession of the land. In this case the sale was by a commissioner under special statutory authority, and it is pointed out that the statute gave the commissioners no express power to assign the mortgage, nor is such power incident to the authority granted; hence an attempted sale by one of such commissioners, inoperative as a sale of the land, is not equivalent to an assignment of the mortgage.

This case is, however, disapproved in *Pell v. Ulmar*, 18 N. Y. 139, holding that a similar mortgage, being a mortgage to the commissioners of a certain public fund, is controlled by a special statute, which gives to the mortgagor no equity of redemption, and only a right to redeem from forfeiture after breach of condition, and hence to give such mortgagor no right to the possession of the land as against a purchaser at a foreclosure sale by one of the commissioners, although the sale is inoperative to pass the title to the land.

In Arizona a mortgagee in possession

entitled to possession of the mortgaged premises until he has paid the amount of the void foreclosure decree, with interest. In *Stull v. Masilonka*, 74 Neb. 309, 104 N. W. 188, it was said: "Where a valid real estate mortgage has been foreclosed, even though the foreclosure proceedings were void, neither the mortgagor nor a person claiming under him will be permitted to assail the title acquired through the foreclosure proceedings, without offering to pay

the amount of the decree and interest." The rule thus announced was followed and approved in *Currier v. Teske*, supra.

In the case at bar it is not claimed that the plaintiff ever offered to pay the amount of the void foreclosure decree, with interest thereon, or the taxes paid by the defendant and his grantors.

It follows that the judgment of the District Court was right, and it is therefore affirmed.

under a void foreclosure sale may successfully defend his right to possession in an ejectment suit by the mortgagor or parties claiming under him, where no offer to pay the mortgage debt is made, and such purchaser has the right to retain possession until the requirements of equity are fully met. *Bryan v. Brasius*, 3 Ariz. 433, 31 Pac. 519, affirmed in 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803.

Where those claiming under a mortgagor stand by and make no objection, to the purchaser at a void foreclosure proceeding taking possession of the mortgaged property and making large improvements thereon, they are estopped from denying his right to possession; such possession is lawful and cannot be disturbed in an ejectment action. *Bryan v. Pinney*, 3 Ariz. 412, 31 Pac. 548.

And ejectment will not lie against a mortgagee rightfully in possession, although under an invalid foreclosure of the mortgage, since he is in the position of a mortgagee in possession after condition broken. *Johnson v. Sandhoff*, 30 Minn. 197, 14 N. W. 889; *Backus v. Burke*, 63 Minn. 272, 65 N. W. 459; *Morse v. Byam*, 55 Mich. 594, 22 N. W. 54. But where the mortgagee or purchaser wrongfully obtains possession of the mortgaged land without a valid foreclosure and sale, the grantor or mortgagor have the legal right to possession, and may recover the same in an ejectment action. *Lewis v. Hamilton*, 26 Colo. 263, 58 Pac. 196.

The action of ejectment cannot be maintained by the mortgagor, or those claiming under him, against the mortgagee in possession of land under an invalid foreclosure proceeding, where the right of action to redeem the mortgage is barred by the statute of limitations. *Russell v. H. C. Akeley Lumber Co.* 45 Minn. 376, 48 N. W. 3.

If a purchaser of land at a voidable foreclosure sale has gone into possession of the land, and is sued in ejectment by the mortgagor, he may resort to equity to preserve his possession until the mortgage is paid. *Haggart v. Wilczinski*, 74 C. C. A. 176, 143 Fed. 22.

d. As against partition action.

Since the purchaser at an invalid mortgage foreclosure sale has a right to hold the land until it is redeemed, the mortgagor cannot maintain proceedings to partition

the land. *Harsh v. Griffin*, 72 Iowa, 608, 34 N. W. 441.

A mortgagee in possession under a void foreclosure proceeding cannot be subjected to a partition action by the heirs or a portion of the heirs of the mortgagor, without tendering to him the amount of the mortgage, or plaintiffs' proportion thereof. *Sawyer v. Vermont Loan & T. Co.* 41 Wash. 524, 84 Pac. 8.

e. Proceeding to quiet title.

Where a mortgagee becomes a purchaser at a void foreclosure, and enters into the occupancy of the property under a deed improperly executed and delivered by the commissioner, he is nevertheless a mortgagee in possession; and the mortgagor's assignee cannot quiet his title to the property against such mortgagee without paying or offering to pay a debt for the security of which the mortgage was created. *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312.

f. Right to payment for improvements.

When the owner of the equity of redemption permits his right to satisfy a mortgage to remain dormant for nearly thirty years, during which time others have paid the assessments and taxes and made improvements in the belief that they had title under foreclosure of the mortgage, he cannot complain that, as a condition of regaining possession, he is required to account for and to pay such taxes, assessments, and improvements, according to the just and enlightened principles of equity. *Miner v. Beekman*, 50 N. Y. 337.

A mortgagee is entitled to an allowance for improvements made on the mortgaged premises in good-faith belief in the validity of his title to the mortgaged property, where, with knowledge thereof, the mortgagor made no objection to the making of the improvements; and where, in a proceeding to redeem, the mortgagor is allowed for the rental value of the land, and for increased rental value because of such improvements, the mortgagee is entitled to an allowance not only for improvements, but for interest on the cost of the same from the time of such expenditure. *Sloane v. Lucas*, 37 Wash. 348, 79 Pac. 949.

It has been held, however, that a purchaser of land at a foreclosure sale invalid because unfairly conducted by the trustee is not entitled to an allowance for improve-

ments, unless a claim is made by the mortgagor for rent, in which event he is entitled to offset any improvements against the rent. *Littell v. Grady*, 38 Ark. 584.

But a mortgagee or purchaser at a foreclosure sale under defective proceedings, on being required to surrender the land, may take down and remove any improvements made by him thereon, where such improvements are not so connected with the soil that their removal will be prejudicial thereto. *Cooke v. Cooper*, 18 Or. 142, 7 L.R.A. 273, 17 Am. St. Rep. 709, 22 Pac. 945.

g. Miscellaneous rights.

It has been held that on an accounting, a mortgagee who has taken possession under an invalid mortgage foreclosure proceeding will be charged with the rent received, or that which, with reasonable diligence, should have been received, from the mortgaged premises during the period of his possession. *Harper v. Ely*, 70 Ill. 581.

But it has also been held that, in the absence of wilful wrong, fraud, or neglect, a mortgagee in possession will only be required to account for the proceeds from the land actually received, and not for what ought to have been received. *Watson v. Perkins*, 88 Miss. 64, 40 So. 643.

A purchaser at a defective foreclosure sale has a right to pay and procure the discharge of a prior mortgage, or, if it has been paid, to maintain proceedings to have it canceled of record. *Venner v. Denver Union Water Co.* 15 Colo. App. 495, 63 Pac. 1061.

But a purchaser at an invalid foreclosure sale is not entitled to maintain proceedings to have his title to the mortgaged premises quieted, where, because of defects in the proceedings, he obtained no title under the sale. *Ibid.*

A mortgagee once lawfully in possession of land, although under a void or voidable foreclosure proceeding, who has been wrongfully deprived of the possession by the mortgagor or an intruder, may resume his possession if he can, and again hold the same; never having voluntarily surrendered or abandoned possession, he has not lost his right thereto, and he may again peaceably enter into possession, and thus be restored to his rightful position as mortgagee in possession. *Townshend v. Thomson*, 139 N. Y. 152, 34 N. E. 891.

IV. Rights of purchaser as affected by statute of limitations.

a. In general.

The rule that a mortgagee in possession under an invalid mortgage foreclosure sale cannot be deprived of his possession until his mortgage has been paid applies to cases where action on the mortgage is barred by the statute of limitations. *Haggart v. Wilczinski*, 74 C. C. A. 176, 143 Fed. 22.

The fact that all action on the mortgage debt is barred by the statute of limitations does not relieve the mortgagor of the neces-

sity of paying the mortgage debt as a condition to relief against the void foreclosure of the mortgage, where the mortgagee or purchaser at the foreclosure sale is in possession of the mortgaged land. *Boschker v. Van Beek*, 19 N. D. 104, 122 N. W. 338.

That all action on the mortgage debt is barred by the statute of limitations is no defense to the right of the mortgagee in possession under a void foreclosure proceeding to retain possession until payment of his mortgage; and the court, exercising equitable powers and recognizing equitable defenses in an ejectment action, will not disturb the quiet and peaceful possession of such a mortgagee until the mortgage debt is paid and every requirement of equity fully met. *Bryan v. Brasius*, 3 Ariz. 433, 31 Pac. 519, affirmed in 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803.

A mortgagor or those claiming under him are not entitled to have their title to the mortgaged land quieted as against a mortgagee in possession under a void foreclosure proceeding without paying or offering to pay the mortgage, although the debt secured thereby is barred by the statute of limitations. *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312; *Brandt v. Thompson*, 91 Cal. 461, 27 Pac. 763.

In Minnesota the rule obtains that where the holder of a mortgage under a void mortgage foreclosure sale has gone into the possession of the land as mortgagee in possession, and so remains until the right of action to foreclose his mortgage is barred by the statute of limitations, he becomes vested with the absolute legal title of the mortgaged premises. Since the right to foreclose and the right to redeem are reciprocal, all action by the mortgagor to redeem from the mortgagee in possession is barred at the same time as the right to foreclose. *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; *Russell v. H. C. Akeley Lumber Co.* 45 Minn. 376, 48 N. W. 3; *Jellison v. Halloran*, 44 Minn. 199, 46 N. W. 332.

Since a mortgage is a mere security, and does not of itself confer title, the right to redeem must continue until the mortgage is foreclosed. The right to redeem and the right to foreclose, therefore, being reciprocal and commensurable, redemption under the mortgage is cut off simultaneously with the barring of the right to foreclose. *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Haskell v. Bailey*, 22 Conn. 569; *Brenner v. Quick*, 88 Ind. 546; *Green v. Turner*, 38 Iowa, 112; *Smith v. Foster*, 44 Iowa, 442; *King v. Meighen*, 20 Minn. 264, Gil. 237; *Dorsey v. Conrad*, 49 Neb. 444, 68 N. W. 645.

b. When action accrues.

1. In general.

The statute of limitations does not run against the mortgage debt when the mortgagee is in possession under a void foreclosure proceeding. *Investment Securities*

Co. v. Adams, 37 Wash. 211, 79 Pac. 625; Sawyer v. Vermont Loan & T. Co. 41 Wash. 524, 84 Pac. 8.

In Backus v. Burke, 63 Minn. 272, 65 N. W. 459, it is said that when the purchaser at a sale in foreclosure of a mortgage, although the sale is invalid, takes possession of the mortgaged premises, the statute of limitations ceases to run against his mortgage lien; it, however, commences to run in his favor as against the right of the heirs of the mortgagor and their grantees who are under no disability, to attack the validity of the foreclosure.

While the statute of limitations does not commence to run in favor of a mortgagee or his grantee entering under an invalid mortgage foreclosure sale, if they enter and continue in possession avowedly as mortgagees, this rule does not apply to a third person entering as purchaser at a foreclosure sale when the foreclosure proceedings are a nullity as to the owner of the equity of redemption, since possession under such circumstances is adverse and hostile from the beginning. Miner v. Beekman, 50 N. Y. 337; Shriver v. Shriver, 86 N. Y. 575.

As to the purchaser of land at a sale in foreclosure of a mortgage, the right of a mortgagor to attack the validity of the foreclosure proceeding commences to run at the time the purchaser takes possession of the land under claim of title based upon his purchase, since such possession is adverse to the mortgagor. Houts v. Hoyne, 14 S. D. 176, 84 N. W. 773.

This is also the doctrine of Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792, holding that the mortgagor's right of action to redeem from an invalid mortgage foreclosure sale, as against a mortgagee in possession, is barred under a statute providing that "any action for relief not herein before provided for must commence within ten years after the cause of action shall have accrued," and it is held that the mortgagor's action to redeem accrues under this statute at a time when the mortgagee in possession sells by absolute deed the mortgaged premises to a third person, who goes into possession of the land under such deed to the knowledge of the mortgagor, the theory being that so long as the mortgagee acknowledges or recognizes the mortgagor's right in the land the statute of limitations does not run against the latter's remedy, but when the mortgagee in possession denies the mortgagor's right the statute is put in motion. The court adds: "Of course, where the mortgagee is permitted to take possession under an agreement on his part to hold in subjection to the mortgagor's rights, such possession is not deemed adverse so as to set the statute of limitations in motion against the mortgagor until the mortgagee distinctly disavows his obligations as such and notice thereof is brought home to the mortgagor. This is so because, until the mortgagor has notice of the repudiation of the agreement, he has the right to presume that the origi-

nal arrangement continues. Where, however, the mortgagee's possession is adverse from the beginning, and he has never acknowledged any obligation to the mortgagor, there is no ground for the presumption above mentioned, and the act of taking possession not only gives rise to a cause of action in favor of the mortgagor, but also starts the statute of limitations running against such cause of action."

The cause of action of the mortgagor or those claiming under him to redeem from an invalid foreclosure sale accrues, and the statute of limitations against such right commences to run, at the time the purchaser enters into possession, claiming under his purchase, where the character of the possession as indicated by the facts and circumstances attending the same is adverse to the mortgagor or those claiming any interest in the property under him. Stout v. Rigney, 46 C. C. A. 459, 107 Fed. 545.

On the theory that an action to redeem from a mortgage is barred at the same time that the right to recover the mortgage debt is barred, it has been held that the right of a mortgagor to take action to redeem from an invalid foreclosure of the mortgage accrues when the mortgage matures. Dorsey v. Conrad, 49 Neb. 444, 68 N. W. 645.

2. As affected by nature of title or disability of claimant.

As to the right of a holder of an estate in remainder in mortgaged premises to attack as invalid a foreclosure of the mortgage and a sale of the premises thereunder, the statute of limitations does not commence to run until after the death of the life tenant. Hope v. Shevill, 137 App. Div. 86, 122 N. Y. Supp. 127.

Compare with Hendricks v. Calloway, 211 Mo. 536, 111 S. W. 60, holding that the statute of limitations begins to run in favor of a third person purchasing under an invalid foreclosure sale at the time he takes possession thereunder, even as to persons holding an estate in remainder, and although the life tenant is living.

As to minors, the statute of limitations barring the right to attack as invalid a sale in foreclosure of a mortgage does not commence to run until they reach their majority. Ibid. Backus v. Burke, 63 Minn. 272, 65 N. W. 459.

c. What statute applicable.

A purchaser of land under an invalid foreclosure sale may hold the same as against a mortgagor who fails to commence proceedings to redeem until after his action is barred by a limitation statute relating to actions not otherwise provided for, where the equitable action to redeem is not otherwise provided for in any other section of the statute of limitations. Hubbell v. Sibley, 50 N. Y. 468; Houts v. Hoyne, 14 S. D. 176, 84 N. W. 773.

Where a purchaser at an invalid foreclosure sale enters into possession of the

land under such circumstances and his possession is of such character as to indicate that he holds in opposition to any claim of the mortgagor his possession is adverse to the mortgagor, and any right of the latter to attack the sale is barred by the statute of limitations if not commenced within the period of time prescribed by the statute for the recovery of lands or tenements. *Stout v. Rigney*, 46 C. C. A. 459, 107 Fed. 545.

Although a foreclosure decree is void as to the heirs of the mortgagor not made parties to the foreclosure proceeding, nevertheless the right of such heirs to redeem from a mortgagee in possession is barred by a statute fixing a limitation upon the time in which to commence suits for redemption by any person not a party to a foreclosure proceeding, of land sold under a decree in chancery in foreclosure of a mortgage. *Hunt v. Ellison*, 32 Ala. 173.

The sale of land in foreclosure of a mortgage, other and different from the land described in the mortgage, where the wife of the mortgagor owns the land sold and is a party to the proceeding, is sufficient to give color of title to bring the case within the operation of the statute of limitations, applicable to parties to suits, as to the right of the heirs of the wife to recover the real estate thus sold. *Sedwick v. Ritter*, 128 Ind. 209, 27 N. E. 610.

But under this statute of limitations against actions to recover real estate which applies only to parties in proceedings under which such land was sold, where the wife of a mortgagor is not made a party to a proceeding to foreclose a mortgage, she is not barred from attacking the validity of the foreclosure as to her dower rights in the premises. *Brenner v. Quick*, 88 Ind. 546.

V. Rights of purchaser as affected by laches of mortgagor.

The doctrine of laches does not go to the maintenance of an action to redeem from an invalid foreclosure of a mortgage, but may have application in determining what equitable relief shall be granted with reference to improvements, if any, placed upon the land by a bona fide purchaser. *Hope v. Shevill*, 137 App. Div. 86, 122 N. Y. Supp. 127.

And a mere lapse of time short of the period fixed by the statute of limitations will not bar a claim to equitable relief, as against a purchaser of land in possession under an invalid foreclosure sale, where the right is clear and there are no countervailing circumstances. In doubtful cases, however, long or unreasonable delay may sometimes turn the scale. *Kelly v. Hurt*, 61 Mo. 463.

Thus, where a sale in foreclosure of a mortgage is so irregular that it will be set aside by a court of equity on prompt application, such relief will not be given after the lapse of considerable time, during which the purchaser has been in possession of the land, and made valuable improve-

ments thereon, and it has increased in value. *Hunt v. Ellison*, 32 Ala. 173 (thirteen years); *Daniel v. Modawell*, 22 Ala. 365, 58 Am. Dec. 260. Especially where to sustain an application to set aside a sale would be to make the incident survive the principal, to make the right to vacate the sale exist after the applicant's interest in the land is barred in favor of the heirs of the purchaser by the statute of limitations. *Hunt v. Ellison*, supra.

And even though the mortgage has not been legally foreclosed, where no steps have been taken to redeem for nearly forty years after the maturity of the mortgage, and more than thirty years after the attempted foreclosure, it requires a very strong showing to authorize a bill to redeem. *Hoffman v. Harrington*, 33 Mich. 392.

A. G. S.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Plff. in Err.,
v.

FREDERICK C. TIEDT.

(— C. C. A. —, 196 Fed. 348.)

Carrier — duty to furnish special trains.

1. Neither the owner of an amusement park, nor special groups of persons desiring to patronize it, can compel a railroad company to furnish special trains for the use of such persons, although special trains are furnished for persons desiring to patronize another amusement park in the same vicinity.

Same — establishment of parks — duty to furnish trains.

2. The mere fact that, at the instance of a railroad company, a person fitted up an amusement park, will not require the court to compel the railroad company to

Note. — No other case, aside from *ATCHISON, T. & S. F. R. Co. v. TIEDT*, has been found, upon the precise question as to the duty of carriers to run special trains. It seems clear, however, under the general rules, that so long as a carrier furnishes a reasonably adequate regular train service, and uses due care to supply on its regular trains sufficient coaches to carry all who may apply for transportation as passengers, it is under no duty or obligation to run special trains for the benefit of a limited group of persons.

Generally as to the right of a carrier to discriminate with respect to special or unusual service, see note to *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 12 L.R.A.(N.S.) 506.

As to the duty to give regular train service on Sunday, see note to *Southern R. Co. v. Wallis*, 30 L.R.A.(N.S.) 401.

furnish special trains to convey patrons to the park.

Same — custom — absence of contract.

3. A custom to furnish special trains to transport patrons to an amusement park under contract will not impose the duty upon the railroad company to furnish similar service without contract.

(January 2, 1912.)

ERROR to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois to review a judgment in plaintiff's favor in an action brought to recover damages for unlawful discrimination against plaintiff in the use of defendant's transportation facilities. Reversed.

Statement by Baker, Circuit Judge:

Defendant in error (plaintiff below) alleged in his declaration: That for ten years prior to 1908 he owned and still owns a picnic park contiguous to defendant's railway in Cook county, Illinois; that at defendant's special instance and request he expended \$45,000 in putting in amusement features; that prior to the grievances herein complained of he had been making \$15,000 a year out of the patronage of excursionists; that up to 1908 defendant encouraged plaintiff to maintain and operate his park; that near plaintiff's park was Columbia park; that the two were the only practicable sites for picnic parks on defendant's line near Chicago; that the length and character of haul, cost of service, and volume of business to the two parks were practically the same; that no other transportation line was available; that prior to 1908 defendant furnished excursion trains to both under substantially the same circumstances and conditions and without discrimination; that during 1908, and thence hitherto, defendant continued the same service to Columbia park, but, in violation of its duty, refused to run excursion trains to plaintiff's park, to his great damage.

On a trial of the general issue, the court submitted the case to the jury as one of unlawful discrimination. The jury returned a verdict for \$33,000, \$15,000 being for damages accrued and \$18,000 for future damages; and judgment on the verdict was entered.

Of forty-three assignments of error, we deem it essential to consider only two,— refusal to direct a verdict for defendant; overruling the motion in arrest of judgment.

For the determination of these assignments plaintiff's evidence may be assumed to support every allegation of fact in the declaration. We pass over all of defendant's

evidence that special trains to plaintiff's park were refused on account of the boisterous and unruly conduct of excursionists, breaking windows, damaging seats, interfering with safe operation by pulling bell cords, air-brake valves, and the like, and note only the undisputed status relating to discrimination. In March, 1908, plaintiff served a written demand upon defendant to furnish for "himself individually" as owner of the park and for him "as agent" of twenty-four named clubs or societies special trains of from twelve to eighty cars on dates between May and August. Defendant, calling attention to the fact that there was no contract for such special services, offered, if the societies plaintiff professed to represent should desire to use the regular trains scheduled to stop at the station adjoining plaintiff's park and would give reasonable notice of the number of cars necessary to add to such trains, to furnish accommodations to all persons who should apply for tickets at regular passenger rates. This offer was rejected, on the ground that nothing but special excursion trains would do. Before this controversy arose the course of business was for plaintiff to arrange with a society to rent his park for a certain day, and then for the society to make a special contract with defendant for an excursion train on that day.

Argued before Baker and Seaman, Circuit Judges, and Carpenter, District Judge.

Messrs. Robert Dunlap, Lee F. English, and James L. Coleman, for plaintiff in error:

Under the Illinois statutes, power is vested in the management of the railway company to regulate the time and manner of running different trains, and determining at what particular places particular trains shall run or stop.

Chicago & A. R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60; Trotlinger v. East Tennessee V. & G. R. Co. 11 Lea, 533; Northern P. R. Co. v. Washington Territory, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 53 L. ed. 186, 29 Sup. Ct. Rep. 55; People ex rel. Linton v. Brooklyn Heights R. Co. 172 N. Y. 95, 64 N. E. 788; People v. New York, L. E. & W. R. Co. 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856; State ex rel. Smart v. Kansas City, S. & G. R. Co. 51 La. Ann. 200, 25 So. 129; Nashville, C. & St. L. R. Co. v. State, 137 Ala. 439, 34 So. 401; Page v. Louisville & N. R. Co. 129 Ala. 237, 29 So. 676; Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co. 45 N. J. Eq. 65, 6 L.R.A. 855, 17 Atl. 146;

Chicago & E. I. R. Co. v. People, 222 Ill. 396, 78 N. E. 784; Jacquelin v. Erie R. Co. 69 N. J. Eq. 440, 61 Atl. 18; College Arms Hotel Co. v. Atlantic Coast Line R. Co. 61 Fla. 550, 54 So. 459.

There is no common-law or statutory duty to run excursion or picnic trains to any place.

Moore v. St. Louis, I. M. & S. R. Co. 67 Ark. 389, 55 S. W. 161; 1 Wyman, Public Service Corp. § 757; Texas & P. R. Co. v. Lacey, 107 C. C. A. 331, 185 Fed. 225; Georgia S. & F. R. Co. v. Zarks, 108 Ga. 800, 34 S. E. 127.

The railway company had a lawful right to refuse to contract with plaintiff about excursion trains.

Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 497, 49 L. ed. 1135, 1140, 25 Sup. Ct. Rep. 745; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 514-516, 44 L. ed. 568, 569, 20 Sup. Ct. Rep. 385; Barney v. The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 1,030; Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; Spofford v. Boston & M. R. Co. 128 Mass. 326; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Northern P. R. Co. v. Washington Territory, 142 U. S. 501, 502, 35 L. ed. 1095, 1096, 12 Sup. Ct. Rep. 283; United States ex rel. Northwestern Warehouse Co. v. Oregon R. & Nav. Co. 159 Fed. 980; State ex rel. Skeen v. Ogden Rapid Transit Co. 38 Utah, 242, 112 Pac. 120; St. Louis Drayage Co. v. Louisville & N. R. Co. 5 Inters. Com. Rep. 137, 65 Fed. 39; Little Rock & M. R. Co. v. St. Louis & S. W. R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; Crosby v. Pere Marquette R. Co. 131 Mich. 288, 91 N. W. 124; Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169; Memphis News Pub. Co. v. Southern R. Co. 110 Tenn. 684, 63 L.R.A. 150, 75 S. W. 941; Com. ex rel. Norton Bd. of Trade v. Norfolk & W. R. Co. 111 Va. 59, 68 S. E. 351; Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113; Railroad Commission v. Louisville & N. R. Co. 10 Inters. Com. Rep. 173; Worcester Excursion Car Co. v. Pennsylvania R. Co. 2 Inters. Com. Rep. 793, 3 I. C. C. Rep. 577; United States ex rel. Morris v. Delaware, L. & W. R. Co. 2 Inters. Com. Rep. 617, 40 Fed. 101.

Shippers and passengers alone can sue for breach of duty of carriers in favor of the public.

1 Wyman, Public Service Corp. §§ 360-362; Public Service Corp. v. American Lighting Co. 67 N. J. Eq. 122, 57 Atl. 482; 6 Am. & Eng. Enc. Law, 2d ed. 237, 238; 40 L.R.A. (N.S.)

2 Hutchinson, Carr. 3d ed. § 963; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Ogden v. Coddington, 2 E. D. Smith, 317; Houston & T. C. R. Co. v. Robinson, — Tex. Civ. App. —, 131 S. W. 444; 3 Hutchinson, Carr. § 1320; Little Rock & Ft. S. R. Co. v. Conatser, 61 Ark. 562, 33 S. W. 1057; Southern Kansas R. Co. v. Clark, 52 Kan. 398, 34 Pac. 1054; Fairmount & A. Street Pass. R. Co. v. Stutler, 54 Pa. 375, 93 Am. Dec. 714; Brink v. Wabash R. Co. 160 Mo. 87, 53 L.R.A. 811, 83 Am. St. Rep. 459, 60 S. W. 1058; Lafaye v. Harris, 13 La. Ann. 553; Crosby v. Pere Marquette R. Co. 131 Mich. 288, 91 N. W. 124; State v. Central Vermont R. Co. 81 Vt. 459, 21 L.R.A. (N.S.) 949, 71 Atl. 193; Hadley v. Western U. Tele. Co. 115 Ind. 191, 15 N. E. 845; Atkinson v. Newcastle & G. Waterworks Co. L. R. 2 Exch. Div. 441, 46 L. J. Exch. N. S. 775, 36 L. T. N. S. 761, 25 Week. Rep. 794; House v. Houston Waterworks Co. 88 Tex. 233, 28 L.R.A. 532, 31 S. W. 179; Taylor v. Lake Shore & M. S. R. Co. 45 Mich. 77, 40 Am. Rep. 457, 7 N. W. 728; Boston Safe-Deposit & T. Co. v. Salem Water Co. 94 Fed. 238; Metropolitan Trust Co. v. Topeka Water Co. 132 Fed. 702; Ward v. Hobbs, L. R. 4 App. Cas. 13, 48 L. J. Q. B. N. S. 281, 40 L. T. N. S. 73, 27 Week. Rep. 114, 3 Eng. Rul. Cas. 125.

Plaintiff's alleged loss or damage is too remote.

1 Sutherland, Damages, 3d ed. § 33; Strong v. Campbell, 11 Barb. 135; Little Rock & Ft. S. R. Co. v. Conatser, 61 Ark. 562, 33 S. W. 1057; Crosby v. Pere Marquette R. Co. 131 Mich. 288, 91 N. W. 124; State v. Central Vermont R. Co. 81 Vt. 459, 21 L.R.A. (N.S.) 949, 71 Atl. 193; Hadley v. Western U. Tele. Co. 115 Ind. 191, 15 N. E. 845; Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co. 25 Conn. 265, 65 Am. Dec. 571; Brink v. Wabash R. Co. 160 Mo. 87, 53 L.R.A. 811, 83 Am. St. Rep. 459, 60 S. W. 1058; Pacific Pine Lumber Co. v. Western U. Tele. Co. 123 Cal. 428, 56 Pac. 103; Gregory v. Brooks, 37 Conn. 365; Weeks, Damnum Absque Injuria, § 5, p. 9; New York, N. H. & H. R. Co. v. Piscataqua Nav. Co. 47 C. C. A. 225, 108 Fed. 92; Lamb v. Stone, 11 Pick. 527; Adler v. Fenton, 24 How. 407, 16 L. ed. 696.

Messrs. Fred W. Bentley, John J. Coburn, Frank Novak, and William A. Macy, for defendant in error:

Defendant is bound by the law and public policy of Illinois.

Chicago & N. W. R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; Hurd's Rev. Stat.

(Ill.) 1909, chap. 32, §§ 26, 67d, pp. 562, 574; *Brush v. Carbondale*, 229 Ill. 150, 82 N. E. 252, 11 Ann. Cas. 121; *Vidal v. Philadelphia*, 2 How. 127, 198, 11 L. ed. 205, 234; *People ex rel. Hunt v. Chicago & A. R. Co.* 130 Ill. 175, 22 N. E. 857; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 48 L.R.A. 568, 75 Am. St. Rep. 184, 56 N. E. 822; *People ex rel. McIlhany v. Chicago Live Stock Exch.* 170 Ill. 556, 39 L.R.A. 373, 48 N. E. 1062; *People ex rel. Jackson v. Suburban R. Co.* 178 Ill. 606, 49 L.R.A. 650, 53 N. E. 349; *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292; *St. John v. Erie R. Co.* 22 Wall. 136, 22 L. ed. 743; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 483, 53 L.R.A. 413, 74 Am. St. Rep. 314, 53 N. E. 1089; *Beach, Monopolies*, § 221; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Greenhood, Pub. Pol.* 654, 655; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553.

It is a railroad corporation's duty to serve all kinds of industries directly dependable upon it, alike, after undertaking business.

Chicago & N. W. R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 619, 53 L. ed. 359, 29 Sup. Ct. Rep. 214; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *New York Cement Co. v. Consolidated Rosendale Cement Co.* 178 N. Y. 167, 70 N. E. 451; *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 535, 18 Am. Rep. 754; *Memphis News Pub. Co. v. Southern R. Co.* 110 Tenn. 684, 63 L.R.A. 160, 75 S. W. 941; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72; 13 Current Law, 622; 5 Am. & Eng. Enc. Law, 177; *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 51 Fla. 578, 40 So. 876; *Toledo & O. C. R. Co. v. Wren*, 78 Ohio St. 137, 84 N. E. 785; *Union P. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Cates v. Atlantic Baggage & Cab Co.* 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372; *United States Exp. Co. v. State*, 164 Ind. 196, 73 N. E. 101; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *New England Exp. Co. v. Maine C. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Shipper v. Pennsylvania R. Co.* 47 Pa. 338; *Sanford v. Catawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 667; *Case of Monopolies*, 11 Coke, 84; 7 Harvard L. Rev. 342; Stat. 21 James I. chap. 3; *Eddy, Combinations*, § 336; *State ex rel. Dobney v. Chicago & N. W. R. Co.* 83 Neb. 518, 120 40 L.R.A. (N.S.)

N. W. 165; *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 51 Fla. 578, 40 So. 875; *Mathis v. Southern R. Co.* 65 S. C. 271, 61 L.R.A. 824, 43 S. E. 684; *Chicago & A. R. Co. v. Davis*, 159 Ill. 53, 50 Am. St. Rep. 143, 42 N. E. 382; *Atlantic Coast Line R. Co. v. Geraty*, 20 L.R.A. (N.S.) 310, 91 C. C. A. 602, 166 Fed. 10.

Industry located on line to which personal delivery is appropriate may recover for refusal to serve it in matters in which its patrons are interested, or where the direct result is loss of custom.

Coe v. Louisville & N. R. Co. 3 Fed. 775; *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.* 66 Md. 399, 59 Am. Rep. 167, 7 Atl. 809; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *Lancashire & Y. R. Co. v. Gidlow*, L. R. 7 H. L. 517, 45 L. J. Exch. N. S. 625, 32 L. T. N. S. 573, 24 Week. Rep. 144; *Richmond v. Dubuque & S. C. R. Co.* 40 Iowa, 264; 3 *Sutherland, Damages*, 3d ed. § 901, p. 2682; *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; *Tift v. Southern R. Co.* 138 Fed. 753.

Baker, Circuit Judge, delivered the opinion of the court:

If a duty rests upon a public service corporation to afford facilities independently to each of two persons, industries, or localities, the service must be rendered on substantially equal terms, impartially, without undue discrimination. But if no duty in law exists to serve either, then the giving to one of what is not owed cannot be a basis for the other's complaint of unlawful discrimination; that is, back of any question of unlawful discrimination must lie the duty to serve.

It is usually said that a common carrier's duty is to serve the public. In a general sense this is true, for latently the right to be served is in the public; but the carrier's duty arises only when some individual demands a service that is common, that is due to him as a member of the public. And if the individual separates himself from the public, and demands a use of the carrier's property or facilities, not in the common right, but for his own separate profit or advantage, the carrier may either refuse or, within certain limits, obligate itself to give the special privilege. We say "within certain limits," for in the public interest the carrier cannot be permitted to incapacitate itself for the full performance of its public obligations. These principles are sufficiently illustrated in *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct.

Rep. 542, 628; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 697, 43 L. ed. 864, 19 Sup. Ct. Rep. 565; *Donovan v. Pennsylvania Co.* 61 L.R.A. 140, 57 C. C. A. 362, 120 Fed. 215, affirmed in 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; *Johnson v. Georgia R. & Bkg. Co.* 108 Ga. 496, 46 L.R.A. 502, 34 S. E. 127; *State ex rel. Skeen v. Ogden Rapid Transit Co.* 38 Utah, 242, 112 Pac. 120; 1 *Wyman, Public Service Corp.* § 757.

Tested by these principles, a cause of action was neither pleaded nor proved. Plaintiff was not demanding, in the common right, that he be accepted as a passenger. As agent of intending passengers, plaintiff had no standing, for the right would be in them. Further, no group of persons who separate themselves from the public can demand, in the common right, that a special train, to which they alone, and not the public generally, shall be admitted, shall be run on such days and at such hours as they choose to Birnam Wood, or any field or grove that pleases them. Still less is there room for the claim that every landowner, or any landowner, who may have rented his ground to intending picnickers, can by mandamus compel the carrier to furnish such trains.

Defendant, a foreign corporation doing an interstate business, was, of course, as fully subject to Illinois law as any interstate carrier chartered by the state. But we find nothing in the Illinois Constitution, statutes, or decisions that furnishes any foundation for plaintiff's case. Authorities dealing with the rights of passengers, shippers, and consignees are not in point, for plaintiff was not a passenger, nor was he a shipper or consignee of passengers.

Contract and custom were urged in argument as additional grounds of plaintiff's case. That plaintiff on defendant's "encouragement" should have opened his park, and "at defendant's special instance and request" should have invested so large a sum in structures, may have been unfortunate. But no contract elements of time, terms, conditions, mutuality, appear in pleadings or proofs; and the cause was submitted to the jury solely as one of discrimination. As to custom it is enough to say that a custom to do a thing from time to time under special contracts will not establish a custom to dispense with contracts.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Petition for certiorari denied by Supreme Court of United States April 8, 1912.
40 L.R.A. (N.S.)

IOWA SUPREME COURT.

IOWA CITY

v.

JOSEPH GLASSMAN, Appt.

(— Iowa —, 136 N. W. 899.)

License — peddling — excessive fee — exceeding profits of business.

1. A municipality will not be permitted to enforce a license for peddling fruits and vegetables within its limits, which if paid by the day exceeds the daily gross profits of the business, or if by the year nearly equals the gross profits that could be made in the portion of the year during which the business could be carried on.

Municipal corporations — taxing power — review by court.

2. The discretion of the municipal corporation in exercising its taxing power upon the business of peddling within its limits is not beyond the power of the courts to review, so far as it affects the reasonableness of the tax.

Appeal — failure to number lines — discretion.

3. The court will exercise discretion as to striking the abstract for a failure to comply with the rules as to numbering the lines, where the case is before it for final determination and the entire abstract is so short that no inconvenience could have been caused by the omission.

Same — deficient argument — discretion as to striking.

4. The court will exercise discretion as to striking appellant's argument in a criminal case, for failure to comply with the rules as to preliminary statements, when the question is not raised until final submission.

(June 25, 1912.)

APPEAL by defendant from a judgment of the District Court for Johnson County convicting him of violating a municipal ordinance forbidding peddling without a license. Reversed.

Statement by McClain, Ch. J.:

The defendant was convicted before the mayor of peddling within the limits of the city without first having procured a license. On appeal to the district court, it was conceded by the defendant that he was engaged in peddling, within the terms of an ordinance, and evidence was introduced for the purpose of showing that the provisions of the ordinance were unreasonable. The

Note. — As to validity of license tax upon peddlers so high as to be prohibitory in effect, see note to *People v. Wilson*, 35 L.R.A. (N.S.) 1074. And see references in that note for annotation on related questions.

trial court made a finding affirming the judgment of the mayor, and the defendant appeals.

Mr. O. A. Byington, for appellant:

Whenever it is manifest that the amount of a license tax imposed in the exercise of the police power is substantially in excess of the reasonable expense of issuing a license and of regulating the occupation to which it pertains, or is virtually prohibitory, the act or ordinance imposing the tax is invalid.

25 Cyc. 611; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Fayetteville v. Carter*, 52 Ark. 301, 6 L.R.A. 509, 12 S. W. 573; *Jacksonville v. Ledwith*, 26 Fla. 166, 9 L.R.A. 69, 23 Am. St. Rep. 558, 7 So. 885; *Spiegler v. Chicago*, 216 Ill. 114, 74 N. E. 718; *Wysong v. Lebanon*, 163 Ind. 132, 71 N. E. 194; *Burlington v. Unterkircher*, 99 Iowa, 401, 68 N. W. 795; *Re Martin*, 62 Kan. 638, 64 Pac. 43; *State v. Snowman*, 94 Me. 99, 50 L.R.A. 544, 80 Am. St. Rep. 380, 46 Atl. 815; *Van Baalen v. People*, 40 Mich. 258; *St. Paul v. Dow*, 37 Minn. 20, 5 Am. St. Rep. 811, 32 N. W. 860; *Littlefield v. State*, 42 Neb. 223, 28 L.R.A. 588, 47 Am. St. Rep. 697, 60 N. W. 724; *Blanke v. Board of Health*, 64 N. J. L. 42, 44 Atl. 847; *Baker v. Cincinnati*, 11 Ohio St. 534; *Johnson v. Philadelphia*, 60 Pa. 445.

In case of useful employments, prohibition cannot be exercised under authority to license.

Burlington v. Bumgardner, 42 Iowa, 674; *Burlington v. Putnam Ins. Co.* 31 Iowa, 102; *Ottumwa v. Zekind*, 95 Iowa, 622, 29 L.R.A. 734, 58 Am. St. 447, 64 N. W. 646.

Messrs. A. E. Maine and Frank F. Messer, for appellee:

A license tax imposed in the exercise of the discretion vested in the municipal authorities cannot be declared unreasonable because the court may think so.

Cooper v. District of Columbia, MacArth. & M. 250; *United States Distilling Co. v. Chicago*, 112 Ill. 19; 25 Cyc. 612; *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Denny v. Des Moines County*, 143 Iowa, 466, 121 N. W. 1068; *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa, 615, 77 Am. St. Rep. 548, 80 N. W. 665.

The law presumes the charge to be reasonable.

Iowa City v. Newell, 115 Iowa, 58, 87 N. W. 739; *Ottumwa v. Zekind*, 95 Iowa, 623, 29 L.R.A. 734, 58 Am. St. Rep. 447, 64 N. W. 646; *Burlington v. Unterkircher*, 99 Iowa, 407, 68 N. W. 795; *Burlington v. Putnam Ins. Co.* 31 Iowa, 102.

The question of unreasonableness cannot 40 L.R.A. (N.S.)

be determined by the extent of the business of a single individual.

Nashville, C. & St. L. R. Co. v. Attalla, 118 Ala. 363, 24 So. 450; *Stull v. De Mattos*, 23 Wash. 71, 51 L.R.A. 896, 62 Pac. 451; *Swan v. Indianola*, 142 Iowa, 740, 121 N. W. 547; *Fretwell v. Troy*, 18 Kan. 271; *People v. Grant*, 157 Mich. 24, 133 Am. St. Rep. 329, 121 N. W. 300; *Cherokee v. Fox*, 34 Kan. 16, 7 Pac. 625; *Re White*, 43 Minn. 250, 45 N. W. 232; *Beecher v. Ferris*, 110 Mich. 537, 68 N. W. 269; *People v. Baker*, 115 Mich. 199, 73 N. W. 115; *Gamble v. Montgomery*, 147 Ala. 682, 39 So. 353; *Burlington v. Unterkircher*, 99 Iowa, 407, 68 N. W. 795; *Iowa City v. Newell*, 115 Iowa, 58, 87 N. W. 739.

McClain, Ch. J., delivered the opinion of the court:

In the attempted exercise of the authority conferred by Code, § 700, "to regulate, license, and tax peddlers," the plaintiff city enacted an ordinance describing as a misdemeanor and providing a penalty for plying the vocation of a peddler within the city limits "without first procuring a license and paying the license fee and tax, which license fee and tax shall be, in addition to the mayor's fee of \$1, the sum of \$5 per day or \$350 per year for each peddler on foot; \$6 per day or \$350 per year for each peddler using a one-horse conveyance; \$10 per day or \$500 per year for each peddler using a two-horse conveyance." It is conceded that defendant was engaged in peddling fruit and vegetables not of his own raising, from house to house in Iowa City, without procuring a license and in violation of the ordinance. The sole question presented for determination is whether the ordinance is valid.

1. While a city has unquestionably the power to regulate the business of peddling, by requiring that any person desiring to pursue such business must secure a license, it is well settled that, in the exercise of the power to regulate, the city cannot impose a license fee which shall be in effect prohibitory and thus entirely suppress the pursuit of a lawful calling. The council being vested with authority to legislate on the subject, its discretion will not be interfered with unless its action is plainly unreasonable; but the courts may inquire into the reasonableness of such regulations and hold them to be in excess of the power conferred, if the manifest purpose and effect is to prohibit, rather than to regulate, in a case where the power to prohibit is not given. *State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652; *Ottumwa v. Zekind*, 95 Iowa, 622, 29 L.R.A. 734, 58 Am. St. Rep. 447, 64 N. W. 646; *Burling-*

ton v. Unterkircher, 99 Iowa, 401, 68 N. W. 795.

It seems to us plain, on the face of the ordinance itself, that it was not passed in any reasonable attempt to regulate the business of peddling. It is impossible to conceive of any conditions involved in the pursuit of such business which would justify the exaction as a mere license fee of \$5 per day or \$350 per year for a peddler on foot, or a correspondingly greater amount for a peddler using a one-horse or a two-horse conveyance. The court can certainly take judicial notice of the fact that no reasonable system of regulation for the protection of the public would involve any such expense on the part of the city as would require the imposition of such a license fee, and that the business involved no such extraordinary wear and tear on the streets of the city as would justify any such exaction.

II. Counsel for the city insist, however, as the proper basis for the license required, that, in the exercise of the power of taxation conferred as distinct from the power of regulation, the discretion of the city council is absolute, and not subject to review by the courts; and it is without doubt true, as said in many cases, that the discretion of the council in exercising the power of taxation should not be interfered with by the courts on trivial grounds. But we find no authority for saying that the power of the city council to impose taxes of this character is without limitation and beyond inquiry as to the reasonableness of the taxes imposed. With reference to the power of the city council in a different class of cases in which the exercise of discretion is vested in it, we have used this language: "It is undoubtedly true that ordinances of a municipality, when passed by legislative authority, are to be given great force and effect, but they are not sacred, by any means; and it is equally as true that, where general power is given a municipality, it must be exercised in a reasonable manner, and, if it is not so exercised, it is the duty of the courts to protect those who may suffer thereby." *Hall v. Cedar Rapids*, 115 Iowa, 199, 88 N. W. 448.

The general rule is that, when a question is raised as to the reasonableness of a city ordinance which has reference to a subject-matter within the corporate jurisdiction, the ordinance will be presumed to be reasonable, unless the contrary appears on the face of the ordinance itself or is established by proper evidence. *Com. v. Patch*, 97 Mass. 221; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Gamble v. Montgomery*, 147 Ala. 682, 39 So. 353; *Fayetteville v. Carter*, 52 Ark. 301, 6 L.R.A. 40 L.R.A. (N.S.)

509, 12 S. W. 573; *Iowa City v. Newell*, 115 Iowa, 55, 87 N. W. 739.

But, on the other hand, if it is evident that the ordinance is not calculated, nor intended, in fact, to accomplish a purpose within the legitimate scope of the particular power conferred upon the city, it is invalid. With reference to an ordinance exacting a license fee of \$10 per month for selling or offering for sale fresh meat on the streets, which it was attempted to justify under a grant of authority to license and regulate hawkers, hucksters, and peddlers, the supreme court of Michigan used this language: "It is evident that it [the ordinance] was simply an exercise of arbitrary and unauthorized class legislation for the benefit of a few shopkeepers, and an unjust discrimination against those who desired to sell from carts or wagons about the village. It is difficult to perceive how such a by-law could be of public benefit. Its tendency would be, if enforced, to increase the price of fresh meat to the consumer, while it could serve no useful or beneficial purpose as an offset to this increased cost of an article of daily and necessary food." *Chaddock v. Day*, 75 Mich. 527, 4 L.R.A. 809, 13 Am. St. Rep. 468, 42 N. W. 977. In *Peoria v. Gugenheim*, 61 Ill. App. 374, involving the validity of an ordinance imposing a license fee of \$200 per month on itinerant merchants and transient vendors of merchandise, the court said: "The ordinance clearly shows that its aim and intent was to prevent competition with the city merchants by transient merchants, to the detriment of the public generally. The license fixed by the ordinance is out of all reason too high. . . . It could not have been intended for revenue, for very few could or would pay it, and it would be an unreasonable tax and out of all proportion to other taxation." In *Harrodsburg v. Renfro*, 22 Ky. L. Rep. 806, 51 L.R.A. 897, 58 S. W. 795, it was held that an ordinance fixing the amount of a license for the sale of intoxicants at \$300 per year more for a place on the main street than was required for a place on any other street was unconstitutional because it violated the spirit of the Constitution as to uniformity of laws in respect to taxation. In *Carrollton v. Bazzette*, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837, it was held that authority given to the city council to "license, tax, regulate, suppress, or prohibit itinerant merchants and transient vendors of merchandise" did not sustain an ordinance which was in effect prohibitory as to a business not objectionable in respect to the character of the articles sold nor the mode of selling, and that it was therefore material for the

court to inquire whether the license fee fixed was reasonable, or whether it was so high as to amount in effect to a suppression of the business, rather than a regulation of it by license; and the court reached the conclusion that a license fee of \$10 per day without discrimination as to the extent of the business or the length of time it was to be conducted was unreasonable. These cases sustain the conclusion which we reach that, even in the exercise of the power to tax, the reasonableness of the ordinance in its general provisions and with reference to the subject-matter may be inquired into.

Looking to the ordinance itself, we find that it imposes upon peddlers a minimum tax of \$5 per day or \$350 per year without regard to any period greater than one day and less than one year during which the business may be pursued; and, looking into the evidence, we discover that the business in which defendant was engaged was that of selling, from house to house, fruit and vegetables which he had purchased in carload lots or in smaller quantities; that he could not profitably carry on his business for more than about six months in the year; and that his gross profits on sales did not exceed on the average \$3 or \$4 per day. It appears from the evidence that the profits thus testified to by defendant were substantially as large as those of others engaged in the same kind of business. It further appears that the taxes paid by several grocers in the city on their stocks of merchandise amount per annum to from \$10 to \$50. Now we think it quite evident that the purpose of the council was not to impose a tax on peddlers which would be reasonable in view of the fact that they are not subject to taxation as merchants, and in view of the further fact that by reason of their exemption from rent charges their percentage of profits on the business done may be larger than that of regular merchants; but to practically and effectually prohibit such business as that which defendant was attempting to conduct, a business in every respect lawful and entitled to reasonable protection and encouragement. We therefore hold that the tax imposed is unreasonable, and on that account the ordinance is void.

III. With the case has been submitted a motion of appellee to strike the appellant's abstract and argument, and to affirm. The objection to the abstract is that the lines are not numbered as required by § 50 of our rules. We have in some cases required the appellant to number the lines of his abstract where he has omitted to do so before taking submission of the case. But the abstract in this case consists of

but nine pages, and we have not thought that it would be of any practical advantage to the appellee to enforce the rule in this manner. We might, of course, refuse now to consider the case if the omission of the appellant to comply with the rule was of any practical inconvenience of the court. But we do not feel justified in arbitrarily dismissing the appeal for technical failure to comply with the rule. In short, we are inclined to enforce the rule with strictness where timely objection is made and it appears that its enforcement would be of any practical advantage to the appellee or to the court; but we reserve some discretion as to its enforcement when the case is before us for final determination.

The ground presented for striking appellant's brief and argument is that it contains no preliminary statement of the nature of the action, the issues, the facts, the judgment, and the errors and exceptions relied upon for reversal, as required by our rules, § 53. We might, no doubt, with propriety strike the appellant's brief and argument on this ground before the submission of the case; but even then we should usually do so only with leave to remedy the defects pointed out within a reasonable time. We would not be justified in now doing so, especially in a criminal case, and thus cutting off the appellant from any opportunity to have his case considered. We must reserve a discretion in the application of the rule when the question is raised on final submission. The motion to strike the abstract and argument and to affirm is therefore overruled.

The judgment of the lower court sustaining defendant's conviction under the ordinance is reversed.

KANSAS SUPREME COURT.

C. A. RICHOLSON

v.

WILLIAM FERGUSON, Appt.

(— Kan. —, 124 Pac. 360.)

Evidence — entries in books.

1. Under the provisions of the statute that entries in books intended as records of payments and similar matters, made in the regular course of business, at or near the time of the transaction, shall be admissible

Headnotes by MASON, J.

Note. — A search has failed to disclose any other cases passing upon the question decided in *RICHOLSON v. FERGUSON*, as to payment by a debtor as evidence as against a third person of the previous existence of the indebtedness.

in evidence on proof that they were so made, the fact that a corporation made certain payments may be shown by its books, although it is not a party to the action.

Same — payment by stranger — evidence of debt.

2. Where one who had been the general manager of a corporation sells his stock under an agreement that a note given in part payment therefor shall be subject to a proportionate deduction on account of any just claims existing against the corporation, not shown by its books, in an action upon the note, proof of the defendant that such claims were made against the corporation, and that a new manager paid them after a full investigation, makes out a prima facie case for a deduction, and casts upon the plaintiff the burden of showing that the claims so made and paid were not just.

(June 8, 1912.)

APPPEAL by defendant from a judgment of the District Court for McPherson County in plaintiff's favor in an action on a note given in part payment of stock. Reversed.

The facts are stated in the opinion.

Mr. Frank O. Johnson, for appellant:

The books of the company were competent and proper evidence.

State v. Stephenson, 69 Kan. 405, 105 Am. St. Rep. 171, 76 Pac. 905; *Ætna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810; *Garden City v. Heller*, 61 Kan. 767, 60 Pac. 1060; *St. Louis & S. F. R. Co. v. Gaba*, 78 Kan. 432, 97 Pac. 435.

The law presumes that business transactions of men are done in good faith, and the courts must presume, in the absence of any evidence to the contrary, that the company acted in good faith when it paid these various items entered in the said Royston Suspense Account.

Baughman v. Penn, 33 Kan. 508, 6 Pac. 890.

Mr. David Ritchie, for appellee:

Entries in books are never competent as against third parties, and cannot be used as against parties that are not parties to them.

State ex rel. Pabst Brewing Co. v. Carpenter, 129 Wis. 180, 8 L.R.A. (N.S.) 178, 108 N. W. 641; *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 429; *Minton v. Underwood Lumber Co.* 79 Wis. 646, 48 N. W. 857.

Mason, J., delivered the opinion of the court:

In 1906 J. T. Royston organized the Marquette Roller Mill Company, having a capital stock of \$40,000. Only one share stood in his name; but his wife, for whom he

acted as agent, owned a considerable amount of stock. He was general manager of the business until December, 1907, when he and his wife sold their stock to various persons; William Ferguson being the purchaser of twenty shares. A written agreement for the sale provided that the price should be fixed by the book value, according to an inventory to be taken, one third to be paid in cash, one third in six months, and the remaining one third in a year; notes to be given for the deferred payments. The contract contained a provision reading: "The notes due in six months to be subject to deduction of *pro rata* shares of any just claims or bills of any nature that may be held by any parties against said mill company, and which for any cause do not appear on the books of the company at time of inventory."

The inventory was made, and the price of Ferguson's stock was thereby fixed at \$2,125.29. He paid \$1,417.06 in cash, and gave his note for \$708.53; the note bearing the memorandum: "This note subject to deduction for any claim against the mill company, and not appearing on the books of the company." The note was transferred to C. A. Richolson, who brought action upon it. Ferguson answered, alleging that at the time of his purchase of the stock there were just claims against the company, not shown on its books, amounting to \$14,036.97, and that the reduction in price to which he was entitled on that account amounted to more than the note. At the trial the existence of three claims of that character was admitted. The defendant introduced evidence tending to show that after the sale of the Royston stock a number of claims were made against the company on account of matters not shown on the books; that these claims were investigated by the new manager, and either paid in full, or compromised by the payment of a less sum. The court directed a verdict for the plaintiff, and the defendant appeals.

The new manager of the company testified that he had examined into the various claims that were made against the company by reason of the manner in which the business had been conducted under the former management, found that they were meritorious, and made the best settlement he could; that all such payments were correctly entered in the books under the title "Royston Suspense Account." That account, showing payments amounting in all to \$13,636.97, was offered in evidence. The plaintiff contends that the books of the company were not admissible against him. We think they were clearly competent for the purpose of proving the amount paid out by the corporation upon claims not shown

by the books at the time the stock was sold. The statute makes entries intended as records of payments admissible on proof that they were made in the regular course of business of any person or corporation, at or about the time of the transaction. Civil Code, § 384 (Gen. Stat. 1909, § 5979). Here there was evidence not only of their having been so made, but that they were in fact correct.

A more difficult question is whether the fact that the corporation paid the claims is prima facie evidence that they were valid. The contract of Royston in selling the stock was in effect a warranty that there were no outstanding valid claims against the company, not shown by the books, and the defendant's answer in effect asks damages for the breach of that warranty. The grantee of a warranty deed, who, without being sued, buys in an outstanding title or pays off a claim, is required to prove its validity, in order to have recourse against his grantor; and by the weight of authority a judgment against him is not even prima facie evidence against a grantor, who had no notice of the action, although there are some decisions to the contrary; and Mr. Freeman says that the question has not been carefully considered. 1 Freeman, Judgm. § 187; 8 Am. & Eng. Enc. Law, 98; 2 Devlin, Deeds, 3d ed. §§ 918, 919, 925, 926; 2 Black, Judgm. §§ 567, 571.

Here the claims were paid without notice to the warrantor. They were not paid, however, by the person to whom the warranty was made, but by the corporation, over whose action he had no control. As between the Roystons (or Richolson, who claims through them) and Ferguson, the fact that the corporation paid the claims would have been competent evidence of their validity, if the officers had had personal knowledge of the matter, on the principle that makes a statement against interest admissible. Although the officers necessarily acted only upon information derived from others, their payment of the claims was some evidence that they believed them to be valid. The obvious purpose of the guaranty given to Ferguson was that he should get the stock at its actual value. The risk of claims being enforced against the company on account of matters not shown by the books was assumed by the Roystons. When such claims were presented to and paid by the company, Ferguson, through no fault of his own, was made to suffer the character of loss against which he had been insured. We think it was rather incumbent upon Richolson, claiming through the Roystons, to show that the claims paid were not just, than

40 L.R.A. (N.S.)

upon Ferguson to show that they were. The knowledge and means of information of J. T. Royston concerning the transactions were necessarily superior to those of Ferguson. The situation is unusual, and we are aware of no case the facts of which are closely similar. Perhaps the nearest in principal is *St. Louis & S. F. R. Co. v. Gaba*, 78 Kan. 432, 97 Pac. 435. There a contract for the construction of a building imposed a loss of \$10 upon the contractor for each day completion was delayed beyond a fixed date. The subcontractor agreed with the contractor to lose \$10 for each day's delay caused by his failure to supply certain materials in time. A delay in the completion of the building was caused by the negligence of a railroad company in handling material shipped by the subcontractor. The contractor submitted to a deduction of \$10 a day in his settlement with the builder, and the subcontractor to a similar deduction in his settlement with the contractor. It was held, upon these facts, that the subcontractor could recover the same amount from the railroad company, without proving that the circumstances were such that the builder could have enforced against the contractor a claim for damages at the rate of \$10 a day.

The defendant asks that judgment in his favor be directed by this court. We think, however, that the ends of justice will be better served by a new trial. The trial court, in effect, sustained a demurrer to the defendant's evidence. The parties should have a further opportunity to introduce evidence.

The judgment is reversed, and a new trial ordered.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

FRUIN-COLNON CONTRACTING COMPANY, Appt.,

v.

I. C. CHATTERSON.

(146 Ky. 504, 143 S. W. 6.)

Foreign corporation — estoppel to question right to do business.

1. The rule preventing one who contracts

Note. — Statutory provision for penalty as affecting validity or enforceability of contract made by foreign corporation without complying with conditions of doing business.

This note is supplemental to the note to *Tri-State Amusement Co. v. Forest Park*

with a corporation from denying its corporate existence does not prevent a taxpayer from denying the right of a corporation with which a municipality contracted for a street improvement, to enforce the assessment against his property, because of failure to comply with the statutory requirements necessary to permit it to do business in the state.

Same — right to enforce contract — statutory penalty.

2. A foreign corporation which contracted to pave a street without complying with the statutory requirements necessary to enable it to do business in the state cannot enforce the paving assessment, if the statute provides that it shall not be lawful

for it to do business in the state until it has complied with the statute, although the only penalty provided by the statute is a fine.

(January 30, 1912.)

APPEAL by plaintiff from a judgment of the Chancery Branch, First Division, of the Circuit Court for Jefferson County dismissing an action brought to enforce a lien upon defendant's property to satisfy the cost of a street improvement. Affirmed.

The facts are stated in the opinion.

Mr. Adrian C. Humphreys for appellant.

Highlands Amusement Co. 4 L.R.A.(N.S.) 688.

These notes do not purport to deal with the general question whether a contract made in violation of the terms of a statute in relation to foreign corporations is for that reason invalid or unenforceable, but only with the effect upon that general question of the fact that the statute provides for a pecuniary penalty in such case. They therefore do not include cases like *David Lupton's Sons Co. v. Automobile Club*, 225 U. S. 489, 56 L. ed. 1177, 32 Sup. Ct. Rep. 711, involving the effect upon that question of the fact that the only consequence expressly declared by the statute is exclusion from the courts of the state.

Generally, as to the enforceability in a Federal court or a court of another state of a contract made by a foreign corporation which has not complied with the conditions of doing business in the state, see note in 26 L.R.A.(N.S.) 999.

It will be seen that in *FRUIN-COLNON CONTRACTING CO. v. CHATTERSON* it is held that where a statute in the nature of a police regulation expressly declares that it shall be unlawful to do business until its requirements have been complied with, and imposes a penalty for its violation, a contract made in contravention of the statute will not be enforced by the courts, although the statute does not in terms bar actions in the courts.

Cases holding the contract void.

There is considerable difference of opinion as to the effect upon the contract of a statute imposing a penalty for its disobedience. In some cases it is considered that the statute prevents the making of a contract, while other cases hold that the contract itself is not invalid. It will be noted that the cases where the contract is held void are not confined to those arising under statutes which expressly declare that the unlicensed doing of business shall be illegal or unlawful.

In *Re Conecuh Pine Lumber & Mfg. Co.* 180 Fed. 249, where the Alabama Constitution forbade any foreign corporation to do "any business in this state, without having at least one known place of business, and 40 L.R.A.(N.S.)

an authorized agent or agents therein," and statutes passed to give effect to the constitutional provision made the doing of any business in this state, without compliance with the Constitution and statutes, illegal, and forbid it under a penalty." The court said: "The doing of business by a foreign corporation, without compliance with the laws of the state in that regard, was not only contrary to its policy, but was made illegal, and forbidden under a penalty. The courts will not enforce such a contract, directly or indirectly, but leave the parties in the situation in which they have placed themselves, and refuse to aid either."

And in *Thomas v. Birmingham R. Light & P. Co.* 195 Fed. 340, it was held that as the Alabama court of last resort had decided that the statute made contracts of foreign corporations not complying with its regulations, void, the Federal court would follow the construction of the Alabama court. (As to the duty of the Federal court to follow the state court decisions as to such question, see note to *Snare & Triest Co. v. Friedman*, ante, p. 380).

Where the Constitution and statute provided that no foreign corporation should do any business in the state without having one or more known places of business and an agent upon whom process might be served, and the statute also provided that it should not be lawful for such corporation to do any business in the state until it should file a certain statement, and that any person who as employee or officer or agent of the corporation should transact any business for it within the state, without the provisions of the act being complied with, should be guilty of a misdemeanor, the United States court in *Pittsburgh Constr. Co. v. West Side Belt R. Co.* 11 L.R.A.(N.S.) 1145, 83 C. C. A. 501, 154 Fed. 929, followed the construction of the Pennsylvania court, holding that contracts of a foreign corporation made before it was registered in Pennsylvania were void (although the decision of the state court upon the statute was subsequent to the making of the contract in question in the case in the Federal court).

In *United Lead Co. v. J. W. Reedy Elevator Mfg. Co.* 222 Ill. 199, 78 N. E. 567, 6 Ann. Cas. 637, where the statute provided

Messrs. Chatterson & Blitz, for appellees:

A state may impose upon foreign corporations entering the state such terms as it deems fit.

Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

The object of § 571, Ky. Stat., was to provide some known designated person upon whom process could be served, so as to bring the corporation personally before the courts of this state.

Paducah Cooperaage Co. v. Com. 122 Ky. 755, 93 S. W. 92.

An unlawful act cannot be made lawful after its commission, by any subsequent act of the violator, and such unlawful act is of itself void.

Tri-State Amusement Co. v. Forest Park Highlands Amusement Co. 192 Mo. 404, 4 L.R.A.(N.S.) 688, 111 Am. St. Rep. 511, 90 S. W. 1020, 4 Ann. Cas. 808.

When the act is declared unlawful and therefore prohibited, any contract made in pursuance of said unlawful act is prohibited and void.

Ibid.; Cincinnati Mut. Health Assur. Co.

that no foreign corporation organized for pecuniary profit should be authorized or permitted to transact business in the state until it designated an agent to receive process, and also provided a punishment or penalty for a failure to comply with the act; and further provided that no such corporation so failing could maintain any suit or action, legal or equitable, in any court of the state, whether arising out of contract or tort,—it was held that a contract entered into by such corporation while not permitted to transact business in the state was null and void. Compare Meader Furniture Co. v. Commercial Nat. S. D. Co. *infra*.

In Hunter W. Finch & Co. v. Zenith Furnace Co. 245 Ill. 586, 92 N. E. 521, the court said: "The rule in this state is that if a contract is unlawful under the statute, it is void notwithstanding the statute imposes a penalty upon a foreign corporation doing business in violation of its provisions.

... The same principle seems to be maintained by the supreme court of Minnesota." But the court admitted the evidence of a contract made in Minnesota by the plaintiff, an Illinois corporation not complying with the Minnesota statute (the contract being for the purchase of coal by it to be delivered by the seller to a Minnesota partnership), considering that it was not the purpose of the Minnesota statute to prohibit the making of a single isolated contract such as the one in question.

Where the statute prohibited the transaction of business until the statute had been complied with,—made such foreign corporations subject to all the liabilities, restrictions, and duties which were or might be imposed upon corporations of the like character organized under the laws of the state; provided that they should have no other or greater powers, that there should be a penalty or fine for failure to comply with the act, and that no such noncomplying corporation should be entitled to maintain any suit or action in any court of the state upon any demand, whether legal or equitable,—it was held that the business carried on by a foreign corporation that had not complied with the statute was unlawful and contrary to the state policy, and every contract it entered into

in furtherance of such disobedience was void. Parke, D. & Co. v. Mullett, — Mo. —, 149 S. W. 461. The court follows the decision in Tri-State Amusement Co. v. Forest Park Highlands Amusement Co. 192 Mo. 404, 4 L.R.A.(N.S.) 688, 111 Am. St. Rep. 511, 90 S. W. 1020, 4 Ann. Cas. 808, without discussing the point in detail.

The same view was expressed in First Nat. Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636, where, however, it was held that the contract in question was not within the expression "doing business," and that therefore it was not against the public policy of the state.

Under a statute providing that no extra-provincial company of a specified class should carry on any business in the province unless it should have been duly licensed or registered, and that no agent of it should carry on such business until the company should have obtained a license or certificate, and that any company which failed or neglected to obtain such license or certificate should incur a penalty of \$50 for every day during which it carried on such business, it was held that the statute was a clear prohibition, and that the contracts of such company within the province were void. Northwestern Constr. Co. v. Young, 13 B. C. 297, overruling DeLaval Separator Co. v. Walworth, 13 B. C. 74.

In Ireland v. Andrews, 6 Terr. L. Rep. 66, where the statute provided that no foreign company having gain for its object, or a part of its object, should carry on any part of its business in the territories unless it was duly registered, and imposed a penalty for a breach of this provision; and further provided that any such company should not, while unregistered, be capable of maintaining an action or other proceeding in any court, in respect of any contract made in whole or in part in the territories, in the course of or in connection with business carried on without registration, contrary to the provisions of the statute, it was held that a note given to such an unregistered corporation to pay for a sale made by it, and indorsed to the plaintiff, was taken for an illegal consideration, and as the indorsee had notice of the illegality he was not a holder in due course and could not recover.

v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 629; Thorne v. Travellers' Ins. Co. 80 Pa. 15, 21 Am. Rep. 89; McCanna & F. Co. v. Citizens' Trust & Surety Co. 35 L.R.A. 236, 24 C. C. A. 11, 39 U. S. App. 332, 76 Fed. 420; Aetna Ins. Co. v. Harvey, 11 Wis. 394; Webb v. Alexander, 7 Wend. 281; Alleghany Co. v. Allen, 69 N. J. L. 270, 55 Atl. 724; Blevins v. Fairley, 71 Mo. App. 259; Ehrhardt v. Robertson Bros. 78 Mo. App. 404; Ashland Lumber Co. v. Detroit Salt Co. 114 Wis. 66, 89 N. W. 904; Allen v. Milwaukee, 128 Wis. 678, 5 L.R.A.(N.S.) 680, 116 Am. St. Rep. 54, 106 N. W. 1099, 8

Ann. Cas. 392; Meyers v. Spangenberg & McL. Co. 65 Misc. 475, 120 N. Y. Supp. 174; La Moine Lumber & Trading Co. v. Kesterson, 171 Fed. 980; Buck Stove & Range Co. v. Vickers, 80 Kan. 29, 101 Pac. 668; Cyclone Min. Co. v. Baker Light & P. Co. 165 Fed. 996; Manufacturers' Commercial Co. v. Blitz, 131 App. Div. 17, 115 N. Y. Supp. 402; International Text Book Co. v. Lynch, 81 Vt. 101, 69 Atl. 541; International Text-book Co. v. Peterson, 133 Wis. 302, 113 N. W. 730, 14 Ann. Cas. 965.

If any act is forbidden under a penalty, a contract to do it is held void.

Cases sustaining the contract.

In *Dunlop v. Mercer*, 86 C. C. A. 435, 156 Fed. 545, where a foreign corporation did business in the state of Minnesota without complying with the statute which provided that a neglect to do so should subject it to a fine, and which further provided that such corporation should not maintain any suit or action in any court of the state, it was held that this provision of the statute did not make the contract void, nor prevent the corporation from suing in the courts of the United States. The court considered that the purpose of the statute was not to make contracts void, but to subject the corporation to process or perhaps to a license tax.

In *Meador Furniture Co. v. Commercial Nat. S. D. Co.* 192 Fed. 616, where the state statute provided that there should be a penalty of a fine for a foreign corporation that failed to comply with the provisions of the statute as to doing business within the state, and prohibited suits by it in the state courts, it was held that this did not make the contract void, and that the corporation might sue in the Federal court. The court points out that although, before the statute had been amended by increasing the amount of the fine, it had been held by the supreme court of the state in *United Lead Co. v. J. W. Reedy Elevator Mfg. Co.* supra, that the statute made the contract null and void, that the Federal court was not bound to follow this, as the decision was not made till after the contract in the present case. The reader will note the direct conflict here in opinion upon what is practically the same statute.

Where the statute provided that no foreign corporation specified should be permitted to maintain any action in the courts of the state until compliance with the statute, and that any person or officer presuming to act as agent or employee of such corporation before the statute had been complied with should forfeit \$100 a day, it was held that the legislature did not intend that a violation of the statute should operate or destroy or avoid contracts made by such corporations before they complied with the law, but simply imposed a penalty by way of fine upon its

agents or officers who contracted business before they complied therewith. (The court pointed out that the subsequent statute of 1908, making the agents of such corporations guilty of a misdemeanor and liable to a fine further provided that the failure to comply with the statute should not affect the validity of any contract made with such corporation, but that it should not maintain any suit in the courts of this state on any such contract.) *Kendrick & Roberts v. Warren Bros.* 110 Md. 47, 72 Atl. 461.

Where the statute provided as a punishment for failure to file the statutory papers, a liability to indictment and, upon conviction, to a fine not exceeding \$500, and prohibition from further carrying on business in the state until the fine was paid and the statute complied with, it was held that the statute did not nullify the contracts of a foreign corporation. *Galletley v. Strickland*, 74 S. C. 394, 54 S. E. 576.

So, where the statute provided a penalty for any officer or agent or other person acting for a foreign corporation who had transacted business without complying with the statute, it was held that the contracts of such corporation were not void. *Horrell v. California, O. & W. Homebuilders' Asso.* 40 Wash. 531, 82 Pac. 889.

In *the American Hotel Supply Co. v. Fairbanks*, 41 N. S. 444, where the statute provided that foreign companies, before doing business in the province, should transmit to the provincial secretary a certain statement, and that any company which failed to comply with these provisions was liable to a penalty of \$10 per day during such default, and a penalty of \$10 per day for every day that an agent transacted business for it, with a provision that the governor in council might, after the statement had been received from a company, remit, in whole or in part, the penalty incurred by reason of default in transmitting the statement, the court, while considering that the power of the governor general to remit only applied to annual statements, and not to the original statement, still on the whole case was of the opinion and held that the contract of a foreign corporation which had never filed any statement was not invalid.

B. B. B.

Drury v. Defontaine, 1 Taunt. 136; *Smith v. Robinson*, 106 Ky. 477, 45 L.R.A. 510, 50 S. W. 852.

The person dealing with the corporation which has not complied with the statute is estopped to invoke the aid of the statute.

Johnson v. Mason Lodge, No. 33, I. O. O. F. 106 Ky. 839, 51 S. W. 620; *Hallam v. Ashford*, 24 Ky. L. Rep. 870, 70 S. W. 197.

Carroll, J., delivered the opinion of the court:

The appellant, a Missouri corporation, was awarded in April, 1909, by the board of public works in the city of Louisville, a contract for the construction of street improvements, a portion of which abutted on the property of appellee. Having completed the contract in August, 1909, it brought this action in 1910 against the appellee upon an apportionment warrant to enforce its lien upon her property to satisfy the cost of the improvement. For defense to the action, the appellee relied on § 571 of the Kentucky Statutes (§ 2158, *Russell's Stat.*) providing that "all corporations except foreign insurance companies formed under the laws of this or any other state, and carrying on any business in this state, shall at all times have one or more known places of business in this state, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this state, until it shall have filed in the office of the secretary of state a statement, signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices or in its agent or agents, it shall at once file with the secretary of state a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employee of such corporation who shall transact, carry on, or conduct any business in this state, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense."

She set up that the appellant had failed to comply with this statute and hence could not recover against her on the contract made with the board of public works for the street improvement. In a reply, appellant admitted that when the contract was awarded and the work completed it

had not complied with the statute, but averred that it did so afterwards, and in November, 1909. Chancellor Miller, now a judge of this court, ruled that, under the facts admitted by the pleadings, the plaintiff could not recover, and entered a judgment dismissing the petition. On this appeal, the only question presented is, Did the failure of the appellant to comply with the statute before making the contract and completing the work under it deny it the right to recover the cost of the improvement?

A number of reasons are assigned by counsel for appellant why the judgment should be reversed, one of them being the contention that a person dealing with a corporation and contracting with it as such is estopped to deny its existence or its power to contract. And, it is said that this street improvement contract, although not made directly with appellee, was made by her agent, the city of Louisville, and therefore, after the work had been completed and appellee has received the benefit thereof, she could not set up as a defense the want of power on the part of the corporation to make the contract.

It has been adjudicated in a number of cases decided by this court, and is a well-settled doctrine, that a person who contracts with a corporation is estopped to deny its corporate existence, or its charter power to contract, in an action brought by it to enforce the contract. This principle was first announced by this court in *Bank of Gallipolis v. Trimble*, 6 B. Mon. 601, and was followed in *Jones v. Bank of Tennessee*, 8 B. Mon. 122, 46 Am. Dec. 540; *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. 359; *Lail v. Mt. Sterling Coal R. Co.* 13 Bush, 32, and in many other cases, and was subsequently incorporated in the law in § 566 of the Kentucky Statutes (§ 2152, *Russell's Stat.*) reading: "No corporation organized under this chapter shall be permitted to set up or rely upon the want of legal organization as a defense to any action against it; nor shall any person transacting business with such corporation, or sued for injury done to its property, be permitted to rely upon such want of legal organization as a defense."

But in none of the cases above mentioned was the corporation involved acting in violation of an express statute in making the contract, or charged with having made a contract that it was forbidden by law to enter into. The plea of estoppel was made and sustained upon the theory that a person who deals or contracts with a corporation in its corporate name and capacity cannot afterwards rely upon some defect in its organization to defeat a contract vol-

untarily entered into with it. It is therefore very clear that neither this line of cases nor the statute has any application to the question here made. In this case the plea does not raise the question that appellant corporation was not properly organized, or assail the legality of its existence, or question its charter power to make a contract of the character involved, but it is put distinctly upon the ground that the statute declares that "it shall not be lawful for any corporation to carry on any business in this state until it shall have filed in the office of the secretary of state a statement signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served," so that we have no difficulty in putting these cases aside as wholly irrelevant to the question presented by this record. There are, however, other cases more directly in point in which the doctrine of estoppel has been extended to embrace contracts that were made when one of the parties to the contract was forbidden by statute to contract until after it had complied with certain statutory requirements. Of this class of cases we might select *Johnson v. Mason Lodge*, No. 33, I. O. O. F. 106 Ky. 838, 51 S. W. 620, which was followed in *Aultman & T. Co. v. Mead*, 109 Ky. 583, 60 S. W. 294, as a fair example. In that case it appears from the opinion that *Mason Lodge* was an incorporated institution organized under the laws of this state, and that *Johnson* executed to it his note for borrowed money, upon which note the corporation brought suit. As a defense to the action, *Johnson* set up that at the time of the execution of the note and the commencement of the action the corporation had not filed with the secretary of state a statement showing the location of its office, and the name of its agent or agents upon whom process could be served, as required by § 571 of the Kentucky Statutes, *supra*, and for this reason the obligation sued on was unenforceable. In holding this defense untenable the court, without considering the effect of § 571 on the contract, put its decision upon § 566 of the Kentucky Statutes, *supra*, and the cases heretofore cited, holding that, persons transacting business with corporations will not be permitted to rely upon the want of legal organization as a defense. The opinion further distinguished the case of *Vanmeter v. Spurrier*, 94 Ky. 22, 21 S. W. 337, and *Vannoy v. Patton*, 5 B. Mon. 248,—that will be hereafter noticed,—upon the ground that "in the case of *Vanmeter v. Spurrier*, the statute under consideration was one to protect the public against worthless fertilizers, and 40 L.R.A. (N.S.)

the case of *Vannoy v. Patton*, from the sale of liquor without license. . . . The vice was in the contract itself, and they are therefore distinguished in this respect from this case, which only involves the idea of disability to sue; and it appears to us that the defenses relied on in this case are inconsistent, and neither of them is tenable."

It is worthy of notice that in this opinion the case of *Smith v. Robertson*, 106 Ky. 472, 45 L.R.A. 510, 50 S. W. 852, was not mentioned, although it would seem that the conclusion announced in the *Johnson Case* conflicts with the conclusion reached in the *Smith Case*. In *Smith v. Robertson*, *Smith* was the owner of a stallion that was bred to a mare owned by *Robertson* under an agreement by which *Robertson* agreed to pay for the service fee \$150. The action was brought by *Smith* to recover this fee. As a defense to the action, *Robertson* pleaded and relied upon § 4201 of the Kentucky Statutes (§ 6142, *Russell's Stat.*), providing that "any person who shall engage in any business, or sell or offer to sell, any article on which a license is required, before procuring the license and paying the tax thereon, as required by law, shall be deemed guilty of a misdemeanor and, on conviction, be fined not less than fifty nor more than one thousand dollars for each offense, unless otherwise specially provided,"—and averred that *Smith* had not, before the service charged for was rendered, paid the annual license fee required by law for standing his stallion. And the court held that, as *Smith* was guilty of a violation of law in standing his stallion before procuring a license and paying the license fee, he could not recover on the contract with *Robertson* for the service of the stallion.

It is not, however, necessary in disposing of the case we have, to attempt to reconcile the apparent conflict in these two opinions; nor is it required that we should either approve or distinguish the ruling in *Johnson v. Mason Lodge*, No. 33, I. O. O. F., as, in that case, the doctrine of estoppel was applied to *Johnson*, who had directly entered into the contract with the *Mason Lodge* that he was seeking to avoid. If the contract relative to the street improvement had been made between appellant and appellee, then we would have a case in all respects similar to *Johnson v. Mason Lodge* No. 33, I. O. O. F. But the contract sought to be enforced by appellant company was not made with appellee, or with any agent authorized to speak for her. She was not a party, so far as the record shows, to the contrary, or advised with about it. The city, without asking her consent or consulting her at all, made the contract, and

we know of no principle in the law of estoppel that would preclude her from questioning a contract made under circumstances like this.

As the appellee, under our view of the law, is not estopped from pleading the want of authority on the part of the appellant company to enter into the contract, because forbidden to do so by the laws of this state, the question recurs, Should this statute be enforced against it to defeat the collection of the cost of the improvement? Upon this point the argument is pressed by counsel for appellant that this statute was not intended to affect contracts made by a corporation that had not complied with the statute, or to defeat its right to enforce contracts entered into by it, although in technical violation of the statute. It is said that the only penalty that should be imposed for a violation of this statute is the one fixed in the statute itself, and that the exaction of this penalty satisfies any violation of the statute committed by the corporation. There are cases holding that where a penalty only is imposed for the failure to comply with a statute, that persons who contract with the corporation and receive benefits from it under the contract will not be permitted to rely upon its non-compliance to defeat the contract while yet holding to the benefits. Especially is this held to be true in cases in which the statute was intended solely for revenue purposes, and where the contract entered into was in itself lawful. Thus in *Lindsey v. Rutherford*, 17 B. Mon. 246, Lindsey purchased a bill of exchange upon which Rutherford was liable; and, the bill not being paid at maturity, Lindsey brought suit against Rutherford and the other obligors. They defended upon the ground that as Lindsey had never obtained a license to engage in the business of purchasing bills and notes, he could not enforce the contract. But the court put aside this defense as insufficient, saying, that as the statute was intended solely for revenue purposes, and did not prohibit the making of the contract attempted to be enforced, that the only penalty that could be imposed was the one inflicted by the statute for conducting the business without a license.

On the other hand, in *Franklin Ins. Co. v. Louisville & A. Packet Co.* 9 Bush, 590, foreign insurance companies instituted an action against the packet company to recover from it claims amounting to several thousand dollars. One of the defenses relied on by the packet company was that, as the companies had failed to comply with the conditions prescribed by the laws of this state, they could not recover. In sustaining this defense, the court said: "It

seems to use that that act by its terms, details, and manifest objects clearly imports a legislative purpose and intention not only to prevent certain violations of the act by the imposition of penalties, but to render it absolutely unlawful for foreign insurance corporations, by their agents, as in this case, to make contracts of insurance within the state, without complying with and in disregard of the provisions of the act. . . . Construing the statute as we do, as not intended merely as a means of raising revenue from the business of insurance, but to affect the validity of contracts of insurance made in violation of it,—or, in other words, to prohibit the business itself so far as carried on in violation of the law,—the contracts of insurance sought to be enforced in this case were illegal, and the court below properly refused to enforce them."

In *Vanmeter v. Spurrier*, 94 Ky. 22, 21 S. W. 337, the statute provided that any person who should manufacture or sell any commercial fertilizer without a compliance with the statute regulating the sale of this article should be subject to a penalty. The fertilizer company, without complying with the provisions of the statute, sold to Vanmeter fertilizer, and, upon his failure to pay, brought suit to recover the amount due. Vanmeter defended upon the ground that the contract was not enforceable on account of the noncompliance by the fertilizer company with the statute, and the court held this defense good on the ground that although the statute did not prohibit the making of contracts by companies that had not complied with the statute or declared that such contracts should not be enforced, it was yet a statute to protect the public against the sale of fraudulent goods, and contracts made without compliance with it should be declared void; distinguishing the case of *Lindsey v. Rutherford*, supra, upon the ground that in the *Rutherford* Case the statute was purely for revenue purposes, and was not intended to inhibit the making of contracts, and no question of public policy was involved in its violation.

In *Vannoy v. Patton*, 5 B. Mon. 248, it was held that the vender of spirituous liquors sold without paying a license could not recover the price of the article. And here, again, the court put the decision upon the ground that the sale of liquor was a business coming strictly within the police power of the state, and the courts would not lend their aid to enforce a contract in itself unlawful.

In *Bull v. Harragan*, 17 B. Mon. 349, vendors of lightning rods who sold without compliance with the statute regulating the sale of such articles were denied the right

to recover on a contract, upon the ground that the statute expressly provided that contracts made before compliance with it should be void. To the same effect is *Mabry v. Bullock*, 7 Dana, 337.

It may well be conceded that it would be difficult to reconcile the reasoning of the various opinions we have alluded to, and it is not necessary that we should attempt this task, as the case before us may easily be differentiated from those we have cited holding contracts enforceable. The statute relied on in the case before us is not a revenue statute in any sense of the word. It is a police regulation enacted for the benefit and protection of the citizens of the state and to enable persons desiring to bring actions against corporations to know upon whom service of process may be had. It not only imposes a penalty for its violation, but it expressly provides that "it shall not be lawful for any corporation to carry on any business in this state until it shall have filed in the office of the secretary of state a statement," etc. With the exception of the *Johnson Case*, supra, this case arises under a statute differently worded from the statutes construed in the other cases cited; and, as the decision in the *Johnson Case* was rested distinctly upon the ground that *Johnson* was estopped to make the defense that the contract was invalid, we feel authorized to say that the precise question before us has not heretofore been decided by this court.

With the question of estoppel out of the way, the exact matter for decision is, Will a foreign corporation be assisted by the courts of this state to enforce a contract that was entered into and completed at a time when it was unlawful for the corporation to carry on in this state the business it was engaged in, and out of which the contract arose? The statute does not provide that contracts entered into before it has been complied with shall be void or nonenforceable, nor does it use any language in reference to the contract; but, when a statute makes it unlawful to do business under certain conditions, it seems to necessarily and logically follow that the doing of the business under the prohibited conditions is in itself unlawful. When the doing of the act is made unlawful, there is no reason why the statute should also declare that contracts made in violation of it should also be unlawful. When the law prohibits a thing, it is unlawful to do it, and the courts should not lend their aid to the enforcement of prohibited contracts. Courts are established to afford remedies to litigants who seek relief growing out of lawful transactions, and not to aid those who 40 L.R.A. (N.S.)

would invoke their assistance to enforce contracts made in violation of law. Their chief purpose is to secure the observance of laws enacted for the safety and protection of life and property and the general well-being of the people, and it would be a startling departure from this purpose if they should also give relief to parties who were seeking to enforce contracts made in violation of law. Such a course of procedure would be a perversion of justice, and convert the courts into instruments to aid lawbreakers, in place of punishing them. It is also argued that it would be a hardship on this corporation to lose the value of its work, but this furnishes no reason why it should obtain relief, as there is scarcely a penal statute the enforcement of which does not impose severe burdens; and, if the severity of the punishment should be treated as a reason for disregarding the statute, many beneficial laws would go unenforced.

Our attention has been called by counsel for appellant to authorities from other states, holding that the courts will not deny relief in cases of this character, but will leave the offending corporations to be punished under the penalty feature of the statute. That there is much diversity of opinion on the subject under consideration to be found in the decisions of the courts of other states cannot be doubted by any person who has examined the cases, but we think the weight of authority supports the principle that when a statute expressly declares that it shall be unlawful to do business until its requirements have been complied with, a contract made in contravention of the statute will not be enforced by the courts. *Buckley v. Humason*, 50 Minn. 195, 16 L.R.A. 423, 36 Am. St. Rep. 637, 52 N. W. 385; *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Henni v. Fidelity Bldg. & L. Co.* 61 Neb. 744, 87 Am. St. Rep. 519, 86 N. W. 475; *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.* 192 Mo. 404, 4 L.R.A. (N.S.) 688, 11 Am. St. Rep. 511, 90 S. W. 1020, 4 Ann. Cas. 808; *Randall v. Tuell*, 89 Me. 443, 38 L.R.A. 143, 36 Atl. 910; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; 2 Chitty, Contr. p. 1005; 1 Page, Contr. § 332. Where a statute is purely for revenue purposes, and contains no prohibition against the making of contracts, and does not declare that contracts made without obtaining the license shall be unlawful, the rule generally prevailing is that a contract made without obtaining the license is not void. *Fairly v. Wappoo Mills*, 44 S. C. 227, 29 L.R.A. 215, 22 S. E. 108; *Vermont Loan &*

T. Co. v. Hoffman, 5 Idaho, 376, 37 L.R.A. 509, 95 Am. St. Rep. 186, 49 Pac. 314. But, as this statute was not enacted for revenue purposes, our conclusion is that the prohibition against the corporation doing business in this state also prohibits the enforcement of contracts made by it.

Wherefore the judgment of the lower court is affirmed.

Miller, J., not sitting.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, Resp't.,

v.

OLE HANSON, Appt.

(— Minn. —, 136 N. W. 412.)

Evidence — sufficiency — coloring oleomargarin.

1. Defendant was convicted of selling oleomargarin made in imitation of butter of a shade or tint of yellow, under chapter 183, Laws of 1911. It is held:

Evidence was sufficient to justify the jury in finding that the oleomargarin sold was by intentional selection of ingredients, though without artificial coloring, purposely made of a shade or tint of yellow.

Oleomargarin — statutory prohibition — construction.

2. Chapter 183, Laws 1911, construed, and held to prohibit the manufacture or sale of oleomargarin purposely made of a shade or tint of yellow, though no artificial coloring matter is used, and that the words "butter of a shade or tint of yellow" mean not only "yellow butter," but all butter which has any shade or tint of yellow.

Same — constitutionality.

3. As so construed, § 1 of the act is unconstitutional, in so far as it prohibits the manufacture or sale of oleomargarin of a shade or tint of yellow; such shade or tint being produced by natural and essential ingredients which are not deleterious or injurious to health.

(Holt and Philip E. Brown, JJ., dissent.)

(May 31, 1912.)

Headnotes by BUNN, J.

Note. — For applicability of oleomargarin statutes where resemblance to butter results from choice of ingredients, and not from the introduction of coloring matter, see note to *State v. Meyer*, 14 L.R.A. (N.S.) 1062.

As to ignorance that article furnished as butter is oleomargarin as a defense, see note to *State v. Welch*, 32 L.R.A. (N.S.) 746.

40 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the District Court for Blue Earth County convicting him of illegally selling oleomargarin, and from an order denying his motion for a new trial. Reversed.

The facts are stated in the opinion.

Mr. Henry Veeder, with Messrs. Frank B. Kellogg, C. A. Severance, and Robert E. Olds, for appellant:

As a matter of construction, the coloration and ingredients referred to are artificial and extraneous ones; and so long as the product is made from "wholesome, necessary, and recognized ingredients," it may be sold, even though it resembles butter, and even though the manufacturer might, by selecting his ingredients, make the product a lighter color.

State v. Hammond Packing Co. 105 Minn. 359, 117 N. W. 606; *Bennett v. Carr*, 134 Mich. 243, 96 N. W. 26; *State, Ammon, Prosecutor, v. Newton*, 50 N. J. L. 543, 14 Atl. 610; *McCann v. Com.* 198 Pa. 509, 48 Atl. 470.

Oleomargarin is a wholesome food product, and its manufacture and sale cannot be prohibited.

People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *People v. Meyer*, 89 App. Div. 185, 85 N. Y. Supp. 834; *People ex rel. McAuley v. Wahle*, 124 App. Div. 762, 109 N. Y. Supp. 629; *People v. Biesecker*, 169 N. Y. 53, 57 L.R.A. 178, 88 Am. St. Rep. 534, 61 N. E. 990; *People v. Guiton*, 73 Misc. 408, 133 N. Y. Supp. 353.

A statute prohibiting the manufacture or sale of a wholesome article of food cannot be upheld.

State v. Hanson, 84 Minn. 42, 54 L.R.A. 468, 86 N. W. 768; *State v. Tetu*, 98 Minn. 351, 107 N. W. 953, 108 N. W. 470; *State v. Crescent Creamery Co.* 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768.

Messrs. Lyndon A. Smith, Attorney General, Alexander L. Janes, Assistant Attorney General, and John W. Schmitt, for the State:

The state proved an intentional imitation of butter of a shade or tint of yellow, and this warranted conviction.

Meyer v. State, 134 Wis. 156, 14 L.R.A. (N.S.) 1061, 114 N. W. 501.

Bunn, J., delivered the opinion of the court:

Defendant was convicted of selling oleomargarin made in imitation of butter of a shade or tint of yellow, in violation of the provisions of chapter 183, Laws of 1911.

He appealed from an order denying his motion for a new trial.

The questions here are (1) as to the sufficiency of the evidence to sustain a decision that there was an intent to make oleomargarin of a shade or tint of yellow, (2) as to the proper construction of the law, and (3) as to its constitutionality when so construed. The material provisions of the law in question are as follows:

The title is: "An Act to Regulate the Manufacture and Sale of Oleomargarin and to Prescribe Penalties and Punishments for the Violation of the Provisions of this Act."

Section 1 provides, in substance, that no person, firm, or corporation shall manufacture or sell oleomargarin which shall be in imitation of butter of any shade or tint of yellow, unless such oleomargarin shall be made and kept free from all coloration or ingredients causing it to look like butter of any shade or tint of yellow, nor unless the same shall be kept and presented in a separate and distinct form, and in such manner as will advise the purchaser and consumer of its real character.

Section 2 makes it unlawful to sell or offer for sale oleomargarin which is not conspicuously labeled as such on each tub, package, or parcel thereof, and requires the wrapping in which it is sold to purchasers to be plainly stamped with the word "oleomargarin." Descriptive matter on the label is required to be free from misleading information, or any matter that would indicate that the product was butter. At the end of this section is this proviso: "Provided that nothing in this section shall be construed to prohibit the manufacture or sale of oleomargarin in a separate and distinct form, and in such manner as will advise the purchaser and consumer of its real character, when free from coloration or ingredients that cause it to look like or resemble butter of any shade or tint of yellow."

Section 3 makes it unlawful for the proprietor of any hotel, dining room, café, bakery, boat, lumber, mining, or railroad camp, boarding house, or hospital, where guests, boarders, or patients are served with food, to serve oleomargarin as or for butter, or as a substitute for butter, unless the bill of fare, if there be one, or a placard conspicuously posted, if there be no bill of fare, shall announce "Oleomargarin used in place of butter."

There is no claim by the state that the oleomargarin sold by defendant was artificially colored by the addition of any dye or coloring matter. The sole charge is that the essential ingredients were so selected and mixed as to produce an article that resembled or imitated butter of a shade or

tint of yellow. It is not denied that the article sold possessed this shade or tint of yellow, and in that respect, as well as others, resembled butter. That the maker intended to produce this result, and deliberately endeavored to make an article that would look like butter of a yellow shade or tint, is, we think, established by the evidence. But it is freely admitted that this color is the result of judicious selection and combination of fats, oils, and other necessary ingredients; that no coloring matter is used; and that the result is a thoroughly healthful product that resembles yellow butter in appearance and texture, tastes like butter, and sells at a lower price. That it was possible for the manufacturer, the real defendant here, to make oleomargarin that was equally wholesome and palatable, but of a shade or tint of yellow that was much lighter than the article on the sale of which the conviction was based, is clear, because oleomargarin of such lighter shade or tint was also manufactured and sold. But it is fully established and conceded that it is impossible to make oleomargarin that is pure white, or that does not have a slight yellow shade or tint. And such light tinted article does imitate or resemble light tinted butter in the same sense and to the same extent that the deeper tinted article imitates or resembles butter of a deeper yellow. In short, the manufacturer can produce oleomargarin of several shades or tints of yellow, all of which imitate butter of like shades or tints. The article that defendant was convicted of selling was intentionally made of a deeper yellow. The motive is plain; the consumer will not buy the lighter colored article. The sales of this are but 10 per cent of the sales of the yellow article, while the price is the same. There can be, however, no intent to deceive the purchaser or consumer, as the provisions of the law concerning labels on packages and wrappers are fully complied with. It is utterly impossible for the purchaser to be deceived.

1. The first of the questions involved on this appeal we answer in the affirmative. That is, as we have above pointed out, the evidence was sufficient to justify the jury in finding that the oleomargarin in question was purposely made of a shade or tint of yellow.

2. We are asked to construe the law as only prohibiting the use of artificial coloring matter, and not the coloration that comes from the ingredients themselves, selected with reference to producing a yellow color. It is insisted by defendant that this was the construction given to the 1905 law (Rev. Laws 1905, §§ 1753-1756) in *State v. Hammond Packing Co.* 105 Minn. 359, 117

N. W. 606, and that the present law is not to be distinguished from the 1905 law. While it seems clear that on the question of an intention to produce oleomargarin of a yellow color by selection of the natural ingredients, the evidence in the Hammond Case was sufficient for the same reasons that the evidence in this case is sufficient to show such intention, yet the opinion itself does not state that intentional coloration by artificial means was essential to a conviction. The decision apparently holds merely that there was no evidence of an intent to imitate yellow butter; but the stipulated facts in the case, the reasoning of the opinion, and the authorities relied on, give ground for defendant's confident claim that it was held that the 1905 law prohibited only coloration by artificial means. But whether this be correct or not, we think the present law cannot be so construed. Language in the 1905 law which gave color to the construction contended for was changed in the present law, probably to prevent this construction. The words "made or colored to imitate yellow butter" were changed to "shall be in imitation of butter of a shade or tint of yellow." Where the 1905 law permits the sale of oleomargarin, "if not in semblance of yellow butter, and if free from prohibited ingredients," the present law forbids its sale "with or without coloring matter, unless made and kept free from all coloration or ingredients causing it to look like butter of any shade or tint of yellow." We would be willing to adopt any construction to which the language used is fairly susceptible, in order to uphold the law; but we feel that the intent of the legislature is clearly manifest that oleomargarin shall be kept out of the field of yellow of the various shades and tints now occupied by butter, and this whether the yellow shade is produced by extraneous coloring matter or by intentional selection of the natural ingredients.

We cannot, however, agree with the state's contention that "butter of any shade or tint of yellow" means simply "of the color of yellow butter." The words "any shade or tint of yellow" are used three times in the law; and it was so clearly the intention to make a distinction between "yellow butter" and butter of a "shade or tint of yellow," that we are unable to say that the words are to be given no meaning. The state advances the ingenious argument that the law was intended to prohibit only oleomargarin that was in imitation of butter of those shades of yellow usually found in yellow butter, and not to forbid its manufacture so as to resemble butter of the shades of yellow more closely approaching

the white. This is a difficult position to sustain. Butter varies in color from the golden color of June butter to the light-colored butter of winter, and to the nearly white butter often sold. There is nearly, if not quite, as much difference in the shades or tints of yellow found in butter as there is in the shades and tints of the various samples of oleomargarin received as exhibits in this case. In other words, the light-colored oleomargarin made by Swift & Company, the manufacturers, resembles butter of a light shade or tint of yellow, while the darker product resembles butter of a dark shade or tint of yellow. We are not unmindful that the intention of the legislature to prohibit, under the guise of regulation, should not be presumed, or of the fact that lawmakers must have known that it was impossible to make a pure white oleomargarin. They undoubtedly knew this, and also that butter is of all shades of yellow. But to say that they intended to prohibit the sale of oleomargarin which should resemble or imitate June butter, or butter of a deep yellow color, or of any particular shade of yellow, is to disregard entirely the words "of any shade or tint." We construe the law, therefore, as making criminal the sale or manufacture of oleomargarin purposely made of any shade or tint of yellow, whether the tint or shade be dark yellow, golden, or light yellow. Even as so construed, § 1 of the law might be sustained as a valid exercise of the police power, if it made proof of an intent to deceive or defraud the purchaser or consumer, essential to a conviction. And it would be immaterial that no artificial coloring was used, or that the product was entirely wholesome, was exactly like butter in taste, or was in fact butter. The purchaser is entitled to know what he is buying; and any law enacted to prevent fraud or deceit, and having any fair tendency in that direction, would be valid.

But this law does not make the intent to deceive or defraud essential to a conviction of a violation of § 1. Intentionally making oleomargarin of a shade or tint of yellow is made criminal, without proof of an intent to deceive. This being so, the law cannot be sustained, unless there is a reasonable probability that the purchaser or consumer will be deceived by the yellow shade or tint into buying or eating oleomargarin, mistaking it for butter. Oleomargarin should be sold for what it really is. *Plumley v. Massachusetts*, 155 U. S. 461, 30 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154. The power of the legislature to regulate its manufacture and sale rests, not upon the right to legislate in the interest of the public health, but up-

on the undoubted right to enact laws to protect the public against fraud and deception, to suppress false pretenses, and promote fair dealing in an article of food. But we are quite unable to perceive how there is any but a remote possibility of deceiving the purchaser or consumer by making oleomargarin imitate butter in color, whether it be a conscious or accidental imitation. The intent to make oleomargarin of a shade or tint of yellow by the selection of ingredients is no evidence of an intent to deceive either purchaser or consumer. Oleomargarin is made to resemble butter of a yellow color, not to deceive anybody, but because the public buys the substitute if it has the yellow shade, but refuses to buy it if it has a light shade. The intent is not to deceive the public, but to make an article which will find a market. It seems clear, not only that there was no intent to defraud or deceive, but that the color of the product has, in view of the stringent provisions of the law that clearly tend to prevent deception, no fair tendency to make either purchaser or consumer mistake oleomargarin for butter. The provisions of the law relating to placards upon the tubs or packages in which it is exposed for sale or sold, to the wrappers stamped with the word "oleomargarin," in which the retail dealer is required to deliver it to the purchaser, the provisions forbidding misleading statements on labels, and those requiring the proprietors of hotels, restaurants, boarding houses, and other eating places to print on their bills of fare, or upon large placards, that oleomargarin is used in place of butter, are well designed to protect both the purchaser and the consumer from buying or spreading on his bread the butter substitute, if he does not wish to do so. It adds nothing to this protection of the purchaser or consumer to have the article colored white, red, or blue. It may be suggested that the guests of a private housekeeper have not this protection, or that store, hotel, or restaurant proprietors may not obey the law as to placards, or that a purchaser who cannot read may be deceived. But, granting that there may be a few instances where, by mistake, the consumer may take into his system oleomargarin when he thinks he is eating butter, does this furnish a ground upon which the legislature can prohibit the manufacture and sale of a perfectly wholesome and healthful article of food? On the record before us, such a deception would be wholly without damage. In its last analysis, it is a mere matter of sentiment.

Let us look for a moment on the other side. The high price of butter is notorious. The poor man must often go without, or

buy the inferior grades, while people of moderate means find good butter a luxury they can ill afford. There is a large and growing demand for a butter substitute that will taste and look like butter, and that can be purchased at a less price. Apparently, judging from the fact that sales of the light-colored oleomargarin are but 10 per cent of the sales of the darker yellow, the people want their butter substitute to resemble butter in color, as well as in texture and taste. The legislature says to them by this act: "You cannot have what you want; you must either buy butter made from cream, or you must buy oleomargarin that is white." Unless the prejudice of the people against the white color is removed, this is a command that they buy butter, and pay higher prices. It is impossible to appreciate why the public should not have a free choice, why butter should not be sold on its merits to those who want it, and why those who want oleomargarin of a yellow shade should not be permitted to have it. A law that tends to secure this result, and to enable the public to buy whichever article it wants, without danger of being deceived as to what it buys, is commendable. But a law that destroys competition between two products of equal merit, that precludes the public from purchasing what it wants, is surely meretricious, unless there is some question of public health or some danger of fraud or deception that makes such a law beneficial. Clearly no question of public health is involved; and there seems no danger of deception that at all compares with the advantages that come to the people by having their choice between the more expensive butter and the cheaper substitute.

Butter from cream may be made and sold in any shade or tint of yellow. Butter is given a monopoly of the entire yellow field, and oleomargarin must keep out. The inevitable results will be maintaining or increasing the price of butter, and striking down a great industry. All this under the power that the legislature has to pass laws that make for the public health, promote the public welfare, or prevent fraud and deceit in the sale of food products. But there are limits to the exercise of the police power. Where the legislature destroys private property or private rights under the guise of promoting the public health or preventing deception, there must be some basis for the decision that the public health will be benefited or deception prevented. This is a question upon which the decision of the legislature is final, except where it is clear that no basis existed, when it becomes the right and duty of the court to interfere. We are unable to es-

cape the conclusion that the law in question not only seriously injures, instead of benefits, the public, but deprives the manufacturer of his property without due process of law, and without a sufficient basis upon which the act can be upheld as a valid exercise of the police power. That this makes the law, in so far as it prohibits the manufacture or sale of oleomargarin made of a shade or tint of yellow, repugnant to both national and state Constitutions, is a conclusion that follows inevitably. The decision in the Hammond Packing Co. Case directly recognizes this, and practically holds that the law involved in that case would be unconstitutional if construed as we have felt obliged to construe the law involved here. It is in fact conceded that the legislature had no right to prohibit the manufacture of oleomargarin. It being a wholesome article of food, a statute prohibiting its manufacture or sale cannot be upheld. *State v. Hammond Packing Co.* 105 Minn. 359, 117 N. W. 606; *State v. Hanson*, 84 Minn. 42, 54 L.R.A. 468, 86 N. W. 768.

Decisions rendered when it was not established that oleomargarin contained no ingredients injurious to health are clearly not in point. *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308, was decided on the theory that it was a deleterious substance. The law of 1891, requiring all oleomargarin to be colored bright pink, was sustained in *State ex rel. Weideman v. Horgan*, 55 Minn. 183, 56 N. W. 688, upon the theory that the laws prohibiting entirely the manufacture and sale of oleomargarin were valid, as had been held in *Butler v. Chambers*, supra, and in *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257. But when it was proved that oleomargarin contained no substance injurious to health, it was held in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, that it was a lawful article of interstate commerce, and in *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768, that a state statute prohibiting the sale of oleomargarin as a substitute for butter, unless it was of a pink color, was invalid as being in necessary effect prohibitory. Since these decisions, there has been no case denying the right of oleomargarin to be classed as a wholesome food product, or upholding any prohibitory law. The following language from the opinion of Justice Peckham in the *Collins* Case is pertinent here: "To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute 40 L.R.A. (N.S.)

must be taken into consideration when deciding as to its validity, even if that result is not, in so many words, either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. . . . Although, under the wording of this statute, the importer is permitted to sell oleomargarin freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition." There can be no sound distinction between a statute requiring oleomargarin to be pink, blue, red, or black, and one forbidding it to have the natural color given by its ingredients. In effect, this law says that oleomargarin must be white; for it is absurd to suppose that there would be any market whatever for a blue or pink product. But the evidence clearly shows, as we have before said, that the sales of the light-shaded oleomargarin are but 10 per cent, as against 90 per cent for the darker shade, and then the light-shaded article is not white, but has a "shade or tint of yellow." Considering that the direct and necessary result of the statute is to prohibit at least 90 per cent of the manufacture and sale of a wholesome article of food, it cannot save the law that it was enacted under the pretense of regulation. *State ex rel. Simpson v. Sperry & H. Co.* 110 Minn. 378, 30 L.R.A. (N.S.) 966, 126 N. W. 120.

The statutes construed in *Wisconsin* and *Iowa* prohibit the manufacture and sale of oleomargarin made to imitate "yellow butter." The court, in its opinion in the *Wisconsin* case, intimates strongly, if it does not distinctly hold, that, had the law prohibited oleomargarin in imitation of butter of any shade or tint of yellow, it could not be sustained. One of the grounds for reversing the conviction in that case was the instruction of the trial court that "yellow butter" meant butter of any shade of yellow. Justice Timlin says, in speaking of the instruction: "It laid down a rule which, if followed by this court, would go far to convict the lawmakers of having, under pretense of making a police regulation to prevent fraud, enacted a law to exclude all competition of oleomargarin with all kinds of butter." *Meyer v. State*, 134 Wis. 156, 14 L.R.A. (N.S.) 1061, 114 N. W. 501. The validity of the *Wisconsin* statute was not directly passed upon; the case involving its construction rather than its constitutionality. The *Iowa* case (*State v. Armour Packing Co.* 124 Iowa. 323, 100 N. W. 59, 2 Ann. Cas. 448) holds the statute of that state constitutional; but the force

of the decision is weakened by the assumption that statutes absolutely prohibiting the sale of oleomargarin are constitutional, and by the fact that the law only prohibited oleomargarin made in semblance of yellow butter, and that no claim was made that it could not be manufactured without having "this yellow hue."

Our conclusion is that, if construed as we think it must be, § 1 of the law in question is invalid, because it amounts to a prohibition of the manufacture and sale of a wholesome article of food. This decision in no way affects the other provisions of the act,

but is only that oleomargarin may be manufactured and sold, though it be of a shade or tint of yellow, providing such shade or tint is produced by natural and essential ingredients which are not deleterious or injurious to health.

Order reversed, and new trial granted.

Holt, J., dissenting:

I do not profess to have greater reluctance to declare a law invalid than any of my associates. But I cannot agree to the conclusion arrived at, and believe that the section of the law in question should be held valid, and so interpreted as to give effect to the intention of the legislature. Holding that view, it seems to me the conviction was right.

The trial court instructed the jury: "If you find from all the evidence in this case, beyond a reasonable doubt, that state's Exhibit No. 1 [the butter sold] was made in imitation of butter of a shade and tint of yellow, and you further find from the evidence in the case that the said shade or tint of yellow was produced by an intentional combination and mixture of the ingredients thereof, made for the purpose of producing the said shade and tint of yellow, so that the same should be in imitation of butter of a shade or tint of yellow, and the manufacturer thereof could have used and chosen the ingredients used in the manufacture of state's Exhibit No. 1, so that the same would not be in imitation of butter of any shade or tint of yellow, but intentionally and purposely so combined and mixed the said ingredients for the purpose of producing the same in imitation of butter of a shade or tint of yellow, then your verdict should be a verdict of guilty. . . . Under the law, the manufacturer of the article would have no right to put together a combination of ingredients in the manufacture of oleomargarin for the purpose of imitating butter of a shade or tint of yellow, as provided under the law which I have charged you. But the manufacturer has a right to combine proper ingredients for the manufacture of oleomargarin for 40 L.R.A. (N.S.)

the purpose of producing the same, and producing thereby a wholesome and palatable food; and if in such production, and in such commingling of the constituents necessary thereto, the result is an article in the imitation of butter, as provided by the statute, of a shade or tint of yellow, it is not a violation of such law. I charge you, gentlemen, further, that there is no law in the state of Minnesota prohibiting the manufacture and sale of oleomargarin as such, and placing it upon the market as such. The law that is against it is, as I have read to you, that it shall not be made in imitation of butter of any shade or tint of yellow; and I charge you that it shall not be so purposely made in imitation of butter of a shade or tint of yellow."

It must then be assumed, upon this charge, that the jury found that the article sold by defendant was oleomargarin, designedly made by the collection of such ingredients, or the adoption of such process of extracting, preparing, or combining them, as to imitate butter of a yellow shade or tint. The evidence amply sustains this finding of a wilful purpose to imitate the yellow color of butter in the manufacture of Exhibit 1. It was admitted that Swift & Company was the manufacturer of this oleomargarin at South St. Paul, Minnesota. Three brands of its oleomargarin were received in evidence, the Premium, the Crown, and the Lilly. Each brand consisted of two kinds, the white and the yellow. Exhibit 1 is the yellow Premium brand. These brands sell at different prices; the Premium being the highest priced. There is no difference in the price between the white and yellow kind of the same brands. The demand for white is only one tenth of that for the yellow. The chief constituent of all appears to be oleo oil, extracted from the fat of beef. Of this, about 50 per cent is used in the white kind and 5 per cent more in the yellow, except in the yellow of the Premium brand. Another ingredient is cotton seed oil. Of this, 15 to 20 per cent is used in the yellow and 5 to 10 per cent in the white oleomargarin. In the yellow Premium, butter is used instead of the milk and cream used in the other kinds. It also appears that by using so-called June butter color might be added; also by selecting the fats from which the oleo oil is extracted, as well as by variation in temperature and pressure in extracting it. Bleached cotton seed oil may be obtained which is colorless, and, by varying the temperature in the manufacture of cotton seed oil, the yellow color may be controlled to a certain extent. The difference in the demand is a motive for the attempt to make the yellow the imitation of the

ordinary butter color. Originally oleomargarin was made with hardly any shade of yellow, unless coloring matter was added. Then Congress enacted a law placing a higher tax on oleomargarin where artificial coloring matter was used. Thereupon the ingenuity of the manufacturer was directed to so select, make, and combine the necessary ingredients as to produce the desired butter color without the addition of any specific substance for the purpose of giving color alone. The effort was successful, and legislation against the use of colors to produce the ordinary butter yellow failed to protect the consumer against deception. Manifestly the act in question was directed against this newly discovered method of manufacture, whereby the desired yellow butter color was attained without the use of special coloring matter. The claim that it is more expensive to use milk and cream than butter to give the butter flavor falls, when it is observed that the June butter is used only in the highest priced yellow brand.

That the legislature has the right to regulate the sale of a food product made in imitation of, and as a substitute for, a staple article of well-known origin and food value, so that the public may be protected from deception, is so well settled that authorities need not be cited. The right of the legislators to not only regulate, but prohibit, the sale of oleomargarin is held in *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308, and the cases there cited. The title of the act (chapter 183, Laws 1911) shows the purpose to be to regulate the manufacture and sale of oleomargarin, not to prohibit; and with that end in view the law must be interpreted. Therefore the narrow, literal construction that, if the product contains any tint or shade of yellow, its sale is prohibited, must be rejected, because no oleomargarin has been made, or is being made, absolutely free from the tint of yellow. Courts ought not to accuse legislators of an attempt to prohibit by underhanded indirection, when they openly profess to regulate only. Therefore, to give meaning and effect to the manifest intention of the act, the phrase "imitate butter of any shade or tint of yellow" must be construed as equivalent to "imitate yellow butter." In ordinary parlance, butter is called white or yellow. We speak of winter butter as white, and with "June butter" is understand an article of a pronounced yellow color. Although, strictly speaking, there is some yellow in the whitest winter butter, it is often designated as white. It should also be borne in mind that the manufacturers of oleomargarin make what

it termed "white," as distinguished from the so-called "yellow," kind of the same brand. With knowledge that the efforts of the manufacturers to imitate the yellow butter in the product, without the addition of colors, but by manipulating the process and ingredients, had partially, or perhaps wholly, succeeded, the inference is not strained that the legislature intended to prohibit the sale of oleomargarin so manufactured that a yellow butter color was imparted to it from whatever cause. The ordinary method of manufacture from the usual ingredients seems to produce the white oleomargarin, so called. This product contains the same ingredients as the yellow, is as easy to make, and has the same taste and food value. Either dyes must be used, or else the manufacturer must resort to intentional selection, manipulation, and combination of the ingredients to produce the yellow kind. To construe the law to mean that the oleomargarin manufactured and sold must not imitate yellow butter, there is no prohibition, only regulation. It merely requires the manufacturer to abstain from taking pains to make the product imitate yellow butter, to the end that the consumer, when he eats a substance which looks like ordinary yellow butter, knows he is not eating oleomargarin. The contention may be made that this discriminates against the so-called white butter and yellow oleomargarin, and the consumer of the product that is light or white has no notice of what he eats from that color. Grant this to be true, it is an argument that should appeal to the legislators, but ought to have little weight when addressed to a court asking that a legislative act be declared of no effect or meaning. It may be urged that the purity, wholesomeness, and nutritive value of oleomargarin is not surpassed by butter; and hence the mere sentiment of the consumer ought not to be considered. One may, with equal force, say that when a pound of oleomargarin is just as good in every respect as a pound of butter, it is utterly immaterial to the purchaser which he gets. But it is well settled that laws may properly be passed to protect both purchaser and consumer against deception. It may be conceded that the manufacture and sale of oleomargarin should be restricted only in so far as to insure its being wholesome and nourishing; that free rein should be given to the manufacturer to produce an imitation of butter that is perfect as to all its qualities, including that which appeals to the eye; that a substitute for butter, equally good, which could be had at a much cheaper price, would be a blessing to the consumer in these times of high prices; that

the poor consumer who is not able to buy "golden" butter should not be compelled to advertise his poverty to the guest or neighbor who happens to drop in at meal time, and sees ordinary whitish oleomargarin on the table. But these, and other suggestions of like kind, are all arguments properly addressed to the legislators, who undoubtedly know that, while consumers, without doubt, desire to have the price of such a necessary article of food as butter reduced by the manufacture and sale of cheaper substitutes, nevertheless their taste rebels at eating the latter. Nearly all of us want "the other fellow" to eat the oleomargarin, while we eat the butter. Courts have no right to invalidate or emasculate statutes, because deemed unwise or inexpedient.

Nor should it be held that there is no violation of the statute, if the product can be made in imitation of yellow butter without the addition or use of any coloring matter not a necessary constituent. The legitimate aim of the legislature by this law was, no doubt, to so regulate the manufacture and sale of oleomargarin that, if the consumer desired protection against deception, he should have it in the color of the compound. The law may be said to amply protect the purchaser, and also, to a certain extent, the consumer, by provisions of labels, placards, and notices where the product is served. But people do not always conform to law, and especially is this true when you reach small eating places and private boarding houses; and it is certainly within the province of the legislature to add this further regulation, so that we may know, if we care so to do, that when we eat what looks like yellow butter, we are not eating oleomargarin. The design in the law being to give notice, as far as it may well be given, by way of color or appearance to the eye, that the oleomargarin allowed to be manufactured and sold is not butter, we must eliminate the interpretation that violation depends on how the yellow color was produced. There are harmless dyes or colors which do not at all affect the wholesome qualities of the food products to which they may be added. The provision under consideration was not aimed at the means by which the yellow appearance in the compound is obtained, but rather at the result.

Appellant also contends that if the law be construed to prohibit the manipulation of the ingredients in the manufacture so that the yellow butter color is obtained, there is no certainty or uniform basis upon which to place a conviction. Jurors have different ideas of shades of yellow in butter; and a jury in one case or one locality may find

the sale of the product a violation which a jury in another case or in another locality may find the opposite. But if the interpretation is given that ingredients in the act refer to dyes or substances introduced into the compound for the sole purpose of giving color, the suggested difficulty is obviated. While we appreciate the force of this claim, it appears to us that the construction contended for, as hereinbefore stated, would render ineffectual the object sought to be attained by the law, namely, that the consumer may judge from the appearance of what he partakes whether it be ordinary yellow butter or oleomargarin. Moreover, in regulatory statutes of this nature, the line of demarcation between the forbidden and the permissible is not always easy to find. For example, it is criminal to run an automobile at a greater speed than is reasonable. This leaves it so that one jury may find the speed of 25 miles an hour an offense, while another jury may fail to so find under the same conditions. This may render the result of the prosecution doubtful; but we do not think the statute is thereby rendered void.

The case of *State v. Hammond Packing Co.* 105 Minn. 359, 117 N. W. 606, should not be considered out of harmony with the views herein expressed. By the stipulation in that case, it was made to appear that there was no design in selecting the ingredients to obtain butter color. Furthermore, it did not appear that the white could be as readily manufactured as the yellow from essentially the same ingredients. The court says: "In order to sustain this, a criminal prosecution, there must have been evidence of intent that the oleomargarin was made or colored to imitate yellow butter." The expression is used "made to imitate yellow butter." In the case of *Meyer v. State*, 134 Wis. 156, 14 L.R.A. (N.S.) 1061, 114 N. W. 501, under a law similar to ours, it was held that the state must show a conscious imitation of yellow butter, but that it is immaterial whether this be done by the addition of a dye or by the selection of ingredients. *State v. Armour Packing Co.* 124 Iowa, 323, 100 N. W. 59, 2 Ann. Cas. 448, is also an instructive case, but goes so far as to hold that no intent to imitate yellow butter need be shown. If the product imitated yellow butter, the law was violated. The case of *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277, holds that an intentional imitation of dairy butter by the addition of harmless coloring matter, not essential to the compound, shows a violation of the law; but the question is not presented whether or not an intentional selection, manipulation, and combination

of the essential ingredients of oleomargarin, so as to simulate butter color, does not also show a violation.

The case of *Bennett v. Carr*, 134 Mich. 243, 96 N. W. 26, holds that an act in that state prohibiting the sale of any product in imitation of yellow butter does not prevent the sale of oleomargarin, the yellow color of which is produced naturally from its food ingredients. But the court arrives at this conclusion on the ground that when the statute was enacted "the only method in use in causing the oleomargarin to look like yellow butter was the introduction of some extraneous coloring matter. This was the mischief to be remedied." A prior statute, not repealed, defined the oleomargarin which could be made and sold. With this statute, defendant had complied. Construing the two statutes together, the ruling above stated was made.

It appears to me that the law should be given effect. If that be done, it must be conceded that defendant had a fair trial, and the conviction should be affirmed.

I am authorized to say that Mr. Justice **Phillip E. Brown** concurs in this dissent.

MASSACHUSETTS SUPREME JUDICIAL COURT.

LEVI A. DAME
v.

C. H. HANSON & COMPANY, Appt.

(212 Mass. 124, 98 N. E. 589.)

Conditional sale — assignment of interest — effect.

Under a sale on condition that if the vendee shall sell, mortgage, or pledge the

Note. — Assignment or transfer of purchaser's interest under a conditional sale.

This note, as indicated in its title, is confined strictly to the question whether the purchaser may assign or transfer the property so as to pass any right he may then have had therein, including the right to perfect his title by performance of the contract with the vendor. It is therefore not concerned with cases involving the question whether an assignee or transferee from the purchaser acquires a right or interest superior to that of the vendor.

Under a conditional sale by the terms of which the seller reserves the title to the goods until payment of the price, the buyer acquires a defeasible interest in the property which, before default, he may sell. 35 Cyc. 668; *McRea v. Merrifield*, 48 Ark. 160, 2 S. W. 780; *Dedman v. Earle*, 52 Ark. 164, 12 S. W. 330; *Day v. Bassett*, 102 Mass. 40 L.R.A. (N.S.)

property or fail in payments, the vendor may take immediate possession of the property, and hold it free of all claims from the vendee, the vendee may confer an interest on an assignee which will enable him to perfect the title by full payment of the purchase price, and the attempted assignment does not forfeit all rights under the contract.

(May 24, 1912.)

APPPEAL by defendant from a decree of the Superior Court for Suffolk County in plaintiff's favor in an action brought to recover possession of certain property sold by defendant on condition to plaintiff's assignor. Affirmed.

The facts are stated in the opinion.

Messrs. **John J. Hogan** and **William A. Hogan**, for appellant:

The vendee obtained no right under the conditional sale to dispose of the property, but only to hold it until the terms of the contract were complied with.

Coggill v. Hartford & N. H. R. Co. 3 Gray, 545; *Gilbert v. Thompson*, 3 Gray, 550, note; *Sargent v. Metcalf*, 5 Gray, 306, 66 Am. Dec. 368; *Blanchard v. Child*, 7 Gray, 155; *Deshon v. Bigelow*, 8 Gray, 159; *Carter v. Kingman*, 103 Mass. 517; *White v. Garden*, 10 C. B. 919, 20 L. J. C. P. N. S. 166, 15 Jur. 630.

The vendee has only a bare right of possession, and those who claim under him, whether as creditors, mortgagees, or purchasers, can acquire no higher or better title, and the plaintiff communicated nothing by its tender. It was as if made by a stranger.

Gilbert v. Thompson, 3 Gray, 550, note; *Benner v. Puffer*, 114 Mass. 376; *C. B. Cottrell & Sons Co. v. Carter, R. & Co.* 173 Mass. 155, 53 N. E. 375; *Lorain Steel Co.*

445; *Currier v. Knapp*, 117 Mass. 324; *Newhall v. Kingsbury*, 131 Mass. 445; *Vincent v. Cornell*, 13 Pick. 294, 23 Am. Dec. 683; *Glaspay v. Cabot*, 135 Mass. 435 (*obiter*); *United Shoe Machinery Co. v. Holt*, 185 Mass. 97, 69 N. E. 1056 (*obiter*); *Powers v. Burdick*, 126 App. Div. 179, 110 N. Y. Supp. 883; *Tweedie v. Clark*, 114 App. Div. 296, 99 N. Y. Supp. 856; *Bailey v. Colby*, 34 N. H. 20, 66 Am. Dec. 752; *Christenson v. Nelson*, 38 Or. 473, 62 Pac. 648;

Or mortgage, *Ames Iron Works v. Richardson*, 55 Ark. 642, 18 S. W. 381; *Chase v. Ingalls*, 122 Mass. 381; *Carpenter v. Scott*, 13 R. I. 477.

But in order to have such a saleable or mortgageable interest, the conditional vendee must be in possession, and must have paid part of the purchase price. *Karalis v. Agnew*, 111 Minn. 522, 127 N. W. 440; *Savall v. Wauful*, 21 N. Y. Civ. Proc. Rep. 18, 16 N. Y. Supp. 219; *Sunny South Lumber Co. v. Neimeyer Lumber Co.* 63 Ark.

v. Norfolk & B. Street R. Co. 187 Mass. 500, 73 N. E. 646.

Messrs. F. Keezer and E. M. Shanley for appellee.

Morton, J., delivered the opinion of the court:

The property in question was sold by the defendant to one Terrell, upon what are termed "conditional sales or leases." The condition was as follows: "Signed by me [Terrell] and payable to C. H. Hanson & Company, Inc., or order, that if said goods and chattels or any part thereof shall be attached, or if I shall sell, mortgage, pledge, or attempt to sell, mortgage, or pledge the same or any part thereof, or shall fail to pay said note at maturity, said C. H. Hanson & Company, Inc., shall have the right, without any demand or notice, to take immediate possession of said property, and hold the same absolutely free from all claims and demands from me." Taking the condition as it reads, the title to the property would seem to have passed to Terrell subject to be divested at the option of the defendant upon the happening of either of the contingencies named and the taking possession of the property by the defendant, pursuant to the condition. But

however that may be, and assuming that the title was in the defendant, it was held by it subject to the performance by Terrell of the conditions named, and Terrell had therefore a right or interest which he could and did convey in mortgage to the plaintiff. Chase v. Ingalls, 122 Mass. 381; Currier v. Knapp, 117 Mass. 324; Swallow v. Emery, 111 Mass. 355; Day v. Bassett, 102 Mass. 445. Upon tender of the amount due by Terrell or his assignee before possession was taken by the defendant, the title vested in Terrell or his assignee. Bailey v. Colby, 34 N. H. 29, 37, 66 Am. Dec. 752; Cutting v. Whittemore, 72 N. H. 107, 111, 54 Atl. 1098. The case differs from those cases relied on by the defendant, where no right or interest whatever passed until the goods were paid for by the purchaser according to the contract. In C. B. Cottrell & Sons Co. v. Carter, R. & Co. 173 Mass. 155, 53 N. E. 375, possession was taken several months before a tender was made. In the present case possession was not taken until after the tender, when the rights of the plaintiff to redeem had become fixed. It is not necessary to consider the scope or effect of Rev. Laws, chap. 198, § 11.

Decree affirmed.

268, 38 S. W. 902; C. B. Cottrell & Sons Co. v. Carter, R. & Co. 173 Mass. 155, 53 N. E. 375; Albright v. Meredith, 58 Ohio St. 194, 50 N. E. 719.

So, a purchaser from a conditional vendee acquires title upon a compliance with the conditions of the sale by the vendee (Currier v. Knapp, 117 Mass. 324), although the vendor refuses to accept payment (Day v. Bassett, 102 Mass. 445); or by the purchaser tendering the balance due (Bailey v. Colby, 34 N. H. 29, 66 Am. Dec. 752).

So, the purchaser of a conditional vendee's interest may compel the vendor to perform the contract. Christenson v. Nelson, 38 Or. 473, 63 Pac. 648.

So, where the conditional vendee, after mortgaging the property to a third person while in default, paid the balance due, the mortgage became valid upon payment of the price. Crompton v. Pratt, 105 Mass. 225.

In Chase v. Ingalls, 122 Mass. 381, a lessee was in possession of chattels upon part payment under leases whereby he was to pay for the use or rent of the property a certain sum weekly until he had paid a specified sum, when the lessor's claim was to cease; and in case the lessee neglected to pay the sum specified, the lessor might take possession of the property and terminate the leases. The lessor did not take possession, although the lessee failed to pay the rent as it became due, and the full amount was never paid. The lessee mortgaged the property to a third person, and thereafter another attached the property

upon a writ against the lessee. In a suit for conversion of chattels by the mortgagee against the attaching officer, it was held that the lessee had the legal possession, and a right in the property which he could convey; that his mortgage passed to his mortgagee that right of property, with a corresponding right of possession, which was good as against the lessee and against anyone attaching the property as his.

So, where a conditional vendee in possession executes a mortgage valid because having paid part of the purchase money, he has a mortgageable interest in the property; and if the vendor, instead of retaking the property by complying with the conditional sales act as to tender of amount paid, elects to treat the property as belonging to the purchaser, by causing it to be seized in execution, pursuant to a judgment recovered for unpaid instalments, such mortgage takes precedence of the subsequent levy by the vendor. Albright v. Meredith, 58 Ohio St. 194, 50 N. E. 719.

And upon the perfection of the title by payment of the purchase price, a prior mortgage executed by a conditional vendee becomes valid and takes precedence of an attachment by one of his creditors, levied after the payment had been completed. Carpenter v. Scott, 13 R. I. 477.

And even where a conditional vendee transfers the property to his wife after default, she may acquire title by redeeming within the thirty days before the sale, allowed by the lien law after the vendor has taken the property (Powers v. Burdick.

126 App. Div. 179, 110 N. Y. Supp. 883); and this is true of any purchaser (Tweedie v. Clark, 114 App. Div. 296, 99 N. Y. Supp. 856).

So, on the principle that a conditional vendee may sell the property, he may, before maturity and before payment (Dedman v. Earle, 52 Ark. 164, 12 S. W. 330), or after maturity and before payment, where the vendor has failed to retake the property or make demand (Nattin v. Riley, 54 Ark. 30, 14 S. W. 1100), exchange the property purchased for other property; but the original vendor does not lose title to the property sold, nor acquire title to the property for which it is exchanged.

And where the conditional vendee mortgages the property to one of his creditors while in default, his vendor may retake the property, and does not waive such right by advising such creditor, who knew of the reservation, to take a mortgage of the property. Ames Iron Works v. Richardson, 55 Ark. 642, 18 S. W. 381.

But if, upon the vendee's failure to pay, the vendor does not take possession of the property or make demand, the vendee's default does not of itself operate as a forfeiture of the interests of the vendee or of the rights of his mortgagee. Sunny South Lumber Co. v. Neimeyer Lumber Co. 63 Ark. 268, 38 S. W. 902.

And where a conditional vendee before default sells the property, the vendor, having no right of possession, cannot maintain trover against a subsequent purchaser before the day named for payment. Vincent v. Cornell, 13 Pick. 294, 23 Am. Dec. 683.

So, a vendor cannot replevy the property from a conditional vendee's purchaser before the purchase money is due. Nutting v. Nutting, 63 N. H. 221.

But it was held in C. B. Cottrell & Sons Co. v. Carter, R. & Co. 173 Mass. 155, 53 N. E. 375, that a lessee, under an instalment contract whereby the lessor, on receipt of stipulated monthly instalments, agreed to execute a bill of sale, did not acquire title to the chattels until all the instalments were paid; that consequently where the lessee mortgaged the property while instalments due remained unpaid, the mortgagee acquired no title; and that where the mortgagee, after the lessor had constructively taken possession because of lessee's default, purchased the property at a sale under the mortgage, the lessor could maintain replevin without any demand, the purchaser under the mortgage taking nothing by his tender of the amount due.

According to Carroll v. Beard, 27 Ont. Rep. 349, only the interest of a tenant in goods held under a conditional sale could, by the statute as to landlords, be sold for rent, and that interest is what would be left after the balance of the price is deducted out of the value of the goods seized.

As to the validity and effect of a stipulation in a contract for the sale of land, against assignment by the vendee without the vendor's consent, see note to Lockerby v. Amon, 35 L.R.A.(N.S.) 1064. J. D. C. 40 L.R.A.(N.S.)

MISSISSIPPI SUPREME COURT.

ALCORN COTTON OIL COMPANY, Appt.,
v.
STATE OF MISSISSIPPI.

(— Miss. —, 56 So. 397.)

Adulteration — power to require notation on package.

A statute imposing a penalty for selling adulterated cotton seed meal without noting the adulteration on the package is not unconstitutional in failing to inform an accused of the nature and cause of the accusation against him, because it does not fix any standard of adulteration.

(April 24, 1911.)

APPEAL by defendant from a judgment of the Circuit Court for Alcorn County, convicting it of violation of the law against adulteration of cotton seed meal. Affirmed.

The facts are stated in the opinion.

Mr. W. J. Lamb for appellant.

Mr. James R. McDowell, Assistant Attorney General, for the State.

Note. — *Validity of police regulations as to branding or labeling articles of commerce.*

As to constitutionality of statute prohibiting or regulating sale of poisons, see note to Katzman v. Com. 30 L.R.A.(N.S.) 519.

As to duty of druggist or apothecary in the sale or compounding of drugs or medicines, see note to Tremblay v. Kimball, 29 L.R.A.(N.S.) 900.

As to right to prohibit sale of milk except in bottles, see note to Com. v. Drew, 33 L.R.A.(N.S.) 401.

On the question as to whether the requirement of pure food laws as to labeling applies to small retail packages taken from original package of the manufacturer, see note to Armour & Co. v. Bird, 25 L.R.A.(N.S.) 616.

Generally, as to constitutionality of discriminations in statutory regulations concerning food products, see note to Freadrich v. State, 34 L.R.A.(N.S.) 650.

Cases involving the validity of inspection laws which incidentally require certain marks or labels to be attached by the inspector have been excluded.

The question involved in cases like American Linseed Oil Co. v. Wheaton, 25 S. D. 60, —L.R.A.(N.S.) —, 125 N. W. 127, as to the power of the legislature to prescribe a particular test of purity, quality, weight, etc., to which an article of commerce must conform irrespective of branding or labeling, is, of course, not within the scope of this note.

The earlier cases passing upon regulations as to branding or labeling articles of com-

Whitfield, C., filed the following opinion:

Section 1317 of the Code of 1906 is in the following words: "It shall be unlawful for any person or corporation to adulterate any cotton seed meal with hulls, sawdust, or anything else, without noting such adulteration, in plain and legible characters, on each sack; and it shall be unlawful for any person to sell in this state any cotton seed meal adulterated with hulls, sawdust, or anything else, without such adulteration being noted in plain and legible characters on each sack or receptacle thereof. Any person or corporation violating the foregoing provisions of this section shall be guilty of a misdemeanor, and on conviction, shall be fined in a sum

not less than one hundred nor more than one thousand dollars."

The appellant was indicted under this statute, the indictment charging that "the Alcorn Cotton Oil Company, being engaged in the business of manufacturing, sacking, and selling cotton seed meal, did then and there wilfully and unlawfully adulterate cotton seed meal by mixing hulls therewith, without noting such adulteration in plain and legible characters on each sack." The evidence in the case shows that the appellant sold cotton seed meal to one W. S. Berry, the said sacks of cotton seed meal being composed of 50 per cent cotton seed meal, and 50 per cent hulls, without noting such adulteration in plain and legible characters on the sacks. Manifestly, on the

merchandise are presented in the note accompanying Ex parte Hayden, 1 L.R.A.(N.S.) 184.

Validity and effect of Federal food and drug act, of June 30, 1906.

The Federal food and drug act of June 30, 1906 (chap. 3915, 34 Stat. at L. 768, U. S. Comp. Stat. Supp. 1911, p. 1354), which prohibits the interstate transportation of foods and drugs that have been adulterated or labeled so as to defraud or mislead the public, is a proper exercise of the police power of Congress over interstate commerce, and not an infringement upon the police power of the states. *Shawnee Mill. Co. v. Temple*, 179 Fed. 517; *United States v. 420 Sacks of Flour*, 180 Fed. 518; *United States v. 74 Cases of Grape Juice*, 181 Fed. 629.

And in *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364, it was held that Congress could lawfully enact the provisions of the food and drugs act under which adulterated and misbranded articles of food, the subjects of interstate commerce, may be confiscated by a proceeding *in rem* in the Federal courts after they have reached their destination, and there remain in the hands of the consignee in the original unbroken packages.

The provisions of the Federal food and drug act making it a criminal offense for a wholesaler or manufacturer to sell a misbranded article of food under a false guaranty that the merchandise is not adulterated or misbranded within the meaning of the statute are not invalid as to one whose entire connection with the transaction of selling and delivering was consummated within the state, as was the issuance of the false certificate, since it enabled an innocent purchaser, relying upon the certificate, to sell the same in interstate commerce, as was done in this case, which it was the very object of the statute to prohibit. *United States v. Charles L. Heinle Specialty Co.* 175 Fed. 299.

Congress did not, by the passage of the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. 40 L.R.A.(N.S.)

Stat. Supp. 1911, p. 1354), for the prevention of adulteration and misbranding of foods and drugs when the subject of interstate commerce, preclude the enactment of a statute by a state, prohibiting sales of concentrated commercial feeding stuffs in the original packages unless there be compliance with its requirements as to inspection and analysis and the disclosure of the ingredients, including the minimum percentage of crude fat and crude protein, and the maximum percentage of crude fiber, and with its incidental provisions for the filing of a certificate, for registration, and for labels and stamps. *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

There is no conflict between the provisions of the food and drug act of June 30, 1906, for the prevention of the adulteration and misbranding of foods and drugs when the subject of interstate commerce, and the requirement of a state statute as applied to sales by importers in the original packages, that there shall be stated in the labels on concentrated commercial feeding stuffs offered for sale in the state the names and percentage of the diluent or diluents or bases. *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784.

Requiring label to show ingredients, name and residence of manufacturer, etc.

In *State v. Southern Cotton Oil Co.* 154 N. C. 635, 70 S. E. 741, it was said that the requirement that the contents of each package must be shown by a label or tag was the most efficient method of insuring protection to the public from the sale of worthless and injurious articles of commerce.

A statute requiring articles of food to bear a label giving a statement of the ingredients going to make up its composition is a proper police regulation. *Savage v. Scovell*, 171 Fed. 566.

A statute requiring syrups, molasses, etc., to be labeled by their true names, and show all the ingredients going to make up their

facts of the case, the appellant's conduct falls strictly within the condemnation of § 1317.

It is said, first, that this section is repealed by § 14 of the act of 1908 (Laws 1908, chap. 107). We do not think so. The act of 1908 was dealing with a wholly different subject-matter. The law of 1908 fixes the penalty for the adulteration or sale of certain commercial foodstuffs falling below a certain standard, and provides for inspection, analysis, etc. It has nothing to do with the sale of cotton seed meal. That article is especially excepted from the law of 1908.

It is next said that § 1317 is unconstitutional, because it does not inform the defendant of the nature and cause of the ac-

cusation against him, in this: That the said section does not prescribe any standard of adulteration. The first thing to be observed in the discussion of this proposition is that § 1317 does not declare the mere sale of adulterated cotton seed meal a crime. That section, and §§ 2260, 2261, and 2263 of chapter 51 of the Code of 1906, plainly show that the appellant could have sold, so far as a mere sale was concerned, any grade of cotton seed meal. The offense denounced by § 1317 is not the mere sale of adulterated cotton seed meal, but its failure to note on the sacks which contained adulterated cotton seed meal the fact of such adulteration. That precisely is the purpose and object of the section, and this object must be kept in mind in

composition, does not deprive persons of their property without due process of law, in violation of the state or Federal Constitution. *McDermott v. State*, 143 Wis. 18, — L.R.A. (N.S.) —, 121 N. W. 888, 21 Ann. Cas. 1315.

So, a statute which requires tags to be placed upon packages of fertilizers, showing the ingredients, is a valid police regulation to prevent fraud and sale of a worthless article. *Steiner v. Ray*, 84 Ala. 93, 5 Am. St. Rep. 332, 4 So. 172.

Likewise, a regulation by the commissioner of internal revenue that imitation whisky be labeled as such is reasonable. *Woolner & Co. v. Rennick*, 170 Fed. 662.

So, a statute which requires a label to be placed upon all packages of baking powder, showing the ingredients, together with the name and residence of the manufacturer, is not unconstitutional, as an infringement upon private rights, or as class legislation. *State v. Sherod*, 80 Minn. 446, 50 L.R.A. 660, 81 Am. St. Rep. 268, 83 N. W. 417.

A statute requiring packages containing cider vinegar to bear a label stating the fact, together with the name and place of business of the manufacturer, is a proper exercise of the police power for the purpose of preventing fraud. *People v. Windholz*, 92 App. Div. 569, 86 N. Y. Supp. 1015.

And a statute prohibiting the sale of vinegar containing artificial coloring matter, although not injurious to health, is a proper exercise of the police power. *People v. Girard*, 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823, affirming 73 Hun, 457, 26 N. Y. Supp. 272; *Williams v. McNeal*, 7 Ohio C. C. 280, 4 Ohio C. D. 596.

The legislature may prohibit the sale of substances having the semblance of butter or cheese, but not wholly made from pure cream or milk, unless each package of such substance shall bear a label showing the ingredients used or entering into its composition, even though it is a patent article. *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429.

So, a statute requiring process butter to be labeled "renovated butter," so as to distinguish it from creamery butter, is a prop-

er exercise of the police power to prevent fraud and deception. *Com. v. Seiler*, 20 Pa. Super. Ct. 260; *Hathaway v. McDonald*, 27 Wash. 659, 91 Am. St. Rep. 889, 68 Pac. 376.

The legislature may inflict a penalty for the selling of skimmed milk without advising the purchaser that it is such. *People v. Abramson*, 137 App. Div. 549, 122 N. Y. Supp. 115; *People v. Bowen*, 182 N. Y. 1, 74 N. E. 489 (*obiter*).

A statute requiring a tag to be attached to the carcass of a calf, containing certain information, including the age of the calf when slaughtered, is a reasonable exercise of the police power to protect the public against the sale of unwholesome food. *People v. Bishopp*, 106 App. Div. 266, 94 N. Y. Supp. 773, affirming 44 Misc. 12, 89 N. Y. Supp. 709.

So, a provision of the game laws which prohibits the transportation of deer unless tagged and plainly labeled with the name of the owner has been held constitutional. *State v. Niles*, 78 Vt. 266, 112 Am. St. Rep. 917, 62 Atl. 795.

A statute prohibiting the manufacture and sale of flaxseed or linseed oil unless it answers the chemical test for purity recognized in the United States Pharmacopœia, and providing that such oil shall be marked and sold only under its true name as pure raw or boiled linseed oil, is a proper police regulation, and does not offend against the 14th Amendment of the Federal Constitutional, which guarantees to every citizen property rights in every state. *State v. Holton*, 148 Iowa, 724, 126 N. W. 1125.

Nor does such statute violate the provision of the state Constitution by depriving persons of their liberty or property without due process of law. *Ibid*.

And in *State v. Williams*, 93 Minn. 155, 100 N. W. 641, it was held that a statute which required a label on linseed oil was a proper police measure to protect consumers against fraud and deceit.

The court said in *State v. Holton*, *supra*, that the evident purpose of the statute which required a label on oils was to pre-

discussing the constitutionality of the statute. The plain object of this statute is to require those who adulterate cotton seed meal with hulls to note such adulteration on the sacks or receptacles, so that the purchaser may know exactly what he is getting and paying for. If the vendor wishes to sell adulterated cotton seed meal, he may do so; but he must note the adulteration on the sacks, so that he who buys may know that he is not being defrauded by getting something different from what he offers to buy.

The learned counsel for appellants cite a number of cases from other states, every one of which we have critically examined. We do not think any of those cases is strictly in point, where the offense charged,

as here, is the failure to note adulteration on the receptacles of the adulterated material. Nearly all these cases are cases in which a statute first prescribed a standard of purity, and then afterwards made it a crime to sell the particular thing, as milk, etc., unless the article so sold came up to the standard prescribed in the statute. Those cases are not at all in point in a consideration of the constitutionality of this statute, which permits the sale, and does not prohibit the sale, of adulterated cotton seed meal, but makes it an offense to so sell without noting the adulteration on the receptacles.

In the case of *Com. v. Kevin*, 202 Pa. 23, 90 Am. St. Rep. 613, 51 Atl. 594, the statute provided that an article of food

vent fraud and deception, and that it did not, in the opinion of the court, prohibit the sale of linseed oil that is adulterated, or any compound that contains such oil, where the product is not sold as pure linseed oil. *Ibid*.

The equal protection of the laws is not denied to manufacturers and sellers of mixed paints containing other ingredients than pure linseed oil, pure carbonate of lead, oxid of zinc, turpentine, Japan dryer, and pure colors, by a state statute which makes the manufacture and sale of such paints a misdemeanor unless the label shows the constituent ingredients and the quantity or amount of each, because the manufacture and sale of mixed paints containing only the ingredients specified in the statute, and possibly, of all paste paints, are free from such consequence or condition. *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114.

Nor does such a statute deprive the manufacturers and sellers of mixed paints of their liberty without due process of law. *Ibid*.

So, a statute forbidding one to sell a product from the original package, labeled with a trademark, upon the false representation that it was placed in the package by the owner of the label, does not deprive the seller of his property without due process of law, although the product was in fact that of the owner of the label, and was purchased by the seller for the purpose of resale. *People v. Luhrs*, 195 N. Y. 377, 25 L.R.A.(N.S.) 473, 89 N. E. 171. As to the validity of a penal statute to protect trademarks, see note to the above case in 25 L.R.A.(N.S.) 473. Generally as to the protection of trade union labels or trademarks, see note to *State v. Bishop*, 29 L.R.A. 200.

The exception in favor of existing contracts, contained in a statute making it criminal to sell or deliver black powder for use in any coal mines in the state except in original sealed packages containing 12½ pounds of powder, does not make such statute repugnant to U. S. Constitution, 14th 40 L.R.A.(N.S.)

Amendment, as denying the equal protection of the laws. *Williams v. Walsh*, 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137, affirming 79 Kan. 212, 98 Pac. 777.

But a statute making it unlawful to sell milk as certified milk unless conspicuously marked with the name of the association certifying it is invalid for failure to designate any particular association or individuals to whom the vendor could apply for certification. *People v. Briggs*, 193 N. Y. 457, 86 N. E. 522, reversing 121 App. Div. 927, 106 N. Y. Supp. 1140.

Requiring label to show weight or measure.

A statute establishing a standard weight for a loaf of bread, and providing that every loaf that does not weigh the full weight required by the statute shall be plainly labeled with the exact weight, is not unconstitutional as an unreasonable interference with the conduct of private business. *State v. McCool*, 83 Kan. 428, 111 Pac. 477.

And a city ordinance requiring labels to be placed on loaves of bread sold within the city, specifying the size and weight of the loaf and the name of the maker, is not unreasonable. *Chicago v. Schmidinger*, 243 Ill. 167, — L.R.A.(N.S.) —, 90 N. E. 369, 17 Ann. Cas. 614, 245 Ill. 317, 92 N. E. 244 (subsequent appeal).

So, in *Re Masmith*, 2 Ont. Rep. 192, it was held that a municipal regulation establishing a standard weight for a loaf of bread, and requiring each loaf to be labeled, showing the weight, is *intra vires* and reasonable.

And in *State v. Belle Springs Creamery Co.* 83 Kan. 389, — L.R.A.(N.S.) —, 111 Pac. 474, it was held that a statute which specified the weight of a print or package of butter, and required smaller packages to bear a label showing the net weight, is a valid police regulation.

Likewise, a statute requiring packages of cornmeal to bear labels showing the weight of the contents is a valid exercise

should be deemed adulterated if it contained *any added substance* which is poisonous or injurious to health; and the court held that that statute made it an adulteration to add a substance which was poisonous or injurious in any quantity, even though the quantity added was not enough to make the compound poisonous or injurious to health. For the very same reason this § 1317 was a proper exercise of legislative power, even if it declared cotton seed meal to be adulterated by the addition of any quantity of hulls unintentionally mixed with the cotton seed meal, no matter how small the quantity. In the course of the opinion the court said: "The purpose of the legislature in the passage of the act is most commendable, and the statute should receive a

construction by the courts that will fully and effectually accomplish the object of its enactment." And again the court said: "As said above, the purpose of the act was twofold: To protect the public health, and to prevent fraud and deception in the manufacture and sale of adulterated food. It is within the province of the general assembly to determine whether the addition of a poisonous or injurious substance to a food article endangers the health of the citizens of the state who used the compound; and, if it does, then it is clearly within the police power of the state to prohibit the manufacture and sale of the adulterated article, as well as to protect the public from imposition or fraud in the sale of it. The exercise of such authority by

of the police power, and does not deprive persons of their property without due process of law. *State v. Co-operative Store Co.* 123 Tenn. 399, 131 S. W. 867.

And in *State v. Southern Cotton Oil Co.* 154 N. C. 635, 70 S. E. 741, the constitutionality of a statute requiring packages of cotton seed meal to bear a tag showing the brand, weight of package, amount of ammonia or nitrogen, and name and address of the manufacturer, was upheld.

But in *Ex parte Dietrich*, 149 Cal. 104, 5 L.R.A.(N.S.) 873, 84 Pac. 770, it was held that a statute requiring the marking of small packages of butter intended for sale with their weight in figures not less than a quarter of an inch high is an unconstitutional interference with liberty and property rights, and not a legitimate exercise of the police power.

A municipal ordinance which requires milk dealers indelibly to indicate the capacity upon glass jars which contain the milk sold does not unconstitutionally deprive them of their property in the old jars. *Chicago v. Bowman Dairy Co.* 234 Ill. 294, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 Ann. Cas. 700.

Nor is such an ordinance void as special legislation, although it does not apply to all milk dealers, or to all persons who vend substances in liquid form. *Ibid.*

The statute which in effect places persons who manufacture and sell, or who sell either at wholesale or retail, certain specified food products in package form, not put up by retailers, in one class, and retailers who put up and sell the same products in package form themselves, in another class, and provides that such food sold in package form, not put up by the retailer, shall bear a printed label showing net weight or measure of the contents, does not deprive one who sells a "misbranded" package, of the equal protection of the laws, and is not violative of the 14th Amendment to the Constitution of the United States. *Freadrich v. State*, 89 Neb. 343, 34 L.R.A.(N.S.) 650, 131 N. W. 618; *Lichtensteiger v. State*, 89 Neb. 356, 131 N. W. 623. 40 L.R.A.(N.S.)

Oleomargarin statutes.

Statutes prohibiting the manufacture or sale of imitation butter, or oleomargarin colored to resemble butter, are deemed to fall within the scope of this note, since their purpose, like that of statutes requiring labeling or branding, is to prevent deception rather than to guard against adulteration.

Such statutes do not deprive persons of their liberty or property without due process of law. *People v. Freeman*, 242 Ill. 373, 90 N. E. 366, 17 Ann. Cas. 1098; *People ex rel. McAuley v. Wahle*, 124 App. Div. 762, 109 N. Y. Supp. 629; *People v. Simpson, Crawford Co.* 62 Misc. 240, 114 N. Y. Supp. 945, affirmed without opinion in 133 App. Div. 889, 118 N. Y. Supp. 1132; *McCann v. Com.* 198 Pa. 509, 48 Atl. 470, affirming 14 Pa. Super. Ct. 221; *Com. v. Mellet*, 27 Pa. Super. Ct. 41; *Com. v. Caulfield*, 27 Pa. Super. Ct. 279, which is affirmed in 211 Pa. 644, 61 Atl. 243; *Com. v. McDermott*, 37 Pa. Super. Ct. 1, reversed on other grounds in 224 Pa. 363, 24 L.R.A.(N.S.) 431, 73 Atl. 427.

Likewise, a statute prohibiting persons who sell oleomargarin from selling or giving away with it any coloring matter which may be used to color the oleomargarin so as to give it the appearance of yellow butter is a valid police regulation, and not an illegal restraint of trade, or interference with vested rights. The court said: "It may well be that the purchaser of oleomargarin is hindered to an extent from obtaining coloring matter with which to color oleomargarin for sentimental or other reasons, which is intended for his own consumption; but the probabilities are that one who would thus purchase both the oleomargarin and the coloring ingredient has in view some subsequent purchaser from him, or some consumer other than himself, and that he seeks the means of compound to work fraud or deception upon some other." *People v. Von Kampen*, 149 App. Div. 887, 134 N. Y. Supp. 710.

See next subdivision for the effect of

the legislative department of the government does not transcend the constitutional limit of its power. In *Powell v. Com.* 114 Pa. 294, 60 Am. Rep. 350, 7 Atl. 913, 7 Am. Crim. Rep. 32, Sterrett, J., after reviewing the cases holding legislation to be constitutional on the ground that it was the lawful exercise of the police power of the state, says: "The manufacture, sale, and keeping with intent to sell, may all alike be prohibited by the legislature, if, in their judgment, the protection of the public from injury or fraud requires it. To deny the authority of the legislature to do so is to attack all that is vital in the police power. To refuse recognition of the power in a given case because, in the judgment of some, the legislature, though acting within its proper sphere, may have mistaken the public necessity for a law prohibitory in its character, is to make the individual judgment superior to that of the legislature, to which the people,

in their sovereign capacity, have delegated the lawmaking power."

In *St. Louis v. Leissing*, 1 L.R.A. (N.S.) in the note at page 918, it is said: "The regulations most frequently tested in the courts are those establishing an arbitrary standard of quality, without regard to the question of adulteration or extraction, and prohibiting under penalty the sale of milk falling below the required standard. *St. Louis v. Leissing* is typical of the decisions upon this question. The authorities are there very thoroughly gathered; but see, especially, also, as sustaining regulations of similar character, *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *State v. Stone*, 46 La. Ann. 147, 15 So. 11; *Com. v. Hough*, 1 Pa. Dist. R. 51; *Kansas City v. Cook*, 38 Mo. App. 660; *State v. Crescent Creamery Co.* 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107; *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E.

commerce clause of the Federal Constitution upon state statutes in relation to oleomargarin.

Effect of commerce clause of Federal Constitution.

A state statute declaring sales of fertilizers void unless each package has attached thereto a tag, to be furnished by the agricultural commissioner of the state, does not violate the Federal Constitution, which vests in Congress the power to regulate commerce, where the sale is made within the state, although the vendor is a resident of another state, and the fertilizers are also to be imported from another state. *Brown v. Adair*, 104 Ala. 652, 16 So. 439.

A state statute which makes it unlawful to ship to or from any part of the state any carcass of a calf unless a tag is attached, containing certain information, including the age of the calf when slaughtered, is not a regulation or interference with interstate commerce, but is a reasonable exercise of the police power to protect the people of the state against the sale of unwholesome food. *People v. Bishop*, 106 App. Div. 266, 94 N. Y. Supp. 773, affirming 44 Misc. 12, 89 N. Y. Supp. 709.

Likewise, a statute requiring syrups, molasses, etc., to be labeled by their true name, and show all the ingredients going to make up their composition, does not unduly interfere with interstate commerce. *McDermott v. State*, 143 Wis. 18, — L.R.A. (N.S.) —, 126 N. W. 888, 21 Ann. Cas. 1315.

A state statute requiring packages containing articles of food to be branded with a statement of the net contents by weight when offered for sale in the retail trade 40 L.R.A. (N.S.)

imposes no obligation upon the manufacturer in a foreign state, but operates alone upon the dealer, who is selling the product at retail as a part of the body of the property of the state, and exclusively under state control, and does not unlawfully interfere with interstate commerce. *Re Agnew*, 89 Neb. 306, 35 L.R.A. (N.S.) 836, 131 N. W. 817, Ann. Cas. 1912 C, 676, followed in *Re King*, 89 Neb. 298, 131 N. W. 820.

The requirement that the name and percentage of the diluent or diluents or bases shall be stated in the labels, as provided by a state statute relating to the sale within the state of concentrated commercial feeding stuffs, is a proper exercise of the police power of the state, and does not, as applied to sales by importers in the original packages, amount to an unconstitutional regulation of interstate commerce. *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

The use of the words "original packages," in a statute making it unlawful to sell, offer for sale, or deliver black powder for use in any coal mines in the states except in original sealed packages containing 12½ pounds of powder, does not necessitate the conclusion that the statute prohibits the importation of black powder from other states in other than 12½-pound packages. *Williams v. Walsh*, 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137, affirming 79 Kan. 212, 98 Pac. 777.

And a state statute prohibiting the coloring, coating, or polishing of an article intended for food, whereby damage or inferiority is concealed, is not in conflict with the power of Congress to regulate commerce, although applied to articles sold in original packages imported from other states. *Arbuckle v. Blackburn*, 65 L.R.A.

610; *People v. Kibler*, 106 N. Y. 323, 12 N. E. 795; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107, reversing 37 Hun, 319; *State v. Groves*, 15 R. I. 208, 2 Atl. 384. The intent to evade the regulation is no part of the offense, and a dealer is guilty though he sells the milk exactly as drawn from the cows, when it falls below the required standard. *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *Pain v. Boughtwood*, L. R. 24 Q. B. Div. 353, 59 L. J. Mag. Cas. N. S. 45, 62 L. T. N. S. 284, 38 Week. Rep. 428, 16 Cox, C. C. 747, 54 J. P. 469; *People v. Kibler*, 106 N. Y. 323, 12 N. E. 795; *People v. Schaeffer*, 41 Hun, 23; *Com. v. Farren*, 9 Allen, 489; *Com. v. Warren*, 160 Mass. 533, 36 N. E. 308."

In *Dorsey v. State*, 38 Tex. Crim. Rep. at page 533, 40 L.R.A. 201, 70 Am. St. Rep. 762, 44 S. W. 515, the court expressly held that "it would be entirely competent for the legislature by an act to prohibit the sale . . . of flour mixed with meal, or

any other wholesome article, without properly labeling the product of such combination." That is a square decision that our statute prohibiting the sale without noting the adulteration of cotton seed meal mixed with hulls in any quantity is a constitutional statute.

In the case of *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585, the state prohibited the sale of adulterated milk, or milk to which water or any foreign substance had been added. That act was assailed as unconstitutional, and the court said: "Under what is generally called the police power of the state, the legislature may protect the public health, comfort, and safety by prohibiting the adulteration of articles of food, and may legislate for the prevention of imposition or fraud in the sale of such articles. *Pierce v. State*, 13 N. H. 536; *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611; *State v. Freeman*, 38 N. H. 426; *Gage v. New Hampshire Eclectic Medical College*, 63 N. H. 92, 56

864, 51 C. C. A. 122, 113 Fed. 616, appeal dismissed in 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

A statute prohibiting the manufacture or sale of process butter unless plainly marked "Renovated Butter" does not unduly interfere with interstate commerce, even when such butter is imported from another state, for purposes of sale in unbroken packages. *Hathaway v. McDonald*, 27 Wash. 659, 91 Am. St. Rep. 889, 68 Pac. 376.

But in *Jewett Bros. & Jewett v. Small*, 20 S. D. 232, 105 N. W. 738, it was held that a state statute under which every prepared article used for food, drink, flavoring, or condiment, by man or domestic animals, whether simple, mixed, or compound, is required to be marked with the true name of the manufacturer and the location of the factory where it is prepared, constitutes an unreasonable interference with interstate and foreign commerce.

Likewise, a statute forbidding the sale of goods made by convicts without being marked "convict-made" is unconstitutional as applied to goods made in other states, as an unjustifiable interference with interstate commerce. *Re Opinion of Justices*, — Mass. —, 98 N. E. 334. To the same effect is *People ex rel. Phillips v. Raynes*, 136 App. Div. 417, 120 N. Y. Supp. 1053, affirmed without opinion in 198 N. Y. 539, 622, 92 N. E. 1097.

And in *Re Ware*, 53 Fed. 783, it was held that a state statute prohibiting the sale of baking powder containing alum unless the package contained a label indicating that fact is an unreasonable interference with interstate commerce, so far as it relates to original packages imported from other states, in the absence of a showing that such baking powder is deleterious to health.

40 L.R.A. (N.S.)

As shown in the earlier note, statutes regulating the manufacture and sale of oleomargarin have been upheld in many of the states. Cases are there cited which upheld statutes prohibiting sales of oleomargarin unless colored pink.

But since the preparation of the earlier note, it has been held by the Supreme Court of the United States that a statute which requires oleomargarin and other imitation butter to be colored pink is invalid when applied to oleomargarin imported from another state, as an unreasonable restriction of commerce. *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768.

To the same effect is *State v. Bruce*, 55 W. Va. 384, 47 S. E. 146, overruling *State v. Myers*, 42 W. Va. 822, 35 L.R.A. 844, 57 Am. St. Rep. 887, 26 S. E. 539, which is cited in the earlier note.

But a statute prohibiting the manufacture or sale of imitation butter or oleomargarin, artificially colored so as to cause it to look like yellow butter, is not in conflict with the commerce clause of the Federal Constitution. *Plumley v. Massachusetts*, 155 U. S. 462, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154, affirming 156 Mass. 236, 15 L.R.A. 839, 30 N. E. 1127.

As shown by the opinion of Mr. Justice Harlan, such statutes seek to suppress false pretenses and to promote fair dealing in the sale of an article of food; to compel the sale of oleomargarin for what it is by preventing its sale for what it is not; and to protect unwary purchasers, who, without closely scrutinizing the label upon the package in which it is contained, would be induced to buy it as and for butter produced from unadulterated milk or cream.

A. L. R.

Am. Rep. 492. The sale of bread, the inspection of flour, beef, pork, and other provisions, the practice of medicine, surgery, and dentistry, the licensing of druggists, and the sales of drugs and medicines, are regulated, and the sale of spirituous or intoxicating liquor prohibited, by statute. Gen. Laws, chaps. 109, 122, 125-129, 132, 133. Such legislation is not open to the objection that it transcends the limits of legislative authority, the purpose and object of such legislation being the protection of the lives, health, comfort, and safety of all persons, and for securing this purpose persons and property are subjected to many restraints and burdens. They are presumed to be rewarded by the common benefits secured. The statute of 1883, regulating the sale of milk, was designed to insure the purity of an article of food of universal consumption, and very largely an article of trade and commerce; many families being dependent upon the dealer for their daily supply. Of the necessity for the statute the legislature is the sole judge. It clearly belongs to the class of police regulations designed to prevent frauds and to protect the health of the people. Similar statutes in other jurisdictions have been held constitutional. *Com. v. Farren*, 9 Allen, 489; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *Com. v. Luscomb*, 130 Mass. 42; *Com. v. Evans*, 132 Mass. 11; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; *State, Shivers, Prosecutor, v. Newton*, 45 N. J. L. 469."

It is curious to note in this last case that the statute was assailed as unconstitutional for directly the opposite reason from that assigned here. The complaint here is that § 1317 prescribes no standard. The complaint in *State v. Campbell* was that the statute was unconstitutional because it did prescribe an arbitrary standard, and on that point the court makes the following very pertinent observations: "The fixing of an arbitrary standard, in § 9, for pure or unadulterated milk, does not render the statute unconstitutional. In *People v. Cipperly*, 37 Hun, 324, a similar statute of New York was pronounced unconstitutional upon the ground that it deprived the defendant of his liberty and property without due process of law, in that it deprived him of the right upon the trial to have the issue determined according to the evidence of the fact, and compelled him to submit to the statutory declaration of the fact without having the truth ascertained. This decision 40 L.R.A. (N.S.)

was reversed in the court of appeals (101 N. Y. 634, 4 N. E. 107), and the constitutionality of the statute sustained on grounds stated in the dissenting opinion of the court below, where the object of the statute was declared to be to regulate and control the quality of an article of food in the interest of the health of the people. Learned, P. J., said: 'But the defendant takes the broader ground that the legislature cannot, under the Constitution, prohibit the sale of milk drawn from healthy cows, which, in its natural state, falls below the standard fixed by the act, unless such milk, or the articles made from it, are in fact unwholesome, or dangerous to public health. How is that question of fact to be determined? The court cannot take judicial notice whether milk below the standard is, or is not, unwholesome or dangerous to public health. Is that to be a question for the jury? If so, the court must charge a jury in each case that, if they find milk below that standard to be unwholesome, then the statute is constitutional; if they find it to be wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled, or rather unsettled, in that way. The constitutionality would vary with the varying judgment of juries. Either, then, the legislature can, under the Constitution, forbid the sale of milk below a certain standard, whether such milk be in fact wholesome or not. . . . If they may fix a standard, they must judge whether or not milk below that standard is wholesome.'"

We think it is perfectly clear that the legislature had the power to declare that cotton seed meal adulterated to any extent with hulls should not be sold without noting such adulteration, as held in the two cases just above referred to by the learned counsel for appellant. We are therefore clearly of the opinion that the statute on its face is constitutional; and since, on the merits of this case, the cotton seed meal sold and unlabeled consisted of 50 per cent hulls, it must be manifest that under any standard this appellant was properly convicted.

Nothing in this opinion is intended to state that any testimony, other than expert testimony, would be competent to show whether cotton seed meal was adulterated. That point is not before us.

Per Curiam:

The above opinion is adopted as the opinion of the court, and for the reasons therein indicated, the judgment is affirmed.

OKLAHOMA SUPREME COURT.

J. COLLINS, Plff. in Err.,
v.

M. E. LACKEY et al.

(31 Okla. 776, 123 Pac. 1118.)

Specific performance — parol sale — possession not under contract.

1. Possession taken by a vendee under a parol contract for the conveyance of real estate, not taken in pursuance of the contract, or with the knowledge and consent of the vendor, is insufficient to relieve the contract of the operation of the statute of frauds, and to entitle the vendee to specific performance.

Headnotes by HAYES, J.

Note. — Right of a purchaser of real estate to rely on the statute of frauds against contract by his vendor with a third person.

It is assumed in this note that the contract is one which, as between the parties themselves, is voidable by reason of a failure to comply with some requisite of the statute of frauds, the distinctive question treated being, as to the right of a purchaser who was not a party to that contract to take advantage of the statute with reference to such a contract. Cases in which the contract has been by any means taken out of the operation of the statute, so that it would not be available as between the parties themselves, have been excluded.

In *Pickrell v. Morris*, 97 Ill. 220, a grantee whose grantor had previously entered into a parol contract for the sale of the real estate was held entitled to set up the statute of frauds as against the parol contract, although the grantor thereafter executed a deed in pursuance thereof, and in the course of the opinion the court says that no one but the grantor could repudiate the contract on the ground that it was in violation of the statute, but he might do so, and when, by the conveyance of the property to another, he placed it out of his power to comply with the contract, he as effectually repudiated the contract as it was possible for him to do in advance of a suit against him for specific performance.

In *Hunter v. Bales*, 24 Ind. 299, the rule is stated that the vendor makes his election to treat the prior verbal contract as void whenever he makes a valid agreement of sale in the face of it, and that the intermediate purchaser in such case is shielded by the statute as well as the vendor.

So, in the recent case of *Ugland v. Farmers' & M. State Bank*, — N. D. —, 137 N. W. 572, a purchaser who had been informed that a prior parol sale by his vendor had been abandoned, and thereupon took an assignment of a contract for the sale of the real estate in question, was held entitled to plead the statute of frauds against the purchaser on such parol sale, in an action for 40 L.R.A. (N.S.)

Contract — parol sale of realty — statute of frauds — who may rely on.

2. A purchaser of land may rely upon the statute of frauds to invalidate a parol contract for its conveyance, made between his vendor and one claiming adversely under such parol contract.

(May 14, 1912.)

ERROR to the District Court for Kingfisher County to review a judgment in favor of defendant Mary E. Lackey in an action brought to quiet title to certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. D. K. Cunningham and L. R. Weiss, for plaintiff in error:

The statute of frauds is a personal de-

specific performance against him and his trustee, in whose name he had in the meantime obtained the title from the original vendor.

And in *Masterson v. Little*, 75 Tex. 682, 13 S. W. 154, a purchaser who had obtained title to land was held entitled to plead the statute of frauds against the claim of one who had a parol contract with his grantor for an interest in the land.

It was held in *King v. Coleman*, 98 Tenn. 561, 40 S. W. 1082, that a purchaser in possession by virtue of an execution sale and deed in accordance therewith might plead the statute of frauds against the validity of a prior parol sale in an entirely different chain of title, so as to defeat the right of the parol vendee to dispossess him.

In *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501, where a man about to marry a woman with whom he had agreed by parol to effect a settlement after marriage deeded his property to his children, it was held that such children might plead the statute of frauds as against the agreement in an action to set aside the deeds and compel the completion of the settlement; but it is further held in this case that the deeds were tainted with fraud, so that they would be declared void in so far as they affected the wife's right of dower.

There is *dictum* in *Sonnemann v. Mertz*, 221 Ill. 362, 77 N. E. 550, to the effect that an instruction which excludes heirs and privies of parties to a parol agreement from taking advantage of the statute of frauds is incorrect.

In *Hansen v. Berthelsen*, 19 Neb. 433, 27 N. W. 423, the grantee of one who had taken title to real estate under an oral trust was held entitled to set up the statute of frauds as against the *cestui que trust*, in an action by him to have the deed set aside and a reconveyance compelled.

So, in *Dailey v. Kinsler*, 35 Neb. 835, 53 N. W. 973, a plaintiff who had obtained a decree in his favor in an action to set aside certain conveyances and compel a reconveyance to him was held entitled to set up the statute of frauds against an intervener who claimed to be entitled to the property

fense,—in this case personal to the grantors alone,—and cannot be raised by defendants.

20 Cyc. 306, L.; *Daum v. Conley*, 27 Colo. 56, 59 Pac. 753; *King v. Bushnell*, 121 Ill. 656, 13 N. E. 245.

Had the deed not been delivered, but the terms and conditions admitted, the same would entitle the plaintiff to specific performance, even against the grantors.

Sprague v. Jessup, 48 Or. 211, 4 L.R.A. (N.S.) 410, 83 Pac. 145, 84 Pac. 802; *Beale v. Clark*, 71 Ga. 818.

Mr. John T. Bradley, Jr., for defendants in error:

Taking possession of real estate is not sufficient performance of an oral contract to take it out of the statute of frauds.

Bringhurst v. Texas Co. 39 Tex. Civ. App. 500, 87 S. W. 893; *Bradley v. Owsley*, 74 Tex. 69, 11 S. W. 1052, — Tex. —, 19 S. W. 340; *Purcell v. Coleman*, 6 D. C. 59; *Catlett v. Bacon*, 33 Miss. 269; *Terry v. Craft*, — Tex. —, 87 S. W. 844; *Heflin v. Milton*, 69 Ala. 354; *Manning v. Pippen*, 95 Ala. 537, 11 So. 56; *Updike v. Armstrong*, 4 Ill. 564; *Burns v. Daggett*, 141 Mass. 368, 6 N. E. 727; *Wisconsin & M. R. Co. v. McKenna*, 139 Mich. 43, 102 N. W. 281; *Kelsey v. McDonald*, 76 Mich. 188, 42 N. W. 1103; *Chamberlain v. Manning*, 41 N. J. Eq. 651, 7 Atl. 634; *Galbreath v. Galbreath*, 5 Watts, 146.

Hayes, J., delivered the opinion of the court:

This action was commenced in the court

in dispute by virtue of a parol trust in her favor from the defendant.

And in *Sanborn v. Murphy*, 86 Tex. 437, 25 S. W. 610, a purchaser was held to have the right to set up the statute of frauds to avoid an attempted parol rescission of a contract by which his grantor became possessed of the land in question.

In *Grundies v. Kelso*, 41 Ill. App. 200, it is held that the grantee of a lessor, being in privity with such lessor, can set up the statute of frauds against an alleged parol extension of the lease.

But in *Shakespeare v. Alba*, 76 Ala. 351, where one had purchased land subject to a parol lease thereon, it was held that he could not, in an action specifically to enforce the lease, in which his vendor was made a party and waived the benefit of the statute, set up such statute to invalidate the lease. There were other reasons given, however, for the decision in this case, some of which seem of more force than the one above given.

In *Lucas v. Mitchell*, 3 A. K. Marsh. 244, one who, with full knowledge of a parol sale by the holder of a title bond to one who had paid the purchase price and gone into possession, secured an assignment of

below by plaintiff in error, hereinafter called plaintiff, against defendants in error, to remove cloud from title to certain real estate. As it does not appear that any of the defendants in error, except M. E. Lackey, have any interest in this controversy, we shall refer to her as defendant.

Plaintiff alleges in his petition that he is the owner of the legal title and in actual and peaceable possession of lots 10, 11, and 12, in block 1, in Colson's addition to the city of Kingfisher; that defendant claims some right, title, or interest in and to said lots adverse to plaintiff, the exact nature of which is unknown to him. He prays in his petition that title to said lots be forever quieted in him, and that the deed under which defendant claims be canceled and held for naught. Defendant in her answer and cross petition makes general denial of the allegations of plaintiff's petition, and specifically denies that plaintiff is the owner or has any interest in the lots, and sets up title in herself by virtue of a warranty deed executed and delivered to her on the 9th day of January, 1909. She prays that title to said lots be quieted in her; and that any deed or muniment of title purporting to vest any interest or title in plaintiff be canceled and held for naught. To her answer, plaintiff filed a reply denying the affirmative allegations therein; and on the issues thus joined the case was tried by the court, without a jury.

The court, after hearing all the evidence, found the facts substantially as follows: On the 21st day of December, 1908, Albert

the title bond to himself, was held not entitled to the aid of a court of equity to compel a conveyance from the parol vendee, who in the meantime had secured the legal title in himself.

In *Bulkley v. Storer*, 2 Day, 531, it was held that a purchaser of land who had fraudulently obtained title to the same could not object to the introduction in evidence of a parol contract, void under the statute of frauds, in his grantor's title, in an action on the case against him for fraud.

After the vendor under a parol contract has elected to treat the contract as void, and has conveyed the property to another, he cannot file an answer in an action for specific performance in such a way as to complete the parol contract and render it enforceable. *Messmore v. Cunningham*, 78 Mich. 623, 44 N. W. 145. Nothing is said in this case as to the right of the grantee to rely on the statute of frauds.

The fact that the grantee may have had notice of the parol contract was held to amount to nothing in *Pickerell v. Morss*, 97 Ill. 220.

See *Lucas v. Mitchell*, 3 A. K. Marsh. 244, supra. W. A. E.

M. Colson, J. O. Collins, F. C. Smith, and Justin B. Call were the owners of the lots in controversy. On that date, A. M. Colson, acting for himself and his joint owners, entered into an oral agreement with plaintiff to sell and convey said lots to him; and thereafter a deed was executed by the above-named joint owners of the lots, and said deed was, on the 2d day of March, 1909, delivered to plaintiff. On the 1st day of January, 1909, plaintiff took possession of the lots and made improvements thereon by cutting soap weeds on same and spreading manure on the lots, and also by digging two post holes and setting two posts thereon. On the 9th day of January, 1909, George P. Bonnett, who was the duly appointed and acting attorney in fact for the said Colson, Smith, Call, and Collins, purports to have conveyed the lots to defendant. On the last-mentioned date, Bonnett, as attorney in fact for the owners of said lots, executed and delivered to defendant Mary E. Lackey a deed conveying said lots to her. His power of attorney was duly recorded on the 9th day of January, 1909, and the deed executed to Mary E. Lackey was filed for record on the 12th day of January, 1909, prior to the delivery of the deed from the same grantors to plaintiff. Plaintiff continued in possession of said lots until the 5th day of February, 1909, on which date defendant, over the protest of plaintiff, entered upon said lots and plowed them up, except a small portion on which was located a cow corral, the possession of which was retained by plaintiff. Defendant, prior to the purchase by her of the property, saw the manure that had been placed on said lots, but was not informed who put it there, and had no actual notice of plaintiff's oral contract for the purchase of said lots.

From these facts, the court concluded that the oral contract between Colson and Collins, on December 21, 1908, for the sale of said lots, was void under the statute of frauds; and that the possession taken thereof by plaintiff on January 1st, and the improvements made by him thereon, were not sufficient to entitle plaintiff to specific performance of said contract, and for that reason defendant Mary E. Lackey acquired a good title by virtue of her deed, and is the owner and entitled to possession of the lots, and rendered judgment accordingly.

The sole assignment of error relied upon for reversal of this cause is that the judgment of the trial court is against the law and the evidence. It is not questioned that the parol agreement made between plaintiff and the grantors on December 21, 1908, is void, unless the taking of possession by plaintiff and making the improvements on the lots mentioned is sufficient to take the

contract out of the operation of the statute of frauds, and render plaintiff entitled to specific performance of the contract. Plaintiff did not pay the purchase price at the time the oral contract was made. There is evidence to the effect that he paid same some time prior to the time the deed was finally delivered to him; but the exact date of the payment of the purchase price by him is not disclosed by the evidence. But whether paid before the execution and delivery of the deed to defendant on January 9, 1909, or afterwards, is not very material, for it is well settled by the authorities that the payment of purchase money alone is not sufficient performance of an oral agreement to sell real estate to authorize the court to enforce specific performance thereof. The authorities are practically unanimous that payment of the purchase price and taking possession under the contract and making valuable improvements on the granted premises constitute such a performance of the contract as will warrant a decree of specific performance. There is some division in both the English and the American authorities as to whether taking possession alone under the contract, without making valuable improvements, is sufficient to take the contract out of the operation of the statute. The weight of authority, both in England and in this country, however, supports the rule that possession alone of land under a verbal contract, when delivered to the vendee, is sufficient performance to take the case out of the statute of frauds, without the additional circumstances of payment of consideration, or the making of valuable improvements. Pomeroy, Spec. Perf. § 115.

In *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286, and *Sutherland v. Taintor*, 17 Okla. 427, 87 Pac. 900, it was held that the court would enforce a parol agreement for the sale of real estate, when the vendor has paid the consideration and taken possession in good faith, with the knowledge and consent of the vendor, and made permanent improvements thereon. No case has been decided in this jurisdiction that we now recall where the facts involved were that the grantee had taken possession only, without payment of consideration and without the making of valuable improvements. Among the many decided cases which hold that the delivery of possession by the vendor, or the taking thereof by the vendee, in pursuance of the contract, is sufficient to authorize a decree of specific performance, are the following: *Keatts v. Rector*, 1 Ark. 391; *Blakeney v. Ferguson*, 8 Ark. 272; *McNeill v. Jones*, 21 Ark. 277; *Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. 149; *Eaton v. Whittaker*, 18 Conn. 222, 44 Am. Dec. 586; *Edwards v. Fry*, 9 Kan.

417; *Baldwin v. Baldwin*, 73 Kan. 39, 4 L.R.A.(N.S.) 957, 84 Pac. 568; *Bresnahan v. Bresnahan*, 71 Minn. 1, 73 N. W. 515; *Green v. Richards*, 23 N. J. Eq. 32; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Jomsland v. Wallace*, 39 Wash. 487, 81 Pac. 1094.

The reason upon which the foregoing rule is founded is that, if there be no agreement valid in law or equity, where the vendee has gone into possession in pursuance of his contract, or with the consent of the vendor, then such vendee is made a trespasser and liable as such to the vendor, although his every act has been done with the knowledge and consent of the vendor; and such a position would amount to a fraud practised upon him by the vendor. *Browne*, Stat. Fr. § 469. But, in order for possession alone to authorize specific performance, it must be attended by certain circumstances; it must be notorious, exclusive, and delivered or taken in pursuance of the alleged contract. *Browne*, Stat. Fr. §§ 473-476. One who is already in possession, and continues such possession after the making of a parol contract for purchase, does not thereby take the contract out of the statute. An entry made after the parol agreement, not in pursuance thereof, and without the knowledge of the vendor, is a trespass, and does not authorize a decree of specific performance. Such entry, in order to authorize specific performance, must be in pursuance of and on the faith of the contract. *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286; *Id.*, 202 U. S. 287, 50 L. ed. 1032, 26 Sup. Ct. Rep. 610, 6 Ann. Cas. 189; *Browne*, Stat. Fr. §§ 483, 484; *McNeill v. Jones*, 21 Ark. 277; *Foster v. Kimmons*, 54 Mo. 488; *Benedict v. Bird*, 103 Iowa, 612, 72 N. W. 768; *Browder v. Phinney*, 37 Wash. 70, 79 Pac. 598; *Wood v. Thornly*, 58 Ill. 465.

There is an entire absence of any evidence in the record to show that plaintiff took possession in pursuance of the parol agreement. On the other hand, the testimony is to the effect that nothing was said about possession; nor did he take possession with the knowledge and consent of the vendors. Plaintiff owns and lives upon lots that join the lots in controversy on the north. Prior to the making of the oral agreement, his cow lot extended some 3 or 4 feet over on the lots in controversy. The only acts of possession exercised by him since the oral agreement that were not exercised before are that he dug post holes and set two posts, for the purpose of extending his cow lot some 8 or 9 feet farther over on the lots purchased, and the additional acts of spreading some manure in bunches over a part of the lots, and digging up some weeds. But whether all these acts

constituted a taking of possession before the purchase or after the purchase, in neither event were they done in pursuance of the contract, and for that reason are ineffective to relieve the agreement of the operation of the statute; and, the contract being voidable at the election of either party thereto, even if defendant had knowledge thereof at the time she received her deed, it was without any force.

It is contended, however, by plaintiff that defendant cannot avail herself of the statute. It is true that where parties to a parol contract to convey real estate desire to perform the contract, they may do so, and a stranger to the contract cannot set up the statute for the benefit of either of the parties or for himself; but this rule does not exclude those holding in privity with one of the contractors of the right to avail himself of the statute. To hold otherwise would, in a great measure, destroy the statute. The purpose of such statute is to provide that no person to a parol contract to convey real estate shall be bound thereby, unless he chooses to be, and voluntarily executes the contract. But if he may not sell the property which is the subject of such a contract to another, and such a contract remains a cloud upon his title, unless suit is brought to remove it, or unless the other contracting party brings a suit to enforce the contract, and defendant pleads the statute and obtains judgment declaring the contract void, then such a contract creates a liability against the parties, subject to be defeated only by a suit. When the owners of this land, acting through their lawfully constituted agent, conveyed same to defendant, they placed it out of their power to comply with their parol agreement with plaintiff, and thereby repudiated their contract with him; and their grantee, being privy to the parol agreement, may take advantage of the statute. *Hansen v. Berthelsen*, 19 Neb. 433, 27 N. W. 423; *Best v. Davis*, 44 Ill. App. 624; *Pickerell v. Morss*, 97 Ill. 220; *Sonnemann v. Mertz*, 221 Ill. 362, 77 N. E. 550; *Masterson v. Little*, 75 Tex. 682, 13 S. W. 154; *Shelton v. Thompson*, 96 Mo. App. 327, 70 S. W. 256.

Plaintiff also contends that the power of attorneys of the agent from whom defendant purchased had been revoked prior to the execution of the warranty deed to defendant. It is not necessary here to decide what would have been the effect of defendant's deed, if the owners of the land had, prior to the execution and delivery of the deed to defendant, executed and delivered to plaintiff their deed for the land in controversy, of which defendant had no actual or constructive notice until the delivery of the deed by the agent to her. It

is sufficient answer to this contention that, as heretofore determined, plaintiff never became vested with any legal or equitable title under the parol agreement; and, while the deed from the owners of the land to plaintiff was drawn on the 21st day of December and signed the next day by one of the grantors, the deed was not signed and executed by the other grantors, nor delivered, until in March thereafter, long subsequent to the execution and delivery of defendant's deed. At the time defendant purchased and received her deed, her grantors were the owners of the legal and equitable title to this land, and, acting either in person or through their lawfully constituted agent, had power to convey it.

For the foregoing reasons, the judgment of the trial court should be, and is, affirmed.

Turner, Ch. J., and Williams, Kane, and Dunn, JJ., concur.

NEBRASKA SUPREME COURT.

HARRY W. BURDICK

v.

BLANCHE KAELEN et al., Appts.

(— Neb. —, 136 N. W. 988.)

Parent and child — transfer of custody — welfare of child.

Where a mother dies immediately after the birth of a child, and the father commits it to the custody of a competent woman, who properly cares for it in a suitable home, without compensation, and the father permits a mutual attachment to grow up between them for a number of years under a contract with him awarding to her its permanent custody, in a proceeding by the father to regain his child, the general rule, that the controlling consideration is the child's own best interests, applies.

(June 12, 1912.)

A PPEAL by defendants from a judgment of the District Court for Custer County affirming a judgment of the County Court in plaintiff's favor in a habeas corpus proceeding to secure the custody of Bertha Mildred Burdick. Reversed.

The facts are stated in the opinion.

Headnote by ROSE, J.

Note.— See note to State ex rel. Kearney v. Steele, 16 L.R.A. (N.S.) 1004, referred to in the above opinion. As to the effect of the death of parent to whom the custody of a child has been awarded, upon the right of the surviving parent, see note 40 L.R.A. (N.S.)

Messrs. Sullivan & Squires, for appellants:

Everything must give way to the best interests of the child.

State ex rel. Thompson v. Porter, 78 Neb. 812, 112 N. W. 286.

The contract in evidence in the case at bar is a valid binding contract that respondents can rely upon, and by its terms respondents are entitled to the custody of the child.

Legate v. Legate, 87 Tex. 248, 28 S. W. 281; Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Enders v. Enders, 164 Pa. 266, 27 L.R.A. 56, 44 Am. St. Rep. 598, 30 Atl. 129; Curtis v. Curtis, 5 Gray, 535; Dumain v. Gwynne, 10 Allen, 270; People ex rel. Johnson v. Erbert, 17 Abb. Pr. 395; Merritt v. Swinley, 82 Va. 433, 3 Am. St. Rep. 115; Bently v. Terry, 59 Ga. 555, 27 Am. Rep. 399; Bonnett ex rel. Newmeyer v. Bonnett, 61 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91; Com. ex rel. Gilkeson v. Gilkeson, 1 Phila. 194; State ex rel. Wood v. Deaton — Tex. Civ. App. —, 52 S. W. 591; Stringfellow v. Somerville, 95 Va. 701, 40 L.R.A. 623, 29 S. E. 685; Green v. Campbell, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. 212; Cunningham v. Barnes, 37 W. Va. 746, 38 Am. St. Rep. 57, 17 S. E. 308; People ex rel. Curley v. Porter, 23 Ill. App. 196; Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321; Miller v. Wallace, 76 Ga. 479, 2 Am. St. Rep. 48; Hoxsie v. Potter, 16 R. I. 374, 17 Atl. 129; Ellis v. Jesup, 11 Bush, 403; Nugent v. Powell, 4 Wyo. 173, 20 L.R.A. 199, 62 Am. St. Rep. 17, 33 Pac. 23; Anderson v. Young, 54 S. C. 388, 44 L.R.A. 277, 32 S. E. 448.

Messrs. Silas A. Holcomb and A. P. Johnson, for appellee:

Plaintiff was entitled to the custody of his child.

State ex rel. Thompson v. Porter, 78 Neb. 812, 112 N. W. 286; Norval v. Zinsmaster, 57 Neb. 158, 73 Am. St. Rep. 500, 77 N. W. 373; Terry v. Johnson, 73 Neb. 663, 103 N. W. 319; Miller v. Miller, 123 Iowa, 165, 98 N. W. 631; 29 Cyc. 1586; Sturtevant v. State, 15 Neb. 459, 48 Am. Rep. 349, 19 N. W. 617; Re Bullen, 28 Kan. 781; Clarke v. Lyon, 82 Neb. 625, 20 L.R.A. (N.S.) 171, 118 N. W. 472.

Rose, J., delivered the opinion of the court:

This is a controversy over the custody of a child named Bertha Mildred Burdick.

to Clarke v. Lyon, 20 L.R.A. (N.S.) 171, and later case, Wilson v. Mitchell, 30 L.R.A. (N.S.) 507. As to right of parent to appointment as guardian of minor child, see note to Re Crocheron, 33 L.R.A. (N.S.) 868.

It was born November 13, 1906, and its mother died five days later. Before it was a week old, it was taken to the home of Bert Kaelin, where it remained for more than three years. Kaelin's family consisted of himself, his wife, and two children, a boy ten years old and a girl of the age of six. May 14, 1910, Harry W. Burdick, the father of the child, petitioned the county court of Custer county for a writ of habeas corpus to obtain its custody, alleging that it was unlawfully deprived of its liberty by the Kaelins. At that time Burdick's family consisted of himself, a second wife, and a little son by his first wife. The rival families are prosperous farmers, living in commodious homes $\frac{1}{2}$ of a mile apart, in Custer county, near Ansley. The trial in the county court resulted in an order taking the child from the Kaelins and restoring it to its father. Upon a review of the proceedings in the district court, the judgment of the county court was affirmed. The Kaelins have appealed to this court.

Is the judgment of the county court free from error? Did the best interests of the child, when all of the facts, circumstances, and conditions disclosed by the evidence are considered, require the county court to take the child from the Kaelins and restore it to its father? These are the questions to be determined.

Both the father and the Kaelins are abundantly able to furnish the child a suitable home, to support it, to educate it, and to bestow upon it a bounty in the form of property or testamentary bequests. It cannot be determined, without disregarding the evidence, that the father is unfit to have the custody of his child. That Mrs. Kaelin is a suitable person to raise it has been demonstrated by an actual test of motherly devotion and care, above the criticism of the father himself. The decision must therefore be controlled by other considerations.

The father asserts his rights as the natural guardian of his offspring. He further urges that he has a suitable home; that he has remarried and can properly care for his child; that his present wife will give it the care of a mother; that, according to the expressed wish of the child's mother and his own desires, his two children should be raised and educated together; that for their own good they should be companions; that the ties between brother and sister will be a benefit to both, if they are permitted to live together; that the control of a father is the best assurance of the child's welfare and happiness; that the Kaelins obtained only temporary custody of the child, with the understanding they should receive compensation, which he is willing to pay; that for the purpose of preventing his own

relatives from interfering with its custody, he entered into a contract allowing Mrs. Kaelin to keep it, but not for the purpose of abandoning his own rights as parent; that the contract was void as to him; and that the best interests of the child demand that it be restored to his custody and control.

The merit of these propositions cannot be determined without a full consideration of other facts. In a controversy like this, the court is not bound, as a matter of law, to restore the child to its father. The welfare of an infant is paramount to the wishes of the parent, where it has formed a proper and natural attachment for another person, who has long stood in the relation of a parent, with the parent's consent. *Sturtevant v. State*, 15 Neb. 459, 48 Am. Rep. 349, 19 N. W. 617; *Norval v. Zinsmaster*, 57 Neb. 158, 73 Am. St. Rep. 500, 77 N. W. 373; *State ex rel. Thompson v. Porter*, 78 Neb. 811, 112 N. W. 286.

Before and after the death of the mother, Mrs. Kaelin was at her home to minister to her and to her child, without compensation. At the request of its father, she took the child and its little brother home with her, and for a short time kept an account of her expenditures in behalf of the baby. The little boy returned to his father in three weeks, but went back at intervals, remaining for a short time only. The child was sickly, and for three months it took practically all of Mrs. Kaelin's time. Like an anxious and devoted mother, she spent entire nights with it, without sleep. One night, when it was sick, she telephoned for its father, and he came to see it. Afterwards she again telephoned for him in the night; but he declined to come, saying she knew better than he what to do. Constant attention to the helpless, innocent child produced the natural result. There soon came a time when she recognized a growing attachment for it, and when she began to dread a separation. After considerable discussion, the following contract in writing was duly executed:

This agreement made and entered into this 16th day of March, A. D. 1907, by and between Harry W. Burdick, of the first part, and Blanche Kaelin, of the second part, witnesseth: That Harry W. Burdick, of the first part, is the father of Bertha Mildred Burdick, his minor child; and that said Harry W. Burdick has this day voluntarily relinquished all his right to the custody of and control over said Bertha Mildred Burdick, and to the services and wages of said child, to the end that said Bertha Mildred Burdick should be adopted by Blanche Kaelin, and that said Blanche Kaelin shall be-

stow upon said Bertha Mildred Burdick all the care of and control over, as should be bestowed upon a child born in lawful wedlock. It is further agreed that the first party shall, at all reasonable times, be permitted to visit said Bertha Mildred Burdick and to have said Bertha Mildred Burdick visit him, if she so chooses. It is further agreed that, should the second party not provide the proper care of said child, then the said Harry W. Burdick shall have full right to take said child and declare this contract null and void.

Harry W. Burdick.

Blanche Kaelin.

Witness: C. Mackey.

Consent to the adoption was withdrawn. Of course, a father, by entering into a contract of this kind, cannot escape his obligations to his offspring; nor can such an instrument be made the means of keeping a child in an unsuitable place, where a proper one is available. An examination of the opinions discussing this subject shows the correctness of the following editorial note found in *State ex rel. Kearney v. Steele*, 16 L.R.A. (N.S.) 1004: "Though it is quite generally held that a contract, whereby a parent intrusts to another the custody of his child, with the understanding that his rights thereto as parent are thereby transferred, is against public policy and unenforceable, yet the cases are numerous where the court is at great pains to discover whether or not such an agreement has been made. To such a contract great importance is attached; and oftentimes, especially where both claimants for the child are equally fit, such contract is the deciding factor."

Though Burdick insists that the contract was made to protect the child's custody from the interference of his relatives, his own testimony shows that every time he thereafter mentioned the subject to Mrs. Kaelin she asserted her absolute right of control, and that her will in that respect prevailed. She kept the child three years after he remarried. She and her husband have defended their possession in three courts with a vigor which could not be surpassed on behalf of their own children. When Burdick spoke to Mrs. Kaelin about paying for keeping the child, she resented it, saying she could not be compensated in money. He never in fact gave or paid her anything of value beyond \$18,—an insufficient reward for taking care of his little boy alone, though she made no charge for doing so. No disinterested person can read the record without being convinced that she believed in her right of custody under her contract. After the agreement was exe-

cuted, she allowed the child to pull at her heart strings, and she reciprocated without restraint. She testified, without qualification, that her attachment for the child was the same as for her own children. When the writ was served upon her, all the child knew of home and mother had been learned at the Kaelins, where it was happy and contented. Such ties cannot be severed without affecting the child. Did its best interests require a separation? Mrs. Kaelin has children of her own. Her spirit has been refined in the crucible of motherhood. She has been a teacher. In her home the child hears language and observes manners born of culture and refinement, where there are pictures, flowers, and music. There it is under moral and religious influences softened by liberality and freedom. A court may well hesitate to take a child away from such surroundings to try an experiment elsewhere. It is no disparagement to the stepmother to say that these conditions cannot be equaled in her home. Upon a few days' acquaintance, she was married to the father of the child six months after the death of its mother. She is ten years older than her husband, has no children of her own, and has passed the time of life when she can hope to become a mother. At the trial she made no claim to an affection for the child, beyond that imposed by her duties as a stepmother. These facts are not mentioned as reflections upon her fitness to have the custody of the child, but to suggest the difference in conditions to which a change of custody would subject it. Mrs. Burdick has a large, well-kept house, near a good school; and her testimony indicates that she would require strict observance of moral and religious principles as she understands them.

At the time of the trial, the child's happiness and welfare were assured, for the present at least. To make a change would be an experiment at best. At the Kaelins the father will not be deprived of the companionship of his daughter, but will be welcomed there as a visitor at all proper times, as long as he recognizes their right of custody. Upon a proper consideration of the entire case, it cannot be held that the best interests of the child require a change in its custody. It follows that there was error in the order affirming the judgment of the county court. The affirmation is therefore reversed, and the cause remanded to the district court, with instructions to commit the custody of the child to Mrs. Kaelin.

Reversed, with instructions.

ALABAMA SUPREME COURT.

ARTHUR DREW, Appt.,

v.

WESTERN STEEL CAR & FOUNDRY
COMPANY.

(— Ala. —, 56 So. 995.)

Master — inspection of junk — negligence.

A master is not liable for negligence in failing to inspect an ammonia tank sold to him as junk, before turning it over to employees to be broken into scrap, so as to be liable for injuries caused by the escape of gas which had been permitted to remain in the tank when the employees started to work upon it.

(McClellan and Somerville, JJ., dissent.)

(November 29, 1911.)

APPEAL by plaintiff from a judgment of the City Court of Anniston in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Niel P. Sterne and Tate & Walker for appellant.

Messrs. Willett & Willett for appellee.

Somerville, J., delivered the opinion of the court:

Plaintiff sued to recover for personal injuries, and the case was submitted on the following agreed statement of facts, which was all the evidence:

"On the 15th day of March, 1909, plaintiff was an employee of defendant. While engaged in the regular course of his employment, he sustained injuries by ammonia gas escaping from an ammonia tank, which was being broken by the steam hammer of defendant. Plaintiff's injuries confined him to his bed, and incapacitated him from working for three weeks, weakened his eyesight, and caused him to be short-winded. This ammonia tank had been taken from a pile of scrap iron on defendant's yard, and the ammonia tank and scrap iron had been on defendant's

yard for about two years. That defendant was in the habit of purchasing for its rolling mill large quantities of scrap iron, and had purchased this ammonia tank as scrap iron, together with a lot of other scrap iron, and it had been in the scrap pile on defendant's yard, as stated, for something over two years; that the defendant had just before this accident broken up as scrap iron several other ammonia tanks similar to the one which injured plaintiff, and found nothing in them and nothing wrong with the same.

"The tank in question was a 9-inch tank about 6½ feet long, and was charged with ammonia gas, a substance dangerous when allowed to escape. It was not known, however, to defendant, or any of its agents or employees that it was charged with ammonia gas or any other substance. No inspection had been made of it; nor had any inspection been made of the other ammonia tanks which had been broken up as scrap iron. The ammonia tank in question had been taken from the scrap pile and placed on the steam-hammer anvil by order of Lee Coker, who was intrusted with superintendence in that respect by the defendant. The employees started to mash or break up this ammonia tank into scrap iron in the usual manner, by placing one end on the steam-hammer anvil, with the other end resting on the sawhorse. The men who placed the tank on the sawhorse and anvil stepped back to get out of the range of the flying particles of iron, and the man operating the steam hammer struck the tank a light blow with the hammer. There was no noticeable effect from the blow, except a slight flattening of the end of the tank, but when the hammer was raised the ammonia or gas gushed out, shooting the tank out from under the anvil and around in a semicircle to a point about 30 feet from the hammer, and on the opposite side from that on which it was resting when struck. The ammonia was scattered during the flight of the tank, and plaintiff was injured as a result of the escaping ammonia from the tank. The tank in question and others which were broken up were of the kind in which ammonia gas is ordinarily kept, although they were all pur-

Note.— *Duty of master to inspect junk to be handled by employees.*

One other reported case involves the duty of the master in respect to servants engaged in handling junk. In *Nickel v. Columbia Paper Stock Co.* 95 Mo. App. 226, 68 S. W. 955, it was held that it was the master's duty to warn servants engaged in sorting rags and paper, of the danger of infection, where refuse from a hospital containing

pieces of cotton saturated with blood and pieces of decaying human flesh, or any other foul or poisonous materials, were collected by his agents. The court held further that, even if the material had been collected without the defendant's knowledge or authority, common prudence would have dictated an inspection thereof before handing it over to servants to be sorted.

W. M. G.

chased by defendant as scrap iron, to be used as scrap iron, and had been put in the scrap-iron pile on defendant's yards."

The complaint formulates the charges of negligence on the part of the defendant, through its superintendent in charge of the work, in the following terms: "(A) He ordered the plaintiff and others to put said ammonia tank on said hammer, to be broken thereby, when he knew, or ought to have known, that the said tank was dangerous and liable to explode or emit dangerous chemicals or gaseous substances when struck by said hammer. (B) He negligently had said tank placed on said hammer, to be broken thereby, without informing himself as to whether or not the same was liable to explode or emit dangerous chemicals or gaseous substances when struck by said hammer. (C) He negligently had said ammonia tank placed on said hammer, to be broken thereby, when the same was dangerous and liable to explode or emit dangerous chemicals or gaseous substances on being struck, of which dangerous nature of said tank the said Lee Ooker knew, or ought to have known of the same, by the exercise of reasonable diligence. (D) He negligently ordered said ammonia tank to be placed on said hammer, to be mashed thereby, and negligently failed to examine the same, and to ascertain whether or not it was charged and liable to explode or emit dangerous chemicals or gaseous substances on being struck. (E) He negligently had said ammonia tank placed on said hammer, and the same struck by said hammer, when he knew, or ought to have known, that the said tank was likely charged with ammonia or other highly explosive substance, and that the striking of the same with the said hammer would likely injure those close by. (F) He negligently had said ammonia tank placed on said hammer, and the same struck by said hammer, without testing or inspecting the same to see whether or not it was charged, and without knowing whether or not the same had been so inspected or tested."

The record is silent as to what pleas were interposed by the defendant, and we presume the submission was on a plea of the general issue. The trial court gave to the jury the general affirmative charge for the defendant, and there was judgment accordingly. Thus the only question here is whether the evidence offered, there being no dispute as to the facts, was of such a character as to *prima facie* show negligence on the part of the defendant employer, or to permit any rational inference favorable to that view.

The general rule, often affirmed by this 40 L.R.A.(N.S.)

and other courts, is thus stated: "If the facts are disputed, or, if not disputed, the existence of negligence is an inference, which, as mere matter of discretion and judgment, may or may not be drawn from them, the question must be submitted to the jury." *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487. And, again: "In cases of doubt—where the facts are disputed, or where different minds may reasonably draw different conclusions from the same undisputed facts—the question of negligence *vel non* is a question of fact for the determination of the jury; but, when the facts are undisputed, and the inference to be drawn from them is clear and certain, it is a question of law for the decision of the court." *Louisville & N. R. Co. v. Allen*, 78 Ala. 494.

The situation presented here is novel, and falls within the twilight zone, where law and fact intermingle, and the boundary between them becomes difficult to distinguish.

It is the nondelegable duty of the master to exercise due care and diligence to furnish reasonably safe and suitable materials and appliances to the servant who has to work with them. *Tutwiler Coal, Coke & I. Co. v. Farrington*, 144 Ala. 157, 168, 39 So. 898; *Southern R. Co. v. McGowan*, 149 Ala. 440, 43 So. 378; *Smith v. Watkins*, — Ala. —, 55 So. 611. The servant may assume that what is thus furnished is free from defect, and he is not required to exercise ordinary care to ascertain the defect. 149 Ala. 440, 43 So. 378.

A necessary corollary to the duty just stated is that materials which are apparently dangerous to use, by reason of some quality or condition, or which, though apparently innocent, may, by reason of antecedent conditions known to the master, harbor a hidden danger, ought to be inspected by the master before they are delivered to the servant for his use, or before he is required to use them. Otherwise the master may assume that what is ordinarily harmless will constantly be so under similar forms and conditions, and even reasonable care and prudence would not require any special inspection.

Where the law has not prescribed the special conduct due from the master under the particular circumstances, no more is required of him than "that degree of care which very careful and prudent men exercise in their own affairs." *Williams v. Anniston Electric & Gas Co.* 164 Ala. 84, 51 So. 385. So, negligence is the doing of something which a prudent and reasonable man would not do, or the omission to do something which a reasonable and prudent man would do, guided by those considerations which ordinarily govern the conduct

of human affairs. *Garlick v. Dorsey*, 48 Ala. 220.

In the application of these general principles to the particular facts in hand, we are aided by no Alabama decision, and from other states we find only two cases which seem to be approximately pertinent.

In *Purdy v. Westinghouse Electric & Mfg. Co.* 197 Pa. 257, 51 L.R.A. 881, 80 Am. St. Rep. 816, 47 Atl. 237, it was held that the use of barrels that had formerly contained oil, alcohol, turpentine, benzin, whisky, and other things, for the shipment of iron castings, does not render an employer liable for injury to an employee by explosion of a barrel, caused by lighting a match to read the number on the barrel, done in the line of his service, when it is not shown that the employer had any knowledge that there was danger of an explosion in the use of such barrels. Says the court, per McCollum, J.: "There is no testimony in the case which shows that the defendant company, or any other person connected with it, knew that the barrels, used as above stated, were, under any circumstances, explosive; nor is there any testimony showing that such barrels are not commonly and ordinarily used for such purposes at manufactories, or that they are in any way unsuitable for such use. It seems, therefore, that the testimony introduced in support of the plaintiff's claim was justly held by the court below to be insufficient to charge the defendant company with negligence." It will be noted that the decision rests upon two propositions: (1) That in thus using these barrels the defendant was but conforming to common usage; and (2) that there was nothing to show any knowledge of their dangerous character, or of any likelihood of their explosion, since they were empty when brought. And, we may add, the danger was latent, and not discoverable by any practicable inspection. This decision is referred to in the text of *1 Labatt on Master and Servant*, § 81, p. 217, and that able writer there says of it, by way of criticism, that he is of the opinion that "it was a fair question for the jury whether the employer ought not to have inquired more closely into the conditions, before allowing the appliances in question to become part of his plant."

In the case of *Neveu v. Sears*, 155 Mass. 303, 29 N. E. 472, the plaintiff, a stone mason, was dressing a stone furnished to him by his employer, the defendant, when the stone exploded and injured the plaintiff. The stone had been blasted with dynamite from the defendant's quarry, and there was evidence that, notwithstanding precautions taken at the quarry, unex-

ploded dynamite had been found in the drill holes of some of the stones there quarried. It was held that the question whether defendant had exercised reasonable care in discovering and removing unexploded dynamite from the stone before delivery to the plaintiff was for the jury. Says the court, per Barker, J.: "We are of the opinion that there was evidence for the jury that the defendant failed to use reasonable care to furnish safe material for the plaintiff's work. The jury were entitled to consider matters of common knowledge with the evidence, and to draw reasonable inferences from the whole. . . . His [defendant's] employment of competent quarrymen, and his furnishing them with proper means of preventing any dangers consequent upon the use of dynamite, would not justify him in relying upon an actual want of knowledge that there had been carelessness at the quarry, as an excuse for furnishing a dangerous stone for plaintiff's use, if, knowing all that had happened at the quarry, he would then have had reason to believe that unexploded cartridges might remain in the blocks removed to the storage ground, and in the stones split from them. The jury . . . were left to say whether or not there was need of such an examination, upon the knowledge which the defendant had, or ought to have had, of what occurred at the quarry, and were instructed to hold the defendant only to such care as an ordinarily prudent man, with such knowledge, ought to use with reference to stone coming from such a quarry."

It is apparent at a glance that *Neveu v. Sears*, in its material and decisive aspects, is very strongly analogous to the present case, if, indeed, there be any valid distinction at all. Here the material furnished to the injured man, to be broken by violent percussion, was a metal gas tank "of the kind in which ammonia gas is ordinarily kept." This tank bore upon its face the history of its former use as a receptacle for an explosive gas, which might be dangerous to human beings, if suddenly exposed to it in sufficient quantity. It may be that the weight of probability is that those who use such tanks for the storage of ammonia gas would exhaust their gaseous contents before discarding them for the junk pile. But this is a mere inference of fact, which might reasonably be subject to frequent exceptions. It certainly cannot be affirmed, as matter of law, based on any common usage or experience, that such a tank presumptively contained no harmful residue of its former noxious contents. Nor can it be affirmed, as matter of law, that the employer owed to his employee no

duty to inspect a tank known to have once been dangerous, so far as his present use of it is concerned, by reason of imprisoned gas, and so to ascertain whether that danger had been removed, and the material made safe for his own present uses.

It is, of course, true that injuries from latent defects in machinery or materials, whose presence cannot reasonably be anticipated, and which cannot be discovered by careful inspection, impose no liability on the employer. *Louisville & N. R. Co. v. Allen*, 78 Ala. 494. But it cannot be said that this is a latent defect in that sense, since the nature of the receptacle offered a rational basis for anticipation, and detection would, it may fairly be assumed, have resulted from an inspection by no means difficult or troublesome.

As already noted, the case of *Purdy v. Westinghouse Electric & Mfg. Co.* supra, though of doubtful soundness, is distinguishable from the present case, and is not an apposite authority.

We have carefully considered the facts of the case, as well as the authorities and the able arguments presented by opposing counsel; and I cannot escape the conclusion, in line, I think, with the *Massachusetts* case referred to, that a jury might, in the application of their common sense and experience to the facts, have drawn legitimate inferences favorable to the negligence of the defendant. I therefore hold that the withdrawal of that issue from the jury was error, for which the judgment should be reversed. Justice McClellan concurs in this view of the case, but Justices Simpson, Anderson, Mayfield, and Sayre hold that the evidence shows no breach of duty on the part of the defendant, either in fact or in inference, and that the trial court properly withdrew the case from the jury.

It results that the judgment must be affirmed.

Simpson, Anderson, Mayfield, and Sayre, JJ., concur.

McClellan and Somerville, JJ., dissent.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
v.

EDWARD H. ELERDING, Plff. in Err.

(254 Ill. 579, 98 N. E. 982.)

Constitutional law — limitation of hours of labor — women — judicial knowledge.

1. The court does not know judicially 40 L.R.A.(N.S.)

that there is no reasonable connection between the health, welfare, and safety of the public and the limitation of the hours of labor of women in hotels, which would render such limitation an improper subject for the exercise of the police power.

Same — discrimination — public nature of business.

2. Limiting hours of labor of women in hotels to ten, while placing no limitation upon them in boarding houses and other like places, is not an unconstitutional discrimination, since the public nature of the hotel business furnishes a proper ground for classification.

Same — individual instances — effect.

3. That individual instances exist where women are not injured or overworked by being kept on duty in a hotel for more than ten hours does not render invalid a law limiting the employment of women in such places generally to that period of time per day.

(Vickers, J., dissents.)

(June 21, 1912.)

ERROR to the Circuit Court for Coles County to review a judgment convicting defendant of violating the statute limiting the hours of labor of women in hotels. Affirmed.

The facts are stated in the opinion.

Mr. J. H. Marshall for plaintiff in error. Messrs. Edgar A. Bancroft, and Samuel A. Harper, with Messrs. W. H. Stead, Attorney General, Fred H. Hand, Assistant Attorney General, and R. G. Hammond, for the State:

Statutes limiting the hours of women's labor in factories, laundries, mercantile and mechanical establishments, hotels, and restaurants are constitutional.

W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 27 L.R.A.(N.S.) 994, 91 N. E. 695; *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; *State v. Muller*, 48 Or. 252, 120 Am. St. Rep. 805, 85 Pac. 855, 11 Ann. Cas. 88; *State v. Buchanan*, 29 Wash. 603, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52; *Com. v. Hamilton Mfg. Co.* 120 Mass. 383; *Com. v. Beatty*, 15 Pa. Super. Ct. 5; *Withey v. Bloem*, 163 Mich. 419, 35

Note. — Constitutionality of legislative limitation of hours of labor.

For the earlier cases upon this question see notes to *People v. Orange County Road Constr. Co.* 65 L.R.A. 33; *People v. Williams*, 12 L.R.A.(N.S.) 1130; *Ex parte Martin*, 26 L.R.A.(N.S.) 242; and *Withey v. Bloem*, 35 L.R.A.(N.S.) 628. And see references in latter note for annotations on allied questions.

Since the preparation of the last note, the *Massachusetts* court, in *Com. v. Riley*,

L.R.A.(N.S.) 628, 128 N. W. 913; *Wenham v. State*, 65 Neb. 394, 58 L.R.A. 825, 91 N. W. 421.

The amending act of 1911 is not arbitrary in its classification; it embraces all women employees in all the business establishments named; and all such establishments serve the public, and work in them is done under the pressure and strain of the public's demand.

Freund, Pol. Power, § 736; *Lasher v. People*, 183 Ill. 226, 47 L.R.A. 802, 75 Am. St. Rep. 103, 55 N. E. 663, 15 Am. Crim. Rep. 108; *Starne v. People*, 222 Ill. 189, 113 Am. St. Rep. 389, 78 N. E. 61; *Chicago v. Schmidinger*, 243 Ill. 167, — L.R.A. (N.S.) —, 90 N. E. 369, 17 Ann. Cas. 614; *People v. Commercial L. Ins. Co.* 247 Ill. 92, 93 N. E. 90; *McGehee, Due Process of Law*, 312; *Harding v. People*, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; *Bailey v. People*, 190 Ill. 36, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Horwich v. Walker-Gordon Laboratory Co.* 205 Ill. 497, 98 Am. St. Rep. 254, 68 N. E. 938; *Jones v. Chicago, R. I. &*

P. R. Co. 231 Ill. 302, 121 Am. St. Rep. 313, 83 N. E. 215; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *German Alliance Ins. Co. v. Hale*, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, — L.R.A.(N.S.) —, 30 Sup. Ct. Rep. 676; *Mutual Loan Co. v. Martell*, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74; *Chicago v. Sturges*, 222 U. S. 313, 56 L. ed. 215, 32 Sup. Ct. Rep. 92.

Hotels are quasi public, and have a status in the laws different from boarding houses.

Martin v. State Ins. Co. 44 N. J. L. 485, 43 Am. Rep. 397; *Re Liquor Licenses*, 4 Montg. Co. L. Rep. 77; *Beall v. Beck*, 3 Cranch, C. C. 666, Fed. Cas. No. 1,161; *Bowlin v. Lyon*, 67 Iowa, 536, 56 Am. Rep. 355, 25 N. W. 766; *Hall v. State*, 4 Harr. (Del.) 132.

This act applies to all persons engaged

210 Mass. 387, 97 N. E. 367, has upheld the constitutionality of the statute of that state, limiting the time during which women may be employed in labor in manufacturing and mechanical establishments, to fifty-six hours in each week, and to ten hours in each day.

And in *State v. Somerville*, 67 Wash. 638, 122 Pac. 324, it has been held that a statute prohibiting the employment of any female in any mechanical or mercantile establishment, laundry, hotel, or restaurant, more than eight hours during any day, is a valid exercise of the police power of the state for the protection of the public health and welfare, and is not violative of either the Federal or the state Constitution, as depriving employers and employees in the enumerated factories and callings, without due process of law, of their right to contract relative to the employees' labor; or as denying the equal protection of the laws or granting special privileges and immunities, in that it contains a proviso that it shall not apply to or affect females employed in harvesting, packing, curing, canning, or drying any variety of perishable fruit or vegetable, or in canning fish or shell fish.

In the Massachusetts case, it is also held that the further provisions, as a means of enforcing the statute, that "every employer shall post in a conspicuous place in every room in which such persons are employed a printed notice stating the number of hours' work required of them on each day of the week, the hours of commencing and stopping work, and the hours when the time allowed for meals begins and ends;" and that "the employment of such person at any time other than as stated in said printed notice shall be deemed a violation 40 L.R.A.(N.S.)

of the provisions of this section,"—are not so unreasonable, unnecessary, or arbitrary as to be beyond the power of the legislature, and are not obnoxious to either the Constitution of the United States or of that Commonwealth. *Com. v. Riley*, supra.

And in the Washington case, it was further held, to like effect as in *PEOPLE v. ELERDING*, that the fact that a particular factory is modern, well-equipped, sanitary, and healthful; that the labor performed by the female employees therein is light and harmless; and that they could be thus employed for nine hours per day without endangering or impairing their health or physical condition,—does not render invalid, as an unreasonable, arbitrary, and unwarranted exercise of the police power, a statute prohibiting the employment of any female in any mechanical or mercantile establishment, etc., more than eight hours during any day. *State v. Somerville*, supra.

As to validity of limitation of hours of labor on public work, see notes to *Keefe v. People*, 8 L.R.A.(N.S.) 131; *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 24 L.R.A.(N.S.) 201; and *Com. v. Casey*, 34 L.R.A.(N.S.) 767.

As to constitutionality of child labor laws, generally, including statutes limiting the hours of labor of children, see notes to *Starnes v. Albion Mfg. Co.* 17 L.R.A.(N.S.) 602, and *State v. Shorey*, 24 L.R.A.(N.S.) 1121.

As to the power of a state to regulate hours of labor, as affected by the interstate commerce clause of the Federal Constitution, see *State v. Northern P. R. Co.* 15 L.R.A.(N.S.) 134; and *State v. Chicago, M. & St. P. R. Co.* 19 L.R.A.(N.S.) 326.

A. C. W.

in the hotel business and to all women seeking employment in hotels, and is therefore a general law.

Vogel v. Pekoc, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386; People v. Nellis, 249 Ill. 12; Douglas v. People, 225 Ill. 536, 8 L.R.A. (N.S.) 1116, 116 Am. St. Rep. 162, 80 N. E. 341; Dawson Soap Co. v. Chicago, 234 Ill. 314, 84 N. E. 920, 14 Ann. Cas. 1131; People ex rel. Klokke v. Wright, 70 Ill. 388; People ex rel. Stead v. Edgar County, 223 Ill. 187, 79 N. E. 123; W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 27 L.R.A. (N.S.) 994, 91 N. E. 695.

The fact that legislation, similar to this under consideration, has been adopted throughout the United States, is conclusive evidence that it is generally recognized that an evil exists for which a remedy must be provided.

Holden v. Hardy, 169 U. S. 392, 42 L. ed. 791, 18 Sup. Ct. Rep. 383; Wenham v. State, 65 Neb. 394, 58 L.R.A. 825, 61 N. W. 421.

The general assembly may lawfully, under the police power which is inherently possessed by the state, place restraints upon private rights, if such legislation will promote the health, comfort, safety, and welfare of society.

Booth v. People, 186 Ill. 43, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798; Haller Sign Works v. Physical Culture Training Schools, 249 Ill. 440, 34 L.R.A. (N.S.) 998, 94 N. E. 920; Bierly, Pol. Power, p. 9; Withey v. Bloem, 163 Mich. 419, 35 L.R.A. (N.S.) 628, 128 N. W. 913.

Farmer, J., delivered the opinion of the court:

Plaintiff in error is the manager of a hotel in Charleston, Coles county, Illinois, in which he employs female help. The state's attorney of Coles county, at the October term, 1911, of the county court of said county, filed an information against plaintiff in error charging him with violation of the statute prohibiting the employment of females in hotels more than ten hours during any one day. The information contained three counts. The first count charged plaintiff in error with unlawfully employing Dolly Gertz, a female, for a period of ten and one half hours. The second count charged the unlawful employment of Gertrude Doering, a female, for a period of twelve hours, and the third count charged the unlawful employment of Mary Jones, a female, for a period of twelve hours. The plaintiff in error moved to quash the information, which motion was overruled. He thereupon entered a plea of not guilty. There was no dispute as to the facts, and the case was submitted to the 40 L.R.A. (N.S.)

court without a jury, on a written stipulation. Dolly Gertz was employed by plaintiff in error in his hotel as a kitchen maid from 5:30 o'clock A. M. to 2:30 o'clock P. M. and from 5:30 o'clock P. M. to 7 P. M. Her duties during said hours were to wash dishes and kitchen utensils, to assist in paring potatoes, cleaning and preparing vegetables for cooking and fruits for the table. She was required to be in readiness for work during all the hours of her employment; but the time required to do the work assigned her did not exceed seven hours in the aggregate. Gertrude Doering was employed in the said hotel as housekeeper from 7 A. M. to 7 o'clock P. M. She was charged with the responsibility of keeping the rooms in readiness to receive guests, cleaning rooms, making beds, changing linen, and caring for bedclothing. All her duties were supervisory, and no manual labor was required of her. Mary Jones was employed in the hotel from 7 A. M. to 7 P. M. Her duties were to assign guests to rooms, receive payment of bills, keep the accounts of the hotel, and to occasionally take dictation of letters in shorthand from plaintiff in error and transcribe the same on a typewriter. Her duties during the hours of her employment did not actually require more than two thirds of her time. Plaintiff in error contended that the law limiting the hours females may work in hotels is unconstitutional, and requested the court to so hold. The court denied the request, held the law valid, and imposed a fine against plaintiff in error of \$25 under each count of the information. The case is brought here by writ of error; the only question presented for consideration being the validity of the statute.

In 1909 the legislature adopted an act entitled, "An Act to Regulate and Limit the Hours of Employment of Females in Any Mechanical Establishment or Factory or Laundry in Order to Safeguard the Health of Such Employees; to Provide for Its Enforcement and a Penalty for Its Violation." That act limited the hours females might be employed in any mechanical establishment, factory, or laundry to ten hours during any one day, but applied to no other line of employment or business. In 1911 the act was amended by the legislature so as to include a large number of other lines of employment. Hurd's Stat. 1911, p. 1135. As amended and in force since July 1, 1911 (Laws 1911, p. 328), § 1 of the statute reads as follows: "Section 1. That no female shall be employed in any mechanical or mercantile establishment or factory or laundry or hotel or restaurant, or telegraph or telephone establishment or office thereof, or in

any place of amusement, or by any person, firm, or corporation engaged in any express or transportation or public utility business, or by any common carrier, or in any public institution, incorporated or unincorporated in this state, more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any day."

That under the police power of the state the general assembly may enact legislation to prohibit all things hurtful to the health, welfare, and safety of society, even though the prohibition invade the right of liberty or property of the individual, is too well settled to require discussion or the citation of authority. The question here to be determined is whether the law limiting the hours females may be employed in hotels is a valid exercise of that power.

It is for the legislature to determine when conditions exist calling for the exercise of the police power; but the judgment of the legislature in enacting laws under the police power is not conclusive of their validity. There are the same limitations against legislation not authorized under the police power as exist against legislation of any other kind not authorized by the Constitution. What are subjects of the lawful exercise of the police power is as much a question for judicial determination as is the question whether other constitutional limitations have been violated in the passage of laws relating to other subjects.

Sex, alone, would not in all cases serve as a proper basis for the exercise of the police power, for in the invasion of the right of liberty and property there must be some reasonable connection between the limitation upon the hours females may work and the public health, safety, and welfare proposed to be secured by the limitation. *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Booth v. People*, 186 Ill. 43, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

In *W. C. Ritchie & Co. v. Wayman*, 244 Ill. 509, 27 L.R.A. (N.S.) 994, 91 N. E. 695, this court sustained the act as originally adopted, limiting the time females might be employed in any mechanical establishment, factory, or laundry to not exceeding ten hours in any one day, as a valid exercise of the police power for the protection of the health of women and insuring the production of vigorous and healthy offspring by them. There can be no doubt working long hours day after day under the pressure usually attending the labor of an em-

ployee who is subject to the control, direction, and dismissal of the employer, has a tendency to weaken and impair the health of women that would not attend shorter hours of employment. To exactly what extent this may be so of females employed in hotels cannot, perhaps, be definitely known; nor is it necessary that it should be in order to sustain legislation reasonably limiting the hours of work therein. That such is, in general, the effect of long hours of work in any employment is sufficient to authorize their regulation. In *W. C. Ritchie & Co. v. Wayman*, supra, we held the court would take judicial knowledge that on account of woman's physical structure and maternal functions her health, and that of her offspring, was subject to be injuriously affected by requiring her to perform long hours of labor. This is especially so where, in performing the labor, she is not mistress of her own movements, but, under the control of a master, is required to make such exertion as is necessary to meet the needs and demands of the service in which she is engaged. The health and welfare of posterity are as much objects of public solicitude as those of the present generation. If the enforcement of this law tends to preserve the health, strength, and vigor of women engaged in working in hotels, thereby conserving the vitality necessary to the proper discharge of their maternal functions, the rearing and education of children, and the maintenance of the home, its relation to the public health, safety, and welfare is evident.

While, in its last analysis, it is a judicial question whether an act is a proper exercise of the police power, it is the province of the legislature to determine when an exigency exists calling for the exercise of this power. When the legislative authority has decided an exigency exists calling for the exercise of the power, and has adopted an act to meet the exigency, the presumption is that it is a valid enactment, and courts will sustain it unless it appears, beyond any reasonable doubt, that it is in violation of some constitutional limitation. *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82, 84 N. E. 865, 14 Ann. Cas. 994. In determining the validity of legislation for the purpose for which the act under consideration was adopted, courts may take into consideration that members of the legislature come from every part of the state and from the various callings and vocations of life, and may be presumed to have observed and become acquainted with existing conditions, the course of business, the manner in which it is conducted, and how the public interest is affected thereby.

Munn v. People, 69 Ill. 80; *Wenham v. State*, 65 Neb. 394, 58 L.R.A. 825, 91 N. W. 421. These considerations, in a case of doubtful validity of a statute, are sufficient to turn the scales in favor of the validity of the act. It is worthy of note that twenty-seven states have enacted laws limiting the hours of employment of females in certain lines, and five states besides Illinois have enacted laws limiting the hours they may be employed in hotels. Laws limiting the hours females may be employed in mechanical industries, factories, and laundries have been sustained by other state courts of last resort and by the Supreme Court of the United States. *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957. Unless the court could clearly see that there is no reasonable connection between the limitation upon the hours females may work in hotels and the public health, welfare, and safety of society, we would not be authorized to hold the statute invalid, as being an unwarranted exercise of police power. There is nothing in the record in this case and nothing within the legitimate domain of judicial knowledge that would justify us in holding there is no reasonable connection between the limitation and the health, welfare, and safety of the public.

It is insisted the classification of hotels as a place where employment of females is limited to ten hours is arbitrary, and that the statute discriminates between labor in hotels and other like places, such as boarding houses. The classification is not necessarily based on place or the kind of labor performed, but rather on the character of the business requiring the work, together with the environment and surrounding circumstances under which the work is done. The physical exertion required for the performance of a given amount of work, if measured by muscular effort, may be as great in one place as another. If there be a difference upon which this classification is justified, it must exist because of the surroundings which tend to govern the manner or method of doing the work, such as the movements of associate workmen or of machinery, the necessity of continuous speed to meet the demands of others, and the sanitary conditions and moral atmosphere of the place of occupation. So far as the sanitary conditions and moral atmosphere of the place where the work is done are concerned, the police power of the state may be invoked to remedy any evils which may exist, but that may be accomplished by appropriate legislation directed to that end without limiting the hours of exposure to such con-

ditions. The mere fact that some hotels, or all hotels, if such were the fact, are improperly ventilated and foul air is breathed by the employees, or, owing to contact with the traveling public, disease may be contracted more readily than in other places, is not a sufficient justification for limiting the hours in which women may be employed in those places. The legislature has ample power, by direct legislation, to remedy such conditions if they exist. By this enactment it is not sought to change the conditions under which the labor is performed or the character of the labor, but merely to limit the hours of its duration. There is a marked distinction between hotels and boarding houses. A hotel is a quasi public place, and it is within the province of the police power to regulate occupations or business enterprises of a quasi public nature, such as, if unrestricted in their exercise, may be injurious to the health, safety, or general welfare, even though the business is perfectly lawful. This power is so important and comprehensive that its application must be allowed to expand from time to time, to meet new conditions and promote the public welfare. The proprietor of a hotel is engaged in a public business. The demands made upon the employees come from the public, and are not altogether dependent upon or controlled by the employer. The unceasing change of guests requires constant attention and continuous effort to supply their wants and satisfy their needs. The speed with which the employees act, and to a large extent the manner of performing their work, are controlled by the public. The pressure of work comes from sources independent of the employer. No method of regulating the demands of the public under such conditions is practicable, but the time such demands may be made upon the employees may be limited. We are of opinion the nature of the business is such as to afford a valid basis for classifying work in hotels as an occupation authorizing its inclusion in the law limiting the hours of labor for females. The pressure and tension under which the labor is performed afford as reasonable a basis for classification as the work done in lines of employment where machinery is used.

It is contended the facts in the record before us show that the plaintiff in error's female employees are not overworked; that the character and amount of labor performed by them could not injure their health; and that the facts in this record show there is no reasonable connection between the limitation of the hours of work and the health of the female employees named in the information. There are prob-

ably instances where employment for a longer period than ten hours per day in a hotel does not result in any ill effects, but we cannot determine the question here involved from a consideration of a particular instance. The law must be considered in its general application to all cases and conditions existing throughout the state. It must be considered from its application to all employers and employees, and not to any individual employer or employee. If a law of this character must be considered with reference to the particular circumstances and conditions existing in each hotel, it might lead to the absurdity of its being valid in one case and invalid in another. The law is general in its application, embracing all hotels, and is valid as to all or none. That there may be hotels where the labor required of females is so light that more than ten hours' employment would not so tax their powers of physical endurance as to injuriously affect their health affords no justification for holding the law invalid. The wisdom and policy of such legislation are not questions for courts to determine. Those are questions for consideration by the legislature, and unless that body has transcended its constitutional power its enactments must be sustained.

We are of the opinion that limiting the hours of employment of females in hotels to not exceeding ten hours a day was not an unauthorized exercise of the police power of the state. That plaintiff in error violated the law is admitted. The judgment is therefore affirmed.

Vickers, J., dissenting.

Petition for rehearing denied.

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA EX REL. J. HERMAN KRITTENBRINK

v.

CHARLES H. WITHNELL, Building Inspector, Appt.

(— Neb. —, 135 N. W. 376.)

Municipal ordinance — reasonableness — validity.

1. To overturn a city ordinance on the ground that it is unreasonable and arbitrary, or that it invades private rights, the evidence of such facts should be clear and satisfactory.

Headnotes by ROSE, J.
40 L.R.A. (N.S.)

Same — knowledge of council — presumption.

2. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.

Municipal corporation — judge of laws.

3. In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised.

Constitutional law — police power — affecting property.

4. Within constitutional limits, private property is held subject to proper rules regulating the common good and the general welfare of the people.

Municipal ordinance — validity — relation to health.

5. In testing police regulations, the court should inquire whether they have some relation to the public health, safety, or welfare, and whether such is, in fact, the end sought to be attained.

Municipal corporation — nuisance — suppression.

6. While a city having authority "to define, regulate, suppress, and prevent nuisances" (Comp. Stat. 1911, chap. 12a, § 52) cannot arbitrarily prohibit harmless and inoffensive private enterprises by the exercise of such power, the acts of the city council in dealing with nuisances may be held conclusive, if the subject of legislation might or might not be a nuisance, depending upon conditions and circumstances.

Note. — Power of municipality to regulate brickyards.

On the general question as to power of municipal corporations to define, prevent, and abate nuisances, see note to *Grossman v. Oakland*, 38 L.R.A. 593.

Upon the question of municipal control over nuisances affecting safety, health, and personal comfort, see note to *Harrington v. Providence*, 38 L.R.A. 305.

The note to *Ex parte Lacey*, 38 L.R.A. 640, discusses the question of municipal power over nuisances in relation to particular trades or businesses; specifically as to brick and lime kilns, see page 654 of the note.

For other cases passing upon the power of a municipal corporation to regulate brickyards, see *Denver v. Rogers*, 25 L.R.A. (N.S.) 247, and the cases collected in the note. A search has failed to disclose any later cases.

The cases dealing with the question as to the operation of a brick kiln as a nuisance are collected in the note appended to *Phillips v. Lawrence Vitriified Brick & Tile Co.* 2 L.R.A. (N.S.) 92. A. L. R.

Same — brick kiln — prohibition.

7. The passing of an ordinance forbidding the construction of brick kilns in a city may be a valid exercise of police power.

(March 26, 1912.)

APPREAL by defendant from an order of the District Court for Douglas County directing him as building inspector to issue and deliver to plaintiff a permit for the erection and construction of a brick kiln on certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. Harry E. Burnam, I. J. Dunn, and John A. Rine, for appellant:

The peremptory writ of mandamus should not have issued for the reason that the proposed structure for which a permit was sought is of a class prohibited by the ordinances of the city of Omaha.

Bowers v. Indianapolis, 169 Ind. 105, 81 N. E. 1097, 13 Ann. Cas. 1198; *Harmison v. Lewistown*, 153 Ill. 313, 46 Am. St. Rep. 893, 38 N. E. 628; *Kansas City v. McAleer*, 31 Mo. App. 433; *Fischer v. St. Louis*, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; *New Orleans v. Murat*, 119 La. 1094, 44 So. 898; *Re Newell*, 2 Cal. App. 767, 84 Pac. 226; *Lawton v. Steele*, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Griffin v. Gloversville*, 67 App. Div. 403, 73 N. Y. Supp. 684; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Ex parte Heilbron*, 65 Cal. 609, 4 Pac. 648; *Spokane v. Robison*, 6 Wash. 547, 33 Pac. 960; *Miller v. Syracuse*, 168 Ind. 230, 8 L.R.A.(N.S.) 471, 120 Am. St. Rep. 366, 80 N. E. 411; *State ex rel. Cedar Rapids v. Holcomb*, 68 Iowa, 107, 56 Am. Rep. 853, 26 N. W. 33; *Ex parte Glass*, 49 Tex. Crim. Rep. 87, 90 S. W. 1108; *Bowers v. Indianapolis*, 169 Ind. 105, 81 N. E. 1097, 13 Ann. Cas. 1198; *State v. Tower*, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; *Welch v. Swasey*, 193 Mass. 364, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 745, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; *Cochran v. Preston*, 108 Md. 220, 23 L.R.A.(N.S.) 1163, 129 Am. St. Rep. 432, 70 Atl. 113, 15 Ann. Cas. 1048; *State ex rel. Horskottle v. Board of Health*, 16 Mo. App. 8; *Crump v. Lambert*, L. R. 3 Eq. 409, 15 Week. Rep. 417; *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.* 104 Mo. App. 713, 78 S. W. 646; *Fuselier v. Spalding*, 2 La. Ann. 773; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Hutchins v. Smith*, 63 Barb. 252; *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660; *Wenham v. State*, 65 Neb. 394, 58 L.R.A. 825, 91 N. W. 421; *Re Anderson*, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; *Walker v. Jameson*, 140 Ind. 591, 40 L.R.A.(N.S.)

28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869; *State v. Drayton*, 82 Neb. 254, 23 L.R.A.(N.S.) 1287, 130 Am. St. Rep. 671, 117 N. W. 768.

Messrs. Clinton Brome and W. C. Lambert also for appellant.

Messrs. Henry C. Murphy, S. L. Winters, and R. E. McNally for appellee.

Rose, J., delivered the opinion of the court:

This is an application for a writ of mandamus commanding defendant, as building inspector of Omaha, to issue to relator a permit to construct a brick kiln on a tract of land owned by him in that city. Defendant had refused to issue the permit because he could not do so without violating an ordinance declaring: "It shall be unlawful for any person, persons, firm, or corporation to erect or construct within the city of Omaha any kiln or oven to be used in the manufacture of brick." The trial court held in harmony with the views of relator that the ordinance was arbitrary, unreasonable, and void, as being an invasion of personal rights and of private property. The writ was allowed, and defendant has appealed.

To establish the invalidity of the ordinance, relator adduced proof tending to show: He is the owner of $6\frac{1}{2}$ acres of land situated in the outskirts of Omaha, in the immediate neighborhood of a dairy and a pasture, remote from the densely populated portions of the city. He planned to construct and operate on the premises described a modern kiln, different from that formerly used in the manufacture of brick. According to his summary of the proofs relating to the new method, the brick kiln "is no wise harmful to health or vegetation, produces little or no smoke, no deleterious gases, no obnoxious odors, and is not a rendezvous for vagrants and tramps." It is argued by relator that the contemplated enterprise at the place described would not be a nuisance *per se*, and that the city had no authority to interdict it as such. Had the city power to pass and enforce the ordinance?

By charter the state legislature delegated power to the city of Omaha in the following terms: "To make and enforce all police regulations for the good government, general welfare, health, safety, and security of the city and the citizens thereof," and "to prescribe fire limits and regulate the erection of all buildings and other structures within the corporate limits," and "to define, regulate, suppress, and prevent nuisances." Comp. Stat. 1911, chap. 12a, § 144, subds. 25, 32, and § 52. Under the authority thus conferred, the city council,

in passing the ordinance, obviously intended to exercise the police power of the city, and the courts should not interfere with its enforcement unless its unreasonableness, or the want of a necessity for such a measure, is shown by satisfactory evidence. *Peterson v. State*, 79 Neb. 132, 14 L.R.A. (N.S.) 292, 126 Am. St. Rep. 651, 112 N. W. 306.

It will be presumed that the city council in passing the ordinance acted with full knowledge of the conditions relating to the subject of brick kilns located within the city limits. The reasons of public policy which prompted the city lawmakers to pass the ordinance may not appear on the face of the legislation, or in relator's petition, or in the evidence adduced at the trial of this case. *Gardiner v. Omaha*, 85 Neb. 681, 124 N. W. 105. The inquiry, therefore, is not necessarily limited to the city's authority to prevent or abate nuisances, but extends to every phase of police power delegated in any form to the municipality.

In *State v. Drayton*, 82 Neb. 254, 23 L.R.A. (N.S.) 1287, 130 Am. St. Rep. 671, 117 N. W. 768, a well-established doctrine was announced in this form: "Within constitutional limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people, and as to when and how the police power of the state is to be exercised."

Relator's land in Omaha is held subject to proper rules regulating the common good and the general welfare of the people of that city. *Wenham v. State*, 65 Neb. 394, 58 L.R.A. 825, 91 N. W. 421.

In testing police regulations like the ordinance assailed, the court should inquire "whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained." *Smiley v. MacDonald*, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; *Re Anderson*, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; *Union P. R. Co. v. State*, 88 Neb. 247, 129 N. W. 290. According to the principles of law to which reference has been made, relator was not entitled to a writ commanding defendant to issue a building permit in violation of the ordinance, unless the proofs clearly answer those inquiries in the negative, and show that the enactment was an unreasonable and arbitrary invasion of individual rights under the guise of police regulation. *Wenham v. State*, 65 Neb. 394, 58 L.R.A. 825, 91 N. W. 421; *Union P. R. Co. v. State*, 88 Neb. 247, 129 N. W. 290.

Relator has not yet constructed his kiln, and the testimony adduced to show that it would not become a nuisance is based largely on observations of existing kilns operated according to the modern method described 40 L.R.A. (N.S.)

in his plans and evidence. According to the proofs, the volume and character of the smoke will be less objectionable under the new process, but the stack will emit smoke of a light color continually. The fair inference from all the evidence is that black smoke in great volume will escape at intervals under ordinary management of the plant. It is undisputed that clay excavated on the premises, and coal, ashes, and brick in vast quantities, will be handled there. Teams and men will be required for that purpose. The fact that the wind in this climate will carry dust and soot long distances at times cannot be disproved. On one side of the kiln site an addition to the city is rapidly being occupied by valuable residences, and there is no factory in the immediate neighborhood. The proofs show that there are thirteen houses within two blocks of relator's land, and a witness for defendant testified that within five blocks there were twenty or twenty-five families. Smoke alone may amount to a nuisance, where it materially interferes with the comfort of human existence in the house and grounds of the owner, though they are located near the edge of a city no great distance from smoke-producing factories. *Crump v. Lambert*, L. R. 3 Eq. 409, 15 Week. Rep. 417. An ordinance "prohibiting the emission of dense smoke within the corporate limits of the city" has been held valid as a proper exercise of police power. *St. Paul v. Haughbro*, 93 Minn. 59, 66 L.R.A. 441, 106 Am. St. Rep. 427, 100 N. W. 470, 2 Ann. Cas. 580; *Buffalo v. George P. Ray Mfg. Co.* (Sup.) 124 N. Y. Supp. 913; *Rochester v. Macauley-Fien Mill. Co.* 199 N. Y. 207, 32 L.R.A. (N.S.) 554, 92 N. E. 641.

While a city having authority "to define, regulate, suppress, and prevent nuisances" cannot arbitrarily use it to prohibit harmless and inoffensive private enterprises, the acts of the city council in exercising such police power may be held conclusive, if the subject of municipal legislation might or might not be a nuisance, depending upon conditions and circumstances. *Harrison v. Lewistown*, 153 Ill. 313, 46 Am. St. Rep. 893, 38 N. E. 628; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Bowers v. Indianapolis*, 169 Ind. 105, 81 N. E. 1097, 13 Ann. Cas. 1198; *Buffalo v. George P. Ray Mfg. Co.* (Sup.) 124 N. Y. Supp. 913; *Powell v. Brookfield Pressed Brick Tile Mfg. Co.* 104 Mo. App. 713, 78 S. W. 648; *Kansas City v. McAleer*, 31 Mo. App. 433; *Lawton v. Steele*, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878. Brick kilns are frequently condemned as nuisances, and are proper subjects of police regulation. *State ex rel. Horskottle*

v. Board of Health, 16 Mo. App. 8; Kirschgraber v. Lloyd, 59 Mo. App. 59; Harley v. Merrill Brick Co. 83 Iowa, 73, 48 N. W. 1000. If a brick kiln is in fact a nuisance, modern methods of construction and careful operation are immaterial. Powell v. Brookfield Pressed Brick & Tile Mfg. Co. 104 Mo. App. 713, 78 S. W. 646.

In the present case, it seems to be conceded that a brick kiln is an inviting place for tramps in cold weather. While relator expressed the conviction that he could keep them away, there is nothing to indicate they would not be turned loose on the residents of the neighborhood in the outskirts of the city, where police protection may be inadequate. Near valuable residences relator intends to build a smokestack 130 feet high, and to remove clay to a depth not disclosed by his plans or evidence. The value of residence property in the neighborhood might be damaged by relator's enterprise. These were proper matters for the consideration of the city lawmakers. When the entire record is considered, the evidence does not justify a finding that the ordinance in question has no relation to the public health, safety, or welfare, or that it is not a bona fide exercise of police power, or that it amounts to an unconstitutional invasion of relator's individual rights, or that it is arbitrary and unreasonable. In this view of the law and the facts, he has not made a case entitling him to the writ. The judgment of the District Court is therefore reversed, and the cause remanded for further proceedings.

Petition for rehearing denied.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

APACHE STATE BANK, Plff. in Err.,
v.

FLORENCE DANIELS, Admr., etc., of
James Daniels, Deceased.

(— Okla. —, 121 Pac. 237.)

Appeal — from county court.

1. Under the provisions of § 16, art. 7, and § 2 of the schedule of the Constitu-

Headnotes by AMES, C.

Note. — Transfer of key to receptacle as delivery of possession sustaining gift of contents.

For the general subject of sufficiency of constructive delivery to sustain gift *causa mortis*, see the note to Page v. Lewis, 18 L.R.A. 170.

For cases on the necessity of actual delivery, 40 L.R.A.(N.S.)

tion, an appeal lies to the district court from the county court, in probate matters, in those cases in which an appeal was allowed by the statutes of Oklahoma territory. Wilson's Statutes, § 1793; Snyder's Statutes, § 5451.

Jury — in equity case — extent of submission — reversal.

2. In an equity proceeding, the trial judge may, in his discretion, impanel a jury and submit to it distinct questions of fact for its advice; but he should not in such cases submit the case to a jury for a general verdict for the plaintiff or the defendant. Such a submission is erroneous; but a case should not be reversed for such an error, where it affirmatively appears that, notwithstanding the verdict of the jury, the trial judge reviewed the evidence and reached the same conclusion as the jury.

Gift — causa mortis — delivery — sufficiency.

3. James Daniels, on his deathbed, said to his wife: "Florence, I give you all of my bank stock, and all of my property and my diamonds. Take my key to our box and keep it, and allow no one to have it." The bank stock was in a small tin box in a vault in an adjoining room, to which both the deceased and his wife had access. There were two keys to this tin box, one of which was usually carried by the deceased and one key by his wife. At the time these words were spoken, the wife had both keys on her belt, and transferred his key from his key ring to hers. Nothing else was done prior to his death.

Held, that this was not a sufficient delivery to constitute a valid *donatio causa mortis*.

(December 12, 1911.)

ERROR to the District Court for Rogers County to review a judgment in defendant's favor in a proceeding to require her to inventory certain bank stock as the property of the estate of James Daniels, deceased. Reversed.

The facts are stated in the opinion.

Messrs. John H. Burford and Frank B. Burford for plaintiff in error.

Messrs. Davenport & Hall, Ziegler & Dana, and Charles Bucher for defendant in error.

Ames, C., filed the following opinion:

The plaintiff instituted this proceeding by filing in the county court of Rogers

County certificates to complete gift of shares of stock, see the note to Dewey v. Barnhouse, 29 L.R.A.(N.S.) 166.

It will be seen that in *APACHE STATE BANK v. DANIELS*, it was held that a direction to a person who already had both keys of a small box, to take "my" key and keep it, with words of gift as to stock in the box, which was in an adjoining room, was

county an application to require the defendant, who was administratrix of the estate of James Daniels, deceased, to inventory 168 shares of the capital stock of the Farmers & Merchants' Bank of Catoosa. The application alleged that this bank stock had formerly belonged to one James Daniels, deceased; that upon his death James Daniels left two heirs at law, one being his widow, Florence Daniels, the defendant, who was also the administratrix of the estate, and the other his father, S. H. Daniels; that the plaintiff had recovered judgment against S. H. Daniels for \$1,300; that it had thereafter brought an action in the district court of Rogers county against S. H. Daniels and Florence Daniels, as the heirs of the deceased, for

the purpose of subjecting the interest of S. H. Daniels in said stock to the payment of said judgment; that in said cause a receiver had been appointed, who was then in possession of the stock; that the plaintiff was entitled to have the distributive share of S. H. Daniels applied to the payment of its judgment; and that the defendant was claiming the said stock as her individual property and refusing to inventory it. The defendant moved to quash the citation, and the motion was overruled. She then replied, admitting that she held the stock, but claiming it as her individual property, and denying that she was required to inventory it as property of the estate. The issue raised by these pleadings was tried in the county court, and an order

not a good delivery to sustain a gift *causa mortis*.

The court follows the doctrine of *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464, where it was held that a transfer of the key of a trunk, present and capable of manual delivery, is no delivery of the trunk.

In *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267, it was held that a constructive delivery which would satisfy the California statute of gifts was limited to such property as was not capable of actual transfer or immediate delivery, and "that a delivery of the key to a receptacle which is itself present and capable of delivery will not of itself constitute a delivery of the contents of the receptacle."

Similarly, in *Dunn v. Houghton*, — N. J. Eq. —, 51 Atl. 71, it was held that "the delivery of a key with intent that it shall be used to open a receptacle in a distant room, with the further intent that one of several bank books therein may be obtained therefrom, and with the further intent that such bank book may be used by the party to whom the key has been delivered to draw money for his own use, is not sufficient delivery of anything to sustain a gift *causa mortis* of the bank account represented by the book;" the court considering that if a gift of the bank book had been intended, the natural way under the circumstances would have been for the decedent to send for the bank book and deliver it, and not the key.

In *Newman v. Bost*, reviewed in *APACHE STATE BANK v. DANIELS*, the court, in concluding its opinion, said: "There is no such thing in this state as symbolical delivery in gifts either *inter vivos* or *causa mortis*. There is a hint in that direction in the case of *Shirley v. Dew*, 36 N. C. (1 Ired. Eq.) 130, and this is now overruled." But in that case it was considered that bulky articles present were delivered by transfer of the key.

In *Goulding v. Horbury*, 85 Me. 227, 35 Am. St. Rep. 357, 27 Atl. 127, the court, while not disapproving *Hatch v. Atkinson*, declined to disturb a verdict in favor of the donee of the contents of a cupboard, where 40 L.R.A. (N.S.)

there had been a delivery by a sick man of its key, and approved the instruction of the court below, which was in part as follows: "You must determine precisely what significance shall be attached to that act of delivery to her of the key, with the remarks made in connection with it. The mere delivery of the key as a symbol of the property would not be a sufficient delivery, but only as a means of transferring the possession; when it is actually used for that purpose, and the possession is actually transferred, that would constitute a valid and sufficient delivery."

Other cases hold the delivery of keys to a present or accessible receptacle as sufficient.

Thus, in *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. 706, it was held that there was a good gift *causa mortis* of a trunk and its contents, including a bank book, where the donor and donee were joint occupants of a room, and the donor, almost *in extremis*, handed the donee the keys of two trunks at the foot of her bed, declaring to the donee that the trunks and all in them were hers.

In *Cooper v. Burr*, 45 Barb. 9, it was held that there was a good gift of a large amount of money and other property in the decedent's house, where the decedent, about six weeks before her death, handed her keys to the plaintiff and said: "Here are these keys; I give them to you; all I have I give to you; they are the keys of my trunks and bureaus; take them and keep them, and take good care of them; all my property and everything I give to you." The court said: "The language of the donor, accompanied by a delivery of the keys to the trunks and bureaus containing the coin and other property evinced the intention of the donor, and placed the donee in the possession of the means of assuming absolute control at her pleasure."

Similar gifts by sick donors have been sustained where the donor had made delivery of the key of the receptacle containing the property which was in the room or house, in *Re Mustapha*, 8 Times L. R. 160 (bonds), and in *Charleton v. Brooks*, 6 Ont.

was made, directing the defendant, as administratrix, to inventory the stock as the property of the estate. An appeal was taken to the district court, which the plaintiff moved to dismiss because the court was without jurisdiction; the order from which the appeal was taken not being a judgment from the rendition of which an appeal would lie from the county court to the district court. This motion was overruled, and the case proceeded to trial, resulting in a judgment in favor of the defendant, and the case is here on the plaintiff's petition in error.

The defendant claims title to the stock by virtue of a gift from her husband while he was on his deathbed, and it appears from the evidence that the stock was in a

tin box in the vault of the Catoosa bank; that the defendant and her husband lived in a room adjoining the banking room; that the deceased died on Sunday afternoon; that the defendant knew the combination and was accustomed to opening the vault; that a few hours prior to his death the deceased said to his wife that he wished to give her his bank stock and other property in the box, and for her to take the key and not let anybody have it; that at the time there were two keys to the box, one ordinarily carried by the deceased, and the other by the defendant, but that the defendant had both keys in her possession at the time of this gift; and that upon these words being spoken she transferred the key of the deceased from his key ring

L. Rep. 87 (promissory notes, cash, and the like).

In *Young v. Derenzy*, 26 Grant, Ch. (U. C.) 509, where a husband who was sick handed the key of his cash box, which contained a promissory note, to his wife, the box remaining in the custody of the husband as before, it was held that it was a good gift (but whether the box was in the room or house is not stated).

In view of the frequent citation of the early case of *Jones v. Selby*, Prec. in Ch. 300, it is interesting to refer to the facts of that case. The donor having a hair trunk wherein were several things of value, three years before his death sent for the donee, and, in the words of the report, "calls up two of his servants, and, in their presence, says thus, 'I give to my cousin, Mrs. Wetherley, this hair trunk, and all that is contained in it,' and delivers her the key thereof, and bid the servants take notice, and remember it, if they should be at any time called upon for that purpose; and several times after, as it was proved in the cause, asked them if they remembered the hair trunk, and once took a candle and shewed it them, that they might remember it. . . . After his death, upon opening of the trunk, in the presence of several relations and others, there was found in it several rings, pieces of gold, and among other things, a tally upon the government for £500." Before the gift, he had made a will, giving the plaintiff £500, and just before his death made another will, giving her instead £1,000. It was shown that the trunk was never removed from the place where it stood at first; that the donor gave out the order from time to time for renewing of the interest upon the tally, and received it himself. It was held that the onus was upon the plaintiff to show in the first place that the order on the government was in the trunk when it was given, and second, that the increase in the amount of her legacy was not in lieu of the things in the trunk, and concluded that the gift had not been sufficiently proven.

In *Turner v. Brown*, 6 Hun, 331, where, 40 L.R.A. (N.S.)

however, there was no question as to the key, the court said in argument: "Cumbersome property will be well delivered when in a house or room, by the delivery of the key, with intent to surrender its possession and control; so of property in a desk or trunk; so, too, by any act amounting to a surrender to another of its dominion and custody."

But in New York, although a liberal doctrine on the subject prevails it seems there should be some reason for the transfer of a key rather than of the receptacle. Thus, in *Tompkins v. Leary*, 134 App. Div. 114, 118 N. Y. Supp. 810, where there was evidence that the decedent, eighty-four years old, about to go to a hospital for an operation, handed the keys of his desk, containing money and securities, to the claimant, and the evidence was conflicting as to whether the key was delivered as to a donee or a caretaker, it was held that there was no good reason why the securities could not have been personally delivered, and that there was not a good gift *causa mortis*.

Property not in immediate presence or control.

Here the cases are in direct conflict.

In *Keepers v. Fidelity Title & D. Co.* 56 N. J. L. 302, 23 L.R.A. 184, 44 Am. St. Rep. 397, 28 Atl. 585, where the box was not within the immediate control or presence of the donor, and did not pass to the control of the donee during the life of the donor, it was held that the delivery of the key was not sufficient to sustain a gift *causa mortis*.

So, in *Hall v. Hall*, 20 Ont. Rep. 684, a donor who was ill gave the donee his pocketbook containing notes and money, and also gave her the keys of his cash box and of two rooms containing securities, with words of gift of their contents. The cash box was in the custody of his solicitor and the two rooms were in another house, and it was held that this was a good gift of the contents of the pocketbook, but not of the cash box or of the rooms.

On the other hand, in *Marsh v. Fuller*,

to her key ring, but did not enter the vault or take possession of the box.

The questions which are raised by the record are as follows: (1) Did the district court have jurisdiction of this appeal? (2) Was it reversible error for the district court to impanel a jury and submit the issues for a general verdict? (3) Was the delivery sufficient to constitute this a valid *donatio causa mortis*? (4) If so, does the statute providing that the capital stock of a corporation is personal property, and can only be transferred by delivery and indorsement, defeat the gift? (5) Was the defendant, under the circumstances of this case a competent witness for herself?

1. We think the district court had jurisdiction. It is admitted that, under the

18 N. H. 360, where a sick person delivered to a woman certain keys, and at the time of the delivery said, "I give you the chest that is over at Sergeant Rowe's, and all that is in it," with other words of the same import, it was held that the delivery of the key of the chest, with words of gift of the chest and contents, was a sufficient delivery.

So, in *People v. Benson*, 99 Ill. App. 325, where a husband gave his wife the key of a safe in his shop in which there were promissory notes, and stated that he gave her the contents of the safe, it was held that there was a sufficient delivery. The report is obscure, but the act was probably done in illness.

Perhaps the most extreme case on this side of the subject is *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 172, where the donor, about a week before she died, took from her writing desk a letter from her attorney, stating that he had in his safe a promissory note belonging to her and also certain bonds, and gave it to her mother, with the key of the writing desk, and said she wished her to have this, and the money represented by the property her attorney had. The court said and held: "The delivery of the key of the desk, and the actual delivery of the letter from King, containing a full description of the note and bonds held by the agent, the only evidence the intestate had of his possession for her use, is a sufficient delivery to make the gift complete."

In *Thomas v. Lewis* (Page v. Lewis), 89 Va. 1, 18 L.R.A. 170, 37 Am. St. Rep. 848, 15 S. E. 389, it was held that the contents of a safe-deposit box were sufficiently delivered by delivery of its key, with words of gift, on the day of the donor's death.

So, in *Foley v. Harrison*, 233 Mo. 460, 136 S. W. 354, the court, while holding that the evidence was not sufficient to show that there had been a gift of the contents of a safe-deposit box *causa mortis*, said that the delivery of keys to such a box was a sufficient delivery of its contents to complete a valid gift *causa mortis*.

In *Herrick v. Dennett*, 203 Mass. 17, 89 40 L.R.A.(N.S.)

statutes in force in the territory of Oklahoma, an appeal in this case would lie from the probate to the district court, under § 1793 of Wilson's Statutes (Snyder's Statutes, § 5451), which is as follows: "An appeal may be taken to the district court from a judgment, decree, or order of the probate court: First. Granting, or refusing, or revoking letters testamentary or of administration, or of guardianship. Second. Admitting, or refusing to admit, a will to probate. Third. Against or in favor of the validity of a will, or revoking the probate thereof. Fourth. Against or in favor of setting apart property, or making an allowance for a widow or child. Fifth. Against or in favor of directing the partition, sale, or conveyance of real property.

N. E. 141, where a man, having made a bill of sale to a woman of certain securities, some time later, while he was ill, told her to take from his keys the key to a safe-deposit box containing the securities, he having theretofore given her authority to go to that vault, it was held that this was a completed gift of the securities.

Transfer of keys to third parties.

Some of the cases relate to the transfer of keys to an intermediary.

Where there was a delivery of a box of securities and its key, with a memorandum of what was to be done with them, and the box passed back and forth between the parties a number of times, and finally, a few weeks before the donor's death, was delivered into the donee's hands again, it was held that there was no delivery *inter vivos* or *causa mortis*. *Farquarson v. Cave*, 10 Jur. 63, 2 Colly. Ch. Cas. 356, 15 L. J. Ch. N. S. 137.

In *Powell v. Hellicar*, 26 Beav. 261, 28 L. J. Ch. N. S. 355, 5 Jur. N. S. 232, 7 Week. Rep. 171, it was held that a delivery of the keys of two receptacles, one in the room and the other in another house, with instructions to make certain delivery of the contents of the receptacles, was not such a delivery as would constitute a gift *causa mortis*.

Where there was evidence that a sick man told B to take a certain trunk, saying "This is for C; take care of it for her," and B took the trunk and put it in the decedent's closet, it was held that there was no delivery. There being other evidence that the decedent locked the trunk and gave B the key, saying, "I want you to keep it for C," the court held that in that case there was no delivery at all, even for a moment; for, as the trunk was capable of manual delivery, it could not be delivered by the key. *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464.

So, when the key was restored to its usual keeping place after the instructions as to delivery of the gift. *Coleman v. Parker*, 114 Mass. 30.

Sixth. Settling an account of an executor or administrator or guardian. Seventh. Refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; or, eighth. From any other judgment, decree, or order of the probate court, or of the judge thereof affecting a substantial right."

It is urged that § 16 of article 7 of the Constitution limits such appeals to judgments only, and therefore, in substance, denies the right of appeal from all orders which may not be treated as judgments. That section is as follows: "Until otherwise provided by law, in all cases arising under the probate jurisdiction of the county court, appeals may be taken from the

judgments of the county court to the district court of the county in the same manner as is now provided by the laws of the territory of Oklahoma for appeals from probate court to the district court; and in all cases appealed from the county court to the district court, the cause shall be tried *de novo* in the district court upon questions of both law and fact."

Section 2 of the schedule provides: "All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation, or are altered or repealed by law."

In *Gano v. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 819, 3 N. E. 532, on the morning of his death the decedent called one of his three children by his first wife, and said to her, "My notes are in a little box on the bureau there; I want you to take them and divide them equally among you children," telling her to go and get the key to the box, which was in a little drawer. The daughter got the key, tried it in the box, and gave the key to her husband, for fear she might lose it; and after her father's death she took the box home with her; the box contained thirty-eight promissory notes, and they were not capable of equal division among the children. It was held that there was no completed gift before the death of the testator.

On the other hand, where the donor gave instructions to an agent who held the key of a box at the bank, as to the delivery of certain labeled packages therein after his death, and to make up and label other packages therein for similar delivery as labeled, which the agent attended to at once, marking the packages, but retaining the key, it was held that the agent was the trustee for the donees. *Devol v. Dye*, 123 Ind. 321, 7 L.R.A. 439, 24 N. E. 246.

In *Walker v. Foster*, 30 Can. S. C. 299, a father placed certain promissory notes in envelopes addressed to each of his five children, kept them in a desk for some years, locked up and under his control, and shortly before his death, when he believed he was dying, had the envelopes taken from the desk and handed to B, who was directed by him to seal them up and place them in the desk and lock it; he then delivered the key to B, to retain until after his death, and requested him to deliver to each of his children one of the envelopes so addressed; and they were later so delivered to each of the children after the death of the donor. The court, in holding that this was a good delivery and a good gift *causa mortis*, said: "The delivery of possession does not depend on the handing over of the keys of the bureau or desk alone, for the notes were previously taken out of the box and replaced there by Dodge himself 40 L.R.A. (N.S.)

after the sealing of the envelopes. However, had there been no delivery except that of the keys, that would by itself have constituted an actual, and not a mere symbolical, delivery, and the possession and dominion over the securities contained in the desk would have been thus acquired by Dodge."

In *Jones v. Brown*, 34 N. H. 439, where the matter was decided on another ground, the court, referring to a direction to a third party by a sick person to take the key of a chest in the house and carry it away from the house to the home of the person addressed, with directions to deliver it to the donor's nieces after her death, said: "It would seem that a gift of the key of the chest, accompanied by a direction that her things should be equally divided among her nieces, would be a valid *donatio causa mortis* of notes contained in the chest, because it is conceded that there was nothing else in it of any value."

Miscellaneous.

In some of the cases the transfer of the key has been followed by the donee gaining actual possession of the gift in the lifetime of the donor. *Reynolds v. Reynolds*, 20 Misc. 254, 45 N. Y. Supp. 338; *Hagemann v. Hagemann*, 204 Ill. 378, 68 N. E. 381.

The delivery has been held sufficient:

—where the article was returned by the donee to a common depository, of which she retained the key. *Re Swade*, 65 App. Div. 592, 72 N. Y. Supp. 1030.

—where the article, by the donor's direction, was returned to its former place in a closet, as the safest place, with a further direction to lock the closet door. *Westerlo v. DeWitt*, 36 N. Y. 340, 93 Am. Dec. 517.

—where the donee was given a deposit note, and told to keep it with the other valuables which she kept in a cash box, of which she retained the key, the donor occasionally sending for the cash box. *Re Taylor*, 56 L. J. Ch. N. S. 597.

The taking of a safe-deposit box by a

The question here raised is settled by the case of *Bowman v. Bilby*, 24 Okla. 735, 104 Pac. 1078, where the question involved was whether or not justices of the peace, after statehood, had jurisdiction in forcible entry and detainer cases. The Constitution prescribed the jurisdiction of justices of the peace "until otherwise provided by law," and did not confer upon them jurisdiction in such cases. The laws in force in the territory of Oklahoma did. Section 2 of the schedule extended these laws where not repugnant to the Constitution, or locally inapplicable, and the question involved was whether or not that jurisdiction conferred by the territorial statute remained in addition to that jurisdiction which was conferred by the constitution. That is much the same question which is here presented. In the opinion it is said (24 Okla. 738): "It was evidently the intention of the framers of the Constitution to leave the question of the jurisdiction of justices of the peace open to be fixed by the proper legislative authority, and in the meantime, to avoid inconvenience, to adopt by the schedule the old Oklahoma territory statutes on the subject. The enactment of § 2 of the schedule had precisely the same effect as if the legislative assembly had convened immediately after statehood and

passed a statute on the subject of forcible entry and detainer, the same in purport as that in force in Oklahoma territory when statehood became a fact. If the legislature could pass such a law,—and there seems to be no room for doubt upon this proposition,—the constitutional convention could also do so by adopting the law upon the subject from the territory of Oklahoma in conformity with the enabling act. This, to our mind, is what it did; and it was done in order that no inconvenience may arise by reason of the change from the territorial form of government." *Burdett v. Burdett*, 26 Okla. 416, 35 L.R.A.(N.S.) 964, 109 Pac. 922, and *Burnett v. Jackson*, 27 Okla. 275, 111 Pac. 194, are cases in which this right of appeal was exercised, although no question was raised as to the jurisdiction of the court.

2. At the trial in the district court the case was submitted to the jury for a general verdict, and the jury was instructed as in an action at law. This was error. The statute provides (*Wilson's Statutes*, § 1807; *Snyder's Statutes*, § 5465): "When the appeal is on questions of fact or on questions of both law and fact, the trial in the district court must be *de novo*, and shall be conducted in the same manner as if the case and proceedings had lawfully

person in the joint names of himself and another, and delivery of one of the keys to such other person, is, by itself, no gift of the securities in the box (see *In re Bauernschmidt*, 97 Md. 35, 54 Atl. 637); but, with other facts showing the intent to give it, may be sufficient. *Gilkinson v. Third Ave. R. Co.* 47 App. Div. 472, 63 N. Y. Supp. 792.

In *Pink v. Church*, 38 N. Y. S. R. 735, 14 N. Y. Supp. 337, affirmed without opinion in 128 N. Y. 634, 29 N. E. 147, it was held upon complicated facts that the jury were correctly instructed that if the key to the safe-deposit box was given with intent to transfer a present title to the securities, it effects the purpose.

In *Farnsworth v. Whiting*, 106 Me. 430, 76 Atl. 909, the court reversed a judgment holding that there had been sufficient delivery of a gift of the contents of a safe-deposit vault by a transfer of the keys, on the ground that the proof was not sufficient; but the evidence is not reported.

The delivery was held insufficient in *Trimmer v. Danby*, 25 L. J. Ch. N. S. 424, 4 Week. Rep. 399, who, after the death of the donor, there was found in his house, in which, however, he did not reside, a box containing certain bonds payable to bearer, and a memorandum stating that certain of these bonds belonged to his housekeeper, who had charge of the house, and had the key of the box, and probably had had it throughout.

So, in *Cosnahan v. Grice*, 15 Moore, P. 40 L.R.A.(N.S.)

C. C. 215, 7 L. T. N. S. 83, where a woman, on her death bed, handed her stays, in which were concealed a considerable amount of bank notes, to another, and told her not to leave them on the bed, and the latter, on asking for and receiving the key of a box in the room, belonging to the donor, locked up the stays in the box, it was held that there was not sufficient definiteness to make a delivery.

In *Sheegog v. Perkins*, 4 Baxt. 273, where a man in feeble health converted currency into gold and put it into a box, which he deposited in a bank, telling the cashier to let no one but his wife have it, except himself, and in case of his death, no one but his wife, and gave her the key, or allowed her to keep it, there was reason to suppose from the evidence that, after putting the box in the bank, he had taken a considerable amount from it; and it was held, upon the whole case, that this must be viewed at most as a gift *inter vivos*, and that the delivery had not been established.

In *Smith v. Smith*, 2 Strange, 955, which was trover by the personal representatives of a decedent against his landlord, it appeared that the decedent had said that the contents of his lodgings were to belong to the defendant's wife, and when he went out of town he used to give the key to his lodgings to the defendant; it was held that there was sufficient possession here, that the law would adjudge possession to him that had the right, and the jury found for the defendant. B. B. B.

originated in that court; and such appellate court has the same power to decide the questions of fact which the probate court or judge had; and it may, in its discretion, as in suits in chancery, and with like effect, make an order for the trial by jury of any or all the material questions of fact arising upon the issues between the parties, and such an order must state distinctly and plainly the questions of fact to be tried." It will be noted that, while the court had a perfect right to impanel the jury and submit issues to it, the statute specifically requires that such an order of submission "must state distinctly and plainly the questions of fact to be tried." The question of impaneling a jury rests within the discretion of the court. *Cartwright v. Holcomb*, 21 Okla. 548, 97 Pac. 386. When a jury is impaneled in an equity case, it should not be empowered to return a general verdict, nor answer conclusions of law; but specific and distinct questions of fact should be submitted to it. Our statute, however, provides (*Snyder's Statutes*, § 5680): "The court, in every stage of action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Applying this mandatory provision, we must inquire whether this error in procedure affects a substantial right of the plaintiff, and in response to this inquiry we find in the journal entry: "And the jury is now discharged from the further consideration of said cause. And the court having carefully weighed the evidence, and being further advised in the premises, approved the findings and verdict of the jury, and accepts the advice of the jury as in its verdict contained, and renders judgment upon the verdict of the jury." As the trial judge treated the verdict as advisory, as he "carefully weighed the evidence," as he approved of the verdict, and as the responsibility rested upon him, we cannot say that this error in procedure has adversely affected a substantial right of the plaintiff. *Rankin v. Blaine County Bank*, 20 Okla. 68, 18 L.R.A. (N.S.) 512, 93 Pac. 536.

3. The difficult question in the case is whether, under the facts, there was a sufficient delivery of the subject-matter of the gift. The witness by whose testimony it was sought to establish the gift was the attending physician.

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When the case was first tried in the county court, this witness testified as follows:

Q. Was there any conversation by Mr. Daniels with his wife in your presence?

A. Yes, sir.

Q. State as near as you can remember what that conversation was.

A. Well, I advised Mr. Daniels in regard to his condition. I told him that he was growing very weak, and that, if he had any changes to make in his business affairs, he had better do it. And he called Mrs. Daniels, and she sat on the bed, and they had this conversation: She asked him if there was anything that he wanted to say to her. He says: "Yes, Florence. I give you all of my bank stock and all of my property." And he turned to me and asked me if I heard what he said and I told him that I did, and he proceeded a little farther, and he said, "I also give you my diamonds." and that is the best that I can recall it.

The county judge found against the defendant, and in his opinion says: "Jas. Daniels did not part with any dominion or control which he had in the property. He did not voluntarily part with the key to the receptacle which contained the certificates of stock. Jas. Daniels parted with no control, only expressed his intention to give. Florence Daniels gained no more dominion or control by virtue of the declaration of Jas. Daniels than she had before the declaration was made." No mention was made at that trial of a key.

At the trial in the district court this witness testified on direct examination as follows:

Q. In what way did you do that?

A. Well, the way I conveyed it to him was: On this particular visit I was sitting close to the bed, talking to him, and I told him that he was growing very weak, and that I thought, if he had any different arrangements to make in his business affairs, that he had better do so.

Q. You stated that to James Daniels?

A. Yes, sir.

Q. What did he say when you told him that?

A. He spoke then to his wife, Mrs. Daniels.

Q. What did he say?

A. The best I can recollect, it was this: Now Mrs. Daniels was on the bed, I believe, sitting on the bed, I believe, and he said to her: "Florence, I give you all of my bank stock, and all of my property and my diamonds. Take my key to our box and keep it, and allow no one to have it." Now that is the best I can remember that

conversation; it might not have been just in those words, but that is the sense.

Q. That is the substance of it?

A. Yes, sir; as near as I can recall it, from what he said.

Q. What, Doctor, from your experience and observation of him, did you consider the condition of his mind at the time he made that statement?

A. He appeared that his mind was clear and rational, that he knew what he was doing, so far as words went.

Q. When he said that to her, did she do anything?

A. The best I remember now; it was just at the time I was doing some little thing for him; I don't remember just what it was now; but she had some keys on her belt, and she transferred keys from one packet to another; transferred one key, to the best of my recollection, from one bunch of keys on the key ring to another. I don't know. I didn't see the key, and don't know just what she did do; but I saw that much.

Q. About how long was that prior to his death?

A. Well, it wasn't very long; just the exact time, I couldn't say; whether it was an hour or more, I don't know, but it certainly wasn't long.

On cross-examination he testified as follows:

Q. He was in a condition now that he could not talk audibly, except a little above a whisper?

A. Just above, it was hardly a whisper. It was above a whisper, just slightly above a whisper, just enough to—hear.

Q. In answer to your question, what was the first thing that he said?

A. The first thing that he said to Mrs. Daniels?

Q. Just repeat his language.

A. He says, "Florence, I give all of my bank stock and all of my property," and just about that time he turned his head a little to one side and asked me if I heard what he was saying, and I told him that I did, and to go ahead, and he says, "and my diamonds. Take my key to our box and keep it, and allow no one to have it."

Q. "Take my key to our box?"

A. Yes, sir; "and keep it, and allow no one to have it." Now he, of course, didn't speak in a very loud tone, and that is the way that I heard it, and the best I can recollect; that is the words he spoke.

Q. After he mentioned the diamonds, he then said, "Take my key to our box?"

A. Yes, sir.

Q. That is the words?

A. Yes, sir; as near as I can remember.
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Q. "Take my key to our box and let nobody have it?"

A. Yes, sir; in so far as I can recollect.

Q. Was that all of the conversation?

A. Well, so far as I remember, there might have been something else said; but I can remember nothing more now.

Q. You don't recollect anything else?

A. No, sir.

Q. Did you get up and leave them?

A. I believe I got up immediately and left.

Q. Did Florence Daniels get up then?

A. I don't know whether she got up right at that moment or not; I think she sat up a little on the bed.

Q. What was it she was doing, if anything?

A. She was transferring some keys.

Q. Now, just state what she did, about transferring keys there?

A. It seemed that she took a key from one of the bunches and put it on another.

Q. Where did she have those two bunches of keys?

A. They were hanging about her dress.

Q. In front?

A. They were hanging on her dress or belt, I didn't notice; but she had some keys about her.

Q. Then she had two separate bunches of keys hanging to her dress?

A. Yes, sir, I don't know that she had them hanging to her dress, but I distinctly remember that she had two bunches. I heard the noise, and I know that she had two bunches, and transferred a key.

Q. How did she transfer it?

A. She took it from one of the rings, and put it on another.

Q. Just took it off of one bunch, and put it on another?

A. Yes, sir; the best I can recollect.

As previously stated, the court submitted this case to a jury for a general verdict, and in doing so instructed the jury as though it were an ordinary action of law. While that was improper, still an examination of the instructions will give the view of the law which the court applied to the facts in this case. The fourth instruction was as follows: "A delivery of keys to a locked receptacle, accompanied by words of gift, of articles contained therein, is sufficient to transfer the contents of the receptacle, and in this case, if you find that James Daniels delivered to the defendant a key or keys to the box containing the bank stock in question, and stated by word of mouth that he gave her such bank stock, then I instruct you that such words of gift, together with the delivery of a key to the box containing the stock, would constitute

a valid gift, and would vest the equitable title to the bank stock contained in such box in the defendant herein."

It will be observed that no distinction is made between delivering the key of a receptacle which cannot be conveniently moved on account of its size or bulk, and one which is small and easily handled. The bank stock involved was kept in a small tin box about 8 inches wide, 12 inches long, and a few inches deep, to which deceased and his wife, the defendant, each carried a key. This box in turn was kept in the vault of the bank. The bank was conducted in a small room about 18 feet wide and 30 feet long; the rear 10 feet of which being cut off by a partition and used by the deceased and his wife as their home. The vault was at the rear of the banking room, and between it and the bedroom. It opened by an ordinary combination lock, which the defendant was in the habit of opening; she having been for two or three years the assistant cashier of the bank. The deceased was the cashier, and he and his wife seemed to have been the only regular employees. The deceased had been sick for about ten days, during which time the president of the bank had assisted the defendant as much as he could; but he does not seem to have been an active officer, and did not know the combination. The money and valuable papers of the bank were kept in a steel safe, inside of the vault, governed by a time lock; but the tin box was not kept in that safe, but merely set in the vault along with the boxes of other customers. During his illness the deceased seemed to have been attended by the doctor, his wife, and a sister. He died on Sunday afternoon, and the conversation which has been quoted took place about two hours before his death. His sister was not present at the time. Nothing was done until after the death of the deceased, other than that detailed in the testimony quoted, and the question is whether there was such a delivery as to make this a valid *donatio causa mortis*. In reaching a conclusion, we have been assisted by able briefs and oral argument of counsel. We find a conflict in the authorities difficult to reconcile, and it is not our purpose to undertake an exhaustive review, or even citation, of the many authorities on the subject, although we have examined all that have been cited by counsel, as well as others disclosed by our own research. The question involved being presented for the first time in this state, and courts of high standing differing from each other on the subject, causes us to resort to the general policy of our own state, in order to get a safe foundation on which to build.

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The bank stock involved in this case comprises practically the entire estate of the deceased, and, being disposed of by him on his deathbed, amounts in substance to a testamentary disposition. Of course, we do not confuse a *donatio causa mortis* with a testamentary disposition, but merely call attention to the fact that, under the circumstances of this case, this donation is substantially equivalent to a testamentary disposition. We inquire, therefore, as to the policy of the people of this state relative to testamentary dispositions. The policy is evidenced by our statutes, brought forward from the territory of Oklahoma by a direct vote of the people in the adoption of the Constitution.

In the absence of a valid testamentary disposition, the law prescribed the succession, and preserves a just and equitable distribution amongst relatives of the deceased. However, one who is not satisfied with these general rules of succession may dispose of his property otherwise, but in doing so he must comply with the exact procedure authorized by law. Unless his will is entirely in his own handwriting, he must execute it in the presence of two witnesses, at the time he must declare to them it is his last will and testament, and he must request them to sign as witnesses, and they must sign it in his presence and in the presence of each other. Unless these formalities are substantially complied with, the will is void, and the courts will not stop to inquire or to enforce the intention of the deceased, but will require the distribution of his property amongst his heirs according to the will of the people. An unwritten will is recognized by our law only in case the decedent, at the time of his death, was in the military service and in actual contemplation of death, or in expectation of immediate death from an injury received the same day, and it must then be proved by two witnesses present at the making of it, and even then "the estate bequeathed must not exceed in value the sum of \$1,000." Snyder's Statutes, § 8894. It is apparent, therefore, that the policy of our people is to insure the distribution of an estate according to the statutory rule of succession, unless the deceased in due form, and with proper solemnities, has declared a contrary purpose.

A gift *causa mortis* is not mentioned in our statutes, and therefore comes to us as a part of the common law; but in taking it, we must take it in connection with the public policy of our state as evidenced by its statutes. The common law in turn gets the idea from the Roman law, and in the Roman law, according to the Institutes of Justinian, five witnesses were required, in

addition to the delivery of the donation. At the common, however, no specific number of witnesses is required; but the gift must be established by clear and convincing evidence, and it must be accompanied by a delivery of the subject-matter. Mere words, of course, cannot constitute a gift, either *inter vivos* or *causa mortis*, because that would conflict with the fundamental notion of consideration as the basis of contract. Mere words, unaccompanied by delivery, could only be a promise, and there being no consideration, the promise could not be enforced, and therefore the gift would not be complete. In order that the gift be valid, it must be completely executed; because if there remains anything to be done, the donor may refuse to do it. When a gift has been completed by the actual delivery of the subject-matter, it, of course, is valid, and these principles apply to a gift *causa mortis* as well as *inter vivos*.

A gift *causa mortis* differs from a gift *inter vivos* in that it is revocable, while it differs from a legacy in that the donee takes direct from the donor, and not through his estate. A gift *causa mortis* may, according to some of the authorities, be revoked by the donor at any time prior to his death. His recovery is *ipso facto*, a revocation, and its subject-matter is subject to the payment of debts. In view, therefore, of the nature of this gift, we feel justified in considering it in connection with the policy of our law concerning testamentary dispositions.

The general principles which we have laid down are stated in many authorities, some of which are as follows: 3 Pom. Eq. Jur. 3d ed. ¶¶ 1146-1151; Ward v. Turner, 2 Ves. Sr. 431, 9 Eng. Rul. Cas. 811; Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415; Gano v. Fisk, 43 Ohio St. 462, 54 Am. Rep. 819, 3 N. E. 532; Newman v. Bost, 122 N. C. 524, 29 S. E. 848; Parish v. Stone, 14 Pick. 198, 25 Am. Dec. 378 (Shaw, Ch. J.); Harris v. Clark, 3 N. Y. 93, 51 Am. Dec. 352; Raymond v. Sellick, 10 Conn. 480; Drew v. Hagerty, 81 Me. 231, 242, 3 L.R.A. 230, 10 Am. St. Rep. 255, 17 Atl. 63; Cutting v. Gilman, 41 N. H. 147, 152.

We now approach the exact question as to whether there was a sufficient delivery in this case. Ward v. Turner, decided by Lord Hardwicke in 1752, is one of the earliest cases containing an exhaustive discussion of this subject, and it is interesting to note in passing that Lord Mansfield, then Mr. Murray, was of counsel in this case. At page 442 of 2 Ves. Sr. Lord Hardwicke says: "It is argued that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way

of symbol is sufficient. But I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this court, delivery of the thing given is relied on, and not in name of the thing."

Mr. Justice Matthews, in delivering the opinion of the court, in Basket v. Hassell, at page 614 of 107 U. S., says: "The point, which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *causa mortis*; and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its terms, will not suffice."

In 20 Cyc. 1234, it is said: "Property kept in a bureau, chest, or trunk, not readily accessible, and ponderous or bulky articles kept in a warehouse, may be delivered by delivering the key to the receptacle with the intent to pass title to the property therein contained. But the delivery of a key to the receptacle which is near at hand and contains property which might easily be removed and an actual delivery made is not sufficient, as it is not the best delivery possible under the circumstances."

Chancellor Kent says: "Delivery, in this, as in every other case, must be according to the nature of a thing. It must be an actual delivery, so far as the subject is capable of delivery. . . . When the gift is perfect, by delivery and acceptance, it is then irrevocable. . . . If the subject of the gift be not capable of actual delivery, there must be some act equivalent to it." 2 Kent, Com. 555, 556.

In Drew v. Hagerty, 81 Me. 231, 242, 3 L.R.A. 230, 10 Am. St. Rep. 255, 17 Atl. 63, 64, it is said: "We think this ruling was correct. If the act of delivery was for no other purpose than to invest the donee with possession, no reason is perceived why it might not be dispensed with, when the donee already had possession. But such is not its only purpose. It is essential in order to distinguish a gift *causa mortis* from a legacy. Without an act of delivery,

an oral disposition of property, in contemplation of death, could be sustained only as a noncupative will, and in the manner and with the limitations provided for such wills. Delivery is also important as evidence of deliberation and intention. It is a test of sincerity, and distinguishes idle talk from serious purposes. And it makes fraud and perjury more difficult. Mere words are easily misrepresented. Even the change of an emphasis may make them convey a meaning different from what the speaker intended. Not so of an act of delivery. Like the delivery of a turf, or the delivery of a twig, in the ancient mode of conveying estates, or the delivery of a kernel of corn, or the payment of one cent of the purchase money, to make valid a contract for the sale of a cargo of grain, an act of delivery accomplishes that which words alone cannot accomplish. Gifts *causa mortis* ought not to be encouraged. They are often sustained by fraud and perjury. It was an attempt to sustain such a gift by fraud and perjury that led to the enactment of the statute for the prevention of fraud and perjury."

In *Cutting v. Gilman*, 41 N. H. 147, 152, the court say: "A delivery is indispensable to the delivery of a gift *causa mortis*. It must be an actual delivery of the thing itself, or of the means of getting possession and enjoyment of the thing, and there must be something amounting to delivery at the time of the gift; for it is not the possession of the donee, but the delivery to him by the donor, that is material. An after-acquired possession, or a previous and continuing possession of the donee, though by authority of the donor, is insufficient. *Miller v. Jeffress*, 4 Gratt. 472; *Kenney v. Public Administrator*, 2 Bradf. 319."

In *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653, paragraph 1 of this syllabus is as follows: "Delivery at the time of making the gift is essential to a perfect gift *causa mortis*. It is not the possession of the donee, but the delivery to him by the donor, that is material. An after-acquired possession or a previous and continuing possession of the donee, though by the authority of the donor, is insufficient."

In an exhaustive note at page 895 of 99 Am. St. Rep., the author cites a great many cases sustaining the following propositions: "It is absolutely necessary that there be a delivery of the subject-matter of a gift *causa mortis* during the donor's lifetime, and in this respect it does not differ from a gift *inter vivos*. (Citing cases.) Not only must there be a delivery, but the possession of the donee must be a continued one, and the donor have parted with all control and dominion over the subject-matter of the gift 40 L.R.A. (N.S.)

in favor of the donee, so as to put it out of his power to repossess himself thereof, and no further act be required on his part to vest the title in the donee." (Citing cases.)

In *Newman v. Bost*, 122 N. C. 524, 29 S. E. 848, the deceased, in his last illness, sent for the plaintiff, the donee, who was not in the room, and asked her to hand him his private keys, which she did. He then handed her the bunch of keys and told her to take them and keep them; and that he desired her to have them and everything in the house. He then pointed out certain articles of furniture in the house, and asked that his chamber door be opened, and pointed in the direction of the halls and other rooms, and repeated that everything in the house was hers; he wanted her to have everything. Amongst other things he pointed out was a bureau, which was in the room, and one of the keys which he handed her was a key to this bureau, and a bureau drawer which this key unlocked contained in it a life insurance policy payable to the deceased's estate, together with other papers, and there was no other key that unlocked the drawer. After stating the result of the authorities, at page 529 of 122 N. C., the court says: "It is a doctrine, in our opinion, not to be extended, but to be strictly construed and confined within the bounds of our adjudged cases. We were at first disposed to confine it to cases of actual manual delivery, and are only prevented from doing so by our loyalty to our own adjudications." At page 532 of 122 N. C., it is said: "Following this case, founded on *Ward v. Turner*, we feel bound to give effect to constructive delivery, where it plainly appears that it was the intention of the donor to make the gift, and where the things intended to be given are not present, or, where present, are incapable of manual delivery from their size or weight. But where the articles are present and are capable of manual delivery, this must be had." And again at pages 533 and 534 of 122 N. C.: "It being claimed and admitted that the life insurance policy was present in the bureau drawer in the room where it is claimed the gift was made, and being capable of actual manual delivery, we are of the opinion that the title to the insurance policy did not pass to the plaintiff, but remained the property of the intestate of the defendant. But we are of the opinion that the bureau and any other article of furniture, locked and unlocked by any of the keys given to the plaintiff, did pass, and she became the owner thereof. This is upon the ground that while these articles were present, from their size and weight they were incapable of actual manual delivery; and that the delivery of the keys

was a constructive delivery of these articles, equivalent to an actual delivery if the articles had been capable of manual delivery."

In *Keepers v. Fidelity Title & D. Co.* 56 N. J. L. 302, 23 L.R.A. 184, 44 Am. St. Rep. 397, 28 Atl. 585, the deceased gave to her sister the key to a box, declaring at the time that she thereby gave her all that the box contained. The box was in another room of the same house, in a locked closet of which deceased's mother had the key. In holding that this was not a sufficient delivery of the papers and securities contained in the box, the court say (page 308 of 56 N. J. L.): "We are not willing to approve the extreme views which have been adopted in the cases cited. We agree with the sentiment expressed in *Ridden v. Thrall*, 125 N. Y. 572, 11 L.R.A. 684, 21 Am. St. Rep. 758, 26 N. E. 627, that 'public policy requires that the laws regulating gifts *causa mortis* should not be extended, and that the range of such gifts should not be enlarged.' When it is remembered that these gifts come into question only after death has closed the lips of the donor; that there is no legal limit to the amount which may be disposed of by means of them; that millions of dollars worth of property are locked up in vaults, the keys of which are carried in the owners' pockets; and that, under the rule applied in those cases, such wealth may be transferred from the dying owner to his attendant, provided the latter will take the key and swear that it was delivered to him by the deceased for the purpose of giving him the contents of the vault,—the dangerous character of the rule becomes conspicuous. Around every other disposition of the property of the dead the legislative power has thrown safeguards against fraud and perjury. Around this mode the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the substitution of convenient and easily proven devices."

In *Hatch v. Atkinson*, 56 Me. 324, 330, 331, 96 Am. Dec. 464, in deciding that securities contained in a trunk did not pass by delivery of the key, the court says: "If it was the key only, as the brother swears, then very clearly there was no delivery or possession given, even for a moment; for, although delivery of the key of a warehouse, or other place of deposit, where cumbrous articles are kept, may constitute a sufficient constructive or symbolical delivery of such articles, it is well settled that delivery of the key of a trunk, chest, or box, in which valuable articles are kept, which are capable of being taken into the hand, and may be delivered by being passed from hand to hand, is not a valid delivery of such

articles. The rule is that the delivery must be as perfect and complete as the nature of the articles will admit of. While a constructive delivery may be sufficient for large or cumbrous articles, it will not be sufficient for small articles, capable of a more perfect and complete delivery."

The supreme court of New York, in *Cooper v. Burr*, 45 Barb. 9, however, held that the delivery of keys to a bureau and trunks, with appropriate words of gift, is sufficient delivery of coin and jewelry therein contained; the syllabus containing the following: "C., who had been confined to her room by illness for nineteen or twenty years, and to her bed for five or six years, prior to her death, kept in her room a bureau and trunks containing gold and silver coin and jewelry. About six weeks before her decease, handing to the plaintiff, who had lived with and taken care of her for twenty-seven years, the keys of the bureau and trunks, she said: 'Mary, here are these keys. I give them to you. They are the keys of my trunks and bureaus. Take them and keep them, and take good care of them. All my property, and everything, I give to you. You have been a good girl to me, and be so still. . . . You know I have given it all to you. Take whatever you please. It is all yours, but take good care of it.' Held, that the language of the donor, accompanied by a delivery of the keys to the trunks and bureau, evinced the intention of the donor, and placed the donee in possession of the means of assuming absolute control of the contents at her pleasure, and constituted a valid gift of the coin and jewelry in the trunks and bureau."

In *Walsh v. Sexton*, 55 Barb. 251, 256, the deceased, during her last sickness, handed to the donee a box containing securities, with appropriate words of gift. It is held that this was sufficient; but Judge Peckham, in delivering the opinion of the court, says: "I concur in the views expressed by the court in *Brown v. Brown*, 18 Conn. 410, 46 Am. Dec. 328, against both the principle and the policy of sustaining such a gift. But the authorities are the other way. In my judgment this doctrine is fraught with the greatest dangers. It leads into temptation, from which we all pray to be delivered, and it greatly facilitates frauds. The whole thing is wrong. But it is settled by authority, and we are not at liberty to reverse it." So far as New York, therefore, is concerned, we have the rule claimed by the plaintiff in this case; but the reason for that rule having been repudiated, it ceases to be of importance in other states.

In Virginia, in the case of *Thomas v. Lewis* (Page v. Lewis) 89 Va. 1, 18 L.R.A. 170, 37 Am. St. Rep. 848, 15 S. E. 389, it is

held that the delivery of the keys of a box, deposited in the vault of a bank, is a sufficient constructive delivery of the contents of the box; but in that case the box itself was at a distance from the donor, and a strong dissenting opinion was filed. In this dissent Judge Lacy quotes the following language from Lord Eldon's opinion in *Duffield v. Elwes*, 1 Bligh. N. R. 533, 9 Eng. Rul. Cas. 827: "Improvements in the law, or some things which have been considered improvements, have been lately proposed; and if, among those things called 'improvements,' this donation *mortis causa* were struck out of our law altogether, it would be quite as well."

In *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. 706, it is said in the syllabus: "A valid gift *causa mortis* takes place where the donor, on her deathbed, delivers to the donee the keys of her trunk, which is in the room, and declares that the trunk and its contents are the donee's property."

Other cases might be cited tending to support both sides of this controversy; but we have cited enough to show the reason of the courts as well as the conflict of judicial decisions. It seems to us that the weight of authority, the better reason, and the policy of our law, as evidenced by our statutes, are against the gift, and we should not permit our sympathy to make a bad rule which, while perhaps not in this case, would eventually encourage fraud and perjury.

4 and 5. Having reached the conclusion which has been stated, it is needless for us to determine whether it was necessary for the certificates of stock to be indorsed, or whether it was error to permit the wife to testify as a witness in the cause.

We are therefore of the opinion that the case should be reversed, and judgment rendered for the plaintiff in error.

Per Curiam:

Adopted in whole.

WASHINGTON SUPREME COURT.

JACOB ROSIN, Resp't,
v.

DANAHER LUMBER COMPANY, Appt.

(63 Wash. 430, 115 Pac. 833.)

Master — duty to furnish sufficient helpers.

1. A master cannot be held liable for injury to a servant merely because he did not have a sufficient number of men to do the work safely, if he did not know, or the exercise of ordinary prudence would not have charged him with knowledge, that the number furnished was not sufficient. 40 L.R.A.(N.S.)

Trial — instructions — curing error — duty of master.

2. An instruction authorizing a recovery against a master for injury to a servant if he did not provide a sufficient number of men to do the work safely is not cured by a further instruction that the way to determine whether or not he was negligent was to determine whether or not he acted as an ordinarily prudent man would have acted under the same circumstances.

(Dunbar, Ch. J., dissents.)

(June 2, 1911.)

APPEAL by defendant from a judgment of the Superior Court for Pierce County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Hudson & Holt for appellant.

Messrs. Govnor Teats, Hugo Metaler, and Leo Teats, for respondent:

Where the foreman directs a servant to do a certain piece of work, under his direction, he has a right to rely on the safety of the working place, and recovery for resulting injury is allowed, unless the dangers are so obvious that there could be no two opinions about it.

Hilgar v. Walla Walla, 50 Wash. 470, 19 L.R.A.(N.S.) 367, 97 Pac. 498; *Johnson v. Collier*, 54 Wash. 478, 103 Pac. 818; *Cheatham v. Hogan*, 50 Wash. 465, 22 L.R.A.(N.S.) 951, 97 Pac. 499; *Whitham v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900; *McKenzie v. North Coast Colliery Co.* 55 Wash. 495, 28 L.R.A.(N.S.) 1244, 104 Pac. 801.

Crow, J., delivered the opinion of the court:

Action by Jacob Rosin against the Danaher Lumber Company, a corporation, to recover damages for personal injuries. From a judgment in plaintiff's favor, the defend-

Note. — Duty of master to provide sufficient help.

The earlier cases upon this point are collected and discussed in a note to *Di Bari v. J. W. Bishop Co.* 17 L.R.A.(N.S.) 773, and this note is supplementary thereto.

As to liability of master for act of foreman in delegating too few hands to perform work, see note to *Dair v. New York & P. R. S. S. Co.* post, 918.

As to duty of master to furnish superintendence where the work is complicated and dangerous, see note to *Engelking v. Spokane*, 29 L.R.A.(N.S.) 481.

As to assumption of risk of overstraining muscles in lifting weights under immediate direction of master or vice prin-

ant has appealed. Appellant owns a dry kiln, provided with a sliding door about 16 feet 3 inches long, and 10 feet 6 inches wide, weighing 1,200 pounds. Respondent was employed by appellant as an unskilled laborer. On March 5, 1910, appellant's foreman decided to remove the door and lower it to a horizontal position. For this purpose he called five workmen, including respondent. These men, with the foreman, under the latter's direction, attempted to handle the door by supporting it at arm's length with their hands and gradually moving backwards so as to bring it safely to the ground. Before the work was completed some of the men, for reasons disputed in the evidence, released their hold, whereupon the door fell and injured respondent. The

negligence charged was that appellant's foreman attempted to lower the door without providing a sufficient number of men to safely perform the work. It was also alleged that methods selected were unsafe and dangerous. Appellant's first contention is that the trial court erred in refusing its motions for a nonsuit and a directed verdict. In support of these motions it insists the evidence was insufficient to sustain any finding of negligence on appellant's part. We have carefully examined all the evidence, and, without discussing it, will state that we conclude the question of appellant's alleged negligence in failing to provide a sufficient number of men was for the jury. The trial judge instructed the jury as follows: "In the performance of the work

cial, see note to *Stenvog v. Minnesota Transfer R. Co.* 25 L.R.A. (N.S.) 362.

Cases in which the question involved was whether the master had complied with the terms of a statute requiring him to employ a person to perform certain designated services have been excluded. An example of cases of this character is *Karkowski v. La Salle County Carbon Coal Co.* 248 Ill. 195, 93 N. E. 780, where a statute required the mine owners to keep attendants at all of the principal doors of the mine, and the question actually decided was whether a door which was unattended was a "principal door" within the meaning of the statute.

So, too, cases have been excluded where the question was whether the master was negligent in failing to employ a servant to perform certain designated functions. That entirely different principles govern cases of this character will be seen by the decision in *Kennedy v. Wanamaker*, 145 App. Div. 428, 129 N. Y. Supp. 1053, where the court held that it was not the duty of the master to employ a servant to see that an elevator operator did not move the elevator while another employee was at work in the well. The court said: "If it may be said that it was the duty of the defendant at common law to hire another employee to watch the elevator operator, then it is difficult to see where that duty would end, for as well might it be said that the jury might speculate and say that the further duty devolved on the defendant to employ still another watchman to watch the first and see that he performed his duties, and the number of employees to be thus employed to see that other employees performed their duties would in each case depend on the opinion of the jury with respect to the particular facts. No authoritative decision in this jurisdiction has as yet gone to that extent, and it would be opposed to precedents."

It is a rule which does not appear to be questioned by any reported case, that it is the master's duty to furnish a sufficient force of servants to accomplish with a reasonable degree of safety to the servants employed the particular work in which they

are engaged. This rule is specifically laid down in the following cases decided since the preparation of the earlier note: *Pennsylvania R. Co. v. Hartell*, 85 C. C. A. 335, 157 Fed. 667; *Denver & R. G. R. Co. v. Reiter*, 47 Colo. 417, 107 Pac. 1100; *Coughlan v. Philadelphia, B. & W. R. Co.* 6 Penn. (Del.) 242, 67 Atl. 148; *Brown v. Rome Mach. & Foundry Co.* 5 Ga. App. 142, 62 S. E. 720; *Beard v. Georgian Mfg. Co.* 8 Ga. App. 618, 70 S. E. 57; *North Chicago Street R. Co. v. Aufmann*, 221 Ill. 614, 112 Am. St. Rep. 207, 77 N. E. 1120; *Fitter v. Iowa Teleph. Co.* 143 Iowa, 689, 121 N. W. 48; *Illinois C. R. Co. v. Langan*, 116 Ky. 318, 76 S. W. 32; *Standard Sanitary Mfg. Co. v. Minor*, 33 Ky. L. Rep. 982, 112 S. W. 572; *Louisville & N. R. Co. v. Shelburne*, — Ky. —, 117 S. W. 303; *Dougherty v. Minneapolis Steel & Machinery Co.* 110 Minn. 497, 126 N. W. 136, 19 Ann. Cas. 1043; *Meily v. St. Louis & S. F. R. Co.* 215 Mo. 567, 114 S. W. 1013; *Stewart v. Stone & W. Engineering Corp.* 44 Mont. 160, 119 Pac. 568; *Verlinda v. Stone & W. Engineering Corp.* 44 Mont. 223, 119 Pac. 573; *Shaw v. Highland Park Mfg. Co.* 146 N. C. 235, 59 S. E. 676; *Walsh v. Smith*, 26 R. I. 554, 59 Atl. 922; *Anderson v. Southern R. Co.* 70 S. C. 490, 50 S. E. 202; *Biggers v. Catawba Power Co.* 72 S. C. 264, 51 S. E. 882; *Brown v. Gallivan Bldg. Co.* 88 S. C. 80, 70 S. E. 428; *Galveston, H. & S. A. R. Co. v. Bonn*, 44 Tex. Civ. App. 631, 99 S. W. 413; *Turner v. Missouri, K. & T. R. Co.* 45 Tex. Civ. App. 650, 119 S. W. 719.

In *Coughlan v. Philadelphia, B. & W. R. Co.* 6 Penn. (Del.) 242, 67 Atl. 148, in charging the jury, *Lore, Ch. J.*, said: "It is the duty of the master to see that the number of servants engaged upon any particular work is sufficient to secure the reasonable safety of each one of them."

"It is well recognized now that one of the nondelegable duties of the master is to furnish an adequacy of competent fellow servants to do the work in hand." *Brown v. Rome Mach. & Foundry Co.* 5 Ga. App. 142, 62 S. E. 720.

An instruction to the effect that it was the duty of the master to furnish

of handling heavy objects by hand, it is the duty of the employer to provide a sufficient number of men to handle the same in reasonable safety to the men at work, and if you find from the evidence in this case that the defendant did not have a sufficient number of men to handle the door in question with reasonable safety to the men and the plaintiff, then in that regard you can find the defendant negligent as charged by the plaintiff." Appellant requested instructions, refused by the court, to the effect that, before respondent would be entitled to recover, it must be shown, by a fair preponderance of the evidence, that appellant's foreman knew, or in the exercise of reasonable care and ordinary prudence should have known, the men directed to lower the

door were insufficient in number. Appellant now contends the trial judge erred in the instructions given, and in refusing those requested. It argues that the instructions given made it an insurer of the sufficiency of the number of men engaged, and informed the jury that appellant would be responsible should the men be found insufficient, regardless of the fact whether the foreman exercised reasonable care and prudence in determining the number required. Appellant insists that, if reasonable care and prudence were used by the foreman in determining the required number, but, by reason of a mistake in judgment, he fixed upon too small a number, and the accident resulted from the want of more men, appel-

lant would be liable for the injury. It is not enough force to do the work with reasonable safety to all those engaged in it; that if it knew, or by ordinary care could have known, that the force was inadequate, and if the plaintiff did not know it, and in consequence of such lack of adequate force plaintiff was injured, the master was liable to the injured servant, except for the latter's own negligence in the matter, if any,—was held correct in *Standard Sanitary Mfg. Co. v. Minor*, 33 Ky. L. Rep. 982, 112 S. W. 572.

If a master, by misrepresenting to his servant one of the conditions of a particular piece of labor, induces the servant to enter upon an attempt to perform it with an inadequacy of fellow servants, and injury results to the servant from the task's proving to be beyond the physical capacity of those engaged in attempting to perform it, the servant may ordinarily recover from the master for the master's wrong in fraudulently exposing the servant to an extraordinary hazard; provided that the task was one as to which the master's knowledge was actually or constructively greater than that of the servant. *Beard v. Georgian Mfg. Co.* 8 Ga. App. 618, 70 S. E. 57 (headnote by court).

In *Masner v. Atchison, T. & S. F. R. Co.* 101 C. C. A. 244, 177 Fed. 618, it was held that a railroad company was liable for injuries to a switchman caused by the foreman's sending cars down a track without anyone in charge of them, owing, as the foreman said, to the fact that it was impossible for him to do the work which was put upon him if he detailed men to take charge of the cars.

In an action for an injury caused by the fall of a timber which was being moved, evidence as to the number of men customarily used in moving timbers is admissible. *Alabama G. S. R. Co. v. Vail*, 155 Ala. 382, 46 So. 587.

This rule is generally considered to be but a special application of the more general rule which enjoins upon the master the duty of using due care to provide reasonably safe instrumentalities for his servants.

Thus, in *Meily v. St. Louis & S. F. R. Co.* 40 L.R.A. (N.S.)

Co. 215 Mo. 567, 114 S. W. 1013, the court said: "It is as much the duty of the master to furnish a sufficient number of servants to perform the duties assigned to them in reasonable safety as it is to furnish them with a reasonably safe place in which to labor."

And in *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590, the court said: "The servant does not undertake to incur the risks arising from the want of sufficient and skilful co-laborers, or from defective machinery. . . . His contract implies that in regard to these matters his employer shall make adequate provision that no danger shall ensue to him."

In order that the servant should recover it is necessary to prove that the failure to provide a sufficient number of men was the cause of the injury. *Jackson v. Old Dominion Min. Co.* 151 Mo. App. 640, 132 S. W. 306; *Hagglund v. St. Hilaire Lumber Co.* 97 Minn. 94, 106 N. W. 91; *Lake Shore & M. S. R. Co. v. Whidden*, 13-23 Ohio C. C. 85.

Whether or not the master furnished sufficient servants to unload telephone poles is not a question upon which expert evidence is conclusive. *Fitter v. Iowa Teleph. Co.* 143 Iowa, 689, 121 N. W. 48. But the admission of evidence as to the number of men commonly employed by defendant, and the testimony of a qualified witness to the effect that a certain number of men were necessary to do the work with safety, was held not to be error in *Dell v. McGrath*, 92 Minn. 187, 99 N. W. 629.

Whether or not the master has fulfilled his duty of furnishing a sufficient number of servants is ordinarily a question for the jury. *Fitter v. Iowa Teleph. Co.* supra; *Bokamp v. Chicago & A. R. Co.* 123 Mo. App. 270, 100 S. W. 689; *Sheridan v. Interborough Rapid Transit Co.* 115 App. Div. 282, 100 N. Y. Supp. 821; *Gustafson v. Seattle Traction Co.* 28 Wash. 227, 68 Pac. 721; *Smith v. Southern R. Co.* 87 S. C. 136, 69 S. E. 18; *Sandquist v. Independent Teleph. Co.* 38 Wash. 313, 80 Pac. 539. See also 1 *Labatt, Mast. & S.* § 205.

In a few instances in cases of this char-

lant cannot be held liable for such mistaken determination.

The particular alleged act of negligence, to support which evidence was introduced, was that appellant failed to supply a sufficient number of workmen to safely lower the door. It is elementary that a master must provide a sufficient number of servants to safely perform the required work. This duty imposed upon the master is within the rule requiring him to provide his servant a safe place to work and safe instrumentalities with which to work, a suitable number of competent servants being as much a necessity in the way of instrumentalities as reasonably safe machinery

and appliances. If the master fails to provide a sufficient number of servants to safely perform the required work, and such omission results from his failure to exercise reasonable care and ordinary caution in ascertaining and selecting the required number, he will be guilty of negligence. "The obligation of a master to furnish reasonably safe instrumentalities for the performance of his work embraces the obligation to provide a sufficient number of servants to perform the work safely." 26 Cyc. 1292. "The degree of care required of the master is ordinary or reasonable care, such as men of ordinary care and prudence engaged in the same or similar business on their own

acter, the decision turns upon the sufficiency of the complaint.

Thus, a complaint of a servant against his master for injuries received in the performance of the work because of negligence in failing to furnish sufficient help to do the work with safety is insufficient which does not allege that any particular number of men were promised or necessary for that purpose. *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A. (N.S.) 711, 85 N. E. 954.

So, the fact that fewer men were used in moving a timber on the day in question than had been used on the previous day or days in moving two similar timbers, without any evidence as to why the number of men used was reduced, is not enough to warrant a finding that the superintendent ought to have known that the slightly longer strain to which the men were exposed was beyond their strength,—especially in view of the plaintiff's express disclaimer of any complaint that too few men were employed. *Bertholet v. J. W. Bishop Co.* 187 Mass. 32, 72 N. E. 342.

In cases where the injured servant knows of the danger of working with insufficient number of servants, but continues to do so without complaint, he will be deemed to have assumed the risk of any injury caused by such lack of sufficient help. *Lake v. Shenango Furnace Co.* 88 C. C. A. 69, 160 Fed. 887; *Morgan v. Wabash R. Co.* 158 Ill. App. 344; *Manore v. Kilgore-Peteler Co.* 107 Minn. 347, 120 N. W. 340; *Blundell v. Wm. A. Miller Elevator Mfg. Co.* 189 Mo. 552, 88 S. W. 103; *Herron v. American Steel & Wire Co.* 230 Pa. 90, 79 Atl. 228; *International & G. N. R. Co. v. Figures*, 40 Tex. Civ. App. 255, 89 S. W. 780; *Poll v. Hewitt*, 23 Ont. Rep. 619 (defect in automatic brake on horse power which saved the necessity of an extra helper).

So, in *Morgan v. Wabash R. Co.* supra, the court said: "The fact alone that a master fails to employ a sufficient number of men to do the work does not constitute a cause of action."

A servant experienced in the particular work in which he is engaged, and who knows the number of men required to perform the same prudently and safely, cannot recover 40 L.R.A. (N.S.)

from the master for an injury alleged to have been received by reason of the failure of the latter to provide a sufficient number of workmen to perform the work safely, where it is shown that such servant at the request or by direction of the master, but voluntarily and without protest or objection, undertook such work with full knowledge of the limited number of workmen employed, and of the risk, if any, to which he would thereby be exposed. *Cincinnati Gas & Electric Co. v. Johnston*, 76 Ohio St. 119, 81 N. E. 155.

If the injury was caused partly by the plaintiff's contributory negligence there can be no recovery, even if the master had been negligent in failing to provide a sufficient number of servants. *Beardsley v. Murray Iron Works Co.* 129 Iowa, 675, 106 N. W. 180.

In some cases where the servant knew that the master had not provided a sufficient number of servants, a recovery has been allowed under the particular rules as to assumption of risk, statutory or otherwise, which prevail in that particular jurisdiction.

Thus, in *Bodie v. Charleston & W. C. R. Co.* 66 S. C. 302, 44 S. E. 943, it was held that knowledge of a section foreman that he had an insufficient number of men to handle heavy rails would not prevent a recovery for injuries received while so engaged, under the Constitution of South Carolina, which provides that "knowledge by an employee injured by the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an injury caused thereby, etc."

And in *Shaw v. Highland Park Mfg. Co.* 146 N. C. 235, 59 S. E. 676, where a recovery was allowed for injuries caused by the master's failure to furnish sufficient help, the plaintiff appreciated the danger, and would in some jurisdictions undoubtedly be debarred from recovery on the ground that he had assumed the risk. That this defense was not interposed is probably due to the peculiar rule as to that defense which prevails in this state. See note to *Scheurer v. Banner Rubber Co.* 28 L.R.A. (N.S.) 1207, at page 1240.

W. M. G.

account are in the habit of exercising,—that degree of diligence and precaution which the exigencies of the particular service reasonably require. The master is not an insurer of the competency of his servants." 28 Cyc. 1295. See also *Johnson v. Ashland Water Co.* 71 Wis. 553, 5 Am. St. Rep. 243, 37 N. W. 823; *Peterson v. American Grass Twine Co.* 90 Minn. 343, 96 N. W. 913. The same principle applies in selecting a sufficient number of servants for the safe performance of any particular work, and it will be for the jury to determine from the evidence, under proper instructions, whether, in selecting the number, the master has exercised ordinary and reasonable care, such as men of ordinary caution and prudence are in the habit of exercising. In *Fitter v. Iowa Teleph. Co.* 143 Iowa, 689, 121 N. W. 48, a case strikingly similar to this, it was contended the master was negligent in failing to provide a sufficient force of men to handle a heavy telephone pole. The appellate court reversed the order of the trial court by which a verdict had been directed for the defendant, but said: "We may say, however, that the contention of appellee's counsel, that to reverse the judgment below is to hold that negligence may be inferred from the bare fact that plaintiff was injured, is incorrect. The facts and circumstances under which the injury was sustained are shown with particularity. The work to be done, the method of its performance, the help furnished, the manner in which the injury was received, are all matters of evidence. Whether this showing indicated the exercise of reasonable care was a matter of fact, and not of law."

If in view of the happening of the accident, and plaintiff's contention that it was caused by an insufficient number of men to do the work, the question of an exercise of reasonable care by the master was an issue of fact for the jury, such issue should have been submitted by proper instructions for their consideration. The single fact of the happening of an accident which would have been avoided had more servants been provided to safely perform the work is not of itself sufficiency to establish negligence of the master. It must also appear that he did not exercise ordinary or reasonable care and prudence in estimating the number actually provided as necessary for the particular work.

The master is not an insurer of the number of servants required, any more than he is of their competency. If he were, then to relieve him from any possible negligence in such cases as this, it would become his imperative duty to make a preliminary test not only of the weight of objects about to be handled, but also of the physical strength

and endurance of the servants detailed to perform the particular work. Such a requirement would be impracticable, and, in many instances, impossible. The law only demands an exercise of reasonable and ordinary care and prudence in selecting the number of men to perform the work.

Respondent contends the instruction of which appellant complains was not erroneous, but that if it was, no prejudicial error resulted, as it was cured by other instructions given. The only other instruction upon which such a contention can be predicated with any apparent degree of reason reads as follows: "The way to determine whether the plaintiff or defendant was negligent or not is to compare what was done or left undone by either of them with what would have been done or left undone by a man acting with ordinary prudence. If a man acts as an ordinarily prudent man would act under the same circumstances and conditions, there is no negligence; if a man fails to act as an ordinarily prudent man would act under the same circumstances and conditions, there is negligence." This instruction is an abstract statement, in most general terms, of a rule to be employed by the jury in determining whether either appellant or respondent was negligent, and does not correct the concrete instruction previously given, which declared a specific act on appellant's part to have been negligent, without regard to the question whether its foreman did or did not exercise reasonable or ordinary care and prudence. In other words, when the trial judge had expressly informed the jury that putting an insufficient number of men to work was negligence, and thus characterized and defined as negligence appellant's very acts to which respondent and his witnesses had testified, it would not be reasonable, fair, or logical to say the error thus committed was cured by a later instruction whereby the jury were told a person would not be negligent if he acted as an ordinarily prudent man would act under the same circumstances and conditions, and that if he did not so act, he would be negligent. By the first instruction the jury were advised that the doing of a specific act was in itself negligence. By the second or supposed curative instruction, negligence was generally defined to be a failure to act as a person of ordinary prudence. Considered together the logical conclusion would be that the person who did the specific act did not, in its doing, act as an ordinarily prudent man would under the same circumstances and conditions. *Kirby Lumber Co. v. Dickerson*, 42 Tex. Civ. App. 504, 94 S. W. 153, is especially pertinent. The defendant was charged with negligence in having failed

to provide a proper foundation for a stack of lumber which fell upon the plaintiff. The trial court erroneously instructed the jury on the duty of the defendant to provide a reasonably safe foundation. It was contended in the appellate court that other instructions cured the error. The several instructions quoted in the opinion are in form and principle similar to those here involved. The Texas court of civil appeals, in holding the error had not been cured, said: "It is insisted by appellee that, in other paragraphs of the court's charge, the jury were properly instructed that appellant was to be held responsible only for the failure to exercise ordinary care. These instructions, which it is claimed so modified the doctrine laid down in those paragraphs of the charge hereinbefore quoted as to relieve the charge, taken as a whole, of any injurious consequences to appellant, are as follows: 'The mere fact that an accident happens or an injury occurs is not of itself proof of negligence, and millmen are not, under the law, required to use the highest possible degree of care and caution of which the human mind can conceive, or such degree as would prevent every possible accident, but they are only required to exercise ordinary care and diligence.' 'You are charged that the defendant is not to be held as an insurer of its employees against accident by reason of unsafe or insufficient foundations under its lumber piles, but is by the law only required to use ordinary care and caution to construct safe foundations, and to keep them in such condition.' These instructions unquestionably contain a proper statement of the law. The question to be determined is as to their effect in counteracting the effect of those portions of the charge objected to. The jury, by the instructions contained in the charge, taken as a whole, are required to measure appellant's responsibility by two entirely different and inconsistent standards. If they adopted one, they had to discard the other. If they endeavored to reconcile them, it is not improbable that they may have construed the charge to mean, as a whole, that, while appellant was only required to exercise ordinary care, such ordinary care required it, as matter of law, to provide such reasonably safe foundations for the lumber stack as is commonly used by skilled and experienced millmen, and such as they could, by the use of ordinary skill, provide. They might reasonably understand the charge, taken as a whole, arbitrarily and as a matter of law, to fix the standard of ordinary care imposed upon appellant by an absolute requirement to provide reasonably safe foundation for the stack. So understood, those portions of 40 L.R.A. (N.S.)

the charge referring to the exercise of ordinary care by appellant would in no degree have modified the objectionable portions of the charge." The two instructions here given in effect told the jury (1) that a person not acting with ordinary care and prudence is negligent; (2) that one who provides an insufficient number of men is negligent. From the two thus given, the natural conclusion would be that a person who provided an insufficient number of men did not act with ordinary care and prudence, and was necessarily negligent. Thus, it appears that the issue whether appellant's foreman acted with reasonable or ordinary care and prudence was not properly submitted to the jury.

The judgment is reversed, and the cause remanded for a new trial.

Morris and Chadwick, JJ., concur.
Dunbar, Ch. J., dissents.

NEW YORK COURT OF APPEALS.

JOHN DAIR, Resp't.,

v.

NEW YORK & PORTO RICO STEAMSHIP
COMPANY, Appt.

(204 N. Y. 341, 97 N. E. 711.)

Master and servant — foreman's assignment of insufficient help — liability of master.

A shipowner who furnishes sufficient men safely to load the vessel is not liable for injury to a laborer working in the hold, because the foreman delegates too few hands to such place to handle the material sent down, or permits too much to go down at once to be safely handled by the men at work, since the foreman is, with respect to such details of the work, a fellow servant of the injured employee.

(February 2, 1912.)

Note. — Liability of master for failure of foreman to designate enough hands to perform work.

As to the duty of the master to provide sufficient help, see note to *Rosin v. Danaher Lumber Co.* ante, 913.

In jurisdictions where the status of a servant as vice principal or fellow servant is determined by the character of the act being performed by him, it is the general rule that wherever the master has employed an adequate force of servants of a sufficient degree of skill and capacity, and furnished them with all the means which are essential for a proper discharge of their several duties, and the circumstances are such that the same number of men and the same degree of care are not always required,

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, Second Department, reversing a judgment of a Trial Term for Kings County, Part IV., dismissing the complaint and granting a new trial in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. E. Clyde Sherwood, with Mr. Amos H. Stephens, for appellant:

The defendant having furnished a sufficient number of men to do the work, any error of judgment, or even negligence, on the part of the foreman in distributing the members of his gang to their respective stations, was not imputable to the employer,

he is justified in leaving to them the exercise of their own discretion and judgment in the disposition and distribution of the force available.

Thus, a railway company is not liable for the negligence of the foreman of a drill crew in sending a detached car along a track where other cars are being coupled, without stationing a brakeman upon it to control its movements. *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269.

No negligence can be imputed to a railway company for an omission to make regulations as to the number of brakemen to be sent on a train of detached cars when on its way to the repair track, and in what positions they should be placed. Hence, an accident due to the fact that there were too few brakemen on a particular train, and none at the rear end, will be held to be attributable, not to the negligence of the company, but to that of one or another of the employees engaged in distributing the cars. *Besel v. New York C. & H. R. R. Co.* 70 N. Y. 171 (car repairer injured).

In *Hussey v. Coger*, 112 N. Y. 614, 3 L.R.A. 559, 8 Am. St. Rep. 787, 20 N. E. 556, where the plaintiff was injured through the negligence of some of his fellow servants, the court reasoned thus: "It was no part of the duty of the master to remove hatches or direct the particular mode of doing so, any more than to direct workmen in the use of the tools with which they performed their work. There were customary and established modes of performing such services, and each employee was expected to do his work in the manner and style to which he was accustomed, without special directions in respect thereto. It was entirely immaterial whether the superintendent undertook to perform the work of removing hatches, or ordered it to be done by others; he was in either case engaged in performing the duty of a workman. The master had furnished abundant help to do the work, and had done all that was required of him; and it was the fault of the servants that a sufficient number did

as it related to a detail of the work in which the gang was engaged necessarily entrusted by the employer to the skill and judgment of the hatch foreman.

Besel v. New York C. & H. R. R. Co. 70 N. Y. 171; *Potter v. New York C. & H. R. R. Co.* 136 N. Y. 77, 32 N. E. 603; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Reichel v. New York C. & H. R. R. Co.* 130 N. Y. 682, 29 N. E. 763; *Hussey v. Coger*, 112 N. Y. 614, 3 L.R.A. 559, 8 Am. St. Rep. 787, 20 N. E. 556; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371; *Kaare v. Troy Steel & I. Co.* 139 N. Y. 369, 34 N. E. 901; *Vogel v. American Bridge Co.* 180 N. Y. 373, 70 L.R.A. 725, 73 N. E. 1; *Mc-*

not co-operate to perform it safely, or do it in the manner prescribed by custom."

In *Haywood v. Galveston, H. & S. A. R. Co.* 38 Tex. Civ. App. 101, 85 S. W. 433, it was held that a servant who knew that a foreman had designated too few men to unload heavy timbers from a car must be held to have assumed the risk of injuries received by him, upon proceeding with the work under such conditions.

A complaint which fails to allege that any particular number of men were promised or necessary to handle rails is insufficient to sustain an action at common law based on the failure of a foreman to assign sufficient men for the work. *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954. It is very questionable whether the plaintiff would have been allowed to recover in this jurisdiction even if the complaint had been sufficient.

The question whether or not the alleged negligence of a master mechanic in assigning too few men to perform a certain piece of work was the negligence of a fellow servant or a breach of the master's duty was raised, but not decided, in *Hamel v. Newmarket Mfg. Co.* 73 N. H. 386, 62 Atl. 592.

It has also been held that there can be no recovery for negligence in assigning servants to work for which they are unfitted, either in cases where the unfitness was the cause of injury to the unfit person himself, or in cases where the negligence with which it is sought to charge the master consisted in allowing the unfit person whose acts were the direct cause of the injury to undertake duties which he was incapable of performing properly.

Thus, where the act alleged to have directly resulted in injury was that of a fellow servant in requiring the plaintiff to lift beyond his strength, no breach of the master's duty to supply a safe place of work or safe instrumentalities is involved. The issue presented is merely one of the manner in which a servant employed a proper instrument of work. *Robertson v. Chicago & E. R. Co.* 146 Ind. 486, 45 N. E. 655.

Cosker v. Long Island R. Co. 84 N. Y. 77; Cregan v. Marston, 126 N. Y. 568, 22 Am. St. Rep. 854, 27 N. E. 952; Perry v. Rogers, 157 N. Y. 251, 51 N. E. 1021; De Vito v. Crage, 165 N. Y. 378, 59 N. E. 141; Capasso v. Woolfolk, 163 N. Y. 472, 57 N. E. 760; Citrone v. O'Rourke Engineering Constr. Co. 188 N. Y. 339, 19 L.R.A.(N.S.) 340, 80 N. E. 1092; Russell v. Lehigh Valley R. Co. 188 N. Y. 344, 19 L.R.A.(N.S.) 344, 81 N. E. 122; Webber v. Piper, 109 N. Y. 496, 17 N. E. 216; Madigan v. Oceanic Steam Nav. Co. 178 N. Y. 242, 102 Am. St. Rep. 495, 70 N. E. 785; Foster v. International Paper Co. 183 N. Y. 45, 75 N. E. 933; Vogel v. American Bridge Co. 180 N. Y. 373, 70 L.R.A. 725, 73 N. E. 1; Dowdell v. Lackawanna Steel Co. 198 N. Y. 362, 91 N. E. 789; McConnell v. Morse Iron Works & Dry Dock Co. 187 N. Y. 341, 10 L.R.A.(N.S.) 419, 80 N. E. 190, 10 Ann.

Cas. 205; McCampbell v. Cunard S. S. Co. 144 N. Y. 552, 39 N. E. 637; Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Hudson v. Ocean S. S. Co. 110 N. Y. 625, 17 N. E. 342; Filbert v. Delaware & H. Canal Co. 121 N. Y. 207, 23 N. E. 1104; Hogan v. Smith, 125 N. Y. 774, 26 N. E. 742.

All of the details of this simple situation were perfectly well known to the plaintiff, a longshoreman of many years' experience, and whatever risk there was incident to that situation was open and obvious and well known to and assumed by him.

Cahill v. Hilton, 106 N. Y. 512, 13 N. E. 339; Gombert v. McKay, 201 N. Y. 27, — L.R.A.(N.S.) —, 94 N. E. 186; Jackson v. Greene, 201 N. Y. 76, 93 N. E. 1107; Rooney v. Brogan Constr. Co. 194 N. Y. 32, 86 N. E. 814; Dixon v. New York, O. & W. R. Co. 198 N. Y. 58, 91 N. E. 271; Kline v. Abra-

So, a railway company is not liable for an injury to a brakeman caused by the negligence of the engineer in placing his unskilled fireman temporarily in the performance of his duties in handling the engine. South Florida R. Co. v. Price, 32 Fla. 46, 13 So. 638; Parrish v. Pensacola & A. R. Co. 28 Fla. 251, 9 So. 696; Houston & T. C. R. Co. v. Myers, 55 Tex. 110.

A master is not liable for the negligence of his foreman in designating, from among several competent employees, a helper for another servant, merely because he was not as competent as one who might have been designated, and who was asked for to assist on the particular job. Hilton v. Fitchburg R. Co. 73 N. H. 116, 68 L.R.A. 428, 59 Atl. 625.

In a few cases where the employee who had charge of the work, with power of designating the men to perform the different parts of it, was a vice principal, because of the very position which he held as manager of the whole of the master's work, or of a distinct department thereof, it has been held that the master will be liable for any negligence of his in designating too few men to do a particular piece of work, — the general rule being that the master is liable for any negligence committed by an employee occupying such a position.

Thus, in Verlinda v. Stone & W. Engineering Corp. 44 Mont. 223, 119 Pac. 573, the failure of a superintendent to provide assistance in lowering a chain connected with a derrick, which was too heavy for a servant to lower alone, must be imputed to the master.

And in Alabama G. S. R. Co. v. Vail, 142 Ala. 134, 110 Am. St. Rep. 23, 38 So. 124, it was held that a foreman, having been delegated by the master with the duty of hiring and discharging servants to perform the work over which he was foreman, was the representative of the master in that matter, and under obligation to employ servants sufficient to do this work. The 40 L.R.A.(N.S.)

court went on to say: "If he had to take some away to perform some other work, he should have employed others, if necessary, to perform this work properly."

In those few jurisdictions where the superior servant doctrine prevails, of course, the master is liable for the negligence of a foreman in this respect as he is in any other respect.

Thus, in Illinois C. R. Co. v. Langan, 116 Ky. 318, 76 S. W. 32, the court said that among the primary duties owing by the master to the servant is the duty to "furnish them a reasonably safe place in which to do their work, and must furnish them reasonably safe tools and appliances with which to do it. Alongside of these he must furnish them adequate assistance, or a sufficient number of workmen. So, where the master assigns or imposes upon one of his servants the duty of representing him in providing these means, the servant's acts are deemed to be those of the master, and for a single neglect by such servant the master is responsible as though he acted in person."

So, in Masner v. Atchison, T. & S. F. R. Co. 101 C. C. A. 244, 177 Fed. 618, it was held that a railroad company was liable for injuries to a switchman caused by the foreman's sending cars down a track without anyone in charge of them, owing, as the foreman said, to the fact that it was impossible for him to do the work which was put upon him if he detailed men to take charge of the cars. The court said that the defendant was negligent either by the negligent act of the foreman in allowing the cars to run down without a switchman, or by its own failure to provide a sufficient number of switchmen to do the work required. This decision was rendered under the California statute (Cal. Civ. Code, § 1970) which virtually establishes in that state the so-called "superior servant" doctrine. W. M. G.

ham, 178 N. Y. 377, 70 N. E. 923; Drake v. Auburn City R. Co. 173 N. Y. 466, 66 N. E. 121; Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; Gibson v. Erie R. Co. 63 N. Y. 449, 20 Am. Rep. 552; De Forest v. Jewett, 88 N. Y. 264; Maltbie v. Belden, 167 N. Y. 307, 54 L.R.A. 52, 60 N. E. 645; Appel v. Buffalo, N. Y. & P. R. Co. 111 N. Y. 550, 19 N. E. 93; Kennedy v. Manhattan R. Co. 145 N. Y. 289, 39 N. E. 956; Rende v. New York & T. S. S. Co. 187 N. Y. 382, 80 N. E. 206.

Mr. Joseph H. Lecour, Jr., for respondent:

It was the defendant's duty to furnish four men for the specific task in which plaintiff was engaged; that duty was not performed as a matter of law by furnishing a hatch gang of the usual size.

Flike v. Boston & A. R. Co. 53 N. Y. 549, 13 Am. Rep. 545; Sprong v. Boston & A. R. Co. 58 N. Y. 56; O'Connell v. Thompson-Starrett Co. 72 App. Div. 47, 76 N. Y. Supp. 296; Harvey v. New York C. & H. R. Co. 19 Hun, 556; McGovern v. Central Vermont R. Co. 123 N. Y. 280, 25 N. E. 373; Shearm. & Redf. Negligence, 5th ed. 303, 337; Albertz v. Bache, 32 N. Y. S. R. 1014, 10 N. Y. Supp. 639; Hankins v. New York, L. E. & W. R. Co. 142 N. Y. 416, 25 L.R.A. 396, 40 Am. St. Rep. 616, 37 N. E. 466; Whitaker v. Delaware & H. Canal Co. 126 N. Y. 544, 27 N. E. 1042; Pantzar v. Tilly Foster Iron Min. Co. 99 N. Y. 368, 2 N. E. 24.

The defendant's duty to supply a sufficiency of workmen could not be delegated to Gleason, so as to relieve defendant from liability.

Vogel v. American Bridge Co. 180 N. Y. 373, 70 L.R.A. 725, 73 N. E. 1; McCarthy v. Pennsylvania R. Co. 189 N. Y. 170, 81 N. E. 770; Laning v. New York C. R. Co. 49 N. Y. 521, 10 Am. Rep. 417; Mann v. Delaware & H. Canal Co. 91 N. Y. 500; Sciolaro v. Asch, 198 N. Y. 77, 32 L.R.A. (N.S.) 945, 91 N. E. 263; Booth v. Boston & A. R. Co. 73 N. Y. 38, 29 Am. Rep. 97.

The defendant is not relieved from responsibility to plaintiff for negligence in the performance of the master's duties, by reason of the fact that Gleason's negligence as a fellow servant may have concurred in causing the injury.

Strauss v. New York, N. H. & H. R. Co. 91 App. Div. 583, 87 N. Y. Supp. 67; Larkin v. Washington Mills Co. 45 App. Div. 10, 61 N. Y. Supp. 93; Flanagan v. F. W. Carlin Constr. Co. 134 App. Div. 236, 118 N. Y. Supp. 953; Pepe v. Utica Pipe Foundry Co. 132 App. Div. 458, 116 N. Y. Supp. 921; Swanton v. Hastings Pav. Co. 129 App. Div. 553, 114 N. Y. Supp. 443; Young v. Syracuse, B. & N. Y. R. Co. 45 App. Div. 296, 61 N. Y. Supp. 202; Tetherton v. Unit-40 L.R.A. (N.S.)

ed States Talc Co. 41 App. Div. 613, 58 N. Y. Supp. 55.

Gray, J., delivered the opinion of the court:

This is a common-law action to recover damages of the defendant for personal injuries sustained by the plaintiff while in its employment as a stevedore. A vessel of the defendant was being loaded with a cargo of corrugated iron, and the particular negligence charged in the complaint was the failure to provide sufficient and competent men for the work. The case was submitted to the jury upon the question whether there had been a neglect of a duty on the part of the defendant to furnish a sufficiency of fellow workmen to do the work to which the plaintiff had been assigned. The question of the competency of the men in the gang was withdrawn from the jury, and is not in the case. A verdict was rendered for the plaintiff; but the trial court, on the defendant's motion, set it aside and dismissed the complaint. The appellate division has reversed the judgment entered in favor of the defendant and has ordered a new trial; the justices of that court sharply dividing in opinion.

The iron was being transhipped from a lighter into the hold of the defendant's vessel. For that purpose, a gang of eighteen men were employed; eight being placed in the hold of the vessel and the others being engaged on the deck and elsewhere, preparing the cargo for its transshipment. Gleason was over the gang as foreman, directing the men in their work and working with them upon it. The plaintiff was stationed in the hold and with him were seven others, whose business it was to receive the iron as it descended, and to stow it away. It must be assumed that, for the performance of the general work, eighteen men were necessary, and that it was customary to have eight of them in the hold. Of these eight men, four would stand on each side of a propeller shaft running the length of the vessel, and, alternately, receive and handle the iron as it descended on either side of the shaft. This iron was in sheets of about 6 feet in length by 2 feet in width, and was handled in bundles of an average weight of 200 pounds. Several of these bundles, bound together by a chain, would be hooked to a fall of the ship's tackle, raised from the deck, and then lowered into the hold. Upon the day in question matters had proceeded in the usual way until the afternoon, when Gleason, the foreman, transferred four of the men from the hold, and put them to work upon the lighter. That left the plaintiff with three other men in the hold to unslung

and stow the iron bundles. Gleason, who was a witness for the plaintiff, said that in the matter of making this change he was using his own judgment. After that, the work proceeded in the hold, two men only working on either side of the shaft, until some five or six "draughts" of the iron, as the loads in course of transshipment are termed, had been lowered. These draughts had averaged from six to eight bundles in each, and had been easily handled. To quote from the plaintiff's testimony, "They would come down six to eight in a bundle. Those we could handle easily. We had handled a number of them, just two of us." When the accident happened to the plaintiff, a heavier draught was being lowered, and, after being unbound, it fell over upon the plaintiff's leg. His testimony describes the occurrence in this wise: "I remember that draught in particular. . . . As I tried to steady it, I could not hold it up, because the draught was too big. . . . If it had been like the other draughts, we could have managed it. . . . I tried to hold up this draught on edge, but it came right over on me. . . . The trouble with that one was it was too heavy, unusually heavy. . . . When we tried to ease this one down, we couldn't ease it the same as we had done with the others, and we couldn't get out of the way, and it came right back. . . . It tipped over." The plaintiff's fellow workmen in the hold, describing the character of their work, testified that in handling the draughts when there were four men, "three men would steady them and one man take the hook off." He also testified that, after the number of men was so reduced, at first "we handled them (the draughts) without any difficulty; we could have handled this one without any difficulty, if it had been no heavier than the others. It was the extra size and weight that made the trouble."

The evidence in this case makes apparent the fact that while eight men should have been in this hold, four on either side of the shaft, dividing it, in order to handle the bundles of iron, the reduction of that force by withdrawing half of the men did not affect the situation, until an unusually large load was hoisted in. But, assuming that the usual number of eight men should have been in the hold for the handling of loads of ordinary size, and to be prepared for the case of extraordinary ones, the question is whether the act of Gleason, the gang foreman, should be imputed to the defendant, as the general employer. Whether Gleason's act in transferring some of the men from the hold to another part of the work was a negligent one on his part, or, as he says, one in the exercise of his judgment,

how was the defendant at fault? It did not relate to a personal duty of the defendant. The stowing away of the iron in the hold was obviously but a detail of the general work of loading the vessel upon which the gang was engaged, as to performing which experience and observation were the guides. Gleason, though the foreman, was one of the complement of men and a fellow servant; however, in grade above them. He was himself trucking the iron from the lighter. Concededly a sufficient number of men were provided for, and continuously retained upon, the general work of loading the vessel with a cargo of the iron, and there is no suggestion that they were not competent workmen. The duty of the defendant in that respect was fully discharged, and necessarily details of the work were left to the men. With equal necessity, their foreman was invested with some measure of discretion and judgment in managing the execution of the work.

If, in the execution of some detail of the common work upon which a number of men are employed, an injury is occasioned through the fault of one of them, whether he be the foreman or not, it is not to be imputed to the employer. When Gleason omitted to keep the eight men in the hold of the vessel, whether it be regarded as negligence on his part, or as an error of judgment, it was the omission of a duty which rested upon him as a fellow servant, concerning a detail of the work. The defendant having been careful to provide a sufficient number of competent workmen, no further duty rested upon it with respect to the distribution of the men in the various phases of the work. It was under no obligation to direct their actions at all moments, or to see to it that the men were kept at their proper stations. This is the rule inferable from many cases in which a master has committed the management of ordinary work to a coemployee of superior grade, after discharging all those other obligations incumbent upon him when planning and prescribing the work to be done. *Besel v. New York C. & H. R. R. Co.* 70 N. Y. 171; *Potter v. New York C. & H. R. R. Co.* 136 N. Y. 77, 32 N. E. 603; *Loughlin v. State*, 105 N. Y. 159, 163, 11 N. E. 371; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Madigan v. Oceanic Steam Nav. Co.* 178 N. Y. 242, 102 Am. St. Rep. 495, 70 N. E. 785; *Vogel v. American Bridge Co.* 180 N. Y. 373, 70 L.R.A. 725, 73 N. E. 1.

In *Besel v. New York C. & H. R. R. Co.* supra, a part of a train which was being moved separated and, running back against some cars standing on the track, under one of which the plaintiff's intestate was working, caused them to run over him. It was

contended that a sufficient number of brakemen were not on the detached train, engaged in the work of running it and in distributing the cars, and that none was at the rear end of the train. A judgment for the plaintiff was reversed upon the ground that the defendant was not liable for an injury, which was to be imputed to the negligence of the head brakeman, a fellow servant. The general rule was laid down that the duty of the corporation was to employ a sufficient number of workmen and such persons over them as were qualified, competent, and skilful. The opinion then proceeded to consider the question of the alleged negligence: "Although there was not the usual number of brakemen on the top of the cars which were being taken out, it was not occasioned by the negligence of the defendant or the yard master, because they were provided and on hand, and neither the yard master nor his assistant are shown to have had any notice or knowledge that they were not on the train. . . . The head brakeman had immediate charge of this branch of the work and the engine and men engaged in the same, all of which persons were in the yard at the time. . . . Both the yard master and head brakeman were coemployees with the deceased and the other employees, although not of equal degree. . . . All were engaged in the same common work and for the same common purpose, and the acts of no one of them could render the defendant liable for an injury to another. As the corporation employed all the men which were required, who were of a sufficient degree of skill and capacity, . . . and was under no obligation to direct their actions in every instance to a greater extent than was actually done, . . . it was justified in leaving to them the exercise of their own discretion and judgment." 70 N. Y. 175. In *Potter v. New York C. & H. R. R. Co.* supra, the plaintiff's intestate, while inspecting cars, was killed by being crushed between bumpers, as the result of the shunting of cars upon the track. It was claimed that proper care required there should be flagmen upon the cars to signal the engineer and a brakeman on the shunted cars to control their motion. The judgment recovered by the plaintiff was reversed, and a refusal to nonsuit was held to have been error, upon the ground that, the master's duty having been fully discharged by providing sufficient and competent brakemen to do the work under proper regulations, the failure of the brakeman to be at his post was the negligence of the co-servant. It was held that the master was under no duty "to see to it that the servants employed as brakemen or otherwise should be

at their posts. . . . It is quite obvious" (Judge Andrews remarks in his opinion) "that the work of shifting cars in a railroad yard must be left in a great measure to the judgment and discretion of the servants of the railroad who are intrusted with the management of the yard. The details must be left to them, and all that the company can do for the protection of its employees is to provide competent co-servants and prescribe such regulations as experience shows may be best calculated to secure their safety." 136 N. Y. 81, 82, 32 N. E. 604, citing *Besel v. New York C. & H. R. R. Co.* supra. While in actions by the servant to recover against the master for the results of some alleged neglect of a duty owing by him, each case must usually stand upon its own facts, nevertheless, in these cases which have been cited I think a general rule of nonliability appears and controls, where, as here, it is shown, not that there was an insufficient supply of competent workmen, but that the negligence or error of a co-employee of higher grade, in ordering their distribution in the execution of a detail of the work, was the contributing cause. If the master has furnished all the workmen required to perform the particular work, "it was," to use the language of Chief Judge Ruger in *Hussey v. Cogger*, 112 N. Y. 614, 621, 3 L.R.A. 559, 8 Am. St. Rep. 787, 20 N. E. 556, 559, "the fault of the servants that a sufficient number did not co-operate to perform it safely, or do it in the manner prescribed by custom." In the case of *Flike v. Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545, cited in the opinion below, the defendant was held liable for negligence and a want of care, inasmuch as there was a deficiency of brakemen upon the train which caused the accident to the deceased, a fireman on the engine. In that case the conductor, whose business it was to make up the train and to station the brakemen, had failed to provide a sufficient number of them when sending it out. As that was a primary duty owing by the defendant, as master, the neglect of the conductor was imputable to it. As to that duty, he occupied the master's place. That case was referred to in the *Besel* and *Potter* Cases, *ubi supra*, as illustrating a violation of the master's duty in not having employed a sufficient number of men to perform the work.

I think that the charge of negligence against the defendant in a failure to employ a sufficient number of men for the work in question fails, inasmuch as the only insufficiency shown was an omission of the foreman to continue upon a part of the work the customary number of men.—a fault, if it was one, which was added

to in its gravity by increasing the size of the draughts or loads. It will be remembered that the evidence showed that, had the number of bundles in a load not been increased beyond what it had been, the men left in the hold would have been sufficient, and it was only when the increased number was lowered that the accident happened. That was, again, a detail of the work which the foreman was solely responsible for. In principle, the omission of duty in this case is analogous to that of the foreman who, when the master has supplied some article necessary to the proper performance of the work in sufficient quantity, omits to avail himself of it when there is need, and an accident ensues. Whether the omission is attributable to neglect or to an error of judgment, it relates to a detail of the work, and not to a personal duty of the master. See *Madigan v. Oceanic Steam Nav. Co.* 178 N. Y. 242, 245, 102 Am. St. Rep. 495, 70 N. E. 785; *Vogel v. American Bridge Co.* 180 N. Y. 373, 70 L.R.A. 725, 73 N. E. 1.

I think that the order of the Appellate Division should be reversed, and that the judgment entered in favor of the defendant at the Trial Term, dismissing the complaint of the plaintiff, should be affirmed, with costs in both courts.

Cullen, Ch. J., and Haight, Vann, Werner, Hiscock, and Collin, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

v.

JOHN H. GRAHAM, Plff. in Err.

(68 W. Va. 248, 69 S. E. 1010.)

Criminal law — habitual criminal — additional sentence.

1. The provisions of Code 1906, chap. 165, §§ 1 to 5 inclusive, pursuant to which, by an information in the circuit court of the county in which the penitentiary is situated, there may be imposed the additional sentence provided by law upon a convict who once or twice before has been convicted and sentenced to a penitentiary, are not violative of any constitutional guaranty. Same — necessity of indictment.

2. By proceedings under the statute men-

Headnotes by ROBINSON, P.

Note. — As to constitutionality of statutes enhancing penalty for crimes when committed by habitual criminals or prior offenders, see notes to *Re Miller*, 34 L.R.A. 398, and *Com. v. McDermott*, 24 L.R.A. (N.S.) 432.
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tioned, the convict is not held to answer for a crime so as to require presentment or indictment of a grand jury, nor is he thereby twice put in jeopardy for an offense.

(November 22, 1910.)

ERROR to the Circuit Court for Marshall County to review a judgment convicting defendant of felony and imposing sentence under the statute authorizing additional punishments in case of successive convictions. Affirmed.

The facts are stated in the opinion.

Messrs. Everett F. Moore and D. B. Evans, for plaintiff in error:

The increased penalty is an inseparable part of the integral offense, and must be alleged in the indictment.

12 Cyc. 950; *Com. v. Harrington*, 130 Mass. 35; *Tuttle v. Com.* 2 Gray, 505; *Com. v. Holley*, 3 Gray, 458; *Garvey v. Com.* 8 Gray, 382; *People v. Sickles*, 156 N. Y. 541, 51 N. E. 288; *Evans v. State*, 150 Md. 651, 50 N. E. 820; *Ex parte Lange*, 18 Wall. 173, 21 L. ed. 877.

The proceeding by information was in conflict with art. 3, § 4, of our Constitution, and was not due course of law.

Hurtado v. California, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; *King v. Lynn*, 90 Va. 345, 18 S. E. 439.

If the defendant is not entitled to claim the protection of the Constitution because he is a convicted felon, and if he has "only such rights as the statutes give him," his prosecution in the criminal court of Wood county for the offense there committed was void, as that court absolutely had no jurisdiction to try him for said offense.

Davis v. Packard, 7 Pet. 276, 8 L. ed. 684; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122.

Mr. William G. Conley, Attorney General, for the State:

The defendant by his voluntary criminal course had placed himself beyond the provisions referred to in the Bill of Rights.

Ruffin v. Com. 21 Gratt. 790; *King v. Lynn*, 90 Va. 345, 18 S. E. 439; *Noles v. State*, 24 Ala. 672; *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 460; *Wharton*, Crim. Pl. & Pr. 88.

Robinson, P., delivered the opinion of the court:

John H. Graham, alias John H. Ratcliff, alias J. H. Gray, for the third time a convict in the penitentiary at Moundsville, was proceeded against by information in the circuit court of Marshall county pursuant to the provisions of Code 1906, chap.

186, §§ 1 to 5 inclusive. For clear understanding it seems necessary to recite this statute:

"1. All criminal proceedings against convicts in the penitentiary shall be in the circuit court of the county of Marshall.

"2. When a prisoner convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under the 23d or 24th section of chapter 152, the superintendent of the penitentiary shall give information thereof, without delay, to the said circuit court of the county of Marshall, whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment.

"3. The said court shall cause the convict to be brought before it, and upon an information filed, setting forth the several records of conviction, and alleging the identity of the prisoner with the person named in each, shall require the convict named to say whether he is the same person or not.

"4. If he say he is not, or remain silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be impaneled to inquire whether the convict is the same person mentioned in the several records.

"5. If the jury find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court, after being duly cautioned, that he is the same person, the court shall sentence him to such further confinement as is prescribed by chapter 152 on a second or third conviction, as the case may be."

The information averred that Graham in 1898 was convicted and sentenced to the penitentiary for two years, in the circuit court of Pocahontas county; that in 1901, for a subsequent offense, he was convicted and sentenced to the penitentiary for ten years, in the circuit court of Mineral county; that he was paroled from the penitentiary while serving the sentence last mentioned; that in 1907, for a third offense, he was convicted and sentenced to the penitentiary for five years, in the criminal court of Wood county; that the indictment under which he was convicted in Mineral county set forth the former conviction and sentence in Pocahontas county; and that the indictment under which he was convicted in Wood county did not set forth or show either of the former convictions or sentences. The information, filed by the prosecuting attorney of Marshall county, was specific and direct in its averments of the 40 L.R.A. (N.S.)

facts and records of the several convictions and sentences. It prayed that Graham be proceeded against and made to answer the state in the premises. He was brought before the court in the custody of a guard of the penitentiary. He appeared to the information filed against him, and moved to quash the same. The motion to quash was overruled; and thereupon for plea he said that he was not the same person named in the information as having been twice before convicted and sentenced to the penitentiary. Issue was joined on this plea, and the same was tried by a jury. By the verdict it was found that the defendant Graham was the same person who formerly had been convicted and sentenced, as alleged, in the counties of Pocahontas and Mineral. Motion to set aside the verdict and grant a new trial, and motion in arrest of judgment, were overruled. Thereupon the court sentenced Graham to the penitentiary for life, that being the sentence provided for convicts who have twice before been sentenced in the United States to confinement in a penitentiary. Code 1906, chap. 152, § 25.

By this writ of error it is sought, upon many grounds, to overthrow the proceedings and sentence. It is submitted that the information should have been quashed because it was not verified. This objection was not good. A prosecuting officer need not swear to an information which he officially tenders, unless the statute so directs, since he acts under his official oath. 1 Bishop, Crim. Proc. § 713. The exceptions which relate to the trial itself, involving the admissibility and weight of evidence, are by no means well taken. The identity of Graham as the person formerly convicted and sentenced was clearly and regularly established, if there was warrant in law for such proceedings as were had. Nor is there anything in the point that the criminal court of Wood county did not have jurisdiction of the trial of a paroled convict for an offense committed by him in that county. But a question of merit is presented: Is the statute upon which the proceedings were founded constitutional and valid?

The statute is not contrary to any constitutional provision. It is a valid act. It is not a violation of the provision that one shall not be held to answer for treason, felony, or other crime not cognizable by a justice, unless on presentment or indictment of a grand jury. The proceedings for increased sentence are not a holding to answer for the crime to which that sentence belongs. Graham had already been held to answer for the crime itself,—for the establishment of the fact of guilt. This hold-

ing for crime was by indictment in the criminal court of Wood county. By these proceedings he is not held to answer for an offense. He is not made to defend against a charge for crime. He is in no wise called upon to answer in relation to alleged crime. No allegation of crime is in the information. It only alleges his status as a convict. It alleges that he has been held to answer for crime, and that he stands convicted of it through the indictment of a grand jury. It points him out as a convict already held, upon whom rests the general sentence of the law of life imprisonment. That general sentence is: "When any such convict shall have been twice before sentenced in the United States to confinement in a penitentiary, he shall be sentenced to be confined in the penitentiary for life." Code 1906, chap. 152, § 24. The proceedings under the statute are for identification only. They are clearly not for the establishment of guilt. The question of guilt is not reopened. The information only calls upon the convict to answer alleged identification for sentence. The Constitution does not provide that such procedure must be by presentment or indictment of a grand jury.

Nor was Graham again put in jeopardy for the offense as to which he stood convicted in Wood county. The Constitution does forbid that one be twice put in jeopardy of life or liberty for the same offense. But it does not forbid that the legislature may provide proceedings for the identification of those convicted of crime upon whom as a class the law imposes additional punishment. By a single jeopardy the former convict has been held to answer, and the offense established against him. Thus he has been classed with those over whom, by law, hangs additional imprisonment. It only remains for him to be properly identified as belonging to that class. The identification may be at the time of the trial for the offense, if the facts are then known and alleged; or it may be later, at the penitentiary, when the facts develop. This later identification is not a second jeopardy for the offense. It is only an incident to the jeopardy that already exists. Nor is the additional sentence a second punishment for the offense. But one punishment is made to attach to the crime.

Our law does not make it an offense or crime for one to have been convicted more than once. Former conviction is not an integral part of the second or new offense. The law simply enjoins longer sentence because of former conviction. It does not prosecute and punish for the former conviction. It cannot do that. It adds punishment for the crime as to which one is

lastly convicted, because of the class to which he belongs. *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179, and the cases cited therein. The sentence is an incident to the last offense alone. But for that offense it would not be imposed. So proceedings made under this statute cannot be said to constitute a holding to answer for crime, or a placing in second jeopardy for an offense. They are merely ancillary proceedings for the rightful sentence which the law mandatorily enjoins upon those already held or jeopardized.

It is said that the trial and sentence in Wood county foreclosed and forever adjudicated the question of length of sentence. If the facts justifying the longer sentence had in that trial been alleged and proved, that rightful sentence could very properly have been imposed there. But the legislature has seen fit to provide for the imposition of such sentence after trial for the crime to which it may properly attach, whenever it has not been imposed in the trial court. We observe no constitutional restrictions against the statute which has been enacted, in this particular. Since the mere imposing of the additional sentence warranted by law is not a holding to answer for crime, is not a second jeopardy or punishment for the offense itself to which the sentence rightfully belongs, and is clearly due process of law, what constitutional limitation has been placed upon legislation in this particular? None.

Statutes like the one under consideration are of long standing and acceptable recognition. Mr. Bishop, writing of the statutory forms of the provisions for increased punishment because of former conviction, notices the one which "permits the prosecuting officer to bring up from the place of confinement prisoners who have before been convicted, and, on showing the conviction, to have the additional penalty imposed." 1 Bishop, *Crim. Law*, § 959. A form for such proceedings is shown in Bishop's *Directions & Forms*, § 97. In Virginia, provisions of a statute identical with those involved here have been upheld as constitutional and valid. *King v. Lynn*, 90 Va. 345, 18 S. E. 439.

Discussing a statute of the character of the one here involved, Parker, Ch. J., in *Ross's Case*, 2 Pick. 171, stated that which is particularly applicable to the case at hand: "This is not an information of an offense for which a trial is to be had, but of a fact, namely, that the prisoner has already been convicted of an offense; and this fact must appear, either by his own confession, or by verdict of a jury, or otherwise according to law, before he can be

sentenced to the additional punishment. Is he to be sentenced for an offense distinct from the one for which he has been tried upon an indictment? We apprehend not; but the only question is whether he is such a person as ought to have been sentenced, on his last conviction, to additional punishment, if the fact of a former conviction had then been known to the court. There was no need of a presentment by a grand jury, for no offense was to be inquired into. That had been already done. An indictment is confined to the question whether an offense has been committed. Here the question was simply whether the party had been convicted of an offense."

An affirmance of the judgment sentencing the prisoner to life imprisonment is demanded by the record. It will be so ordered.

Petition for rehearing denied January 12, 1911.

Affirmed by the Supreme Court of the United States May 13, 1912 (224 U. S. 616, 56 L. ed. 917, 32 Sup. Ct. Rep. 583).

WISCONSIN SUPREME COURT.

ALAN BOGUE et al., Exrs., etc., of Hugh Sloan, Deceased, Resp'ts.,
v.

EDWARD V. LAUGHLIN et al., Appts.

(— Wis. —, 136 N. W. 606.)

Tax — notice of assessment — waiver of omission.

1. An objection that the statutory notice of intention to place omitted property

Note. — Assessment after death of owner, of taxes omitted during his lifetime.

The right of the officers who are empowered and charged with the duty to see that omitted property is subjected to taxation is a continuing one against each and every taxpayer. It is not terminated with the death of the latter, but proceedings in discharge of such duty can be maintained against his estate after his death, and the notice required by the law may be served upon his administrator or executor. The preceding rule as laid down in *Gamble v. Patrick*, 22 Okla. 915, 99 Pac. 640, 18 Ann. Cas. 348, where the statute makes taxes due "the United States or the territory, county, or city" a debt against the estate of decedent, which must be paid before it is subject to distribution to his heirs or devisees, is sustained by the following additional cases:
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on the tax roll was not given is not available before the court, if, in obedience to the notice, the taxpayer appeared generally before the board.

Same — back taxes — assessment against personal representative.

2. Under statutes authorizing the assessment of property which was omitted from assessment by mistake or inadvertence, making personal representatives personally liable for taxes assessed against them, and giving them a remedy over against the beneficial owner, taxes which should have been assessed during the lifetime of the taxpayer may be assessed against his personal representatives, if there is personal property in his possession belonging to the taxpayer which is subject to taxation, even though it is not the identical property which had been omitted.

Same — constitutionality.

3. There is no constitutional objection to assessing omitted property against the personal representative of the taxpayer after his death.

Same — enforcement — presentation of claim against estate.

4. To collect against personal representatives taxes which were omitted during the lifetime of the taxpayer, it is not necessary to present them as claims against the estate, within the statutory time for presenting such claims, but they may be collected under statutes providing for the assessment of property in the hands of personal representatives.

Same — entry against executors — sufficiency.

5. An entry of an omitted tax against certain named persons, "executors of the estate of" a deceased taxpayer, is a sufficient entry of the tax against them as executors, to comply with the statute permitting an entry against executors making them personally liable therefor and permitting them to reimburse themselves from the estate.

—where the statute provided, "whenever the county auditor shall . . . have reason to believe that any real or personal property has, from any cause, been omitted in whole or in part, . . . he shall proceed to correct the tax duplicate, and add such property thereto, . . . to enable him to do which, he is invested with all the powers of assessors under this act. . . . Before making such correction or addition, . . . he shall give such person notice, in writing, of his intention to add such property to the tax duplicate, describing it in general terms." *Reynolds v. Bowen*, 138 Ind. 434, 36 N. E. 756, 37 N. E. 962; *Saint v. Welsh*, 141 Ind. 382, 40 N. E. 903; *Buck v. Miller*, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; *Graham v. Russell*, 152 Ind. 186, 52 N. E. 806; *Brunson v. Starbuck*, 32 Ind. App. 457, 70 N. E. 163;

—where the statute provided that when property subject to taxation is withheld,

Pleading — form of prayer — executors — representative capacity.

6. That a counterclaim in a suit by executors to enjoin the enforcement of a tax omitted against their testator, which had been assessed against them, prayed judgment against them apparently in a personal capacity, does not prevent the entry of the judgment in a representative capacity, where the statute makes them personally liable, but gives them a lien on the testator's property for reimbursement.

(April 23, 1912.)

A PPEAL by defendants from a judgment of the Circuit Court for Columbia County in plaintiffs' favor in a suit to restrain the collection of a tax levied upon property alleged to have been omitted from the tax roll, and to recover possession of

personal property seized under a warrant for the collection of such tax. Reversed.

Statement by Kerwin, J.:

This action was brought to restrain the collection of a tax levied in 1907 for the years 1904, 1905, and 1906 upon property alleged to have been omitted from the roll in such years, and determine its validity, and recover possession of personal property seized under a warrant for the collection of such tax, prevent the commencement of other action for the collection of the tax, and for general relief. The defendant answered by admissions and denials of the allegations of the complaint, and also, by way of counterclaim, set up the proceedings resulting in assessment of the tax upon the property omitted for the years in question.

overlooked, or from any other reason is not listed or assessed, the county treasurer shall, when apprised thereof, at any time within five years from the date at which such assessment should have been made, demand of the person by whom the same should have been listed or to whom it should have been assessed, or of the administrator, the amount the property should have been taxed in each year, and upon failure to pay such sum within thirty days, he shall cause action to be brought therefor, together with a certain penalty. *Galusha v. Wendt*, 114 Iowa, 597, 87 N. W. 512;

—where the statute provided that if the revenue agent discovers after the expiration of the fiscal year, that any property has escaped taxation by reason of not having been assessed, he shall notify the tax collector, who shall make the proper assessment. *Adams v. Schwartz*, 80 Miss. 660, 32 So. 280;

—where a statute giving a county board of equalization power to assess omitted property was held to authorize the taxation of property escaping taxation during the lifetime of the decedent. *State ex rel. Howard v. Timbrook*, 240 Mo. 226, 144 S. W. 843.

In *Com. v. Sweigart*, 115 Ky. 293, 73 S. W. 758, the statute is not cited, but it is held that the distributee who received the property which had escaped taxation during the lifetime of the decedent received it subject to that liability, and should be compelled out of the property so received to pay all the taxes that are not barred by the statute of limitations.

"Neither the taxpayer nor his estate after his death," it was said in *Graham v. Russell*, 152 Ind. 186, 52 N. E. 806, "can claim any vested rights in the fruits of his fraud or omission to list and return all of his property liable to taxation, and the law, when properly invoked, will not permit either to profit thereby. . . . He, while in life, owed, as one of the highest duties to the government, a duty to pay all taxes

imposed upon his property liable to taxation. As a compensation for the discharge of this duty, the state afforded him protection to his life, liberty, and the due enjoyment of the property with which he had been blessed; and the discharge of this duty, if the decedent is shown to have omitted it, must rest upon his estate. With or without knowledge of the existence of this liability of her decedent, it existed all the same against the property of his estate until paid, unless barred by some provision of law."

It has been held that to sustain a claim for taxes on personal property omitted from assessments of previous years during the life of the decedent, it is incumbent upon the authorities to prove the ownership of the property in decedent during the omitted years; proof of ownership at the time of decedent's death not being held sufficient. *Galusha v. Wendt*, supra; *Gibson v. Clark*, 131 Iowa, 325, 108 N. W. 527; *Butler v. Watkins*, 16 Ky. L. Rep. 302, 27 S. W. 995; *Falkner v. Adams*, — Miss. —, 33 So. 411.

"To subject a man to the anticipation that after his death," said the court in *Galusha v. Wendt*, supra, "when all possibility of explanation is gone, when all evidence of the debts which he has extinguished has disappeared, when the sources from which he derived the money and credits which he may leave are beyond reach, his estate may be called upon to pay taxes for preceding years, . . . regardless of the presumption arising from the assessments actually made from year to year by duly constituted officers, is to add an additional horror to the fears of approaching dissolution. We think that to sustain a claim for taxes on property omitted from assessments for previous years, there must be some evidence as to what property the taxpayer had during those years."

Under the Indiana statute, supra, taxes assessed on the omitted property are a lien on all property in the county belonging to the decedent's estate. So it was held in

There was a reply to the counterclaim. The court found:

That Hugh Sloan was a resident of the village of Poynette during the years 1904, 1905, and down to October 23, 1906, on which date he died. That thereafter his will was duly proved and allowed in the county court, and in December, 1906, letters testamentary thereon were duly issued out of said court to the plaintiffs, Alan Bogue, William Dunlop, and Charles Mair, who ever since have been and now are acting as executors of said estate. That said executors have at all times since their appointment resided within the village of Poynette. That said Hugh Sloan made to the several assessors of said village for each of the years 1904, 1905, and 1906 his sworn statement of valuation of the net average amount of money and credits owned by

him in each of these years, other than debts secured by mortgages or conveyances of real estate, as follows: 1904, \$5,500; 1905, \$5,500; 1906, \$5,000. Said statement was in a gross sum, and not itemized, and constituted in each instance a gross and fraudulent omission and misstatement thereof, to the knowledge of deceased. That said Hugh Sloan was not required by assessors to give, and did not give, said assessors or the several boards of review for said years, any statement of any particular items of which his said property was composed, nor any list of securities owned by him. That no other statement was required of him in either of said years.

That the several assessors of said village placed said several amounts upon the assessment rolls of said village in said years, and assessed and valued the same as

Buck v. Miller, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, that a trust estate is liable to pay taxes which the decedent neglected to pay. In discussing this proposition, Mr. Justice Howard said: "The state and the municipalities to which [the decedent] owed taxes are not concerned specially with any trust he may have created for the management of a part of his estate. He died owing certain taxes which he had avoided paying for a great many years. Those taxes have now been assessed in pursuance of statutory provisions for the assessment of omitted property. The taxes are a lien on all property in the county belonging to his estate. This lien can be released only by payment of the taxes. He could not, by giving away his property, relieve it of the burden cast upon it by the law. It is immaterial to the state whether the property is found in the custody of executors, administrators, trustees, or devisees. The state seeks out the property itself, or any part of it that can be found, and demands of those claiming to own or use it that the taxes be paid." To the same effect is Buck v. Beach, 164 Ind. 37, 108 Am. St. Rep. 272, 71 N. E. 963.

And it was held in Graham v. Russell, supra, that a county auditor may have an official settlement of the decedent's estate set aside for the purpose of collecting taxes evaded by the decedent, especially where it appears that the executrix of the estate never filed any inventory whatever of the personal property left by the decedent, and that she omitted to do this for the purpose of preventing the proper tax officials from assessing the property.

In Woll v. Thomas, 1 Ind. App. 232, 27 N. E. 578, it was held that under the tax law of 1881 the county auditor, acting under his general authority to assess omitted property, has no right to increase the valuation of the property as listed by the deceased owner and appraised by the assessor; he can assess property as omitted only where it is distinct and definite and of recognizable

articles which have not been listed and properly appraised for taxation by the owner.

In Galusha v. Wendt, 114 Iowa, 597, 87 N. W. 512, supra, it was held that, inasmuch as the statute itself authorizes an action against an executor or administrator for omitted taxes of the decedent, there is no necessity for filing the claim against the estate within the time fixed for filing other claims; and that so long as the executor or administrator has funds on hand out of which taxes against the estate of the decedent may be paid, no doubt the right to make demand and bring action therefor continues.

But a section of a statute giving a lien to an agent or representative to indemnify him for paying taxes on property of his principal does not make executors individually liable for taxes assessed by a board of revenue two years after the death of testator, for the years for which the decedent failed to list the property, since the section has reference to persons acting as agents or in some representative capacity, who, at the time fixed by statute for assessment of property for taxation, have property in their hands as agents or in some representative capacity, which they are required by § 6 of the same statute to list for assessment in their names as agents or representatives. Scott v. People, 210 Ill. 594, 71 N. E. 582.

And under the statute which is set out in Adams v. Schwartz, supra, it was held that back taxes could not be assessed upon specific property which the decedent never owned, and upon which all taxes had been paid by the legatees, notwithstanding the property sought to be taxed was bought with legacies which had escaped taxation during the lifetime of the decedent.

State ex rel. Vossen v. Eberhard, 90 Minn. 120, 95 N. W. 1115, which is sufficiently set out in BOGUE v. LAUGHLIN, and is contrary to the general rule as laid down at the beginning of this note, seems to stand alone in its holding.

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the net average of moneys and credits of said Hugh Sloan liable to taxation for said years. That said statements of money and credits for said several years were received by said assessors, and no change made therein by said boards of review. That thereafter said amounts were spread upon the assessment and tax rolls of said village for said years, respectively, as the net average amount of money and credits of said Sloan, other than mortgages exempt from taxation. That said Sloan paid all taxes thereon in due season for the years 1904 and 1906, and the executors of his estate paid the tax thereon for the year 1906. That on May 1, 1907, the plaintiffs, as such executors, had in their possession in said village the personal property belonging to the estate of said Sloan, no distribution thereof having been then made. That the time for presenting claims against the estate of said Sloan was limited to June 10, 1907. That the time fixed for hearing claims against said estate was June 11, 1907. That no claims were then presented to the county court against said estate. In the year 1907, said executors made to the assessors of the village a statement of the value of the net amount of money and credits of said estate in their hands liable to taxation at \$14,000. That they made no statements of property formerly owned by said Sloan liable to assessment in the years 1904, 1905, and 1906, and were not asked to make any such statements. On June 25, 1907, the board of review of said village caused to be served upon said executors a notice to appear before said board on June 28th. That said executors appeared on said day and several subsequent meetings of the board, and discussion of the matters of assessment and alleged "back taxes" was had. On July 25, 1907, the executors were notified, in writing, that the board would be in session July 26, 1907, to hear evidence relating to the true value of the Sloan estate, for which it is liable to assessment for the years 1904, 1905, 1906, and 1907. That at the meeting of the board of review, July 26, 1907, various persons, including two of the executors, were examined. That the executors offered no proofs as to the actual taxable credits of deceased or his indebtedness during any of said previous years. One of the executors declined to be examined, except as to his own indebtedness to the estate. That on August 1st another meeting of the board was held, at which one of the executors was sworn. At the conclusion of the meeting, a motion was made by a member of the board that "by the evidence that is before us in regard to the Hugh Sloan estate, the assessor place upon

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the assessment roll against the executors [naming them] on which taxes have not been paid for the year 1904, \$12,240, and for the year 1905, \$16,895, and for the year 1906, \$20,495, and also raise the assessment for the year 1907, \$12,500."

That on August 2, 1907, a notice was served on plaintiffs, informing them that the board "had found and determined the fact to be that said estate should be assessed upon like accounts (the value of net amount of moneys, accounts, credits, etc.) for omissions for the year 1904, \$12,240, for 1906, \$16,895, and for 1906, \$20,495," and that the executors might be heard respecting the same; that at the meeting of August 3d the plaintiffs appeared and asked for an adjournment, but were refused, and the board adjourned *sine die* that day; that thereafter the assessor entered the assessments upon the assessment roll of said village for 1907, in the column headed "Moneys, Accounts, Credits, Bonds, and Other Securities After Deducting Bona Fide Debts," in the following form: "Net amount of moneys, credits, accounts, bonds, notes, and other securities after deducting bona fide debts. Chas. Mair, W. Dunlop, and Alan Bogue, executors of the estate of Hugh Sloan. Value as fixed by board of review June 28, 1907, \$25,000. The value of June 28, 1907, was made arbitrarily, and not upon evidence. The board of review, after taking the testimony of witnesses and being informed as to the facts, and after due consideration of the same, determined and fixed the valuation for the year 1907, at the sum of \$26,500. And in accordance with their findings, such sum is entered here accordingly. Upon like evidence, and upon knowledge of the facts, and upon due consideration, the board has found and determined the fact to be that said estate should be assessed upon like accounts for omissions for the year 1904, \$12,240, and for the year 1905, \$16,895, and for the year 1906, \$20,495." That no assessment for the year 1907, or preceding years, was entered by the assessor prior to the meeting of the board of review. That taxes were extended upon the tax roll of said village for the year 1907 against said assessed valuation for omitted property, as follows: For the year 1904, \$117.25; for the year 1905, \$264.57; for the year 1906, \$393.50; and for the property of estate for 1907, \$429.56.

That no claim for taxes in question was filed in the county court against said estate, except that on December 26, 1907, a petition for this payment, under § 1044d of the Wisconsin statutes, was filed in county court by defendants, which petition was heard by the court January 14, 1908, and decided on the ground that said section had

no application to the facts in the case, the deceased and the executors having at all times been residents of the same taxing district, and the property of the estate in the possession of the executors therein.

That no appeal was taken by the defendants from said order dismissing said claim. That defendants sued an alternative writ of mandamus out of this court, requiring the county court to act upon said petition, or show cause to the contrary. That the county court made return to said writ, and this court quashed said writ upon said return showing that the county court had decided the matter upon said petition. That no appeal was taken from the judgment quashing said writ. That thereafter, and on February 25, 1908, the defendant treasurer began a suit in this court to recover of the plaintiffs the taxes upon said assessments, which suit is still pending, though no complaint has been served. That on the same day on which service of summons in said mentioned suit was made, but after service of summons therein, the defendant treasurer made a levy under his tax warrant on the following personal property, to wit: From said Alan Bogue, one organ, which was not the property of said Bogue, but belonged to his daughter; from W. Dunlop, one horse, one buggy, one cutter, belonging to said Dunlop individually. That none of said property so seized had ever belonged to Hugh Sloan or his estate. That the property so levied upon was of the value of about \$400. That one of said executors had at that time personal property of his own within reach of said treasurer to the amount and value of \$2,000. That thereupon said treasurer advertised said property so levied upon for sale at auction to pay said taxes. That further levies were threatened by said treasurer and the attorneys who were then acting for him. That said executors had at all times after their appointment sufficient personal property belonging to said estate in their hands to pay all said taxes. That before January 1, 1908, said executors duly tendered to defendant treasurer the amount of tax levied for the year 1907. That he refused to receive said money, and said tender has been kept good, and the amount of said tax paid into court by the plaintiffs. That there is no evidence that said executors had in their possession, on May 1, 1907, any of the same money, notes, credits, or securities that said Hugh Sloan owned in the years 1904, 1905, and 1906.

That after their appointment said executors filed an inventory in said county court in the matter of the estate of said Sloan, which showed personal property in the form of moneys in bank and promissory notes, aggregating \$31,321; all except \$2,000 being

of a taxable nature. That there is no evidence as to what specific items of personal property of said Sloan were omitted from assessments in 1904, 1905, or 1906. That said Sloan, during the years in question, had no active business; he had retired, and did no work. That, in addition to the suits already commenced by the defendants and levies made by them at the time of the commencement of the action, other suits and proceedings for the collection of said taxes were threatened by defendants, unless said taxes for 1904, 1905, and 1906 were paid. And the court concluded that the board of review of said village intended to and did assess said sums as omitted property of the estate of said Sloan against the executors, aforesaid. That the board of review of the village of Poynette, for the year 1907, had no authority to levy an assessment against the plaintiffs for omitted property of said Sloan for the years 1904, 1905, and 1906. That the proceedings had by said board in that regard are illegal and of no force and effect. That plaintiffs are entitled to judgment perpetually restraining the defendants from enforcing the collection of said assessment for alleged omitted property. That plaintiffs are only entitled to such costs as are taxable in law actions, less the amount of costs taxable to said executors upon dismissal of the action begun by defendants February 25, 1908. Judgment was entered accordingly in favor of plaintiffs, adjudging void the assessment made in 1907 levying taxes for the years 1904, 1905, and 1906, and enjoining collection thereof, and for costs, from which judgment defendants appealed.

Mr. Daniel H. Grady, for appellants:

A court of equity will not interfere to declare a tax invalid and restrain its collection unless the objections to the proceedings go to the very groundwork of the tax and necessarily affect materially its principle, and show that it must necessarily be inequitable and unjust.

Kaehler v. Dobberpuhl, 56 Wis. 480, 14 N. W. 644; Warden v. Fond du Lac County, 14 Wis. 618; Kellogg v. Oshkosh, 14 Wis. 623; Miltimore v. Rock County, 15 Wis. 9, 82 Am. Dec. 652; Hixon v. Oneida County, 82 Wis. 515, 52 N. W. 445; A. H. Stange Co. v. Merrill, 134 Wis. 514, 115 N. W. 115; Duluth Log Co. v. Hawthorne, 139 Wis. 170, 120 N. W. 864; Bond v. Kenosha, 17 Wis. 284; Chicago & N. W. R. Co. v. Forest County, 95 Wis. 80, 70 N. W. 77.

The death of the taxpayer does not abate the liability to pay taxes on property which escaped taxation during his lifetime.

27 Am. & Eng. Enc. Law, 2d ed. 701; Graham v. Russell, 152 Ind. 186, 52 N. E.

806; *Saint v. Welsh*, 141 Ind. 382, 40 N. E. 903; *Reynolds v. Bowen*, 138 Ind. 434, 36 N. E. 756, 37 N. E. 962; *Com. v. Sweigart*, 115 Ky. 293, 73 S. W. 758; *State ex rel. Davis & S. Lumber Co. v. Pors*, 107 Wis. 425, 51 L.R.A. 917, 83 N. W. 706; *Fond du Lac v. Otto*, 113 Wis. 39, 90 Am. St. Rep. 830, 88 N. W. 917.

Messrs. Rogers & Rogers and H. E. Andrews, for respondents:

The assessing officers had no power under the law to reassess personal property taxes against a deceased owner.

Dietz v. Neenah, 91 Wis. 422, 64 N. W. 299; *Hayden v. Roe*, 66 Wis. 288, 28 N. W. 186; *Wiesmann v. Brighton*, 83 Wis. 550, 53 N. W. 91; *Day v. Pelican*, 94 Wis. 503, 69 N. W. 368; *Fond du Lac v. Otto*, 113 Wis. 39, 90 Am. St. Rep. 830, 88 N. W. 917.

A statute authorizing assessment of omitted property against the representatives of an estate or against the estate is unconstitutional.

Milwaukee v. Wakefield, 134 Wis. 462, 113 N. W. 34, 115 N. W. 137.

Even if the reassessments attempted to be made were valid, the tax was a claim against the estate of Hugh Sloan, and should have been collected by claim filed like any debt against the estate; not having been so filed, the claim is barred.

Fond du Lac v. Otto, 113 Wis. 39, 90 Am. St. Rep. 830, 88 N. W. 919; *Peters v. Myers*, 22 Wis. 602; *Evans v. Sharp*, 29 Wis. 564; *Simmons v. Aldrich*, 41 Wis. 241; *Plumer v. Marathon County*, 46 Wis. 164, 50 N. W. 416; *Flanders v. Merrimack*, 48 Wis. 567, 4 N. W. 741.

Kerwin, J., delivered the opinion of the court:

Aside from some questions of practice, which will be referred to later, the main points raised by the assignments of error are: (1) Whether there was any property in the possession of the plaintiffs May 1, 1907, owned by Sloan in 1904, 1905, and 1906. (2) What items of property, if any, were omitted said years? (3) Could there be a lawful reassessment of taxes in 1907, upon property alleged to have been omitted in 1904, 1905, and 1906, against the representatives of deceased? (4) Whether, if there was a valid tax, recovery could be had only by filing claim in county court. (5) Was there a proper assessment against the plaintiffs as executors?

The material facts appear from the findings, which are set out in the statement of the case.

1. On propositions 1 and 2, as to whether there was any property owned by Sloan and omitted from the tax roll in 1904, 1905, and 1906, in the possession of the plaintiffs 40 L.R.A. (N.S.)

May 1, 1907, and the amount thereof, we think the omitted property was properly assessable against the executors, under existing statutes, though not in possession of the executors May 1, 1907. Section 1044b, Stat., makes the tax roll *prima facie* evidence of the justice and regularity of the tax; hence the burden was upon plaintiffs in all respects, and especially in this case, on the question whether the property so reassessed was omitted property, or merely undervalued property. No evidence was offered tending to show that it was undervalued property; hence we must hold it was omitted property, because the contrary does not appear. There is no showing whatever, and no effort was made by the executors to show, that the property assessed as omitted property was not in fact omitted property, although they were before the board on notice several times between the 28th of June, 1907, and the 3d day of August, 1907, at which times the matter of the assessment of "back taxes" on Hugh Sloan's estate for 1904, 1905, and 1906 was considered, as will appear from findings set out in the statement of the case. On August 2, 1907, notice was served upon plaintiffs to the effect that the board of review had found and determined to assess for omissions in 1904, 1905, and 1906, and specifying the amount in each year; and that the executors (plaintiffs) might be heard respecting the same. The plaintiffs appeared on August 3, 1907 and asked for an adjournment, which was refused.

Counsel for respondents insists that this notice was not sufficient, because it did not give six days' notice, as required by statute. This objection is not tenable, since the plaintiffs appeared generally before the board in obedience to the notice. It is insisted by appellants that the evidence offered and received before the board of review on the part of defendants was ample to show that the property entered by the board was omitted property during the years in question. But, regardless of this evidence, in the absence of any showing on the part of plaintiffs, the *prima facie* case made by the assessment and tax rolls was sufficient. Laws, 1903, chap. 417, § 1044b. We conclude that the property assessed and entered upon the rolls for the years mentioned must stand as property of Sloan, deceased, omitted in said years.

2. The court below erroneously held and concluded that there could be no assessment of omitted property against the executors of a deceased person, on the ground that there is no statutory authority for such assessment, basing its judgment mainly upon *State ex rel. Ashland Water Co. v. Wharton*, 115 Wis. 462, 91 N. W. 976;

Ashland County v. Knight, 129 Wis. 63, 108 N. W. 208; *State ex rel. Vossen v. Eberhard*, 90 Minn. 120, 95 N. W. 1115. The foregoing Wisconsin cases merely go to the point that statutory authority is necessary to support a "back tax" assessment. This may be conceded, because we think our statutes are sufficiently broad to warrant the assessment of "back taxes" against the personal representatives of a deceased person upon property of deceased which escaped taxation, when the personal representatives have personal property in their possession belonging to deceased, subject to taxation.

Section 1059, Stat., plainly gives authority to reassess property "omitted from assessment . . . by mistake or inadvertence." But it is argued that this authority does not apply to cases where the property was omitted during the lifetime of a deceased person, and justify assessment after his death; that the statute does not authorize an assessment against an heir or personal representative having in his possession personal property of a decedent that escaped taxation during deceased's lifetime through omission from the tax roll. The Minnesota case, *State ex rel. Vossen v. Eberhard*, 90 Minn. 120, 95 N. W. 1115, is relied upon by respondents to support the judgment. This case rests upon § 1631, Gen. Stat. 1894 of Minnesota, which is similar to our statute (§ 1059); and the Minnesota court grounds its decision upon the fact that, while the assessment is valid as to real estate, it is not valid as to personal property, because there is no personal obligation against the owner, and the tax is not made a lien on the property. The court further says that there is a wise reason for the distinction, since it is the policy of the law to permit the free transfer and change of personal property. In *State ex rel. Davis & S. Lumber Co. v. Pors*, 107 Wis. 425, 51 L.R.A. 917, 83 N. W. 706, holding that an owner may be assessed for omitted personal property after he has ceased to be the owner, it is said: "The principle at the foundation of these reassessment laws is that the owner of property is under obligation—some authorities say he is indebted—to the government to pay a sum proportioned to the property owned by him on May 1st of each year."

In other jurisdictions where the statute is no broader than ours, personal property omitted before the owner's death has been held assessable after his death. *Reynolds v. Bowen*, 138 Ind. 434, 36 N. E. 756, 37 N. E. 962; *Graham v. Russell*, 152 Ind. 186, 52 N. E. 806; *Com. v. Sweigart*, 115 Ky. 295, 73 S. W. 758; *Sturges v. Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 40 L.R.A. (N.S.)

1014. It has also been held that, even though a tax has not become a lien at the time of death, yet the fact that deceased had become personally liable to pay it, when it should be levied, made it a debt of decedent which could properly be paid by his executor out of his estate. 18 Cyc. 420; *Re Franklin*, 26 Miss. 107, 56 N. Y. Supp. 858.

In addition to § 1044, Stat., which makes property assessable to executors or administrators, chapter 417, Laws of 1903, adding §§ 1044a, 1044b, 1044c, and 1044d, provides that, when personal property shall be assessed to an executor or administrator, the person so assessed shall be personally liable for the tax, but that he shall have a remedy over against the beneficial owner and a lien on such property. Section 1044b makes the tax a debt against the owner. Under the foregoing statutes and others relating to taxation in this state, we are convinced that the board of review had authority to assess the omitted personal property after the death of Sloan.

True, the court below found that the plaintiffs did not have in their possession on May 1, 1907, any personal property owned by Sloane in 1904, 1905, and 1906; and that there was no evidence as to what specific items were omitted from assessment in 1904, 1905, and 1906. But, as we have seen, it was sufficient that the plaintiffs had in their possession May 1, 1907, personal property subject to taxation, even though not the identical property omitted. The instant case is unlike *Hayden v. Roe*, 66 Wis. 288, 28 N. W. 186, relied upon by respondents, since in that case the administrator was appointed after May 1st the year of the assessment; and counsel sought to hold the assessment valid, under the rule that the title of the administrator related back so as to include property as of May 1st. In the instant case, it is not denied but what the plaintiffs were qualified and acting executors before May 1, 1907. Counsel for respondents cite several Wisconsin cases from 29 to 107 Wisconsin, inclusive, which they argue are to the point that, under our statutes, the tax or liability for the tax cannot be a charge against the owner. But it is plain that these decisions are not applicable to the present situation, under the statutes as they have existed since 1903.

Counsel further argue that the statutes authorizing the assessment of omitted property against the representatives of a deceased person, as in the instant case, are unconstitutional and void. This contention is untenable. We conclude that the assessment was valid.

3. It is next claimed by respondents that,

even if valid, it was necessary to file the claim against the estate before the expiration of the time limited for filing claims. Under the statutes heretofore referred to, ample power is given to assess against the executors, and they are bound to pay the taxes, and reimburse themselves out of the estate in their hands. No reason appears why a different rule should apply in regard to omitted property and other property belonging to the estate; and in each case, under our statutes, the assessment is against the executors. As we have seen, the tax is a debt against the owner; the person assessed is liable for the tax, but has a remedy against the beneficial owner and a lien on the property, and can reimburse himself out of the property in his possession. Chapter 417, Laws of 1903, and § 1061, Stat.

Graham v. Russell, 152 Ind. 186, 193, 194, 52 N. E. 806, 808, is against respondents on this contention. The court said: "The contention of appellant's counsel that the petition ought to have alleged that the taxes in dispute had been filed as a claim against Graham's estate prior to its final settlement is without merit. The facts disclose that the decedent had, for many years prior to his death, failed to list and return for taxation a large amount of his property; and at his death it is charged he was liable for the payment of taxes, on account of his said default, in the sum of \$3,000 and over, which had accrued and were due for state, county, and township purposes. Taxes are not such claims which the law of this state either requires or intends shall be filed for payment against a decedent's estate. It is true that taxes, in the order prescribed by the statute for the payment of liabilities of a decedent's estate, come within the fourth provision of such order of payment. . . . The duty, however, rests upon the administrator or executor to pay the taxes due against the estate, without their being filed or presented for payment."

4. It is further contended by respondents that the assessment was not properly made against the plaintiffs as executors of the estate of the deceased. A great many cases are cited from this court; but they are cases decided when the statutes on the subject were quite different from the present statutes. True the entry against the executors on the tax roll was not in as good form as might be; but, under our present statutes, we think it sufficient as an assessment against the plaintiffs as executors. It is quite apparent from the whole record that the board intended to make the assess-

ment against the executors. Section 1044a, Stat., provides that failure to enter such assessment separately, or to indicate representative capacity or other relationship of the person assessed, shall not affect the validity of the assessment. We think the assessment was valid against the plaintiffs as executors of Hugh Sloan, deceased.

5. Several questions of practice respecting the sufficiency of the complaint in equity, and whether the plaintiffs had an adequate remedy at law, and whether such objections were waived by failure to demur or answer, are argued in the briefs of counsel. But, since we hold that no case was made, either at law or in equity, it is unnecessary to consider or decide such questions.

6. The defendants set up a counterclaim, asking judgment dismissing the complaint, and that they have judgment against the plaintiffs for the sum of \$1,204.88, being the amount claimed due for taxes, and for general relief, together with costs. On the trial, defendants asked permission to withdraw the counterclaim, which was denied, and the counterclaim was permitted to stand.

Chapter 417, Laws of 1903, before referred to, makes the tax collectable from the executors personally, and also makes it a debt of the decedent. It being established that the taxes assessed against the plaintiffs are valid, judgment should have been entered in favor of the defendants for the amount of the debt. It is true that the counterclaim asks judgment against the plaintiffs, apparently a personal judgment. But this is immaterial under our system of pleading and practice. A judgment *de bonis testatoris* is a proper judgment in all cases where the executor is a party and the estate of decedent is liable for the debt. 18 Cyc. 1043 et seq.; Woodward v. Howard, 13 Wis. 557; Hei v. Heller, 53 Wis. 415, 10 N. W. 620; Ladd v. Anderson, 58 Wis. 591, 17 N. W. 320; Borchert v. Borchert, 141 Wis. 142, 123 N. W. 628. So, in the present case judgment may be entered against the plaintiffs, as executors, with direction that the same may be paid out of the property of the estate in the hands of the plaintiffs, since it appears from the record that there is ample property in the hands of the plaintiffs, as executors, to satisfy the claim.

The judgment of the court below is reversed, and the cause remanded, with directions to enter judgment in favor of the defendants upon the counterclaim as indicated in this opinion.

GEORGIA SUPREME COURT.

GEORGIA RAILROAD & BANKING COMPANY

v.

TOWN OF DECATUR.

(137 Ga. 537, 73 S. E. 830.)

Tax — sewer assessment — railroad property.

1. A railroad company owns a strip of land in a municipality, 116 feet wide, through the center of which runs its main line of railroad. The land is located between two streets of the town, along which the town, under legislative authority, laid, respectively, 4,456 and 938 feet of sanitary

Headnotes by EVANS, P. J.

Note. — Liability of railroad right of way to assessment for local improvement.

This note supplements that in 12 L.R.A. (N.S.) 112.

The question whether a local assessment may be enforced against property owned by a railroad company, but not used in the operation of the road, except, perhaps, incidentally, by renting it to others, is not within the scope of this note.

Generally as to liability of the right of way and trackage of a street railway company or other railroad occupying the street, to assessment for street improvements, see the note in 15 L.R.A. (N.S.) 487.

As to liability of street railway for paving assessment, see the note in 46 L.R.A. 193.

As to the liability to local assessments for benefits of property exempt from general taxation, see the notes in 35 L.R.A. 33; 18 L.R.A. (N.S.) 451; and 32 L.R.A. (N.S.) 303.

Generally.

The right of way of a railroad company is liable for assessments for street improvements the same as any other property in the improvement district. *Gilsonite Constr. Co. v. St. Louis, I. M. & S. R. Co.* — Mo., 144 S. W. 1080, citing *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 172, 12 L.R.A. (N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 Ann. Cas. 630.

And it was said in *Hoffman v. Zollman*, — Ind. App. —, 97 N. E. 1015, that the easement of a right of way over a lot may, if benefited, be assessed for the improvement of the street.

Other cases seem to assume that there is nothing about a railroad right of way which prevents its assessment, provided it is benefited, such cases being mainly concerned with whether there are sufficient benefits.

Thus, the view is taken in New Jersey that a railroad right of way is to be regarded for the purpose of local assessments as permanently devoted to public use, and that therefore the proper basis for the assessment is the benefit to the property, and 40 L.R.A. (N.S.)

sewer pipe. The land is held for present use to support the roadbed and to provide for an increase of tracks, which the future needs of the railroad probably may require. Under such circumstances the land abutting on the sewers, of such depth as will not interfere with the present roadbed, is liable for the cost of assessment of the local improvement, and such assessment is not illegal because the abutting property in its present condition, and as devoted to its present use, may not be specifically benefited by the improvement.

Same — municipal determination — conclusiveness.

2. Under its amended charter (Acts 1903, p. 504) the town of Decatur was authorized to construct a system of sewerage, and to assess against abutting property on each side of a street improved 50 cents per lineal

not the enhancement of its market value; and if no benefit is proved, there can be no assessment (*New York Bay R. Co. v. Newark*, 77 N. J. L. 270, 72 Atl. 455); and that this rule applies not merely to land on which the tracks are laid, but also to contiguous land, which, though not at present used for railroad purposes, was acquired for that purpose, and is not being used for any other purpose (*New York Bay R. Co. v. Newark*, — N. J. L. —, 83 Atl. 962, reversing, 80 N. J. L. 146, 76 Atl. 327).

Where railroad property is by statute declared to be held for a public use, neither those portions of a 100-foot right of way located beside the tracks, whose aggregate width is 70 feet, nor the 30 feet upon which the tracks are laid, are liable for assessments for street extension, if they are not thereby benefited. *Re City of New York*, 127 App. Div. 672, 111 N. Y. Supp. 916. This case was cited in a later decision holding that the right of way of a railroad company, being devoted to a public use, is not, if not actually benefited, subject to an assessment for street improvement; and the possibility that the paving of a street which the railroad crosses at an elevation will result from the increase in business and population to the village resulting from the improvement is too remote to be considered upon the question of benefit. *New York, N. H. & H. R. Co. v. Port Chester*, 149 App. Div. 893, 134 N. Y. Supp. 883.

And in *River Forest v. Chicago & N. W. R. Co.* 197 Ill. 344, 64 N. E. 364, it was apparently assumed that there was nothing about a railroad right of way which prevented its being assessed for the improvement of streets upon which it abutted, provided the right of way was benefited by the improvement; but the court denied the propriety of assessing the right of way, upon the ground that in determining whether the right of way was benefited, it was improper to take into consideration the possible or imaginary uses, as depot grounds or otherwise, of a part of the right of way, the court saying that the present, and not the probable future, use of the land, was the test.

foot. The legislative determination of the cost of the local public improvement and its apportionment to the abutting land is conclusive as to these matters.

Same — enforcement — extent of liability.

3. In the absence of express legislative authority, the main track of a railroad

company is not subject to levy and sale to satisfy a lien for assessments for local improvements. It follows that a lot of land bisected by the main track of a railroad is not liable *in solido* for improvements on two streets which bound the lot of land, and between which the main track is located, and therefore a portion of the

But it is held in *Seattle v. Seattle & M. R. Co.* 50 Wash. 132, 96 Pac. 958, that an assessment upon a railroad right of way for street improvements is supported by a finding that the property will be actually benefited to the amount of the assessment if and when it is devoted to any other use than the present, notwithstanding it is also found that the premises are permanently adapted to railroad uses, and that they will not be actually benefited by the improvement as long as they are devoted to that use.

A railroad right of way used solely for tracks cannot be benefited by the opening and paving of a street across it, so as to subject it to an assessment for such improvements. *Detroit, G. H. & M. R. Co. v. Grand Rapids*, 106 Mich. 13, 28 L.R.A. 793, 58 Am. St. Rep. 466, 63 N. W. 1007.

So it is held in *Lehigh Valley R. Co. v. Jersey City*, 81 N. J. L. 290, 80 Atl. 228, that the right of way of a railroad crossing a marsh upon trestles was not benefited by the drainage of the marsh, so as to render it liable for assessments for the construction of the drainage sewer.

Under particular statutory or constitutional provisions.

The right of way of a railroad company is not a public highway within the meaning of a constitutional provision prescribing exemptions from taxation. *Gilsonite Constr. Co. v. St. Louis, I. M. & S. R. Co.* — Mo. —, 144 S. W. 1086, citing *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 172, 12 L.R.A. (N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 Ann. Cas. 630.

A freight depot and spur tracks of a railroad company, although part of its entire system, are subject to special assessment for local improvement, under a statute providing that the property of railroad companies shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals. *Chicago, M. & St. P. R. Co. v. Janesville*, 137 Wis. 7, 28 L.R.A. (N.S.) 1124, 118 N. W. 182, followed in *Chicago, M. & St. P. R. Co. v. Milwaukee*, 148 Wis. 39, 133 N. W. 1120, which added that the statute referred to is in accord with the result in many well-considered cases, and is in harmony with the rule approved by the Supreme Court of the United States that, on the question of benefits or no benefits, the land shall be considered simply in its general relation, and apart from its particular use. Citing *Louisville & N. R. Co. v. Barber Asphalt Paving Co.* 197 U. S. 430, 49 L. ed. 819, 25 Sup. 40 L.R.A. (N.S.)

Ct. Rep. 466, which is set out in the note in 12 L.R.A. (N.S.) 112.

And the depressed portion of a railroad right of way which passes under a street may be charged with the cost of building sidewalks around such right of way at or upon the retaining walls, under a city charter making it the duty of the owner or occupant of any premises to lay sidewalks in front of such premises, or, upon his failure to do so, authorizing the city to lay them and charge the expense to such owner. *New York, C. & H. R. R. Co. v. Buffalo*, 135 N. Y. Supp. 196.

But it is held that the roadbed of a railroad company is not real estate within the meaning of a statute imposing liability for local assessments. *Philadelphia v. Philadelphia & R. R. Co.* 38 Pa. Super. Ct. 529, followed in *Philadelphia Use of Vulcanite Paving Co. v. Fairhill R. Co.* 41 Pa. Super. Ct. 245.

And so much of a way paved and used by a city for public traffic as encroaches upon the right of way of a railroad company does not come within the meaning of the word "street" in a statute authorizing the levying of assessments for paving, so as to entitle the city to assess that portion of the way which encroaches upon the property of the railway company. *Atchinson, T. & S. F. R. Co. v. Cherryvale*, — Kan. —, 123 Pac. 874.

Enforcement by sale.

It is held that a railroad bed cannot be sold for street assessments. *Detroit, G. H. & M. R. Co. v. Grand Rapids*, 106 Mich. 13, 28 L.R.A. 793, 58 Am. St. Rep. 466, 63 N. W. 1007.

In *Louisville, N. A. & C. R. Co. v. State*, 8 Ind. App. 377, 35 N. E. 916, the court recognized the rule that a railroad right of way cannot be sold for the payment of local assessments, but held that a personal judgment was properly rendered against it for the amount of the assessment. And the same is true of *Lake Erie & W. R. Co. v. Bowker*, 9 Ind. App. 428, 36 N. E. 864.

But it was held in Illinois that the portion of the track or right of way of a railroad company which lies within a drainage district may be sold for the payment of a drainage assessment thereon. *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.* 134 Ill. 384, 10 L.R.A. 285, 25 N. E. 781.

As to the personal liability of property owners to pay assessment for local improvements, see the notes in 18 L.R.A. (N.S.) 1259, 29 L.R.A. (N.S.) 770.

L. A. W.

land on one side of the railroad track cannot be levied on to satisfy assessments made against the entire strip of land through which the railway runs, on account of sewers constructed in streets lying on each side of the track.

(February 14, 1912.)

CROSS WRITS of error to the Superior Court for De Kalb County to review a judgment sustaining a demurrer to part of the affidavit of illegality to stay execution issued to collect a special assessment for a sewer in front of or through the property of the defendant; defendant assigning error to the judgment excepted to *pendente lite* and the final judgment resulting from sustaining the demurrer; and plaintiff assigning error to the judgment reducing the amount of the *fi. fa.* Reversed on both assignments.

The facts are stated in the opinion.

Messrs. Joseph B. Cumming, Bryan Cumming, and John S. Candler, for defendant:

There must be resulting benefits to authorize special assessments for sewers.

Atlanta v. Gabbett, 93 Ga. 266, 20 S. E. 306; Atlanta v. Hamlein, 96 Ga. 382, 23 S. E. 408, 101 Ga. 697, 29 S. E. 14; Speer v. Athens, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802; Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; Detroit, G. H. & M. R. Co. v. Grand Rapids, 106 Mich. 13, 28 L.R.A. 793, 58 Am. St. Rep. 466, 63 N. W. 1007; State, New Jersey R. & Transp. Co., Prosecutor, v. Elizabeth, 37 N. J. L. 330; Re Public Park Comrs. 47 Hun, 302; Bloomington v. Chicago & A. R. Co. 134 Ill. 451, 26 N. E. 366; State, New Jersey R. & Transp. Co., Prosecutor, v. Newark, 27 N. J. L. 185; Mt. Pleasant v. Baltimore & O. R. Co. 138 Pac. 365, 11 L.R.A. 520, 20 Atl. 1052; Illinois C. R. Co. v. Chicago, 141 Ill. 509, 30 N. E. 1036; New York & N. H. R. Co. v. New Haven, 42 Conn. 279, 19 Am. Rep. 534; Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; River Forest v. Chicago & N. W. R. Co. 197 Ill. 348, 64 N. E. 364; Chicago, R. I. & P. R. Co. v. Ottumwa, 112 Iowa, 312, 51 L.R.A. 769, 83 N. W. 1074; Detroit, G. H. & M. R. Co. v. Grand Rapids, 106 Mich. 13, 28 L.R.A. 793, 58 Am. St. Rep. 466, 63 N. W. 1007; Seattle v. Seattle Electric Co. 48 Wash. 599, 15 L.R.A. (N.S.) 486, 94 Pac. 194; 25 Am. & Eng. Enc. Law, 1185.

Messrs. Leslie J. Steele and Mayson & Johnson, for plaintiff:

The amount of benefit which an improvement will confer upon a particular lot is a matter of forecast and estimate. In its 40 L.R.A. (N.S.)

general aspect, at least, it is peculiarly a thing to be decided by those who make the law.

Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Speer v. Athens, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802; Bacon v. Savannah, 86 Ga. 301, 12 S. E. 580; Illinois C. R. Co. v. Decatur, 147 U. S. 191, 37 L. ed. 133, 13 Sup. Ct. Rep. 293.

A railroad situated in the street, and running along the length thereof, is contiguous to such street, and subject to special assessments in the same manner as property of private owners abutting on a street.

Chicago, R. I. & P. R. Co. v. Moline, 158 Ill. 64, 41 N. E. 877; Freeport Street R. Co. v. Freeport, 161 Ill. 451, 38 N. E. 137; Kuehner v. Freeport, 143 Ill. 92, 17 L.R.A. 774, 32 N. E. 372; Jacksonville R. Co. v. Jacksonville, 114 Ill. 562, 2 N. E. 478.

The act of the general assembly, providing for this and other sewers, not only adopted the front-foot rule, but also fixed the amount of assessment to be charged on each abutting lot; to wit, 50 cents per front foot; and the legality both of the apportionment and the amount is conclusive.

Cooley, Taxn. 3d ed. 1205; Beach, Pub. Corp. § 1175; Abbott, Mun. Corp. § 368; Dill. Mun. Corp. § 752; Carson v. Brockton Sewerage Comrs. 182 U. S. 398, 45 L. ed. 1151, 21 Sup. Ct. Rep. 860; Wight v. Davidson, 181 U. S. 378, 45 L. ed. 904, 21 Sup. Ct. Rep. 616; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; Leominster v. Conant, 139 Mass. 384, 2 N. E. 690; Hyde Park v. Spencer, 118 Ill. 446, 8 N. E. 846; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921, 100 N. Y. 587, 3 N. E. 682; Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098; Harton v. Avondale, 147 Ala. 465, 41 So. 934; Montgomery v. Moore, 140 Ala. 649, 37 So. 291; Ritter v. Drainage Dist. No. 1, 78 Ark. 580, 94 U. S. 711; Denver v. Campbell, 33 Colo. 170, 80 Pac. 142; Denver v. Londoner, 33 Colo. 104, 80 Pac. 117; Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122, 467; Denver v. Dumars, 33 Colo. 94, 80 Pac. 114; English v. Wilmington, 2 Marv. (Del.) 87, 37 Atl. 158; Morrell v. Union Drainage Dist. No. 1, 118 Ill. 145, 8 N. E. 675; Palmer v. Stumph, 29 Ind. 329; Monroe County v. Harrell, 147 Ind.

505, 46 N. E. 124; Parker v. Challiss, 9 Kan. 161; Barfield v. Gleason, 111 Ky. 509, 63 S. W. 964; Baltimore v. Johns Hopkins Hospital, 56 Md. 1; Sheley v. Detroit, 45 Mich. 432, 8 N. W. 52; State v. District Ct. 47 Minn. 406, 50 N. W. 476; State ex rel. Merrick v. District Ct. 33 Minn. 245, 22 N. W. 625, 632; Vasser v. George, 47 Miss. 713; McMillan v. Butte, 30 Mont. 225, 76 Pac. 203; Eypatian Levee Co. v. Hardin, 27 Mo. 495, 72 Am. Dec. 276; Northern Indiana R. Co. v. Connelly, 10 Ohio St. 165; King v. Portland, 2 Or. 146; Com. use of Pittsburgh v. Woods, 44 Pa. 116; Cleveland v. Tripp, 13 R. I. 50; Norfolk City v. Ellis, 26 Gratt. 228; Allen v. Drew, 44 Vt. 174; Lightner v. Peoria, 150 Ill. 87, 37 N. E. 69; Davis v. Litchfield, 145 Ill. 313, 21 L.R.A. 563, 33 N. E. 888.

Evans, P. J., delivered the opinion of the court:

By an act approved July 30, 1903 (Acts 1903, p. 504), the charter of the town of Decatur was so amended as to authorize the construction of a system of sewerage for that town. The caption and 1st section of the act are as follows:

An Act to Amend the Charter of the Town of Decatur, in the County of De Kalb, So as to Authorize the Mayor and Council of Said Town to Construct a System of Sewerage for Said Town, and to Assess the Cost of Constructing Said Sewerage System against the Abutting Property, or the Property through Which Said Sewer May Be Constructed, and against the Owners Thereof, and for Other Purposea.

Section 1. Be it enacted by the general assembly of the state of Georgia, and it is hereby enacted by the authority aforesaid, that from and after the passage of this act the mayor and council of the town of Decatur, in the county of De Kalb, shall have full power and authority to lay down and construct sewers in said town, and to assess the sum of 50 cents per lineal foot upon the property and estates respectively abutting on said sewer on each side of the street along which said sewer is laid or constructed; and in consideration of the payment of said assessment, the owners of said estates shall have the right to connect their drains from said abutting property for the discharge of sewerage into said sewer; and in case any such sewer is laid down or constructed through or on any private property, along the course of any natural drain or otherwise, a like sum of 50 cents shall be assessed upon such property abutting on each side of said sewer for every lineal 40 L.R.A. (N.S.)

foot, making in all \$1 for every lineal foot, to be assessed upon such property through which sewers are constructed as aforesaid: Provided, that when the same party owns the land on both sides of a sewer running through his land, he shall be assessed only for one side thereof; and in consideration of the payment of said assessment, the owners of real estate, respectively, on each side of said sewer, through or over which such sewer may be constructed, shall have the right to connect their drains from said abutting property for the discharge of sewerage into said sewer. The extent and character, material used, and expense of sewers constructed, as well as the time and manner of constructing the same, shall be in the discretion of the mayor and council of said town, to be prescribed from time to time by ordinance. The remaining cost of all sewers not thus assessed shall be paid by said mayor and council from the treasury of said town.

The Georgia Railroad & Banking Company owns a lot of land in the town, lying between College street and Railroad avenue, 116 feet in width, along the center of which is constructed its main line of railroad track. The town constructed a line of sewerage pipes in front of this property on College street, 4,456 feet, and a line of sewerage pipes, 938 feet on Railroad avenue. For the construction of this sewer the railroad's property was assessed 40 cents for each lineal foot the sewer pipe was laid. An execution was issued against the property *in solido* for the aggregate sum. This execution was levied upon a rectangular strip of the land 30 by 912 feet, lying on one side of the railroad track. The railroad company interposed its affidavit of illegality; and on demurrer all grounds of the affidavit, except such as set up that the cost of the work as constructed was less than the amount assessed, were stricken. The case was tried by the judge without the intervention of a jury. He adjudged the railroad company subject to one half of the amount assessed against its property. The company and the town sued out bills of exceptions.

Though assessments for local improvements are not taxes, within the meaning of the requirement of the Constitution that taxes must be *ad valorem* and uniform, nevertheless assessments for local improvements, such as street paving and sewerage, are an exercise of the taxing power. While assessments for sewerage are primarily referable to the taxing power, they also have in many instances the aspects of the police regulations. It is competent for the legislature to authorize the construc-

tion of a sewerage system in a municipality and to determine how the cost shall be borne as between the public and the property to be benefited. The legislature may fix some definite standard of apportionment of costs to be applied to the property abutting the improvement by a measurement of length, quantity, or value. "Benefit to the owner of the real estate assessed, so far as necessary to be passed upon, as well as the necessity or reasonableness of the improvement, being for the determination of the legislature, is concluded by the act authorizing the assessment, and will not be inquired into by the courts unless in extraordinary cases, presenting a manifest abuse of legislative authority." *Speer v. Athens*, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802; *Bacon v. Savannah*, 86 Ga. 301, 12 S. E. 580. The foregoing principles were elaborately considered in the cited cases, and we need only apply them to the questions presented by the affidavit of illegality.

1. The first of these raises the point that a local assessment for a sanitary sewer cannot be levied against a railroad right of way. The argument is advanced in support of this contention that a sanitary sewer alongside a right of way of a railroad, from the nature of things cannot be of benefit to the railroad, and comes within the exception to the rule referred to in the *Speer Case*, and applied in the case of *Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408, and 101 Ga. 697, 29 S. E. 14. In the latter case the property against which a paving assessment was made was, in consequence of its peculiar shape and situation, not worth more after than before the improvement, and the cost of the improvement largely exceeded the value of the lot; and under such circumstances the process to enforce the collection of the assessment was enjoined, because it virtually amounted to a confiscation of the property. The case in hand does not come within the exception to the rule referred to in the *Speer Case* and illustrated by the *Hamlein Case*. The railroad's land which abutted the improvement is 116 feet wide and located between two streets, and although it is stated in the affidavit of illegality that its present use is for the maintenance of the roadbed and that future needs of the company will probably require all of it for additional tracks, it does not appear that the railroad company may not now put it to some accessorial use, such as leasing it for warehouse and business purposes. The railroad company does not present a case of confiscation. Its contention is but an inference drawn that it will derive no benefit from the improvement. It may be that from the present use to which the property

is put no special benefit may result; but as all of the abutting property is not actually required for the support of the roadbed, and may be used for warehouse or other business purposes, we cannot say that no special benefit will ensue. As was said by Mr. Justice Holmes: "There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land—indeed, whether it is a benefit at all—is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the law." *Louisville & N. R. Co. v. Barber Asphalt Paving Co.* 187 U. S. 433, 49 L. ed. 819, 25 Sup. Ct. Rep. 466. See, in this connection, *Chicago, M. & St. P. R. Co. v. Janesville*, 137 Wis. 7, 118 N. W. 182, and valuable note to this case in 28 L.R.A.(N.S.) 1124.

2. The railroad company contends that under the act providing for the construction of the sewerage system the cost of the improvement must be limited to costs actually incurred in front of the property. Learned counsel for the railroad company conceded on the argument that the legislature could embrace, as a part of the cost to be assessed on the abutting property owner, not only the cost of providing and laying the sewer, but also the cost of all other things that went to make up a complete sewerage system; but it was contended that under the special act the legislature did not make such provision. The caption and the first section of the act are set out in the statement of facts; and we think the legislative intent, as expressed from the language of the act, is to authorize the construction of a sewerage system in the town of Decatur at a cost of 50 cents per lineal foot of the land abutting on each side of the improvement, and that the additional cost shall be paid by the town. It was competent for the legislature to estimate the cost of the improvement, and to fix the frontage assessment. As was said by the Supreme Court of the United States: "The legislature determines expenditures and amounts to be raised for their payment; the whole discussion and all questions of prudence and propriety and justice being confined to its jurisdiction. It may err; but courts cannot review its discretion." *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

The legislature having determined that the cost be apportioned to the abutting land on each side of the improvement, the owners of the land have no cause for complaint that the town, upon discovering that it could construct the improvement for a smaller sum, assessed the abutting land at a sum less than that fixed by the statute. It would have been competent for the town to assess the improvement at \$1 per lineal foot, 50 cents of it to be paid by the landowners on each side; and the landowner cannot complain that the town voluntarily reduced the assessment to 40 cents per foot against each abutting tract of land.

3. The fl. fa. ran against the entire property abutting on the improvement, but was levied on a part of it. It was urged, as a ground of illegality, that the fl. fa., being a special lien against the property along which the sewer was laid, could not be levied for the whole amount upon a selected part. The affidavit of illegality alleged that the defendant owns a strip of land between College street and Railroad avenue, 116 feet in width, along the center of which is constructed its main line of railroad track, and that its present use is to give a sufficient right of way for the proper maintenance of the present roadbed and to provide for increase in the number of tracks as the business of the defendant may require in the future. A majority of the authorities are to the effect that the track, rails, and ties of railroad company cannot be sold by piecemeal, in the absence of express legislative permission. The reason of the rule is that a railroad company is a quasi public institution, and owes a duty to the public to discharge the objects of its franchise, and a compulsory sale of a fragment of its track will prevent its discharge of this duty. *Gray, Limitations of Taxing Power*, § 1190; *Atlanta v. Grant*, 57 Ga. 340. Only so much of the right of way as is essential to the discharge of its present obligations comes within the operation of the principle. A railroad company, by extensive purchase of real estate for future needs, cannot defeat the sale of such real estate under a valid assessment against so much of the right of way as is not necessary for the present maintenance of its roadbed. We think, therefore, that the assessment should have been against the abutting land of such depth as not to interfere with the roadbed, and the land on each side of the track should have been assessed for the abutting improvement; that is to say, the abutting land on College street alongside of which is laid 4,456 feet of sewerage should be assessed 40 cents per foot, and the abutting land on Railroad avenue, alongside of which 938 feet of

sewerage is laid, should be assessed 40 cents per lineal foot. Separate fl. fas. should be issued for each assessment, running against the property abutting on the improvement.

We are not informed by the affidavit of illegality whether the property assessed contains warehouses or depots. If the right of way contains such structures, and is put to such uses, it is assessable and liable for the local improvement abutting the same. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074. As the assessment was made against and levied upon the whole lot, which was bisected by the railroad track, it follows that the illegality should have been sustained on the ground stated in this division of the opinion.

Judgment reversed on both bills of exceptions.

All the Justices concur, except HILL, J., not presiding.

OKLAHOMA SUPREME COURT.

D. B. BALES, Plff. in Err.,

v.

GAULT McCONNELL et al.

(27 Okla. 407, 112 Pac. 978.)

Proximate cause — unguarded machinery — accidental fall.

Where an employee while working close to a horse-power cornsheller slipped from a wagon, and, upon striking the ground, threw out his hand to steady himself, and was injured by the hand coming in contact with certain moving cogs in the machine negligently left unguarded, held, that the unguarded cogs were the proximate cause of the injury.

(November 16, 1910.)

ERROR to the District Court for Grant County to review a judgment dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Headnote by TURNER, J.

Note. — *Negligent condition of place or appliances as the proximate cause of injuries not primarily caused by that condition.*

It is impossible as a practical matter to include in any discussion upon any phase of

Messrs. S. P. Ridings and E. C. Elliott for plaintiff in error.

Messrs. F. G. Walling and Parker & Simons, for defendants in error:

The exposed condition of the cogs was not the proximate cause of the injury.

Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379; Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; Stephenson v. Corder, 71 Kan. 475, 69 L.R.A. 246, 114 Am. St. Rep. 500, 80 Pac. 938; Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; Farmers' High Line Canal & Reservoir Co. v. Westlake, 23 Colo. 26, 46 Pac. 134; Bullivant v. Spokane, 14 Wash. 577, 45 Pac. 42; Jennings v. Tacoma R. & Motor Co. 7 Wash. 275, 34 Pac. 937; Olson v. McMurray Cedar

Lumber Co. 9 Wash. 500, 37 Pac. 679; Schroeder v. Michigan Car Co. 56 Mich. 132, 22 N. W. 220; Morbach v. Home Min. Co. 53 Kan. 740, 37 Pac. 122; 20 Am. & Eng. Enc. Law, 116; Aetna F. Ins. Co. v. Boon, 95 U. S. 130, 24 L. ed. 398; Strobeck v. Bren, 93 Minn. 428, 101 N. W. 795.

Turner, J., delivered the opinion of the court:

On February 20, 1908, D. B. Bales, plaintiff in error, as plaintiff, sued Gault McConnell, George McConnell, and Oscar McConnell, defendants in error, in the district court of Grant county in damages for personal injuries. The amended petition substantially states that on February 26, 1906, defendants owned and operated a

negligence all the cases which turn upon the proximate cause of the injury, for this question is more or less involved in every action founded upon negligence. It is plain that the defendant cannot be held liable unless, as a matter of fact, his negligence was the proximate cause of the injury, and ordinarily if his negligence was the proximate cause he will be deemed liable unless he can interpose some affirmative defense. In the present note, therefore, it is proposed to confine the discussion to those cases in which, in passing upon the master's liability for the injuries received by a servant in coming in contact with negligent conditions by reason of a fall, or otherwise due neither to the master's negligence nor the servant's, the court expressly rests the decision upon the fact that the negligent condition was or was not the proximate cause of the injuries.

There is upon this question, as upon every question where the ultimate decision is governed by the particular facts in the individual cases, a conflict of opinion.

The fact that the immediate cause of the servant's being injured by coming in contact with the machinery which should have been guarded, or of his being injured in some other way, was a slip or stumble, will not, according to the greater weight of authority, prevent the master's negligence from being considered the proximate cause of the injury.

Colusa Parrot Min. & Smelting Co. v. Monahan, 89 C. C. A. 256, 162 Fed. 276 (negligently insulated electric wire); Daubert v. Western Meat Co. 135 Cal. 144, 67 Pac. 133 (clothing caught in protruding set screws); Taylor v. Felsing, 164 Ill. 331, 45 N. E. 161 (failure to provide means for throwing machinery out of gear); Rock Island Sash & Door Works v. Pohlman, 210 Ill. 133, 71 N. E. 428 (unprotected cogwheels); Davis v. Mercer Lumber Co. 164 Ind. 413, 73 N. E. 899 (unguarded saw); Espenlaub v. Ellis, 34 Ind. App. 163, 72 N. E. 527 (unguarded rip saw); United States Cement Co. v. Cooper, — Ind. App. —, 82 N. E. 981 (unguarded machinery; judgment for plaintiff reversed on ground 40 L.R.A.(N.S.)

of misconduct of counsel); Evansville Hoop & Stave Co. v. Bailey, 43 Ind. App. 153, 84 N. E. 549 (unguarded gang saw); Crowley v. Burlington, C. R. & N. R. Co. 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918 (plaintiff slipped as he was trying to get out of the way of a train moving at an unlawful rate of speed); Wible v. Burlington, C. R. & N. R. Co. 109 Iowa, 557, 80 N. W. 679 (insufficient hand-hold); Stodola v. Cedar Rapids & M. City R. Co. 152 Iowa, 37, 131 N. W. 38 (unguarded machinery); Godfrey v. Illinois C. R. Co. 117 La. 1094, 42 So. 571 (defective plank); Rossey v. Lawrence, 123 La. 1053, 49 So. 704, 17 Ann. Cas. 484 (unguarded cogwheels); MacDonald v. Freeman Mfg. Co. 160 Mich. 380, 125 N. W. 352 (unguarded machinery); Snyder v. Waldorf Box Board Co. 110 Minn. 40, 124 N. W. 450 (unguarded machinery); Lore v. American Mfg. Co. 160 Mo. 608, 61 S. W. 678 (unguarded cogwheels); Musick v. Jacob Dold Packing Co. 58 Mo. App. 322 (hot-water tank left uncovered); Swift & Co. v. Holoubek, 60 Neb. 784, 84 N. W. 249, modified on rehearing in 62 Neb. 31, 86 N. W. 900 (defective machinery); Leaux v. New York, 87 App. Div. 405, 84 N. Y. Supp. 511 (defective manhole); Deegan v. Gutta Percha & Rubber Mfg. Co. 131 App. Div. 101, 115 N. Y. Supp. 291 (absence of shifter); Collins v. Waterbury Co. 144 App. Div. 670, 129 N. Y. Supp. 661 (failure to instruct plaintiff how to stop machine); Finkle v. Bolton Landing Lumber Co. 148 App. Div. 500, 132 N. Y. Supp. 1038 (unguarded saw, for the jury); Hartman v. Berlin & J. Envelope Co. 71 Misc. 30, 127 N. Y. Supp. 187 (unguarded belt); Bennett v. Carolina Mfg. Co. 147 N. C. 620, 61 S. E. 463 (unguarded knives); Ziehr v. Maumee Paper Co. 28 Ohio C. C. 342 (exposed cogwheels); BALES v. McCONNELL; Fegley v. Lycoming Rubber Co. 231 Pa. 446, 80 Atl. 870 (unguarded machinery); Longview Cotton Oil Co. v. Thurmond, 55 Tex. Civ. App. 499, 119 S. W. 130 (uncovered revolving spliced shaft); Goe v. Northern P. R. Co. 30 Wash. 654, 71 Pac. 182 (unprotected lever starting machinery); Hoveland v. Hall Bros. Marine R. & Shipbuilding Co. 41 Wash. 164, 82

horse-power cornsheller on the farm of Mrs. Dolan, in Grant county, then territory of Oklahoma, and were then and there shelling her corn at so much per bushel; that plaintiff was then and there employed by Mrs. Dolan, with the consent of defendants, "to work in and about said machine and handle the corn before and after the same was shelled;" that on said day while so employed "defendants carelessly and negligently took and removed from over and around certain wheels connected by cogs and operating together, the protector and shield from over and around said wheels, which was so placed when said machine was manufactured over and around them to protect persons coming in contact with the said machine from being injured by

the said cogs and wheels," that "plaintiff was familiar with said machine and other machines of the same make and style, and knew that said wheels and cogs on said machines were constructed with the shield over and around them to protect persons as above stated; and that plaintiff while so working in and around said machine, as above stated, after the said defendants had so removed said shield and protector, and without any knowledge on his part that the said shield and protector had been so removed, and without any knowledge on his part that the said defendants were operating said machine without said shield or protector, and without any negligence on his part, slipped down and from a wagon standing by and near said machine,

Pac. 1090 (unguarded shaft coupling); *McKean v. Chappell*, 56 Wash. 690, 106 Pac. 184 (defective cable); *Yess v. Chicago Brass Co.* 124 Wis. 406, 102 N. W. 932 (failure to notify servant of the danger arising from the fact that machine could not be stopped under certain circumstances); *Winchel v. Goodyear*, 126 Wis. 271, 105 N. W. 824 (unprotected circular slasher saw).

So, in *Fegley v. Lymcoming Rubber Co.* 231 Pa. 446, 80 Atl. 870, the court said: "To hold that a prior slip or an accidental movement which brings an unfortunate workman into contact with uncovered cogwheels is to be considered as the proximate cause of the resulting injury would be to practically nullify the provisions of the law made to protect him against such risks."

A complaint is not demurrable which alleges that the plaintiff, being obliged to stand upon a table, slipped, and, in trying to save himself, thrust his hand into an uncovered pinion wheel. The contention of defendant was that the primary cause of the injury was a slip due to accident or carelessness. *Shields v. Murdock*, 20 Sc. Sess. Cas. 4th series, 727, as cited in 1 Labatt, Mast. & S. p. 2190.

Where the evidence was that plaintiff's intestate, who was employed as switchman in defendant's yard, went in between two cars to make a coupling, and, having completed it, attempted to step out upon the planking in a highway crossing; that the planks were so uneven that his foot caught or slipped thereon, and he was thrown under the cars; that, as he slipped, he grasped the grab iron, and endeavored to jump out from under the car, and was about to accomplish this, when his foot slipped into a hole between the ends of two ties, and he was run over by the cars and killed,—it was held the court properly left it to the jury to determine whether the condition of the plank at the crossing was the proximate cause of the injury. *Herrick v. Quigley*, 41 C. C. A. 294, 101 Fed. 187. The court took the position that such evidence tended to show that the servant never recovered from the dangerous situation in which he had been placed by the defective planking. 40 L.R.A., (N.S.)

In some cases where a servant has slipped or stumbled, and been injured because of unguarded machinery or of some other dangerous condition due to the master's negligence, it has been held that the slipping was the proximate cause of the injury and consequently the master was not liable for the injury, although some cases arising in the same jurisdiction hold to the contrary, as will be seen by a comparison of these cases and those cited above.

Thus, in *Cincinnati, N. O. & T. P. R. Co. v. Mealer*, 1 C. C. A. 633, 6 U. S. App. 86, 50 Fed. 725, it was held that where a switchman while running alongside of a moving train stumbled over a piece of coke negligently left beside the track by fellow servants of the switchman, and his arm was crushed between the deadwoods of the car, the stumbling was the proximate cause of his injuries, and evidence as to the defective condition of the coupling appliances was inadmissible.

So, in *Crawford & McC. Co. v. Gose*, 172 Ind. 81, 87 N. E. 711, it was held that the slipping of plaintiff's hand off a handle which operated cogwheels, and not the uncovered condition of the wheels against which his hand was thrust, was the proximate cause of his injury.

This case cites with approval *P. H. & F. M. Roots Co. v. Meeker*, 165 Ind. 132, 73 N. E. 253, where the servant at work near unguarded cogwheels, with his foot resting upon a piece of shafting, was thrown against the shafting by the unexpected rolling of the shafting.

So, also, in *Chicago & E. R. Co. v. Dinius*, 170 Ind. 222, 84 N. E. 9, it was held that where a switchman slipped and fell into a hole negligently left in the tracks by the company, the slipping must be considered the legal cause of the injury.

In *McTiernan v. American Woolen Co.* 197 Mass. 238, 83 N. E. 673, where a servant was pushed by fellow servants into a vat of boiling water, it was held that the trial judge properly excluded evidence that the vat had been negligently left uncovered, since the proximate cause of the injury was either the negligence of a fellow employee or

and by and near said cogwheels, which said wagon was being loaded with grain shelled by said machine, and upon alighting on the ground near said machine and near said cogwheels, and supposing that said shield and protector was over, upon, and around said cogwheels, said plaintiff reached out his hand to place the same upon said machine in order to steady himself. And from the fact that the said shields and protector had been removed from over and around said cogwheels, as above stated, and said machine was being carelessly and negligently operated by the said defendants without said shield and protector, the said hand of the plaintiff, which he had so placed upon said machine, as above stated, the same being his left

hand, was caught in said cogwheels; and the said hand was torn, crushed, and mangled; . . . " that defendants knew that divers persons were working around said machine near said cogs, and that it was necessary for the protection of plaintiff and other such persons to have said shield in use on said machine; that the injury was caused on account of the careless and negligent manner in which defendants were operating said machine without the use of said safety device, and that owing to their negligence, as stated, he was damaged in the sum of \$10,000, for which he prayed judgment.

To the amended petition defendants filed separate general demurrers, which were sustained, and, plaintiff refusing to plead

a slippery condition of the floor, for which the master was not responsible.

In *Jones v. Pioneer Cooperae Co.* 134 Mo. App. 324, 114 S. W. 94, it was held that the master is not liable for his failure to provide a scaffolding for an employee engaged in piling stave bolts on a high rick, where the injury was occasioned by his catching his foot on some object on the ground, where such an injury could not have been anticipated by the master.

In *Valentino v. Garvin Mach. Co.* 139 App. Div. 139, 123 N. Y. Supp. 959, where the plaintiff engaged in operating a drilling machine slipped for some unapparent reason, and fell against unguarded cogs, his injuries were held to come solely from the accident.

In *Mulligan v. Thompson Bros.* 143 App. Div. 413, 128 N. Y. Supp. 126, it was held that the driver of a coal wagon who lost his balance and fell against the tailboard of the wagon, which gave way and he was injured in consequence, could not recover for the injuries received, since they were caused by his losing his balance.

No causal connection between the negligence charged and the injury is shown by a complaint in which the abnormal risks specified were that, a passage of only 19 inches in width was provided between a crane and a deep molding pit, and that the pit was left uncovered, in which the injury was alleged to have been received, owing to the fact that the plaintiff stumbled, while walking along the narrow passage, and, in an endeavor to regain his balance, caught his hand in the wheels of the crane. The court based its ruling on the theory that the stumbling was the proximate cause of the accident; that, as the passage was not insufficient for the purpose for which it was used, and was not encumbered or obstructed through the defendant's fault, this stumbling must have been caused by pure accident or by negligence on the plaintiff's part, and that it did not appear that the result would have been different if the pit had been covered. The suggestion that, if the pit had been covered, the plaintiff would not have grasped the crane for support, but would

have allowed himself to fall on the cover, was rejected as being mere speculation, and not averment; but it was declared that, if this had been averred, the complaint would still have been bad. *Greer v. Turnbull*, 19 Sc. Sess. Cas. 4th series, 21, as cited in 1 Labatt, Mast. & S. p. 2228.

In a number of cases where a servant fell onto unguarded machinery or some other negligent condition of place or appliance, the fall being occasioned by accident or some other cause for which neither the master nor the servant himself was legally liable, a recovery has been denied upon the ground that the negligent condition was open and apparent and the dangers thereof were consequently assumed by the servant. *Stumpf v. Corn Products Mfg. Co.* 155 Ill. App. 194 (unguarded pulley); *McTiernan v. American Woolen Co.* 197 Mass. 238, 83 N. E. 673; *Holloran v. Union Iron & Foundry Co.* 133 Mo. 470, 35 S. W. 260; *Valentino v. Garvin Mach. Co.* 139 App. Div. 139, 123 N. Y. Supp. 959; *Kimmerle v. Carey Printing Co.* 144 App. Div. 714, 129 N. Y. Supp. 572.

In some cases of this character, the court discusses to greater or less extent the question of proximate cause; but it is apparent the question of proximate cause is immaterial, since, even if the negligent condition should be considered the proximate cause of the injury, there could be no recovery, as the servant would have waived the negligence of the master by his conduct in voluntarily continuing in the employment.

In *Venbuur v. Lafayette Worsted Mills*, — R. I. —, 75 Atl. 264, it was held that the master could not be held liable for injuries caused to a boy by slipping and thrusting his hand into the blower of a ventilating machine, where such result could not have been anticipated by the master.

In *Meyers v. Ideal Steam Laundry*, 60 Wash. 134, 110 Pac. 803, it was held that where the operator of a machine who, upon slipping, threw his arm into a revolving receptacle of the machine in an endeavor to save himself from falling, could not recover for his injuries, where the machine was reasonably safe. W. M. G.

further, judgment was rendered and entered dismissing his cause. He brings the case here. In support of their demurrers defendants contend that their negligence in failing to use the safety device was not the proximate cause of the injury. They say: "At the most, it can only be said that the exposed cogwheels gave rise to the condition which made the accident possible, and which was in fact caused by the slipping and falling of the plaintiff from the wagon standing by. A simple test to determine the rule of liability in this case is this: If the plaintiff had not slipped and fallen from the wagon, would the accident have occurred? The answer is necessarily, 'No.' Without his slipping from the wagon it could not have occurred, and hence that was the efficient and proximate cause of the accident." The court, in effect, so held. The court erred. That which caused plaintiff to slip from the wagon was the cause of his fall, but the negligently unguarded cogs were the proximate cause of his injury. In *Postal Teleg. Cable Co. v. Zopfi*, 93 Tenn. 369, 24 S. W. 633, as to proximate cause, the court said: "A familiar illustration is the fall of a person upon an ice-covered pavement into an open cellar. In such case the ice is the cause of the fall, but the open cellar may cause an injury which, but for it, would not have occurred." In *Postal Teleg. Cable Co. v. Zopfi*, supra, plaintiff sought to recover damages for personal injuries sustained by his minor daughter at the hands of the defendant company, alleging loss of her services. The facts substantially were that defendant had negligently left a telegraph pole lying between the platform and the first stepping-stone leading from his front gate to the pike; that his little daughter on her way home from school on a rainy day, in stepping over the pole to pass in at the gate, stepped upon the platform, slipped, lost her balance, fell upon the pole, and was injured. On the question of proximate cause the court charged the jury, concerning which the supreme court said: "We think there is no error in the charge thus given, and the trial judge drew a proper distinction between the cause of the fall and the proximate cause of the injury. This is well illustrated in the case of *Deming v. Merchants' Cotton-Press & Storage Co.* 90 Tenn. 353, 13 L.R.A. 518, 17 S. W. 89," and affirmed the judgment of the trial court.

This case is cited and followed in *Anderson v. Miller*, 96 Tenn. 35, 31 L.R.A. 40 L.R.A. (N.S.)

604, 54 Am. St. Rep. 812, 33 S. W. 615, concerning which the court said: "In *Postal Teleg. Cable Co. v. Zopfi*, 93 Tenn. 374, 24 S. W. 633, the same distinction is illustrated where the fall of a young girl was caused by the slippery condition of a walkway, but the injury proximately resulted from the telegraph company negligently leaving its pole where she fell upon it, and received an injury which would not have resulted but for the presence of the pole, even though she had fallen. In that case a hypothetical case is put to further illustrate the distinction of a person falling upon an ice-covered pavement into an open cellar. In such case the ice is the cause of the fall, but the open cellar may cause an injury which, but for it, would not have occurred." *Rosenbaum v. Shoffner*, 98 Tenn. 624, 40 S. W. 1086, was a suit in damages for the death of plaintiff's husband. The material facts were that deceased, Daniel P. Shoffner, went into the storehouse of defendant in Memphis for the purpose, among others, of buying a stove. To ascertain the quantity of pipe that would be required to set it up, he looked at the wall to estimate the distance, and, while so doing and walking backwards, he stumbled and fell into an elevator shaft negligently left unguarded by the proprietor of the store, and sustained injuries from which he died. There was an exception to the following charge: "If you find these facts, then you are instructed that the proximate cause of the injury and death of the deceased was the negligence (if such you find) of the defendant in failing to guard said elevator shaft or opening into which the deceased, Shoffner, fell, and not the fall caused by stumbling over said platform, your verdict should be for the plaintiff," which the court in sustaining said: "This, we think, is a correct exposition of the law. The stumbling on the platform was the cause of the fall, but it might not have been injurious but for the open elevator shaft; and if that was negligently left open, and in consequence the deceased was killed, the defendant would be liable. *Postal Teleg. Cable Co. v. Zopfi*, 93 Tenn. 372-375, 24 S. W. 633; *Anderson v. Miller*, 96 Tenn. 45, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615."

In *Crawfordsville v. Smith*, 79 Ind. 308, 41 Am. Rep. 612, the material facts were that one of the streets of the city ran to the brink of an excavation 25 feet deep, on each side of which was College street, graded and graveled and open to travel

within a yard of the steep banks of the cut; that the city had negligently suffered it to remain open and unguarded; that on the night of the accident while the plaintiff was driving along College street, using due care, his horse took fright, wheeled around, threw him from the buggy, ran away and into the excavation, and was killed. The contention was there, as here, that the action could not be maintained because the negligence in leaving the excavation unguarded was not the proximate cause of the injury complained of, but the court held not so, and affirmed the judgment of the lower court in favor of plaintiff.

In *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. 320, the material allegations of the complaint were that the railroad company, with the consent and permission of the defendant city, had its track and operated its railroad along the side of and in places lengthwise upon one of the streets of the city; that owing to its construction it was a dangerous place for a horse with a carriage to go upon; that it was without fence or barrier between the part of the street occupied by the track and the part not so occupied to prevent horses running upon it; that as plaintiff in his buggy was driving his horse along the street, near said part of the track, his horse suddenly frightened by a car moving along the track, and, notwithstanding plaintiff's efforts to prevent him, ran upon the track where it was laid on and along the street, overturned the buggy, and injured the plaintiff. One of the grounds of demurrer which was sustained was that the frightening of the horse by the moving car, and not the negligence of the city to properly guard the street, was the proximate cause of the injury; but the court held not so, and reversed the trial court. To the same effect, see *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733; *Baldwin v. Greenwood Turnp. Co.* 40 Conn. 238, 16 Am. Rep. 33; *Atlanta v. Wilson*, 59 Ga. 544, 27 Am. Rep. 396.

We are therefore of opinion that when plaintiff slipped from the wagon, and, upon striking the ground, threw out his hand to steady himself, if the cogs had been covered, he would not have been injured; that, as they were negligently left uncovered, he was injured, and hence such negligence was the proximate cause of the injury.

The cause is accordingly reversed and remanded.

All the Justices concur.
40 L.R.A. (N.S.)

WEST VIRGINIA SUPREME COURT OF APPEALS.

E. C. BRALLEY, Admr., etc., of G. T. Lipscomb, Deceased,

v.

TIDEWATER COAL & COKE COMPANY,
Plff. in Err.

(66 W. Va. 278, 66 S. E. 684.)

Master — mine boss and miner — fellow servants.

A mine boss and fire boss employed in a coal mine, pursuant to §§ 409 and 410, Code 1906, in the performance of the duties thereby imposed upon them, including the duty of the mine boss to see that, as the working places advance, break-throughs for air are made, or that brattice shall be used, are fellow servants of the miner employed therein, and the master is not liable for injuries sustained by such miner on account of the negligent performance of those duties.

(Williams, J., dissents.)

(November 16, 1909.)

Headnote by MILLER, P.

Note. — Liability of master for negligence of supervising employee employed pursuant to statute.

Courts and commentators do not always distinguish between statutes which merely require the master to appoint a designated employee and impose certain duties upon him, and those statutes which go a step further and restrict the master's choice of such employee to a certain person or to one of a certain class of persons. But the distinction is a very material one. If the master is compelled to employ a certain person, or even one of a certain class, it might be very plausibly argued that the master ought not to be chargeable with any negligence of the employee.

On the other hand, if the statute merely requires the employment of a competent employee who shall perform certain duties deemed necessary for the welfare of the employees, no valid reason appears why the master should not be liable for the proper performance of those duties, if they are of the class designated as primary duties of the master; but if the duties are such as may be delegated, then the master may be held to have done his full duty if he has exercised ordinary care in selecting a competent man for the position. In other words, it would seem in regard to this class of statutes that they should in reality have no effect upon the master's liability, the employee being considered a vice principal or a fellow servant in accordance with the views prevailing in the jurisdiction as to employees of the same general class appointed without reference to any statute. Such is in fact the rule actually applied, but the

ERROR to the Circuit Court for McDowell County to review a judgment in favor of plaintiff in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Rucker, Anderson, Strother, & Hughes, for plaintiff in error.

A servant assumes the risk resulting from his violation of a statute.

White, Personal Injuries in Mines, § 205; 1 Thomp. Neg. § 83.

The defendant company having complied with the law in every respect, both as to the employment of a mine boss and the employment of a fire boss, it cannot be held that it was negligent as to any of the con-

ditions which were under the supreme control of either one or both of these officers.

Williams v. Thacker Coal & Coke Co. 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107; Purkey v. Southern Coal & Transp. Co. 57 W. Va. 595, 50 S. E. 755; McMillan v. Middle States Coal & Coke Co. 61 W. Va. 531, 11 L.R.A.(N.S.) 840, 57 S. E. 129.

Messrs. L. C. Bell, Ritz & Litz, Strother, Taylor, & Flanagan, and M. L. Davis, for defendant in error:

It is the legal duty of the master to furnish to the servant a reasonable safe place in which to work, and this duty cannot be assigned by him to any other person.

20 Am. & Eng. Enc. Law, 55; King Mfg. Co. v. Walton, 1 Ga. App. 403, 58 S. E. 115:

courts do not always refer the decision to this general principle, as will be seen by the holdings of some of the cases set out below.

Under the Indiana statute (Acts 1891, § 19, p. 57, § 7479, Burns's Anno. Stat. 1901) making it the duty of the owner to employ a competent mining boss who shall be an experienced miner, and prescribing what his duties shall be, the mining boss is held not to be the fellow servant of the miner. Davis Coal Co. v. Pollard, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492 (failure to furnish proofs); Island Coal Co. v. Swaggerty, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026 (negligence in running elevator); Diamond Block Coal Co. v. Cuthbertson, 166 Ind. 290, 76 N. E. 1060 (dangerous roof) Antioch Coal Co. v. Rockey, 169 Ind. 247, 82 N. E. 76 (failure to inspect roof); Linton Coal & Min. Co. v. Persons, 11 Ind. App. 264, 39 N. E. 214 (dangerous roof); Island Coal Co. v. Risher, 13 Ind. App. 98, 40 N. E. 158 (dangerous roof); Eureka Block Coal Co. v. Wells, 29 Ind. App. 1, 94 Am. St. Rep. 259, 61 N. E. 236 (wall of mine became thin).

The master cannot delegate either the common-law or the statutory duty of keeping a mine reasonably safe. Diamond Block Coal Co. v. Cuthbertson, 166 Ind. 290, 76 N. E. 1060.

The mining boss which a mine owner employs as required by statute is not, in the performance of his duties under the law, the fellow servant of appellee, but is the representative of the appellant. Antioch Coal Co. v. Rockey, 169 Ind. 247, 82 N. E. 76.

The earlier Tennessee statute (Acts 1881, chap. 170, p. 234) merely required the mine owner to employ a "competent and practical inside overseer," but did not restrict the mine owner in his choice thereof; under this statute the mine owner was held liable for the overseer or "mining boss."

In Smith v. Dayton Coal & I. Co. 115 Tenn. 543, 4 L.R.A.(N.S.) 1180, 92 S. W. 62, it was held that compliance with a statute requiring the employment of a competent mine boss does not absolve the mine owner from liability for injuries caused by the failure to perform his common-law du-

ties with respect to the safety of the mine, although the statute specifically charges the mine boss with the performance of the duty the neglect of which causes injury to an employee. The court expressly pointed out the fact that the decisions in Pennsylvania and in other states upon this question were not controlling in Tennessee, because they were not in consonance with the general system of that state defining the duties of master and servant.

Heald v. Wallace, 109 Tenn. 346, 71 S. W. 80, was distinguished in Smith v. Dayton Coal & I. Co. supra, upon the ground that in that case the miner was injured while making a dangerous place safe.

Knoxville Iron Co. v. Pace, 101 Tenn. 476, 48 S. W. 232, also discussed the statute of 1881, but this particular question does not appear to have been passed upon.

In Kansas, chap. 159, Laws 1897, which makes it incumbent upon every mine owner, agent, lessee, or operator of coal mines to employ a competent fire boss, whose duties, as prescribed by the statute, are to "examine every working place every morning with a safety lamp before miners or other employees enter their respective working places," does not prescribe the limit of care to be exercised by such mine owner or operator towards employees engaged in working in their mines. This statute increases the duty of the owner or operator of mines by requiring him to employ a competent person to look specially after the condition of the mine; and if, through the negligence of such fire boss, one of the employees is injured by the explosion of gas therein, the owner or operator is liable in damages for such injury. Schmalstieg v. Leavenworth Coal Co. 65 Kan. 753, 59 L.R.A. 707, 70 Pac. 888; Barrett v. Deasy, 78 Kan. 642, 97 Pac. 786; Little v. Norton Coal Co. 83 Kan. 232, 109 Pac. 768.

On the other hand, a foreman appointed under the Pennsylvania acts, which require the employment of a mining boss, who shall keep a careful watch over the ventilating apparatus and all things connected with and appertaining to the safety of the men at work in the mine (statute passed March 3,

Fulton v. Crosby & B. Co. 57 W. Va. 94, 49 S. E. 1012.

Even if the mine boss were negligent in his duties, the master being also negligent, the injury was caused by the concurrent negligence of the master and the mine boss, and the defendant is liable to plaintiff, as the statute has placed this duty which has been neglected upon the operator as well as upon the mining boss.

Lay v. Elk Ridge Coal & Coke Co. 64 W. Va. 288, 61 S. E. 157; 26 Cyc. 1302.

Miller, P., delivered the opinion of the court:

The plaintiff below recovered a verdict and judgment against defendant for \$3,500, for the death of G. T. Lipscomb, a coal min-

er, the result of being burned by gas generated in defendant's mine, and ignited from the lamp of another miner employed in another part of the mine.

The negligence charged in the four counts of the declaration is that defendant wrongfully and negligently permitted fire damp, gases, vapor, and foul air to accumulate in the main and side entries; employed and retained incompetent and inexperienced agents and servants; failed to furnish safety lamps; employed and used a poor, defective, and insufficient apparatus called a "fan," for driving air into said entries; failed to employ a competent mine boss and fire boss, and to keep at said mine a safety lamp or lamps, as required by law, and to have the mine examined and notice given employees

1870, amended April 28, 1877, and June 30, 1885), is a fellow servant of his subordinates, according to the rule as laid down by the courts of that state. Lehigh Valley Coal Co. v. Jones, 86 Pa. 432, 10 Mor. Min. Rep. 30 (explosion caused by defective ventilation); Delaware & H. Canal Co. v. Carroll, 89 Pa. 374, 10 Mor. Min. Rep. 47 (explosion of fire damp); Waddell v. Simonsen, 112 Pa. 567, 4 Atl. 725 (defective construction of gangway); Reese v. Biddle, 112 Pa. 72, 3 Atl. 813 (failure to use props furnished); Redstone Coke Co. v. Roby, 115 Pa. 364, 8 Atl. 593 (explosion of fire damp); Haley v. Keim, 151 Pa. 117, 25 Atl. 98 (deadly gases penetrated through opening which should have been closed); Lineoski v. Susquehanna Coal Co. 157 Pa. 153, 27 Atl. 577 (roof collapsed); Velas v. Patton Coal Co. 197 Pa. 380, 47 Atl. 360 (negligent order); Voshefskey v. Hillside Coal & I. Co. 21 App. Div. 168, 47 N. Y. Supp. 386 (defective bumper on car).

"As the defendants had complied strictly with the 8th section of the act of March 3d, 1870, in providing a practical and skilful inside overseer or mining boss, and as they had thus fulfilled the duty imposed upon them by the general assembly, it is not for this or any other court to charge them with an additional obligation. . . . The act is one of great practical utility to the miner, and lays upon the proprietors of mines all the burthens they ought of right to bear. They must provide capable overseers for their works, and they must furnish what, by such overseers, is required for the safety and welfare of the men engaged in those works. More than this they cannot do, for upon the judgment and skill of these practical agents they must depend quite as much as any of the men who are engaged in their mines." Waddell v. Simonsen, 112 Pa. 567, 4 Atl. 725.

"Nor do we think the liability of the company for the act of its mining boss is changed by the fact that he is appointed pursuant to a statute, where he has a general superintendent over him who has power to direct and control him. We discover no sound reason for any distinction. 40 L.R.A. (N.S.)

In either case the company must appoint a competent and suitable person, and provide suitable and safe machinery. He is to 'carefully watch' and 'to see,' for the purpose of protecting from danger all men at work in the mines, says the statute. This, however, does not displace or supersede his superior, to whom he may be required to report." Lehigh Valley Coal Co. v. Jones, 86 Pa. 432, 10 Mor. Min. Rep. 30.

"There is no room for the allegation that a mining boss under the mine ventilation act of 1870 is an agent of the mine owner or a coemployer. He is clothed with no powers of engaging and discharging miners and laborers at pleasure. He is merely a fellow servant with the miner. He is nowhere in the act designated as the agent of the owner of the mines. His duties are specified in the same manner that the duties of the engineer are specified in the 16th section, and as the duties of other employees are defined in various other sections. He has no general power of control. His duties are confined to special matters. That they are different from those of others of his fellow collaborators, or even that they are of a higher grade, does not matter." Delaware & H. Canal Co. v. Carroll, 89 Pa. 374, 10 Mor. Min. Rep. 47.

"The mining boss is a creature of the legislature, selected by the mine owner in obedience to the command of the law, and in the interest and for the protection of the miners themselves." Redstone Coke Co. v. Roby, 115 Pa. 364, 8 Atl. 593.

In Mulhern v. Lehigh Valley Coal Co. 161 Pa. 270, 28 Atl. 1088, where the statute required a mine owner to employ a sober and competent engineer at the cage hoist, the court held that this did not change the master's common-law liability; if he hired such an engineer, he was not liable for his negligence, as he was a fellow servant of the miners.

In Weaver v. Iselin, 161 Pa. 386, 29 Atl. 49, the trial judge, in a charge declared to be correct, ruled that the possession of a power to employ and discharge workmen—this not being a statutory duty of a mine boss—placed him in the position of a vice

of the accumulation and existence therein of fire damp and dangerous gases, and to provide ample means of ventilation; failed to cause air to be circulated through the said entries, headings, and working places so as to dilute, render harmless, and carry off fire damp, gases, and vapors, but permitted the same to be ignited and to explode with great force and violence about deceased while employed in said mine, in the discharge of his duties, and whereby he was bruised, wounded, suffocated, and injured so much that he then and there died.

The evidence shows that on the day deceased sustained the injuries complained of he had been employed in the defendant's mine, in company with another miner, and that, after having blown down an amount

of coal, the two left the mine, intending to return during the night shift and load their coal. On the way out they met the mine boss, who says he warned them of the presence of gas in the mine, and that the last break-through next to the heading where they had been at work was not yet completed, and that they had better not go into the mine until it should be completed. The practice was to make break-throughs every 60 feet, as the work progressed. The miner who was with Lipscomb did not recollect that the mine boss warned them of the presence of gas. He admits, however, that the fact that the break-through was not completed was mentioned, and that they talked of the burning of a mule by gas near the same place but a short time before that.

principal, and enlarged the liability of the employer beyond that to which he is subject in the case of a mine boss employed under the provisions of the act, and performing only the duties prescribed therein.

In West Virginia the statute (Code 1891, p. 995, § 11, as amended, Code 1906, §§ 409, 410) requires the mine owner to employ a competent and practical inside overseer to be called the "mining boss," who shall be an experienced coal miner, or anyone having two years' experience in a coal mine. Under this statute it has been held that the master is not liable for injuries to miners caused by the negligence of the mining boss.

A mine boss is not a vice principal, as his duties are not delegated to him by his employer, but prescribed by statute. *Williams v. Thacker Coal & Coke Co.* 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107 (large fragment of rock fell from roof of drift), applying the principle that "where a person or corporation is compelled by law to employ an individual in a given matter, no liability attaches for his tortious or negligent acts." To the same effect: *Purkey v. Southern Coal & Transp. Co.* 57 W. Va. 595, 50 S. E. 755; *McMillan v. Middle States Coal & Coke Co.* 61 W. Va. 531, 11 L.R.A. (N.S.) 840, 57 S. E. 129; *Squillache v. Tidewater Coal & Coke Co.* 64 W. Va. 337, 62 S. E. 446.

In the *Williams Case* the court said: "The duty of the operator or agent is to employ a competent mine boss according to the provisions of the statute, and when he has done so he has discharged his duty to his employees in relation to those duties which the statute prescribes shall be performed by such mine boss; and the operator or agent is not liable for injuries arising from the negligence of the mine boss, who is not a vice principal, as his duties are not delegated to him by his employer, but are prescribed by statute; and he is a fellow servant, as in case of an injury to other employees through his negligence the master is not responsible."

As is shown in the opinion, *BRALLEY v.* 40 L.R.A. (N.S.).

TIDEWATER COAL & COKE CO. is in line with the earlier West Virginia cases.

In the *McMillan Case* it was held that a mine boss appointed pursuant to statute is not, merely from his position as such, the servant of the coal-mine owner outside his duties specified in the statute; and such owner is not responsible for his orders to servants of such owner, or his negligence resulting in injury to them.

In Colorado, a mine boss vested with no authority other than that prescribed by the coal mining act of 1885, which is the same as the earlier Pennsylvania act, is a fellow servant of the employees in the mine. *Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251 (mass of rock fell in a drift). The court said: "The mine boss is an individual, so designated by the statute, who must be employed by the mine owner, and put in charge, with reference to its safety and security. He has entire supervision of the whole system of the ventilation of the mine, likewise of its entries, drifts, and rooms, and all machinery and appliances which are used in its operations. He is bound to make his reports regularly to the mine inspector, and is subject to severe penalties for any violation of the act. Of necessity, this would include any failure on his part in the supervision, inspection, and care which the statute requires. . . . We are unable to see how it is possible to compel a company to employ a mine boss, upon whom is laid the responsibility and the duty by statute to attend to the mine and its safety as a place to work in, clothe him with full authority and power in this respect, and subject him to punishments and responsibilities in case of failure, and then hold the master responsible for his acts. He is in no sense the representative of the master, from whom the statute attempts to take entire control of this part of his mining operations. The master may supervise him, and he may, so far as may be, direct such changes to be made as his judgment indicates to be necessary; but when the statute put the control of this particular matter into the hands of the boss, and left to

Lipscomb alone returned to the mine that night, and the testimony of one of the miners is that Lipscomb fanned the gas out of the place where he was at work with his coat, and that the gas which burned Lipscomb was ignited from his lamp some 80 feet from where Lipscomb was employed, which was from 110 to 120 feet from the last break-through.

The plaintiff offered no other evidence showing any alleged negligence of the defendant, or of the mine boss or the fire boss, unless the fact that the last break-through had not been completed or brattice not used, as to which there is no specific allegation, be evidence of the alleged failure to provide ample means of ventilation. No evidence on either side showed negligence in

any other particular. And, contrary to the fact alleged in the declaration, the evidence showed employment and retention of a competent mine boss and fire boss, and that the means of ventilation required by the statute, unless the incompleting break-through and failure to use brattice should be regarded a part of such means, was ample for the purposes of the mine.

Unless this case can be differentiated from *Williams v. Thacker Coal & Coke Co.* 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107; *McMillan v. Middle States Coal & Coke Co.* 61 W. Va. 531, 11 L.R.A. (N.S.) 840, 57 S. E. 129; and *Squillace v. Tidewater Coal & Coke Co.* 64 W. Va. 337, 62 S. E. 446, they must control our decision. The only point of distinction attempted is that as the same

his judgment both the question of safety and the means to be used to that end, we are unable to see how he is, in any sense, either as vice principal or otherwise, the representative of the master, or how he can stand in any other relation to his collaborer than that of a fellow servant."

Under statutes which restrict the master's choice of employees to a certain person or to one of a certain class, we find a decided difference of opinion. In Illinois and Iowa it is held that this fact does not prevent the employee from being a vice principal or the master from being liable for his negligence.

In Illinois the statute (act of April 18, 1899) forbade the appointment of any but certified mine managers and examiners, imposed certain specified duties upon them, and made the mine owner liable for any wilful violation of the act, or any wilful failure to conform to its provisions. Under this act the mine manager and mine examiner have been held to be vice principals so as to render the mine owner liable for their negligence.

This rule has been assumed or expressly recognized in the following cases: *Donk Bros. Coal & Coke Co. v. Stroff*, 200 Ill. 483, 66 N. E. 29 (roof fell); *Riverton Coal Co. v. Shepherd*, 207 Ill. 395, 69 N. E. 921 (dust explosion); *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375 (failure to examine room); *Consolidated Coal Co. v. Shepherd*, 220 Ill. 123, 77 N. E. 133 (defective wall); *Athens Min. Co. v. Carnduff*, 221 Ill. 354, 77 N. E. 571 (explosion of gas; examiner failed to inspect); *Kellyville Coal Co. v. Bruzas*, 223 Ill. 595, 79 N. E. 309 (rule assumed, but no recovery allowed on the facts); *Davis v. Illinois Collieries Co.* 232 Ill. 284, 83 N. E. 836 (dust explosion); *Mertens v. Southern Coal & Min. Co.* 235 Ill. 540, 85 N. E. 743, affirming 140 Ill. App. 190 (defective roof); *Olson v. Kelly Coal Co.* 236 Ill. 502, 86 N. E. 88 (accumulation of debris); *Dunham v. Black Diamond Coal Co.* 239 Ill. 457, 88 N. E. 216, affirming 146 Ill. App. 140 (danger signals not displayed); *Aetitus v. Spring Valley Coal Co.* 246 Ill. 32, 138 Am. St. Rep. 40 L.R.A. (N.S.)

221, 92 N. E. 579 (fall of rock); *Donk Bros. Coal & Coke Co. v. Lucas*, 127 Ill. App. 61, judgment affirmed in 226 Ill. 23, 80 N. E. 560 (failure to furnish props); *Illinois Collieries Co. v. Haveron*, 137 Ill. App. 22 (dust explosion); *Hollingshead v. Wabash Coal Co.* 142 Ill. App. 641 (failure to mark dangerous place).

In *Fulton v. Wilmington Star Min. Co.* 68 L.R.A. 168, 66 C. A. 247, 133 Fed. 193, following the Illinois decisions, it was held that a mine owner is not exempted from liability for the negligence of his manager by the fact that he is forbidden by statute to employ anyone in such capacity but those who have received a certificate of competency from the state examiners. The judgment for the plaintiff was reversed by the United States Supreme Court, but solely for errors committed upon the trial.

The object of the mining act is to protect the health and persons of men employed in the mines of the state while they are in the mines; and to hold that the mine owner may shift his liability to any person employed by him as examiner or miner who holds a certificate of the state mining board is to lessen his responsibility and defeat in great part the beneficent purposes of the act. *Henrietta Coal Co. v. Martin*, 221 Ill. 460, 77 N. E. 902. The court rejected the contention of the mining company that it was not liable for the negligence of its certified officials, which was stated as follows: "Appellant first contends that, as it had in its employ and on duty in its mine a certified mine manager and a certified mine examiner at the time appellee was injured, it discharged its duty to appellee in relation to those duties which the statute prescribes shall be performed by the mine manager and mine examiner, and that it is not liable for injuries to the appellee arising from a wilful failure of the mine manager to deliver props, or for a wilful failure of the mine examiner to perform any duty required of him by the mining act. This is on the theory that the legislature has prescribed the duties which the operator owes to the miner in so far as examination

section (§ 409, Code 1906), which imposes upon the operator or agent of a coal mine the duty to provide and maintain ample means of ventilation also requires that, "as the working places shall advance, break-throughs for air shall be made every 100 feet in the pillars, or brattice shall be used," the operator of the mine is bound to the performance of the latter duty as well as the former, and is not excused from liability on account of the negligent performance of the latter duty by the mine boss, because, by § 410, the performance of that duty is specifically imposed on him. It is argued that the duty respecting break-throughs is a double duty, imposed upon the operator by the first section as well as the mine boss by the latter section, and that the doctrine of

fellow servantry applied in the cases cited can have no application to this case. In view of the construction heretofore placed by us upon this mining law, we see little force in the argument. So far as it is based upon the two provisions of § 409 alluded to, the same argument might be made with respect to the appointment of a fire boss and the duties imposed upon him by said section. We are required to read §§ 409 and 410 together. They pertain to the same subject-matter. Section 410 does not say that the operator or agent of the mine shall personally discharge the duty of making break-throughs, or the use of brattices, any more than it requires of him discharge of other duties thereby required and imposed on the fire boss; but § 410 specifically im-

and management of the mine is concerned, and that all that is required of the operator is that he should employ a manager and an examiner holding certificates from the state mining board, as provided by § 8 of the act in question, and that if he does so, and he has no notice, and the circumstances are not such as to put him on notice, that the employees are incompetent, negligent, or otherwise unfit to perform their duties, he is not liable for any injuries occasioned by any wilful violation of the mining act, or any wilful failure to comply with its provisions, on the part of the examiner or manager."

"It is not, however, contemplated by the statute that the mine owner shall be relieved of liability for an injury resulting to men working in his mine, in consequence of a dangerous condition in the mine of which he had actual notice by reason of the fact that he has not received notice of such condition through the channel of the report of his mine examiner. A mine examiner is a vice principal of the mine owner, . . . and actual notice to the mine examiner or the mine manager, of a dangerous condition in the mine, is notice to the mine owner of such condition." *Olson v. Kelly Coal Co.* 236 Ill. 502, 86 N. E. 88.

The wilful failure of the manager or examiner to observe the provisions of the statute is the wilful failure of the operator, even where the operator has no actual knowledge of the delinquency of the examiner or miner. *Davis v. Illinois Collieries Co.* 232 Ill. 284, 83 N. E. 836.

The courts have upheld the statute notwithstanding the mine owner was restricted in his selection of the employee of the members of a certain class.

In *Donk Bros. Coal & Coke Co. v. Lucas*, 127 Ill. App. 61, the appellate court said: "It may be noted that the statute does not restrict the operator in the exercise of any proper liberty in the selection of such employees. He had no right at common law to select any but competent persons for such service, and the presumption must be that all competent persons desiring such employment will be licensed ('certificated'); there- 40 L.R.A. (N.S.)

fore all competent persons who are willing to perform such service may be employed, and the operator may at any time discharge such employees for failure to perform any specified duty, or for any other reason, or for no reason, and employ others, or he may perform the duties himself in person, if he is able and competent to do so, and will procure the requisite certificate. The requirement of the statute is only that these duties shall be performed, and that they shall not be performed by other than a person whose competency is evidenced by the required certificate. The statute relieves the operator of a part of his common-law duty. It relieves him from the duty of making due inquiry as to the applicant's competency before employing him. The certificate is prima facie evidence of such competency, but it does not relieve the operator from responsibility for any part of his conduct not involving his competency, and not even for that, if the operator knew that for any reason he was in fact incompetent."

In *Fulton v. Wilmington Star Min. Co.* supra, after referring to the cases cited by counsel, the court said: "Some of these cases were under the pilotage laws, requiring that a ship nearing port should take on the first pilot who hailed the vessel, or be liable for full compensation for such pilot. The shipmaster's choice was thus limited, not to a class, but to an individual. This difference creates a substantial distinction between those cases and the case under consideration.

The constitutionality of the statute as thus construed was passed upon by the Supreme Court in *Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412, and it was held that the imposition upon mine owners, by the Illinois mining act of April 18, 1899, of responsibility for the defaults of mine managers and mine examiners, who are required by that act to be selected by the mine owners from those holding licenses issued by the state mining board created by such act, does not deprive them of their property without due process of law, in violation of U. S. Const. 14th Amend., where it is not

poses that duty upon the mine boss. True it is that the provisions of § 410 were made, as recited, to better secure the ventilation of coal mines, and to promote the health and safety of persons employed therein; yet we think that the purpose of the legislature, with that end in view, was that these officers, the mine boss and the fire boss, were to have no *respondeat superior* with respect to those duties specifically devolved upon them by the statute, but that they, within their several spheres, should be made the responsible agents, and be independent, and from under the control of the operator in the discharge of those duties, with authority given them by the statute to call upon and require of the operator that he provide them with the

means and materials for the proper performance thereof.

In consonance, therefore, with our previous decisions, we must hold the mine boss and fire boss fellow servants with the miner in the performance of the duties imposed upon them respecting the ventilation of the mine, including therein the duty of the mine boss to make break-throughs, and to use brattices for such ventilation.

In considering this case our attention has been called to the fact that the legislature of Illinois, in 1905, in re-enacting the mining laws of that state, made provisions therein similar to those in Pennsylvania and in this state, and that the supreme court of Illinois, in *Henrietta Coal Co. v. Martin*, 221 Ill. 460, 77 N. E. 902,

obligatory upon a mine owner to select a particular individual, or to retain one when selected, if found incompetent. It should perhaps be noted in connection with this case that it reversed the judgment for the plaintiff, but solely upon errors committed upon the trial.

"The fact that the proprietor, if he employs men to act in these capacities, is required to employ those who have obtained the certificate from the state mining board, is without significance. The purpose of that provision was, so far as possible, to guard against the possibility of the proprietor employing incompetent, intemperate, negligent, or disreputable persons, and not to enable the operator to shift to his employees his responsibility for the management of the mine." *Henrietta Coal Co. v. Martin*, supra.

It has been pointed out that the statutes of this character do not require the mine owner to keep the certified employee in his employ, and the certificate given by the state board is not conclusive as to the competency of the holder.

In *Consolidated Coal Co. v. Seniger*, 179 Ill. 370, 53 N. E. 733, where the competency of a stationary engineer was in question, the court said: "As to the other objection, it seems defendant was prohibited by law from employing a hoisting engineer who did not have a certificate obtained from the state board of mine examiners, and Rasor had such a certificate. It is argued that by this statute the law has provided the only means by which a hoisting engineer's abilities can be ascertained, and that the efficacy of the certificate for that purpose cannot be disputed. While the law required defendant to select its engineer from a certain class, it did not make it obligatory upon it to employ Rasor, or to retain him in its employment. It would not have been a violation of any law to have discharged him if he was found to be incompetent. If defendant had been compelled to employ him, there would, of course, be no element of negligence on its part in doing so. and it could not be held liable for a violation of the law on account of his unfitness. Such 40 L.R.A. (N.S.)

a certificate does not conclusively establish the competency of the person, but may be considered, with other evidence, upon that question."

And see *Wilmington Star Min. Co. v. Fulton*, supra.

The same view has been taken in Iowa, where the statute requires the employment of a licensed pit boss.

In *Poli v. Numa Block Coal Co.* 149 Iowa, 104, 33 L.R.A. (N.S.) 646, 127 N. W. 1105, it was held that requiring a mine operator to employ only licensed pit bosses does not relieve him from liability for the negligence of his employees so far as it pertains to the performance of the nondelegable duties of the master. The court said: "The licensed engineer and licensed pit boss, so far as their work or duty pertain to the nondelegable obligations of the master, are none the less his representatives because the law requires them to possess certain prescribed qualifications. . . . The law cited by counsel, which compels the master of a ship to employ a licensed pilot, and under which there have been decisions which relieve the shipowner from the consequences of the pilot's negligence or incompetence, is not in point. If the shipowner sends to sea a vessel of such defective construction that it sinks while it is being taken out of the harbor, no one would contend that he is relieved from responsibility for his negligence because a licensed pilot was in charge when the disaster occurred."

But the contrary rule prevails in a number of other jurisdictions.

In Pennsylvania the rule is that inasmuch as by the act of June 2, 1891, Pub. Laws, 176, the state requires the employment by the operator of mines of a certified foreman, and invests such foreman with the power to compel compliance with his directions so far as they relate to the safety of the employees in the mine, an employer cannot be held liable for the mistakes or incompetence of the state's representative. This act is practically the same as the act of May 15, 1893, Pub. Laws, 52, which relates solely to the bituminous mines,

refused to follow our decisions and the decisions in Pennsylvania, in construing the Illinois statute. We have considered those cases, as well as the later cases of the same court, together with the decision of the Supreme Court of the United States (205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412) in the case of *Wilmington Star Min. Co. v. Fulton*, originating in Illinois and affirming the judgment below. This latter case went to the Supreme Court upon a constitutional question, and, of course, that court did not undertake to give its own construction of the statute in question. It simply followed the construction given by the supreme court of Illinois, and determined from it whether the statute, as alleged, was in conflict with the 14th Amendment to the Federal Constitution. No consideration of these cases induces us to depart from our former decisions.

The Pennsylvania rule has been asserted in the following cases which arose under one or the other of the above acts: *Durkin v. Kingston Coal Co.* 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237 (way allowed to become defective); *Golden v. Mt. Jessup Coal Co.* 225 Pa. 164, 73 Atl. 1103 (props set too near track); *Dempsey v. Buck Run Coal Co.* 227 Pa. 571, 76 Atl. 745 (defective ventilation); *D'Jorko v. Berwind-White Coal Min. Co.* 231 Pa. 164, 80 Atl. 77 (explosion of gas); *Reeder v. Lehigh Valley Coal Co.* 231 Pa. 563, 80 Atl. 1121 (obiter); *Szotak v. Berwind-White Coal Min. Co.* 36 Misc. 98, 72 N. Y. Supp. 647 (defects in crossing over haulage way).

Although a mine foreman appointed in accordance with the statute is a fellow servant, yet if the master intrusts him with the duties of superintendence, the master will be liable for his negligence while acting as superintendent. *Hood v. Connell Anthracite Min. Co.* 231 Pa. 647, 81 Atl. 56; *Wolcott v. Erie Coal & Coke Co.* 226 Pa. 204, 75 Atl. 197.

The attempt in the statute to make the master liable for the acts of the certified foreman was held unconstitutional. (*Durkin v. Kingston Co.* 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237, where it was held that the imposition of liability on a mine owner by the act of 1891, art. 17, for the failure of a certified foreman whom he is compelled to employ, and with whose acts he cannot interfere, and whose duties are prescribed by the act, to comply with those duties, is unconstitutional and void).

A similar view has been taken in Tennessee, where the statute made the employment of a certified foreman compulsory (Acts 1903, chap. 237). *Sale Creek Coal & Coke Co. v. Priddy*, 117 Tenn. 168, 96 S. W. 610, 10 Ann. Cas. 745.

In distinguishing *Smith v. Dayton Coal & I. Co.* 115 Tenn. 543, 4 L.R.A. (N.S.) 1180, 92 S. W. 62, cited supra, decided under an 40 L.R.A. (N.S.)

These conclusions render it unnecessary for us to consider specifically any other questions presented and argued here. They are all answered by our conclusions on the main question.

We are therefore of opinion to reverse the judgment below, award the defendant a new trial, and to remand the case to the Circuit Court for that purpose.

Williams, J., dissenting:

I am unable to agree with my associates in so much of the foregoing opinion as holds that the mining boss is not a vice principal, or agent, of the operator in so far as the question relates to the performance of those duties which are expressly enjoined by statute upon the operator, as well as upon the mining boss. Section 409, Code 1906, makes it the duty of "the operator or agent of every coal mine . . ."

earlier act, the court said: "Not only is the employment of a certificated mine foreman made compulsory upon the owner under a penalty for failure to do so, but the control of the mine foreman, in respect of the duties set out in the act, is taken from the owner and the foreman's faithful discharge of duty secured by the imposition of penalties. Under such a statute there is no ground on which to place the liability of the owner for the negligence of the foreman in respect of his failure to discharge the duties referred to."

The statute permitted a mine to be operated for a period not to exceed thirty days without the certified mine boss, and in a Federal decision construing the act it was held that an unlicensed mine boss acting during such period does not have the standing of a certified boss; and consequently the mine owner is liable for injuries resulting from his failure properly to inspect. *Cumberland Coal & Coke Co. v. Gray*, 82 C. C. 87, 152 Fed. 939.

In Michigan, under a statute requiring every stationary engineer to be licensed, and every new boiler inspected before being put in, it was held that, in the absence of actual knowledge of an engineer's incompetency, the master is not liable for injuries due to defects in a boiler which would have been discovered by a reasonable inspection, where the engineer was present at the inspection. *Vincent v. Clements*, 150 Mich. 406, 114 N. W. 330. After alluding to the primary duty of the master to furnish reasonably safe appliances, the court said: "This primary duty is modified, however, in the case before us by the requirements of the ordinance, the character of the services to be rendered by the engineer, and the duties owing by him to the defendants. The defendants were not at liberty to commit to whomsoever they pleased the care and operation of their boiler, but were limited in their choice to those whose qualifications for the position

to provide and maintain "ample means of ventilation," and specifies what the means of ventilation shall be, one of which is break-throughs in the wall, or brattice. This, in my opinion, is a nonassignable duty, and, notwithstanding the statute (§ 410) enjoins the performance of the same duty, upon the mining boss, I do not think the legislature thereby intended that the operator should be relieved from performing it also, or from seeing that it is done. If he chooses to intrust the performance of this joint duty wholly to the mining boss, he thereby makes him his agent for that purpose. I do not deny that, in the performance of those duties enjoined solely upon the mining boss, he is properly regarded as a fellow servant with the miner; but in relation to the negligent act which caused the death of plaintiff's intestate, the failure to make break-throughs

not more than 100 feet back from the heading, or to use brattice, so as to properly ventilate the heading, it was the joint negligence of both operator and mining boss, because the statute expressly makes it the duty of both to do the act. To my mind there is no escape from this conclusion. A failure to make break-throughs not less than 100 feet back from the heading, or to use brattice instead, is negligence *per se*, because the statute expressly requires it to be done. The statute is intended to define what is a reasonably safe place in which to work, as applied to coal mines, and imposes upon the operator a nonassignable duty. Section 410 was not intended to relieve him, but was intended to give greater security to the miners. The making of break-throughs, or the use of brattice, is an essential means of maintaining a proper ventilation. Without one or the other

had been determined by the official boiler inspector of the city, and who held his license certifying that they were 'competent to handle boilers with safety to life and property.'

In England it has been held that the mere fact that an act of Parliament required the owners of a colliery to employ a certified manager did not make such manager any the less a servant of the company, and consequently a fellow servant of the other employees. *Howells v. Landore-Siemens Steel Co.* 44 L. J. Q. B. N. S. 25, L. R. 10 Q. B. 62, 32 L. T. N. S. 19, 23 Week. Rep. 335. This decision is based upon *Wilson v. Merry*, L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, 19 Eng. Rul. Cas. 132, and the argument would be rejected by many at least of the American courts.

Under the decisions of the United States Supreme Court, no action can be maintained at common law against the owner of a vessel for the fault of a compulsory pilot. *Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831. See also *The Joseph Vaccaro*, 180 Fed. 272; *Crisp v. United States & A. S. S. Co.* 124 Fed. 748. Of course, this would include actions for personal injuries received by seamen employed on the vessel. A different rule prevails in admiralty, but that presents a different question.

It may not be out of place at this point to call attention to some other cases which, although not directly in point upon the question here discussed, may be of value because of the somewhat analogous situation presented.

Where a superintendent or any other servant is selected not by the master, but by the servants, either directly or through the medium of a labor union, the master is not liable for negligence of such superintendent or superior servant.

A mine owner is not liable for the negli-

gence of a shot firer who was hired by the miners themselves under a contract with the mine owner. *Edwards v. Lam*, 132 Ky. 42, 119 S. W. 175. The court said: "There is not a liability on the mine owner as to negligence in failing to control the time and manner of shooting in the mines when, by an agreement between the mine owner on the one side and all the miners on the other, the former had not the duty or right to control the matter at all, but it was controlled by the men themselves."

A stevedore is not liable for the negligence of longshoresmen or screwmen in his employ, where he by a contract with his employees was not free to select whom he chose, but was compelled to take the men furnished to him by labor organizations. *Farmer v. Kearney*, 115 La. 722, 3 L.R.A. (N.S.) 1105, 39 So. 967. The court said: "When the workmen delegate to a labor organization which they have joined (and to others in privity with their own organization) the right of selection and superintendence, they agree to accept the membership of their fellow workman in those organizations, and the action of those associations, *ipso facto*, as a good and sufficient guaranty to them for their individual safety and protection, so far as the contractor is concerned. If they deem membership in organizations as conferring benefits upon them, they cannot accept the benefits and repudiate the resulting legal disadvantages."

Likewise it has been held that an employer is not liable to his employee for injuries caused by defective materials used, where the master did not have a free choice of the selection of the materials. *McCall v. Pacific Mail S. S. Co.* 123 Cal. 42, 55 Pac. 706 (contractor held not liable for injuries to his employee due to defective materials furnished by the master under the contract between the master and the contractor).

W. M. G.

there could be no ventilation. They are necessary to the circulation of air, and circulating air is essential to the health and safety of the miner. Without air passages the fan would be a useless contrivance. Without a circulating channel the fan would only serve to condense and hold the air in the working places, and prevent the escape of the dangerous gases. It would be like blowing air into a bottle.

Mr. Thompson, in his work on Negligence (vol. 4, § 4206), in commenting on such statutes as those in Pennsylvania, Indiana, and West Virginia, which require the operator to employ a mining boss, says: "The effect of such a statute is to prescribe the duties owing by the master, and the fact that the mine boss is required to be employed to perform those duties does not relieve the master from the obligation of performing them or of seeing that they are performed."

I have carefully considered our own cases on the point. In *Williams v. Thacker Coal & Coke Co.* 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107, this court laid down the proposition that, when the operator has employed a competent mining boss, "he has discharged his duty to his employees in relation to those duties which the statute prescribes shall be performed by such mining boss, and the operator or agent is not liable for injuries arising from the negligence of the mine boss." I think this proposition is too broad to be sound in principle. It ought to be qualified by limiting its application to the neglect of the mining boss in the performance of those duties which are not also expressly enjoined upon the operator. The facts in that case show that plaintiff's intestate was crushed and killed by the falling of slate in the mine, and by reference to the statute it will be seen that § 410 makes it the express duty of the mining boss to see "that all loose coal, slate, and rock overhead in the working places and along the haulways be removed or carefully secured so as to prevent danger to persons employed in such mines"; but that statute does not enjoin this duty upon the operator. Therefore, unlike the provision in reference to the making of break-throughs 100 feet apart, or of using brattice to properly ventilate the face, it is not a double duty enjoined upon both the operator and the mining boss. Consequently the neglect of the mining boss to carefully inspect the roof would not be the neglect of the operator, but would be the negligent act alone of the mining boss, who, as far as such act is concerned, is a fellow servant. I think that case was properly decided; but I do not think the facts warranted so 40 L.R.A. (N.S.).

broad and unqualified a statement of the principle of law as was therein made.

In *McMillan v. Middle States Coal & Coke Co.* 61 W. Va. 531, 11 L.R.A. (N.S.) 840, 57 S. E. 129, plaintiff was injured by the explosion of dynamite caps which he had been directed by the mine boss to go to a box and get and carry to a fellow workman. The mining boss was there properly held to be a fellow servant of the man injured.

I think the rule was again stated too broadly in the fourth point of the syllabus of the case of *Squilache v. Tidewater Coal & Coke Co.* 64 W. Va. 337, 62 S. E. 446. *Squilache* was burned by the explosion of gas in the mine, and claimed that the presence of the gas was due to the want of proper ventilation; but just what particular act of negligence on the part of the operator plaintiff complained of does not appear. It would seem from a reading of the case that *Squilache* claimed that the presence of gas in dangerous quantities was sufficient of itself to show a want of proper ventilation and the incompetency of the fire boss. It was further claimed that the stoppage of the large fan on the outside of the mine, on the day previous to the accident, was responsible for the presence of the gas, and that these facts established negligence on the part of the operator; but it does not appear in that case that break-throughs were not made at the required distance, or that brattice was not used; nor does it appear that the injury was the result of the failure of the operator to provide the means of ventilation required by the statute. It is true that § 409 makes it the duty of the operator to keep the fan going, as well as to provide channels for the circulation of the air driven by the fan; but it does not appear that it was not necessary to stop the fan for the purpose of repairing its machinery, and the statute expressly allows it to be stopped for this purpose and for the purpose of any other work in the mine making it necessary to stop it. Neither does it appear how long it was stopped, or whether the stoppage was the proximate cause of the injury. In short, it does not appear that the operator failed to perform any of those acts which are expressly enjoined upon him by the statute. It may have been that the mine generated gas in such large quantities that the circulation would not have carried it away fast enough to prevent the explosion, notwithstanding the break-throughs may have been made as required by law. In such case it was clearly the duty of the mining boss to cause the break-throughs to be made nearer together than 100 feet, and in this matter

he is vested with a discretion. The neglect of the mining boss to do more than the statute expressly required, in order to secure good ventilation, would be his own neglect, and not that of the operator.

All of the above cases are clearly distinguishable from the present one, and should not control it. In neither one of them was the question presented that is directly involved in the decision of this case, which is: Did the legislature intend to relieve the operator from liability for failure to provide and maintain certain specified means of ventilation, by making it also the duty of the mining boss to see that such means of ventilation are used? I think clearly not, and, if the operator intrusts the performance of those double duties solely to the mining boss, he thereby makes him, for that purpose, his agent or vice principal.

Section 410, which provides for the employment of a mining boss and defines his duties, is very significant in the language used in the beginning of the section. After defining the duties of the operator in § 409, § 410 begins: "In order to better secure the proper ventilation of every coal mine and promote the health and safety of persons employed therein, the operator or agent shall employ a competent and practical inside overseer, to be called 'mining boss,' etc. This language clearly implies that the operator is not relieved of those duties which the previous section enjoins upon him, but that the legislature intended to provide an additional safeguard and protection to the miner, whose labor, under the most favorable conditions, is known to be of the most hazardous nature, by charging the same duties, and many more besides, upon the mining boss. This is the view taken by the appellate court of Indiana in the case of *Linton Coal & Min. Co. v. Persons*, 11 Ind. App. 264, 274, 39 N. E. 214, 217, in construing a statute similar to our own, which makes it the duty of both the operator and the mining boss to do certain things, and to see that they are done. The court in its opinion (on page 274) says: "This duty the employer cannot delegate so as to escape liability. No matter by whom the duty is performed, the employer is responsible if it is negligently performed, and from that negligence injury results. The statute cited was not intended to relieve the employer of this responsibility. The purpose was to provide an additional safeguard against injury to employees in mines by requiring the operator of the mine, through the mining boss, to give special attention to the safety of the mine as a working place. It was not intended to absolve the owner or

operator from liability when he employed a competent mining boss and delegated the duty to him of making safe the place where he required his employees to work." The same interpretation was given to a similar statute by the supreme court of Illinois, in *Henrietta Coal Co. v. Martin*, 221 Ill. 460, 77 N. E. 902.

Our statute was correctly interpreted by this court, I think, in the case of *Graham v. Newburg Orrol Coal & Coke Co.* 38 W. Va. 273, 18 S. E. 584. That case has not been expressly overruled by any subsequent decision, and I am unable to see why the law as therein expressed is not applicable to the present case. Point 1 of the syllabus states the law as follows: "It is the duty of the operator of every coal mine to provide ample means of ventilation, and to cause air to be circulated through the headings and working places, so as to dilute, render harmless, and carry off dangerous and noxious gases," etc. The statute, as it then was, required the operator to see that break-throughs were made, or that brattice was used so as to keep the working places well and properly ventilated; and by the same act, as amended in 1901 (Acts 1901, p. 228, chap. 106, § 10), he is required to do the same thing, except that by the amendment these break-throughs are required to be made every 100 feet, or brattice to be used, thus making his duty in this regard more specific. I am supported in my view of what is a proper construction of the statute by the sound and forceful reasoning of Brannon, J., found on page 275 of the opinion. I cannot see that the legislature has shown any less solicitude for the safety of the miner by the amendment of the act. I rather think it has shown more.

It does seem to me that any other construction of the statute than what I seek to give it would relieve the operator of liability from almost all acts of negligence in the ventilation and operation of the mine, and would serve to abolish, almost entirely, the doctrine which is as old as the common law itself, and which is, with few exceptions, recognized in every jurisdiction where the English common law prevails, requiring the master to furnish a reasonably safe place for his servant to work, and would also tend to encourage negligence and indifference on the part of the operator concerning the health and safety of his employees. Our statute demands no greater qualification for a mining boss than that he shall be a citizen of the state, and shall have had three years' experience, in a coal mine. Can it be possible that the legislature meant that, if an operator should employ a person of such

limited qualifications, and should turn over to him the operation and ventilation of his mine, he should thereby be relieved from all liability on account of injuries resulting from his negligence in failing to provide and maintain the means of ventilation expressly enjoined by the statute, however gross? I cannot think so. I do not think the duties imposed by statute upon the operator are at all burdensome, or difficult to perform; but, on the contrary, I think they are simple and reasonable, and the operator should be held to a strict compliance with them.

I have thus expressed my views at some length, because I am led to believe, from a careful reading of our own decisions, that the point which I have discussed has never fairly arisen in any other case in this court, and that it is still an open one. I admit that it is settled, and properly settled, that for many purposes the mining boss is a fellow employee with the miner; but I do not think it is settled that he is a fellow employee in relation to the performance of those duties which are expressly made the duty of both the operator and the mining boss. As to such duties, the correct view, in my opinion, would be to regard the mining boss as the agent, or vice principal, of the operator, because, as to them, he is performing a nonassignable duty.

I would affirm the judgment of the lower court.

Petition for rehearing denied January 11, 1910.

WEST VIRGINIA SUPREME COURT OF APPEALS.

A. B. FARQUHAR COMPANY, Limited,

v.

CHARLES E. DE HAVEN et al., Pliffs. in Err.

(— W. Va. —, 75 S. E. 65.)

Judgment — on judgment note — absence of process.

A judgment purporting to be by confession of attorneys in fact, on a note, com-

Headnote by MILLER, J.

Note. — Validity at common law of warrant of attorney to confess judgment.

This note being limited to the question as to the validity at common law of a warrant of attorney authorizing a confession of judgment, cases where there is a statute permitting and regulating such warrants or absolutely prohibiting them have been excluded. The question of the validity of 40 L.R.A.(N.S.)

monly called a judgment note, on warrant of attorney therein, purporting to empower and authorize the payees or agent, or any prothonotary or attorney of record, to appear for the makers and in their names, and confess judgment against them in favor of the payees, for the amount, with costs, and release of errors, entered by the clerk, in the clerk's office, in vacation, without process executed on defendant and declaration filed, is illegal and void on its face; and any execution issued thereon is also without warrant of law, illegal and void, and on motion of defendants should be quashed.

(Robinson, J., and Brannon P. dissent.)

(April 2, 1912.)

ERROR to the Circuit Court for Berkeley County to review a judgment denying defendants' motion to quash an execution on a judgment in plaintiffs' favor, entered against defendants in vacation. Reversed.

The facts are stated in the opinion.

Messrs. J. O. Henson and Allen B. Noll for plaintiffs in error.

Messrs. Martin & Seibert for defendant in error.

Miller, J., delivered the opinion of the court:

The judgment below to which this writ of error applies denied the motion of defendants to quash the execution on a judgment in favor of plaintiffs, entered against them, in vacation, by the clerk of the circuit court on September 12, 1910.

The entire record of the judgment as presented here is as follows:

"This day came the defendants, by Martin & Seibert, their attorneys in fact, and say that they cannot gainsay the plaintiffs' action against them, but that they are justly indebted to the said plaintiffs in the sum of \$527.07, with interest thereon from this date and the costs of this action, on account of two certain notes, one dated August 30th, 1909, due six months after date, and the other dated August 30th, 1909, due twelve months after date.

"It is therefore considered that the plaintiffs, Arthur B. Farquhar, Wm. F. Farquhar, and Frances Farquhar, general partners, trading and doing business as A. B. Farquhar Company, Ltd., do recover of and

warrants of attorney given by married women, infants, or incompetent persons, and questions relating to the consideration for, or of the operation or sufficiency of, warrants of attorney, are also excluded.

As to the validity in other states of judgment upon warrant of attorney, see note in 3 L.R.A.(N.S.) 449. As to law governing warrant of attorney, see note in 38 L.R.A.(N.S.) 814

from the said defendants, Charles E. Dehaven and H. L. Dehaven, the sum of Five Hundred and Twenty-Seven Dollars and Seven Cents (\$527.07), with interest from this date until paid, and their costs in this behalf expended. Teste: L. De W. Gerhardt, Clerk Circuit Court of Berkeley County, West Virginia.

"Memo: Said notes were filed with the said clerk upon the day of the entry of said order, and are in the words and figures following:"

The notes referred to, of which one is copied in the record, are judgment notes, in form like those in use in Pennsylvania, bearing 6 per cent interest, and providing for a 10 per cent attorneys' fee in addition to all other necessary expenses of collection

after maturity. They also contain waiver of presentment and protest, homestead and exemption rights, real and personal, and other rights, and also the following material provision: "And we do hereby empower and authorize the said A. B. Farquhar Company, Limited, or agent, or any prothonotary or attorney of any court of record, to appear for us and in our name to confess judgment against us and in favor of said A. B. Farquhar Company, Limited, for the above-named sum with costs of suit and release of all errors, and without stay of execution after the maturity of this note."

The motion to quash assigned as the only ground therefor that the judgment is void, the clerk being without authority to enter

Warrants of attorney to confess judgment were in use in England from a very early date, as is evidenced by the statement in 3 Bl. Com. 397, that "it is very usual, in order to strengthen a creditor's security for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment . . . in an action of debt to be brought by the creditor against the debtor for the specific sum due; which judgment, when confessed, is absolutely complete and binding;" and no English case has been found that has held such an act invalid.

In this country, in many jurisdictions, warrants of attorney to confess judgment are authorized by statute, and while there are a few cases which, in the absence of statutory authority, have held such warrants valid, *A. B. FARQUHAR Co. v. DE HAVEN*, is in accord with the weight of opinion that unless so authorized they are void, as against public policy.

Thus, in *First Nat. Bank v. White*, 220 Mo. 717, 132 Am. St. Rep. 612, 120 S. W. 36, 16 Ann. Cas. 889, a warrant of attorney based on the common law, to waive issuing a service of process and confess judgment, and to waive and release all errors in said proceedings and judgment, and all proceedings, appeals, or writs of error thereof, was held invalid as against the public policy of the state. It was said: "The field for fraud is too far enlarged by such an instrument. Oppression and tyranny would follow the footsteps of such a diversion in the way of security for debt. Such instruments procured by duress could shortly be placed in judgment in a foreign court and much distress would result therefrom."

Such agreements are iniquitous to the uttermost and should be promptly condemned by the courts until such time as they may receive express statutory recognition, as they have in some states." *Crim. v. Crim.* 162 Mo. 544, 54 L.R.A. 502, 85 Am. St. Rep. 521, 63 S. W. 489, is distinguished from *First Nat. Bank v. White*, as being a case which deals only with the question as to whether full faith and credit should be given to an Ohio judgment had 40 L.R.A. (N.S.)

upon a contract of like character when sued upon in Missouri.

And so, in *McCrairy v. Ware*, 6 Kan. App. 155, 51 Pac. 293, a stipulation in a note, authorizing any attorney whom payee might designate to appear for the maker and confer upon the court jurisdiction without the maker's knowledge, was held invalid as violating the very terms and spirit of the laws of the state. The court said: "It creates no special agency in anyone for the purpose designated, but leaves it open for the plaintiff, filing his petition, to designate someone as the special agent of the defendant simply to enter an appearance and give the court jurisdiction. It in effect results in giving the defendant no day in court. It would open the door to fraud and oppression, and make the courts involuntary parties thereto."

And in *Carlin v. Taylor*, 7 Lea, 666, it was said that a judgment rendered under a warrant of attorney empowering "any attorney of record within the United States or elsewhere to appear for me and confess judgment, etc.," would be invalid.

In *Stretch v. Hancock*, 2 N. J. L. 207, a judgment by a justice on a judgment note, without process and proof, was reversed as illegal. The court said: "The defendant must be brought into court in the usual way and the same proceeding had as in other cases of written contracts."

And a confession of judgment upon a warrant of attorney contained in a lease was held unauthorized and void in *Burns v. Nash*, 23 Ill. App. 552, and *French v. Miller*, 126 Ill. 611, 2 L.R.A. 717, 9 Am. St. Rep. 651, 18 N. E. 811.

And also in *Ball v. Poor*, 81 Ky. 26, it was held that a power of attorney to enter appearance in a cross action, and given subsequently to the filing of the petition, while not within the letter of the statute providing that "powers of attorney to confess judgment or to suffer judgment to pass by default or otherwise, and every release of errors given before an action is instituted, are declared void," yet it is within the spirit of the statute, and is void as against public policy.

the same upon a judgment note, as was done, without suit and service of process.

As both sides agree, the question presented is one of first impression in this state. We have no statute, as has Pennsylvania and many other states, regulating the subject. In the decision we are called upon to render, we must have recourse to the rules and principles of the common law, in force here, and to our statute law, applicable, and to such judicial decisions and practices in Virginia, in force at the time of the separation, as are properly binding on us. It is pertinent to remark in this connection, that after nearly fifty years of judicial history in this state no case has been brought here involving this question,—strong evidence, we think, that such notes, if at all, have never been in very general use in this commonwealth. And in most states where they are current the use of them has grown up under statutes authorizing them, and regulating the practice of employing them in commercial transactions. In the early colonial history of Virginia, they seem to have had considerable recognition, but their use was abolished, and prohibited by penal statutes, enacted in 1744, and they did not again come into

use until that statute was repealed by the Code of 1849. 5 Hen. Stat. at L. p. 240, §§ 4 and 5; § 12, chap. 76, Code 1819; Revisors' Code, 828, note. This history is pretty thoroughly covered by the arguments of counsel, and the opinion of Judge Moncure in *Insurance Co. v. Barley*, 16 Gratt. 363, Anno. 144. We do not wish to be understood, however, as acquiescing in Judge Moncure's exposition of the common law on the subject, vouched in support of the early colonial practices so severely condemned by the statute of 1744. It is significant that this statute does not refer the practice condemned to the common law as its source. Section 4 thereof recites: And "whereas a practice has of late been introduced, of taking bonds, commonly called judgment bonds, with condition, for the payment of money, and a general power to any attorney, to appear, and suffer judgment, etc. . . . ; which practice must be attended with ill consequences, debtors having no previous notice of the time and place of rendering such judgments, whereby they are deprived of an opportunity of making discounts appear against the bond, and are first put to unnecessary law charges, and then obliged to enter into expensive chan-

On the other hand, the validity of such warrants to confess judgment was upheld in *Bush v. Hanson*, 70 Ill. 480, where the court said: "A warrant of attorney to confess judgment is a familiar common-law security. The entry of judgment by a cognovit thereunder is a proceeding according to the course of the common law, which courts have ever entertained, in the ordinary exercise of their authority as courts of general jurisdiction. The fact that the statute has regulated the mode of procedure does not convert the proceeding into one of such a special statutory character that the same presumptions do not obtain as in the case of ordinary judgments of superior courts of general jurisdiction."

And in *Cross v. Moffat*, 11 Colo. 210, 17 Pac. 771, it was claimed that a judgment rendered by virtue of a warrant of attorney embodied in a promissory note should be set aside because the instrument did not authorize the confession as made in the cognovit at the time the proceeding took place. The court said: "There is nothing in our statutes that prohibits the procedure adopted in this case. It is fully recognized and generally pursued at common law; and the sections of the Code providing a mode for obtaining judgments without action do not inhibit pursuing this common-law method when authorized by contract of the parties themselves."

And also in *McClish v. Manning*, 3 G. Greene, 223, a judgment was rendered upon a promissory note before the date upon which it fell due, under authority of warrant of attorney embodied in the instru-

ment, and it was contended that the judgment was invalid because the statute regulating such action provided that any person is authorized to confess a judgment by himself or his attorney only for a debt bona fide due. But the court said: "This statute is merely cumulative on common-law principles in relation to judgments by confession. The same general rules of law which prevailed before this enactment are still applicable to such proceedings. Judgments by confession are encouraged at common law as an amicable, easy, and cheap way to settle and secure debts, and as the cognovit voluntarily acknowledges the justice of plaintiff's claim and authorizes a judgment to be rendered at the next term of court, we see no reason why this intention of the parties should not be enforced."

Parties can confess judgment by a special power of attorney as well as in person. *Toledano v. Relf*, 7 La. Ann. 60.

And in *Insurance Co. v. Barley*, 16 Gratt. 363 (cited at length in *A. B. FARQUHAR Co. v. DE HAVEN*), it was held that a power of attorney to confess judgment, executed before action was brought, was valid.

And while it seems that judgments rendered on a note in accordance with the authority given by power of attorney embodied in the note were formerly as valid in Alabama as if rendered on regular service (*Hutchinson v. Palmer*, 147 Ala. 517, 40 So. 339; *Hodges v. Ashurst*, 2 Ala. 301), (in *Jemison v. Freed*, 161 Ala. 598, 50 So. 52) it was said that under § 4296, Code 1907, such powers are now void.

J. H. B.

cery suits for relief." To remedy whereof, etc.

The substantial features of § 5 of this act are embodied in § 12, chapter 76, Revised Code 1819, reading as follows: "If any attorney, or other person practising as an attorney, shall presume to appear under any power of attorney, made before action brought, for confessing or suffering judgment to pass by default or otherwise, for any defendant in any court of record in this commonwealth, such attorney shall, for every such offense, forfeit and pay \$1,500 to such defendant, for his own use, to be recovered, with costs, by action of debt or information, in any court of record; and, moreover, shall be liable to an action for damages, at the suit of the party grieved." It was this section which, on recommendation of the Revisors, was omitted from the Code of 1849, repealing it, and by which repeal it is argued the common law was thereby restored. We find no justification, either in the history of the common law or elsewhere, for the argument presented here, that the repeal of the statute of 1744 by the Code of 1849, revived a local practice not known to the common law, and which the repealing act itself recites had "of late been introduced." That the common law, so far as affected by the act of 1744, was restored by its repeal, we concede, but farther than that we are unwilling to go.

In *Insurance Co. v. Barley*, supra, the latest Virginia case which can be said to have binding force upon us, suit had been brought, but it does not distinctly appear whether or not the process had been executed. The grounds assigned for the motion to set aside the judgment were: (1) That the power of attorney was executed before suit brought; (2) that an attorney in fact, not an attorney at law, could not confess judgment for his principal; (3) that if an attorney in fact could not confess judgment in open court, only the defendant himself could confess judgment in the clerk's office.

The only points of decision in that case, pertinent in this case, are covered by points 2, 3, and 4 of the syllabus, as follows: (2) "A power of attorney to confess a judgment may be executed before the action is brought." (3) "A judgment may be confessed either in court or in the clerk's office, by an attorney in fact, though the attorney is not a lawyer." (4) "When a statute changing the common law is repealed, the common law is restored to its former state." The fourth point we concede; and limited by the rules and principles of the common law, as modified by our statutes, § 43, chapter 125, and § 2, chapter 134, Code 1906, we do not know that any particular fault

can be found with the general character of points 2 and 3. The Revisors of the Code of 1849, in a note, as a reason for omitting said § 12, as of no value, say: "We do not perceive any good reason why a power of attorney to confess judgment should not be lawful before a writ is sued out as well as after."

By gradual steps, however, the supreme court of appeals of Virginia, in subsequent decisions, have further innovated on the common law. In *Brockenbrough v. Brockenbrough*, 31 Gratt. 580, 599, it is held that a judgment rendered in court, upon the confession of the defendant in person, is not subject to collateral attack for lack of process. The judgment in that case, however, was not predicated on the Virginia statute—the same as our § 43, chapter 125, supra—permitting a defendant in vacation to confess a judgment or decree in the clerk's office. This court held practically the same thing in *Hunter v. Stewart*, 23 W. Va. 549. But in the later case of *Shadrack v. Woolfolk*, 32 Gratt. 709, it was decided that a judgment confessed by the defendant in the clerk's office in vacation is not the subject of collateral attack by other creditors. By *obiter dicta*, the court however, ventured the opinion that if it plainly appeared that the judgment was confessed without a writ or previous process, it would not on that ground be void,—citing the *Brockenbrough* Case, which was a confession in court by the defendant in person. The court said it perceived no substantial difference between the two cases. In *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450, relying on the two cases just referred to, and in *Manson v. Rawling*, 112 Va. 384, 71 S. E. 564, the court went still farther, in holding in the first case that a judgment by confession by an attorney in fact, in the latter, by defendant in person, in vacation, in the clerk's office, without process, was not subject to collateral attack, and it may be observed that the farthest any of these Virginia cases have gone, literally, at least, is to hold such judgments not subject to collateral attack.

The case we have here, on the motion to quash in one of the collateral attack, and to sustain the motion and reversed the judgment below, we must hold the judgment void upon its face. Is it so void? As already indicated, the question must be answered practically upon the common-law rules and principles. We have no statute in any way governing the subject, except § 43, chapter 125, of the Code, providing for a confession by defendant in vacation in the clerk's office. What, then, is the common law applicable to the case?

In 1 Black on Judgments, § 50, it is said: "All judgments rendered upon the confession of the defendant may be divided into two classes: 1. Those entered in an action regularly commenced by the issuance and service of process. 2. Those entered upon the confession of the defendant, or his warrant of attorney, without the institution of an action. The former class of judgments are well known to the common law and must be tested and sustained by rules and principles existing independently of statutes, while judgments of the latter class derive all their efficacy from positive law, and must conform, in order to be valid, to all the requirements and formalities set up by the legislature." In the same section this writer further says: "Now judgments entered for the plaintiff upon the defendant's admission of the facts and law, as the same are known to the common law and exist independently of statutes, are of two varieties; first, judgment by *cognovit actionem*, and second, by confession *relicta verificatione*. In the former case the defendant, after service, instead of entering a plea, acknowledges and confesses that the plaintiff's cause of action is just and rightful. In the latter case, after pleading and before trial, the defendant both confesses the plaintiff's cause of action and withdraws or abandons his plea or other allegations, whereupon judgment is entered against him without proceeding to trial. In order to sustain a judgment of either of these sorts, it is essential that process, regularly issued, should have been served upon the defendant (though he may accept service with the same effect as if the writ had been served as it usually is); and an agreement in writing made out of court, authorizing the clerk to enter up such a judgment, will not sustain it, where there has been no appearance by the defendant." Blackstone says, on the subject of confession of judgment at common law: "And this happens, in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit*; as if he puts in no plea at all to the plaintiff's declaration: by confession, or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just: or by *non sum informatus*, when the defendant's attorney declares he has no instruction to say anything in answer to the plaintiff, or in defense of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a

warrant to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit*, *cognovit actionem*, or *non sum informatus*) in an action of debt to be brought by the creditor against the debtor for the specific sum due; which judgment, when confessed, is absolutely complete and binding." 3 Bl. Com. 396, 397. The great Virginia commentator, Mr. Minor, says on this subject (IV. Minor's Inst. 726): "The defendant was always allowed to acknowledge the plaintiff's action, and confess a judgment for the amount claimed, or for such part thereof as he and the plaintiff could agree upon, provided it was done in open court. But a confession of judgment in the clerk's office was never contemplated by the common law, and can only take place in pursuance of the authority of some statute."

So, according to these authorities, the warrant of attorney, in use at common law, was confined to the confession of judgments in the three ways enumerated by Blackstone, in a pending suit; that is, by answering *nihil dicit*, *cognovit actionem*, or *non sum informatus*. And as Mr. Black says, judgments by confession of defendant or on his warrant of attorney, without the institution of an action, derive all their efficacy from positive or statute law. And judgment in the clerk's office, as Mr. Minor says, was never contemplated at the common law. Such warrant of attorney was usually given by the defendant to the plaintiff, by way of security, on compromising an action; and it authorized the attorney to whom it was directed to appear for the defendant, and to receive a declaration in an action to be brought against him, and thereupon confess the same in the manner already indicated. Tidd, New Pr. 1837 ed. 275; 1 Tidd, Pr. 1828 ed. pp. 590, 606; 2 Chitty, Gen. Pr. 333.

In the case at bar, counsel for defendants in error say, they rely upon the fact that there is nothing in the record showing affirmatively that process was not served. The record, however, purports to be a complete transcript of all the proceedings which took place in the clerk's office in vacation, not at rules; and as no process is exhibited or referred to, we think we must necessarily say that no suit was begun by process, and that there was no action pending in which at common law, a judgment on a warrant of attorney could have been confessed, in either of the ways authorized by the ancient practice. Mr. Freeman says (2 Freeman on Judgments, § 547): "Judgments by confession are in no wise exempt from the rule applicable to other judgments. that to be valid they must be entered in a

court having jurisdiction over the subject-matter of the action and the parties thereto. "Though no adjudication is in fact required in entering a judgment of confession without action, yet it has all the qualities, incidents, and attributes of other judgments, and cannot be valid unless entered in a court which might have lawfully pronounced the same judgment in a contested action." Where the law requires judgments to be signed by the judge, its provision extends to judgment by confession, and renders them void if not so signed." Looking to the literal terms of the power we see it authorizes appearance, but gives no specific authority to waive process, or to appear in the clerk's office, or waive the filing of the declaration; and limited by the rules and practices prevailing at common law, we must say no donee of the power had any authority to waive any of the rights of the defendant, to be sued and served with process, and to have a declaration filed on which judgment might lawfully be entered. Without jurisdiction thus acquired a judgment at common law on warrant of attorney would have been void. And even in those states where it is otherwise provided by statute, the statute being in derogation of common-law rights, the statutes are strictly construed. 23 Cyc. 699.

Let us see how this question has been viewed in the other states than Virginia. In Vermont, the supreme court says: "Judgments on confession without antecedent process have no basis other than the statute, and a full compliance with the statute is necessary to their validity, and the provisions authorizing them are to be strictly construed." *Mason v. Ward*, 80 Vt. 290, 130 Am. St. Rep. 987, 67 Atl. 820. In Iowa, in response to the contention that the statute there, regulating confession of judgment, was merely cumulative of the common-law remedy, the court said: "We do not think this position is correct. . . . So far as we are advised it has never been the understanding of the profession nor of the business community in this state that warrants of attorney to confess judgment had any place in our law. A confession of judgment pertains to the remedy. A party seeking to enforce here a contract made in another state must do so in accordance with the laws of this state. Parties cannot, by contract made in another state, engraft upon our procedure here remedies which our laws do not contemplate nor authorize." *Hamilton v. Schoenberger*, 47 Iowa, 385. In New Jersey the entry of judgment by a justice on a judgment note without process or proof was declared illegal. That court said: "The

defendant must be brought into court in the usual way, and the same proceeding had, as in other cases of written contracts." *Stretch v. Hancock*, 2 N. J. L. 207. In Tennessee, in *Carlin v. Taylor*, 7 Lea, 666, the supreme court held that no judgment could be confessed in that state by an attorney, on a judgment note like the one involved here. And in Kansas and Missouri, such notes are condemned, and the practice of employing them repudiated on principles of public policy, and as giving to the defendant no day in court, and as permitting the defendant to bargain away his right to be heard in court, contrary to public policy. *McCrairy v. Ware*, 6 Kan. App. 155, 158, 51 Pac. 293; *First Nat. Bank v. White*, 220 Mo. 717, 730, 132 Am. St. Rep. 612, 120 S. W. 38, 16 Ann. Cas. 889. We are inclined to agree with the Missouri court in the case last cited, in which they say: "Such agreements are iniquitous to the uttermost and should be promptly condemned by the courts, until such time as they may receive express statutory recognition, as they have in some states."

Of course, if a debtor has been summoned into court by process, and given a day and an opportunity to be heard, no good reason could be assigned why a judgment should not be pronounced against him at common law by confession on a warrant of an attorney. The fact that the Virginia court and this court have recognized the right of the defendant by personal appearance, to submit himself without process to the jurisdiction of the court, and to confess a valid judgment against him, and that a proper construction of our statute, § 43, chapter 125, of the Code, might authorize a defendant to appear in person in the clerk's office and make like confession of judgment, we do not regard any justification for the proposition, that he may by warrant of attorney authorize appearance by and confession of judgment, either in court or in the clerk's office, without process directed and regularly served upon him. It is contended, however, that the old legal maxim, *qui facit per alium, facit per se*, is as applicable here as in other cases. We do not think so. Strong reasons exist, as we have shown, for denying its application when holders of contracts of this character seek the aid of the courts and of their execution process to enforce them, defendant having had no day in court or opportunity to be heard. We need not say in this case that a debtor may not, by proper power of attorney, duly executed, authorize another to appear in court, and by proper indorsement upon the writ waive service of process, and confess judgment. But we do not wish to be understood as approving or intending to counte-

nance the practice of employing in this state commercial paper of the character here involved. Such paper has heretofore had little if any currency here. If the practice is adopted into this state, it ought to be, we think, by act of the legislature, with all proper safeguards thrown around it, to prevent fraud and imposition. The policy of our law is, that no man shall suffer judgment at the hands of our courts without proper process and a day to be heard. To give currency to such paper by judicial pronouncement would be to open the door to fraud and imposition, and to subject the people to wrongs and injuries not heretofore contemplated. This we are unwilling to do.

These considerations lead us to conclude that a judgment by confession in the clerk's office, on warrant of attorney, without process regularly issued and served upon or accepted by defendant, is void on its face. We therefore reverse the judgment below, quash the execution, and award the defendants costs here and in the court below, incurred on said motion.

Robinson, J., dissenting:

The judgment on which the execution issued is regular and valid on its face. The execution could not be quashed. The order overruling the motion to quash the execution is right and should be affirmed. The only record on which the circuit court could act in determining that motion does not show the judgment void. As far as appears from the record leading to the judgment, that judgment is sound. It purports to have been entered in a pending action. The court could not say the defendants were not served with process and that no declaration was filed, even if those things were necessary as to a judgment by confession. But the judgment itself shows that the court had jurisdiction to enter it. The defendants appeared by attorneys in fact and answered the action; so says the record. Service of process has never heretofore been considered necessary as to a party who appears. We have always understood that a party could appear, waive a declaration, release errors, and do many other things toward the entry of a judgment against him. And we are sure that it has heretofore been well established that one could appear to an action by an attorney in fact and do all that he could in person. The record does not show that the defendants appeared in this action by attorneys in fact acting under the so-called judgment notes. For all the court could see in considering the motion to quash the execution, the attorneys in fact appeared and confessed for defendant under a valid

power of attorney to do so. The power of attorney was not made a part of the record. It cannot be assumed that an invalid power of attorney was recognized in the entry of judgment. The presumption is otherwise.

That the judgment was entered in the clerk's office in vacation does not affect its verity on collateral attack. It has the same dignity in this respect as a judgment entered in court. The statute expressly says so. Code 1906, chap. 125, § 43. "Whether a judgment be the act of the court, or be entered up by the clerk under the statute, the effect is the same; in either case it is the act of the law, and until reversed by the court which rendered it, or by a superior tribunal, it imports absolute verity, and is as effectual and binding as if pronounced upon a trial upon its merits." 8 Enc. Dig. Va. & W. Va. 547.

The judgment has been overthrown on a collateral attack by bringing in matters that are not in the record. An issue of matters outside the record on which the judgment rests, made up on a motion to quash the execution, has been resorted to in finding the judgment to be void. Such matters could only be resorted to on a direct attack of the judgment. The circuit court well knew that it could not quash an execution that rested on a judgment fully purporting jurisdiction and validity,—that the verity of such judgment could not be impeached on collateral attack. "Where a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached unless the record discloses a want of jurisdiction." See the cases cited in 8 Enc. Dig. Va. & W. Va. 545.

If the case of direct attack dealt with by the majority opinion were properly before us, we would be of opinion that common-law principles and Virginia law do not condemn the judgment as void, unless it be on the ground that the power of attorney in the notes is so sweeping and general, so full of partiality to the creditor, as to be void. But this moot question we shall not decide. We may suggest that the power of attorney in the notes is not of the definite and particular character of those powers of attorneys to confess judgments long recognized in Virginia. However, if the power of attorney is valid, no service of process on defendants was necessary when those persons authorized by it to appear to the action in behalf of defendants did so appear. Yet the majority opinion is rested on the want of process. Throughout it that ground is relied on; the concluding paragraph emphasizes that ground. Why is

service of process necessary if the warrant of attorney is valid? If it is good, and the attorneys constituted by it to appear to the action do appear thereto pursuant to that authority, the defendants that made them attorneys in fact for that purpose have hereby entered an appearance. The defendants then have notice of the suit through their attorneys in fact. The court takes jurisdiction of the defendants by their appearance. When the attorneys in fact appear, that appearance is one by the defendants who authorized those attorneys in fact to make it. Surely, the want of direct service of process is not a sound reason for the majority opinion, if the power of attorney is valid. That opinion only makes it invalid because no process was served on the defendants who gave it.

The reasoning of the opinion virtually leads to this: A is detained in California as an invalid. He hears from home that a creditor is threatening suit. He has no defense and deems it to his best interest that judgment be entered against him. He sends a warrant of attorney to B to appear to an action instituted by the creditor, and to confess judgment in his behalf. B cannot do so because no service of process can be made on A. The creditor cannot take judgment though A offers to appear and confess it by duly authorized proxy. If this is sound, it is strange that recognition and practice have long been otherwise.

There was just one question to be answered in the assumed case dealt with by the majority: Is the power of attorney a valid one? If it is valid, if it gave the authority it purports to give, a judgment could be confessed under it on behalf of defendants in an action, even in the clerk's office, and that confession would be a waiver or release of errors. 3 Enc. Dig. Va. & W. Va. 70, 74, 75.

Brannon, P.:

I concur in the above dissent.

Petition for rehearing denied June 15, 1912.

INDIANA SUPREME COURT.

LULU BENNETT, Admr., etc., of **Emery C. Bennett**, Deceased, Appt.,
v.

EVANSVILLE & TERRE HAUTE RAILROAD COMPANY et al.

(— Ind. —, 96 N. E. 700.)

Master and servant — assumption of risk — master's negligence.

1. A member of a bridge gang engaged 40 L.R.A.(N.S.)

in unloading piling from a car assumes the risk of injury from standing on the car in front of a pile about to be rolled off the car, if he is acting within the scope of his employment in being there, and fully appreciates the danger of that method of working, although he was under direction of his foreman, and the latter is negligent in giving the order and in permitting the pile to be rolled upon him.

Pleading — care — assumption of risk.

2. An allegation in a complaint by a servant seeking damages for personal injuries alleged to have been caused by the negligence of his master, that he was in the use of due care and caution, does not negative the fact of his assumption of the risk.

(November 28, 1911.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Greene County sustaining a demurrer to the complaint in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Mr. William L. Slinkard, for appellant:

When the employer orders the employee to do something which encounters a risk not contemplated by his employment, although the risk is equally open to both, it does not necessarily follow that the servant assumes the increased risk.

Nall v. Louisville, N. A. & C. R. Co. 129 Ind. 260, 28 N. E. 183, 611; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; *O'Neal v. Chicago & I. Coal R. Co.* 132 Ind. 110, 31 N. E. 669; *Cincinnati, H. & I. R. Co. v. Madden*, 134 Ind. 462, 34 N. E. 227; *Thomas v. Hoosier Stone Co.* 140 Ind. 518, 39 N. E. 500; *Evansville & R. R. Co. v. Doan*, 3 Ind. App. 453, 29 N. E. 940; *Baltimore & O. & C. R. Co. v. Leathers*, 12 Ind. App. 544, 40 N. E. 1094; *Baltimore & O. S. W.*

Note. — As to servant's assumption of risk of dangers created by the master's negligence, see note to *Scheurer v. Banner Rubber Co.* 28 L.R.A.(N.S.) 1207. See also *Duffey v. Consolidated Block Coal Co.* 30 L.R.A.(N.S.) 1067, and note appended thereto.

As to the servant's right of action for injuries received in obeying a direct command, generally, see note to *Lowe Mfg. Co. v. Payne*, 30 L.R.A.(N.S.) 436; and when accompanied by an assurance of safety, see note to *Brown v. Lennane*, 30 L.R.A.(N.S.) 453.

As to distinction between assumption of risk and contributory negligence, see note to *Rase v. Minneapolis, St. P. & S. Ste. M. R. Co.* 21 L.R.A.(N.S.) 138.

R. Co. v. Welsh, 17 Ind. App. 505, 47 N. E. 182.

It is the duty of the master to furnish the servant a safe place to work, and a failure on the part of the master to perform his duty in this respect will render him liable, when the servant is free from contributory negligence.

Nall v. Louisville, N. A. & C. R. Co. 129 Ind. 260, 28 N. E. 183, 611; Louisville, E. & St. L. R. Co. v. Hanning, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; Louisville, E. & St. L. R. Co. v. Berry, 2 Ind. App. 427, 28 N. E. 714; Evansville & T. H. R. Co. v. Holcomb, 9 Ind. App. 198, 36 N. E. 39; Louisville, N. A. & C. R. Co. v. Cornelius, 14 Ind. App. 399, 43 N. E. 31.

A servant impliedly agrees to assume all ordinary risks incident to the service; but when the risk is increased, and the danger greater by being ordered and placed in a more dangerous and hazardous place, and injury thereby accrues, the master is liable.

Lake Shore & M. S. R. Co. v. McCormick, 74 Ind. 440; Boyce v. Fitzpatrick, 80 Ind. 526; Louisville, N. A. & C. R. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; Louisville, N. A. & C. R. Co. v. Wright, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584.

If the master places one person as a superior to command others in the work to be performed, the person so placed in command stands in the place of the master.

Atlas Engine Works v. Randall, 100 Ind. 293, 50 Am. Rep. 798; Rogers v. Overton, 87 Ind. 410.

If the master required the servant to work in a more dangerous work and place, and if the master knew or ought to have known the dangerous condition, and if the servant was free from fault, the master is liable.

Hancock v. Keene, 5 Ind. App. 408, 32 N. E. 329; Pennsylvania Co. v. Burgett, 7 Ind. App. 338, 33 N. E. 914, 34 N. E. 650; Lake Shore & M. S. R. Co. v. Wilson, 11 Ind. App. 488, 38 N. E. 343; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210.

Messrs. John E. Iglehart, Edwin Taylor, E. H. Iglehart, John T. Hays, and W. H. Hays for appellees.

Myers, J., delivered the opinion of the court:

Appellant instituted an action against appellees for damages for alleged negligence in the killing of her husband. The complaint is in one paragraph, the material portion of which, so far as the question before us is concerned, is as follows: Appellant's decedent was the employee of defend-

ants. That he was employed as a member of a bridge gang on the Evansville & Indianapolis division of the defendants' road. That one Clark was the boss or foreman of the gang. That Clark had under him a number of men, naming them. That on the 4th day of July, 1907, the defendants sent out an extra work train for the purpose of delivering piling along the road. That the piling was about 35 feet long, and about 12 to 14 inches in diameter. That the train was run to a point near Doan's Creek, and the decedent was then and there ordered by the boss, with others, to unload the piling with cant hooks and crowbars. That the pilings were unloaded until there were only two left, one upon the top of the other, and that the top piling was fast. That the pilings were unloaded off of the east side of the car, and rolled down an embankment to the east. That in unloading said car the defendants should have provided skids, long pieces of timber whereby one end would rest upon the ground and the other end upon the edge of the car, for the purpose of rolling the pilings off of the car to the place where they were desired. That, for the purpose of unloading the pilings in safety, defendants should have furnished checks or stops, so that, when the piling was rolled from off the under piling on the west side, the same could have been stopped before the rolling off across on the east side. That standards should have been placed on the east side of the car, in order to have stopped the piling when once started to roll from off the top of the lower piling on the west side of the car, so that the same could have been unloaded in safety, without rolling off onto the decedent. That the defendants, by their boss, owed the plaintiff's decedent a further duty not to order the decedent into a dangerous place. That defendants, by their boss, owed the plaintiff's decedent a duty not to carelessly and negligently command the decedent to enter a dangerous and hazardous place. That the defendants, by their boss, owed the decedent a duty that, after ordering the decedent into such dangerous and hazardous place, they should have immediately ordered him out of such dangerous and hazardous place.

The complaint further alleges that it was the duty of the decedent to obey the orders and commands of the boss, and he was compelled to, and did do so, and that it was the duty of the defendants to conduct their business in a safe and prudent manner, so that the injury might not come to the decedent; and it is alleged as to each of these alleged duties that it was negligently and carelessly omitted, and that

defendants, by their boss, negligently and carelessly ordered plaintiff's decedent, and directed and negligently commanded him to go upon the car about the center thereof on the west side of the piling, and commanded him at the point to assist in starting the piling to roll, which piling was then and there fast, and hard to break loose, and the foreman knew it. That the boss placed him in the center of the car in front of the piling, where it was perilous and dangerous. That after being negligently ordered and directed by the boss into the middle of the car, and before the piling started to roll, the danger became imminent and perilous, and the defendants, by their boss, then and there carelessly and negligently failed to order him out of said dangerous and hazardous place. That after ordering plaintiff's decedent into the dangerous place, and failing to order him out of the dangerous place, the boss commanded the decedent, with others, to start piling to rolling at a time when the defendants, by the boss, knew that the piling was stuck and tight and hard to move, and would require great force to start it, and at a time when the defendants, by their boss, knew that, after being started with great force and momentum, it would roll off the car; and without providing any skids, standards, checks, or stops, negligently ordered the plaintiff's decedent to the middle of the car, and in front of the way the piling would roll, and did roll. That decedent, in obedience to the orders of the defendants, went to the middle of the car, east of the piling, and while decedent was in front of the piling, the defendants, by their boss, ordered the piling to be rolled off of the car to the east. That the piling was then and there, by the orders of defendants' boss, and at a time when decedent was in the middle of the car and in front of the piling, carelessly and negligently started to roll to the east, and, without any fault or negligence on the part of the decedent, the piling rolled to the east; the decedent keeping out of the way, using due care and caution, until he came to the edge of the car, when the piling then and there rolled very fast, following him with great speed, and the decedent jumped from the east side of the car, and the piling, on account of the carelessness and negligence of the defendants in not providing any stops, and on account of the defendants' carelessly and negligently failing to provide any standards on the east side, and carelessly and negligently failing to furnish any skids to keep the same from off the body of the decedent, and on account of the defendants, by the boss, carelessly and negligently ordering the decedent into

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the dangerous and hazardous place, and negligently and carelessly starting the piling to roll while the decedent was in front of it, and negligently and carelessly placing him in the dangerous place, then negligently not ordering him out of the dangerous place, and because the defendants ordered the unloading of the piling in a dangerous manner, and negligently and carelessly placed the decedent in a dangerous place, and after so placing him in the dangerous place, by the boss, negligently and carelessly failed to warn and notify the decedent of his danger, and wholly without any fault or negligence on the part of the decedent, but wholly on account of the fault and negligence of the defendants, by the boss, the piling then and there rolled off of the car, striking the decedent across the back and shoulders, all of which was without any fault or negligence on his part, but wholly the fault and negligence of the defendants, by their boss, and by the piling striking and falling upon the body of the decedent, he was then and there mortally injured, from which injuries he then and there died.

A demurrer was sustained to this complaint, from which ruling appellant appeals. The defendants filed separate demurrers to the complaint for insufficiency of facts. The order book entry of the ruling upon the demurrers and the exception is as follows: "The court now sustains the demurrers to the complaint, to which ruling of the court the plaintiff at the time excepts, and plaintiff now refuses to plead further," etc.

The errors assigned are: "That the court erred in sustaining the appellees' demurrers to the appellant's complaint." And: "That the court erred in sustaining each demurrer of each appellee to the appellant's complaint." This was necessarily a rule as to each demurrer and an exception to the ruling as to each, and the errors assigned properly present the question. *Consumers' Gas Trust Co. v. Howard*, 163 Ind. 170, 71 N. E. 493; *Chicago & E. I. R. Co. v. Hamilton*, 42 Ind. App. 512, 85 N. E. 1044; *Farmers' Mut. F. Ins. Co. v. Yetter*, 30 Ind. App. 187, 65 N. E. 762.

It is not claimed that this complaint is good under the employers' liability act, but that it is good as a common-law action. Appellees' contention is that the complaint is insufficient, in that it nowhere alleges that the decedent did not appreciate or have knowledge of the omissions of duty and the dangers alleged, so as to bring him within the nonassumption of the risk. It is alleged that he was a member of a bridge gang; but there is no allegation as to what his duties were under his employment, or

that this work was not in the line of his duty and employment, or that he was ordered to do a thing outside the line of his employment. The contention of appellant is that where the facts averred show the foreman to be a vice principal, and the complaint proceeds upon the theory of the servant being ordered into, and a failure to be ordered out of, a dangerous place; it is sufficient if it be alleged in general terms that the servant was using due care and caution, and not contributing to his injury. Thus, two propositions are involved: First, as to the legal relations between the foreman and the decedent; and, second, does the allegation of using due care and caution obviate the necessity for an allegation of want of knowledge or appreciation of danger, so as to take the case out of the category of assumed risks.

We take up the last proposition first, for the reason that, if the complaint is insufficient in that particular, the first point is immaterial. In most mechanical employments there is an element of danger; hence we have the rule that the employee assumes the risk of the danger ordinarily incident to the work. The rule that the servant does not assume the risks not ordinarily incident to the service—that is, extraordinarily dangerous—is the exception to the rule, but it must be manifest that it is not the unusual hazard alone which creates the liability, but the fact that the servant does not know or appreciate the danger or hazard, for, if he does, clearly he comes within the class of those who assume the risks of the ordinary dangers. It is his want of knowledge or appreciation of the danger that takes the case out of the assumed risks, and not the danger itself, for, if that were not true, the question would resolve itself into one of degrees of danger, and the servant could not recover at all. It is the exception ingrafted upon the general rule that protects him. If, upon the contrary, the servant has full knowledge of, or appreciates, the dangers, or they are as well known to him as to the master, or they could have been discovered by the use of ordinary care, and then proceeds, even though this includes a master's negligence, he must be regarded as having assumed the risk of so doing. *Ft. Wayne & W. Valley Traction Co. v. Roudebush*, 173 Ind. 57, 88 N. E. 676, 89 N. E. 369; *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485; *Lake Shore & M. S. R. Co. v. Johnson*, 172 Ind. 548, 88 N. E. 849; *Cleveland, C. C. & St. L. R. Co. v. Morrey*, 172 Ind. 513, 88 N. E. 932; *Robertson v. Ford*, 164 Ind. 538, 74 N. E. 1; *Chicago, I. & L. R. Co. v. Barnes*, 164 Ind. 143, 73 N. E. 91; *Hollings-*

worth v. Chicago, I. & L. R. Co. 160 Ind. 259, 65 N. E. 750; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281, 66 N. E. 882; *Stalder v. Huntington*, 153 Ind. 354, 55 N. E. 88; *Wabash R. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920; *Sievers v. Peters Box & Lumber Co.* 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; *Wolf v. Big Creek Stone Co.* 148 Ind. 317, 47 N. E. 664; *Myers v. W. C. De Pauw Co.* 138 Ind. 590, 38 N. E. 37; *Ames v. Lake Shore & M. S. R. Co.* 135 Ind. 363, 35 N. E. 117; *Jenney Electric Light & P. Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20, 5 Am. St. Rep. 578, 14 N. E. 721, 15 N. E. 824; *Thayer v. St. Louis A. & T. H. R. Co.* 22 Ind. 26, 85 Am. Dec. 409; *Columbia Cressoting Co. v. Beard*, 44 Ind. App. 310, 89 N. E. 321; *United States Cement Co. v. Koch*, 42 Ind. App. 251, 85 N. E. 490; *Indianapolis Traction & Terminal Co. v. Holtsclaw*, 41 Ind. App. 520, 82 N. E. 986; *Shaver v. Home Teleph. Co.* 36 Ind. App. 233, 114 Am. St. Rep. 373, 75 N. E. 288; *Union Traction Co. v. Buckland*, 34 Ind. App. 420, 72 N. E. 158; *Pittsburgh, C. C. & St. L. R. Co. v. Parish*, 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514; *Romona Oolitic Stone Co. v. Tate*, 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 529; *Lynch v. Chicago, St. L. & P. R. Co.* 8 Ind. App. 516, 36 N. E. 44; *Becker v. Baumgartner*, 5 Ind. App. 576, 32 N. E. 786.

For aught that appears from this complaint, the decedent may have been in the direct line of his employment; he may have known of the neglect of the duties which are alleged to have been neglected; he may have had full knowledge and fully appreciated all the dangers incident to doing the work, or doing it as directed, or going where he did. If these things be true, the allegation that he was using due care and caution is not sufficient. That was his duty as to any service he may have been called upon to render, even when the danger is an ordinary incident to the work, so that the complaint stands without any suggestion of his nonassumption of risk, and it is not supplied by an allegation of the use of due care and caution, for it is not a negation of knowledge or appreciation of the danger. It is entirely consistent with full knowledge and appreciation of the danger. *Indianapolis & G. Rapid Transit Co. v. Foreman*, 162 Ind. 85, 93, 102 Am. St. Rep. 185, 69 N. E. 669, and cases cited; *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460; *Louisville, N. A. & C. R. Co. v. Corps*, 124 Ind. 427, 8 L.R.A. 636, 24 N. E. 1046.

It is not shown that the manner of unloading the piling was not the usual one, or, if it was not, that he did not know it as well as anyone, or that he had not as full knowledge and appreciation of the danger as anyone, or at least that the conditions and results were as obvious to him as to anyone. The allegations of the complaint rather imply his knowledge and appreciation.

It is impossible to uphold the complaint upon the theory of a common-law action, and it is not claimed to arise under a statute.

What we have said in the late case of *Richey v. Cleveland, C. C. & St. L. R. Co.* — Ind. —, 96 N. E. 694, disposes of the recommendations of the Appellate Court upon the subject of jurisdiction.

The judgment is affirmed.

Petition for rehearing denied.

ARKANSAS SUPREME COURT.

J. A. WATKINS et al., Appts.,
v.

JACK CURRY.

(— Ark. —, 147 S. W. 43.)

Estoppel — conditional vender — use of property for prize.

1. A conditional vender of an automobile is not estopped from reclaiming the property upon failure to make the payments, by

Note. — Right of vender in conditional sale to recover property as affected by his knowledge that the purchaser intended to make an unlawful use of it.

Little authority has been found on this point in addition to *WATKINS v. CURRY*. *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 51 L.R.A. 889, 79 Am. St. Rep. 960, 62 Pac. 145, holds that one who sells goods with knowledge that they are to be used in a house of ill fame must be deemed to have aided and participated in the immoral and illegal use, so as to defeat his right of action to recover the goods from a purchaser thereof, on sale under execution against the vendee, where the sale reserved title, ownership, and possession, with the right to take possession even before maturity of the deferred payment, whenever the vender deemed himself insecure. Observing that there is a difference in this respect between conditional and absolute sales, the court had this to say: "Where the sale is absolute, though on credit, the vendee becomes the owner of the property purchased, and has all the rights therein that any owner has over his own property, and he may make such use of it as to him seems fit, without let or hindrance from his ven-

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der. Under an ordinary contract of conditional sale, the law is different. The vendee thereunder, the title being reserved in the vender, is a mere bailee of the property. If the use of the property be not prescribed in the contract of sale, the purchaser must nevertheless use it for a lawful and proper purpose, and in the way its nature contemplates it should be used, or else suffer a forfeiture of its contract. It is clear that the relation between the parties to the contract in the present case was something more than that of debtor and creditor merely, and it would seem it was something more than an ordinary contract of conditional sale. The appellant not only reserved 'title, ownership, and possession of the property,' but reserved the right to 'take possession of the aforesaid personal property whenever it may deem itself insecure, even before the maturity of the deferred payments. This practically left the control of the use of the property with the appellant, and as the evidence shows that it had knowledge of the immoral and illegal use to which the vendees intended to and did put the property, it is hard to conceive why it did not aid and participate in that immoral and illegal use. The distinction between knowing that a buyer is intending to put the property to

the fact that he knows that the purchaser intends to use it as a prize in a contest to increase a newspaper circulation.

Contract — conditional sale — proposed illegal use — effect.

2. A conditional vender is not prevented from reclaiming the property under the contract, by the fact that the purchaser intends to use it in a lottery, if such use was entirely independent of the contract.

Same — extension of time — waiver.

3. A conditional vender does not waive his right to reclaim the property by extending the time for payment after he learns that the property has been offered as a prize in a contest to increase a newspaper circulation, if the time expires before the contest closes.

(April 29, 1912.)

APPEAL by defendants from a judgment of the Circuit Court for Bradley County in plaintiff's favor in an action brought to recover possession of an automobile under the terms of a conditional-sale contract. Affirmed.

Statement by Wood, J.:

This was a suit by Curry against Watkins to recover the possession of an automobile. The complaint is the usual one in replevin,—described the property, and alleged that appellee was entitled to the possession, that it was wrongfully detained, and the other formal allegations. Watkins answered, disclaiming any interest in the property; alleged that he was holding the

der. Under an ordinary contract of conditional sale, the law is different. The vendee thereunder, the title being reserved in the vender, is a mere bailee of the property. If the use of the property be not prescribed in the contract of sale, the purchaser must nevertheless use it for a lawful and proper purpose, and in the way its nature contemplates it should be used, or else suffer a forfeiture of its contract. It is clear that the relation between the parties to the contract in the present case was something more than that of debtor and creditor merely, and it would seem it was something more than an ordinary contract of conditional sale. The appellant not only reserved 'title, ownership, and possession of the property,' but reserved the right to 'take possession of the aforesaid personal property whenever it may deem itself insecure, even before the maturity of the deferred payments. This practically left the control of the use of the property with the appellant, and as the evidence shows that it had knowledge of the immoral and illegal use to which the vendees intended to and did put the property, it is hard to conceive why it did not aid and participate in that immoral and illegal use. The distinction between knowing that a buyer is intending to put the property to

same as the agent of A. L. Greene; asked that Greene be made a party, and that he be allowed to withdraw. Greene was made a party, and answered, denying that the car was wrongfully detained by himself or Watkins, and set up that he was entitled to the possession. He alleged that Curry had sold the car to James E. Hughes, who was editor and manager of the Democrat News, a newspaper published in Bradley county, and that plaintiff sold the car to Hughes for the purpose of its being offered as a prize by Hughes in a voting contest; that he (Greene) entered the contest under the rules prescribed by the newspaper for the same; that he acted in good faith, and was put to expense and trouble to secure subscriptions to the Democrat News; that the contest was to close on the 15th of July; that he had offered to continue securing votes to whatever time Hughes might arrange for the contest to close; that on the — day of July, Hughes absconded, and that there was no one to receive the votes of himself (Greene); that he offered his votes at the office of the Democrat News, and they were rejected; and he prayed judgment in his behalf for the car and asked damages. He also set up that Curry was estopped to claim any rights, if any he may have had, in said car, for the reason that he knew all the time that the car was to be awarded to the person who complied with the rules and received the most votes in the prize contest, and encouraged, aided, and abetted Hughes in the management of the contest. There was a

some unlawful use, and participating in that unlawful intent, is, to say the least, somewhat refined; and where a vender, for the mere sake of gain, makes a contract, the effect of which is to put his own property in the hands of persons who will use it to conduct a house of prostitution, knowing it will be so used, the courts ought not to be astute to find nice distinctions which will enable him to avoid the consequences of his acts." But in a case subsequently arising between the same parties, after the reversal of the judgment under which the execution sale was made, and after the vendee had surrendered all claim to the goods to the vender, it was held that the execution purchaser could no longer hold the goods as against the vender, since the former, being wrongfully in possession after the reversal of the judgment, could not avail himself of the illegality of the original contract, which was closed. *Standard Furniture Co. v. Van Alstine*, 31 Wash. 499, 72 Pac. 119.

For a case which, though different, involves somewhat similar considerations, attention is directed to *Singer Mfg. Co. v. Draper*, 103 Tenn. 262, 52 S. W. 879, holding that the vender of sewing machines can-

demurrer to the answer, which was overruled, and the issues of fact were submitted to a jury under instructions.

Curry testified that he was the agent for the sale of the Ford car in Southeast Arkansas; that he sold a car to Hughes, taking in payment therefor two notes, payable in thirty and sixty days, which notes expressed the contract, and one of which is as follows:

\$237.50 Monticello, Ark. 4/28/1911.

Thirty days after date I promise to pay to the order of Jack Curry, two hundred and thirty-seven and 50/100 dollars, for value received, negotiable and payable at Drew County Bank without defalcation or discount, and with interest from maturity until paid at the rate of 10 per cent per annum. This note is given for agreed purchase price of the following property, to wit: One model 'T' Ford touring car. And it is expressly agreed that the title to and ownership of and to said property shall not pass out of the said payee, but shall be and remain in them until the said sum, with interest and costs, shall be fully paid; and this note is not intended as a sale, but nothing more than an agreement to sell on the payment of the sum and interest as aforesaid. In case of default of payment said payee or his assigns may repossess himself of said property, and all partial payments shall be appropriated as rent of said property. If not paid at maturity this note, together with all other notes given for this purchase, shall become

not by suit enforce the right reserved in the contract of sale to retake the property for default in payment, where he unlawfully sold the machines without compliance with the statute requiring the payment of a vender's license tax.

See also *Taylor v. Chester*, L. R. 4 Q. B. 309, 10 Best & S. 237, 38 L. J. Q. B. N. S. 225, 21 L. T. N. S. 359, 6 Eng. Rul. Cas. 477, holding that one who pledged a bank note as security for payment for suppers and wine served in a brothel could not invoke the assistance of the courts to avoid the pledge and recover back the note upon the ground of the immorality of the transaction.

As to the right to recover the price of property sold for an unlawful use, see the note to *Graves v. Johnson*, 15 L.R.A. 834. And as to insurance on bawdyhouse or furniture therein, see note in 18 L.R.A.(N.S.) 214.

As to whether apparent ownership of conditional vendee affects the right of the conditional vender to claim title as against the former's vendee or creditor, see the note in 25 L.R.A.(N.S.) 766, 782-790.

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due and payable at the bank above named at once. It is well understood that in case of loss or damage of said property while in my hands, or before the payment of this note, said loss shall be mine, and not that of the payee. The makers and indorsers of this note severally waive protest and notice thereof, and diligence in collection.

[Signed] Jas. E. Hughes.

The notes were identical, with the exception of the date of payment. He stated that there was a cash payment of \$250, besides the notes; said that the notes had not been paid.

On cross-examination, Curry stated that Hughes, when he came to buy the car, told him that he was putting on a contest similar to a piano contest; that he was to put on several prizes; that he was thinking of buying an automobile and giving it away as a prize. He said that he didn't know, before he sold him the automobile, that he was to use it as a prize. Said when the note came due he made every effort to collect the note, but that Hughes begged for more time, and promised to pay it in a few days. Before the second note came due, he placed the notes in the Warren Bank for collection. A man by the name of Clugston came over and begged for a few days more time, and he waited until the 5th of July. The 60-day note fell due on June 28, 1911. At that time, Curry says he had heard that the automobile was up in a prize contest. He knew nothing of the contest, except what Clugston said. He didn't know whether those were facts or not. Says: "I didn't care anything about it. I sold the car and took the notes." Says that at the time Hughes bought the car he (Curry) didn't know that he bought it for the purpose of awarding it as a prize in a newspaper contest in Bradley county.

Curry wrote a letter to the Democrat News on April 27, 1911, in which he stated, in substance, that he was glad to know that the News was having success with its contest, stating that success might be expected if the newspaper would hustle and its methods were legitimate, and concluded, saying: "With the best wishes, and knowing that you will have abundant harvest from your contest."

The witness concludes his testimony by stating that parties representing the newspaper had seen him before the car was sold, and told him that they were figuring on a contest, and were figuring on giving away a car and several other prizes. He told them that he was wanting to sell the car,

and was going to place an agency in Bradley county somewhere.

On redirect examination, he said that he didn't have any interest, directly or indirectly, in the car sold to Hughes; that he didn't sell the car for the purpose of putting it in a contest, but for the purpose of getting the money out of the car. Said it was no interest whatever to him whether the newspaper people put on a contest or not.

On behalf of the appellants, testimony was introduced tending to show that about the 26th or 27th of April Hughes was in the newspaper business at Warren, in Bradley county, Arkansas; and that he had a contest in the paper, in which the automobile in controversy was offered as one of the prizes. Copies of the newspaper, containing the advertisement and picture of the car, were introduced, giving in detail the rules for the contest by which prizes were to be given away.

The names of various persons, under the rules of the contest, were to be nominated through the paper by anyone desirous of so doing as candidates for "the automobile contest." The purpose of the contest, as declared, was to increase the circulation of the Democrat News by giving away valuable and costly prizes free, amounting to \$1,155, to the eight most popular persons in the southeastern part of the state; the popularity to be determined by the number of yearly subscriptions secured and the number of papers sold.

The appellant Greene testified that he was nominated as one of the contestants and contested for it, and that one week before the contest was to close, according to the advertisements, he was in the lead; that various other contestants had been in the lead before that; that on the 4th of July he was informed that Hughes, the manager of the paper giving the contest, was gone; and that he then offered his tickets to the Democrat News, and it refused to take them. He says that he was supposed to know by the paper as to how the contestants stood; and that on the 15th of July he got the most votes and claimed the machine. He said at the time he was in the contest he did not know of any right Curry had in the automobile; says the car was supposed to be Hughes' property. No one knew that Hughes owed anything on it until after this controversy came up; that the machine was used by the management of the Democrat News regularly in driving about. He had between twenty and thirty thousand more votes, according to the count at the time he made it, than the next contestant to him; and

therefore he claimed the automobile as having won it in a "popularity contest."

This is substantially the testimony upon which the court gave the following instruction: "You are instructed that, notwithstanding you may find that the plaintiff, Curry, knew of the purpose of Hughes to offer the car in controversy as a prize in a contest, still such knowledge by plaintiff would not deprive him of his ownership of the car, or of his right to recover possession of same in this action, if it appears from the testimony that plaintiff relied upon the payment of the purchase price of the car by Hughes before said car was to be awarded as a prize; and that Hughes in fact never paid for said car, so as to acquire title in himself before the institution of this suit."

The court further instructed the jury as follows: "You are instructed that, if you find from the evidence that plaintiff, Jack Curry, was the owner of the Ford touring car in controversy, and sold it to James E. Hughes on condition that the title was to remain in Curry until the car was paid for, and you further find from the evidence that Hughes never paid the price for which said car was sold him, but made default in payment for the purchase money of the car, then, as a matter of law, plaintiff continued to be the owner of said car, and was entitled to the possession of the same upon default in payment of the same, according to the tenor and terms of the purchase-money notes given by Hughes to plaintiff; and, in that event, plaintiff is entitled to recover in this action, if Curry did not waive his title to said car."

The appellants prayed the court to instruct the jury, in substance, that if they found, by a preponderance of the evidence, that the automobile was sold by Curry to Hughes for the purpose of being put up as a prize, or that Curry, after the sale, consented for the automobile to be put up as a prize to be awarded by Hughes to any person becoming a candidate and receiving the highest number of votes in the popularity contest then being carried on by the Democrat News, that would constitute a waiver by Curry of the title reserved by him in the note; and further prayed that the court instruct that if the jury found that there was a contest in the newspaper, as defined, and that A. L. Greene became a candidate in such contest and received the highest number of votes, their verdict should be in favor of Greene. The court refused to so instruct the jury, and the appellants duly saved their exceptions, and have prosecuted this appeal.
40 L.R.A.(N.S.)

Mr. B. L. Herring, for appellants:

The enterprise was not a lottery.

Burks v. Harris, 91 Ark. 205, 23 L.R.A. (N.S.) 626, 134 Am. St. Rep. 67, 120 S. W. 979, 18 Ann. Cas. 566; *Quatsoe v. Eggleston*, 42 Or. 315, 71 Pac. 66; *Dion v. St. John Baptiste Soc.* 82 Me. 319, 19 Atl. 825.

Mr. Curry is estopped to claim this automobile now. It is too late for him to be heard, now, after he has consented to a disposition of his property that has caused others to part with their money.

Neal v. Cone, 76 Ark. 273, 88 S. W. 952; *Nashville Lumber Co. v. Robinson*, 91 Ark. 319, 121 S. W. 350; *Hyatt v. Bell*, 83 Ark. 360, 103 S. W. 748; *Bell v. Old*, 88 Ark. 99, 113 S. W. 1023; *Peck-Hammond Co. v. Walnut Ridge School Dist.* 93 Ark. 77, 123 S. W. 771.

The law will not permit a man to sell a thing to be used for a known purpose and afterwards assert a right which will defeat the purpose for which he sold it.

16 Cyc. 764, subd. 2; *Busby v. Altes*, 140 Mo. App. 715, 126 S. W. 968; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695.

Mr. John E. Bradley for appellee.

Wood, J., delivered the opinion of the court:

There is no testimony in the record to warrant the conclusion that appellee, Curry, estopped himself from setting up his right to the possession of the automobile, under his contract with Hughes, after the latter had failed to pay the purchase money. The automobile was sold to Hughes, and the title was to pass on condition that he made the payments as specified in the notes; and on his failure to make such payments the title to the automobile did not pass out of the appellee. Giving the testimony of the appellants its strongest probative force, it only tends to show that appellee knew, at the time he sold the car to Hughes, that the latter would use the car as one of the prizes in what is termed his "popularity contest" to promote the circulation of the Democrat News; but there is no testimony whatever to warrant the finding that appellee, at the sale, participated in the purpose of Hughes, and sold the car for the purpose of having the same advertised as one of the prizes to be given away in the contest.

Therefore, conceding that the "popularity contest" scheme was a lottery, and within the rule of the evil denounced in *Burks v. Harris*, 91 Ark. 205, 23 L.R.A.(N.S.) 626, 134 Am. St. Rep. 67, 120 S. W. 979, 18 Ann. Cas. 566, still appellee would be

entitled to recover in this case, because the lottery or gaming transaction had no connection with the sale. The sale was not made for the purpose of promoting such transaction. The consideration for the sale of the automobile was entirely independent of any illegal use to which the automobile may have been applied after the contract of sale was entered into. "An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case." *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 469, 33 L. ed. 760, 10 Sup. Ct. Rep. 461, quoted in *Ashford v. Mace*, — Ark. —, 39 L.R.A.(N.S.) 1104, 146 S. W. 474. See also *Peay v. Pulaski County*, — Ark. —, 148 S. W. 491; *Wood v. Stewart*, 81 Ark. 41, 98 S. W. 711.

The court, in one of its instructions, told the jury that the appellee was entitled to recover under his contract if the car had not been paid for, provided he had not waived his title to said car. This submitted to the jury the question of whether or not the conduct of Curry, in connection with the sale of the automobile, was a waiver of his title and right to the possession of the car. The instruction was really more favorable to the appellants than they were entitled to under the undisputed evidence.

The court did not err in refusing the prayer of appellants for instruction. This instruction virtually assumed that there had been a completed sale of the automobile to Hughes. As the undisputed written contract showed that there had been no perfected sale, the instruction was abstract. Furthermore, by granting the prayer, the court would have told the jury that consent of the appellee for the automobile to be used in the popularity contest after the sale would have defeated his recovery. That is not the law. The evidence shows that the appellee expected that the notes would be paid long before the popularity contest was advertised to close. True he had extended the time for payment at the urgent request of Hughes more than once; but, under the very last extension of payment, the notes were due five days before the popularity contest was advertised to close. Under these circumstances, it cannot be said that appellee consented to relinquish his right to the title and possession reserved in the notes by consenting that the automobile should be used in the prize contest. The instructions correctly presented the law applicable to the facts, and the verdict is sustained by the evidence.

The judgment is therefore affirmed.
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CALIFORNIA SUPREME COURT.
(Department No. 2.)

HAYNES AUTOMOBILE COMPANY,
Resp't.,
v.

WOODILL AUTO COMPANY, Appt.

(— Cal. —, 124 Pac. 717.)

Principal and agent — exclusive sales agency — sale to resident — liability for commissions.

A manufacturer is not liable to an exclusive sales agent for commissions upon sales made by him merely because the purchaser is a resident of the territory covered by such agency, if the sale was made outside such territory.

(June 13, 1912.)

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in plaintiff's favor and from an order denying a motion for vacation of judgment in an action brought to recover the amount alleged to be due for automobiles and attachments sold and delivered by plaintiff to defendant. Affirmed.

The facts are stated in the opinion.

Messrs. Schmidt & Riggins for appellant.

Mr. William Fleet Palmer, for respondent:

There is no rule of law which allows or refuses commissions to agents. The commission as well as the agency is a matter of contract between the parties.

31 Cyc. 1488; *Garfield v. Peerless Motor Car Co.* 189 Mass. 395, 75 N. E. 695; *Thompson-Houston Electric Co. v. Berg*, 10 Tex. Civ. App. 200, 30 S. W. 454; *Wyckoff, Seamans & Benedict v. Bishop*, 115 Mich. 414, 73 N. W. 392.

If respondent, in making the sale to Otis, violated the contract for the "exclusive sale," then there is no provision in the contract, nor trade usage shown, which entitles appellant to a commission on sales

Note. — Right of one having exclusive sales agency within given district, to commissions on sales made by another outside of the district to a resident thereof.

One having exclusive sales agency in a specified territory cannot recover commissions on a sale made by another outside that territory, simply because the vendee is a resident of the territory. *HAYNES AUTOMOBILE Co. v. WOODILL AUTO Co.*

Similarly, an agent having the sale of threshing machines and engines in a certain town and trade tributary thereto for the season ending November 1, of a certain year, is not entitled to a commission

in the territory by whomsoever made. His only action would be for damages.

Roberts v. Minneapolis Threshing Mach. Co. 8 S. D. 579, 59 Am. St. Rep. 777, 67 N. W. 607; *Waterman v. Boltinghouse*, 82 Cal. 659, 23 Pac. 195; *Dolan v. Scanlan*, 57 Cal. 261; *King Powder Co. v. Dillon*, 42 Colo. 316, 96 Pac. 439.

Melvin, J., delivered the opinion of the court.

Plaintiff sued for \$3,092.59 alleged to be due from defendant for automobiles and attachments sold and delivered by plaintiff to defendant. The latter asserted that the plaintiff was indebted to it. Both litigants furnished bills of particulars of their respective claims, and by written stipulation it was agreed that defendant's bill of particulars should be considered as if pleaded by defendant as a counterclaim. The court found that the balance due plaintiff upon all of the accounts between the parties to the action was \$871.16. Defendant appeals from the judgment, and from an order denying its motion for vacation of judgment, under § 663 of the Code of Civil Procedure. The sole controversy upon this appeal relates to defendant's claim of \$600 as commission on the sale of a car to Ralph C. Otis. According to the findings, Otis, who was a resident of Pasadena, purchased from plaintiff for \$3,000 one of the automobiles manufactured by the said Haynes Automobile Company. At the time of the purchase, Otis was in Chicago, Illinois, and he ordered the car to be shipped to him at that city from plaintiff's factory in Kokomo, Indiana. Afterwards he changed the order, and directed that the automobile should be sent to

him at Los Angeles. It was forwarded as directed, with a provision in the waybill that it might be reshipped to Chicago at one-half rate. Payment for the vehicle was made at Kokomo. Defendant does not assert that it had anything to do with negotiating the sale, but bases a claim for compensation solely upon the contract between it and plaintiff, by which the Woodill Auto Company was given the exclusive sale in Los Angeles and vicinity of the cars manufactured by plaintiff. The pertinent portion of the agreement, dated April 15, 1908, was as follows: "This agreement, entered into on this date with the Haynes Automobile Company, of Kokomo, Indiana, and the Woodill Automobile Company of Los Angeles, California, gives to the Woodill Automobile Company the exclusive sale of Haynes cars in Los Angeles and southern half of the state of California."

Appellant contends that, when a manufacturing corporation gives exclusive sale of its products within a given territory to another, the said manufacturer cannot deprive the agent of regular commissions by selling to one who resides within such territory, citing *Garfield v. Peerless Motor Car Co.* 189 Mass. 395, 75 N. E. 695; *Thompson-Houston Electric Co. v. Berg*, 10 Tex. Civ. App. 200, 30 S. W. 454. The cited cases do not sustain appellant's position. The former case was decided upon a contract which, interpreted in the light of trade usage, gave the agent a right to a commission on all automobiles sold to residents of his district. The appeal in this case is on the judgment roll alone, and the record does not show any finding with reference to trade usage. We must there-

on a sale made by another before that date, the machine being delivered after that date, to a purchaser who had formerly lived about 8 miles from the town in question, but in the spring of that year had removed to a town 100 miles away. *Hilliker v. Northwest Thresher Co.* 145 Iowa, 721, 122 N. W. 906.

And an agent for a certain state who, by his contract of employment, was to have the benefit of all sales made in the state, is not entitled to a commission on a sale of goods made in another state, the goods being delivered in the latter state, simply because the purchaser sends the goods for use in his branch house within the agent's state. *Wycokoff, Seamans & Benedict v. Bishop*, 115 Mich. 414, 73 N. W. 392.

And it has been held that under a contract giving one the exclusive agency for the sale of goods in a certain territory, the principal himself may sell to buyers outside, with the knowledge that they intend to dispose of the goods within the agent's territory, and the agent is not entitled to a commission on such goods, although actu-

ally disposed of finally in his territory. *Golden Gate Packing Co. v. Farmers' Union*, 55 Cal. 606.

But a contract giving one the exclusive agency for the sale of goods in a certain city and vicinity, and binding him to refer all inquiries received from territory other than his own to his principal, implies that all inquiries from his territory should be referred to him, so that he is entitled to a commission on a sale made by his principal to a resident of his territory while such resident is in another place, although the goods are delivered at that other place. *Garfield v. Peerless Motor Car Co.* 189 Mass. 395, 75 N. E. 695.

And under a contract whereby an agent for the sale of goods in a certain state is entitled to a commission on all sales of those goods to be used in the state, whether made by him or not, such agent is entitled to his commission on such sale made by his principal, although the terms of sale were agreed upon outside the state. *Thompson-Houston Electric Co. v. Berg*, 10 Tex. Civ. App. 200, 30 S. W. 454.

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fore look alone to the contract, which gives to defendant the "exclusive sale" in its territory of cars manufactured by plaintiff. As the sale was made outside of the state of California, and as no trade usage appears to give defendant any right other than that expressed in the exact words of the agreement, we are compelled to conclude that defendant cannot recover a commission on the transaction. The Texas case cited by appellant is not in point. The contract there under consideration was quite different from the one before us in this case. The contract itself provided that, if sales were made in Texas by a special agent representing the selling company, the agent in that state should receive his commission. His claim was that he was entitled to commission "on the sales of all appellant's products to be used in the state of Texas," and, commenting on this part of the contract, the court said: "We think that it bears the construction contended for by the appellee, and that it reasonably appears from the dealings between the parties that appellant placed upon it the same construction, and there is no error in so much of the court's charge as gave it this construction." It will thus be seen that the meaning of the contract under discussion by the court in the Texas case was made apparent by the dealings between the parties,—an element entirely absent from the case at bar.

It has been held in this state that one having an exclusive agency for the sale outside of California, of products manufactured here, cannot recover commissions on sales made in this state to persons known by the seller as intending to sell the merchandise out of the state. That case is perfectly applicable to the matter before us here. *Golden Gate Packing Co. v. Farmers' Union*, 55 Cal. 606. See also *Wycokoff, Seamans & Benedict v. Bishop*, 115 Mich. 414, 73 N. W. 392.

The judgment and order are affirmed.

We concur: Henshaw, J.; Lorigan, J.

DISTRICT OF COLUMBIA COURT OF APPEALS.

JOHN BARTON MILLER, Appt.,

v.

UNITED STATES.

(38 App. D. C. 361.)

Juror — qualification — crime against company — kinship to stockholder.

1. The son of a holder of stock in an unincorporated joint stock company is not competent to sit as a juror for the trial of 40 L.R.A.(N.S.)

one charged with crime against the company.

New trial — motion — challenge of juror — ground.

2. Failure to state the cause of challenging a salesman who has just declared his relationship to a stockholder of a joint-stock company affected by the crime for which accused is on trial will not prevent setting up the ground of the challenge in support of a motion for new trial.

Juror — competence — relationship — time of interest.

3. That one called as a juror in a prosecution for crime against a joint-stock company, who states that he is a son of a stockholder of the company, does not show that his father owned stock at the time of the commission of the crime, does not render him competent, if the company went into liquidation a short time after the commission of the crime, so that the stock interest could not be presumed to have been acquired in the interim.

Same — peremptory challenge — number.

4. Upon consolidation of two indictments for offenses growing out of one transaction, which might have been incorporated in different counts of one indictment, accused is entitled to only the number of peremptory challenges to jurors which the statute allows him for one indictment.

(March 4, 1912.)

APPEAL by defendant from a judgment of the Supreme Court convicting him of fraudulently taking away or concealing records belonging to an association of which he was secretary-treasurer and of embezzling funds of said association. Reversed.

The facts are stated in the opinion.

Messrs. Henry E. Davis and John E. Laskey, for appellant:

It was error in the court below not to advise the defendant, upon his request in the outset of the trial, to how many peremptory challenges he was entitled.

Cumming v. State, 99 Ga. 662, 27 S. E. 177.

It was error in the court below to hold

Note.—*Jury: relationship to private corporation or association for profit, interested in a criminal prosecution which will disqualify juror.*

This note is confined to the question of relationship to an ordinary business corporation or association organized for profit, and does not include the question as to the connection with an association to suppress crime or prosecute criminals, which will render a juror incompetent to sit in a particular criminal prosecution.

As to the relationship to a private corporation or association which will render a juror incompetent to serve in a civil action in which the corporation or asso-

that the defendant was entitled to ten peremptory challenges only, instead of to twenty.

State v. Smith, 24 N. C. (2 Ired. L.) 403; *Heskey v. State*, 17 Tex. App. 161; *State v. Delisco*, 75 N. J. L. 808, 69 Atl. 218; *People v. Helm*, 152 Cal. 532, 93 Pac. 99; *Betts v. United States*, 65 C. C. A. 452, 132 Fed. 228; *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 293, 36 L. ed. 707, 709, 12 Sup. Ct. Rep. 909; *Lewis v. United States*, 146 U. S. 370, 376, 36 L. ed. 1011, 1014, 13 Sup. Ct. Rep. 136; *Butler v. Evening Post Pub. Co.* 78 C. C. A. 511, 148 Fed. 821; *People v. Sweeney*, 55 Mich. 586, 22 N. W. 50.

The fact that the juror's father was a large stockholder, at the time its affairs were closed, in the corporation the funds of which the defendant was charged with having embezzled, and the books of which he was charged with having taken away and concealed "with intent to defraud and injure the said association and the said stockholders and members thereof," is a common-law disqualification and rendered the juror incompetent.

Young v. Marine Ins. Co. 1 Cranch, C. C. 452, Fed. Cas. No. 18,163; *Moore v. Farmers' Mut. Ins. Asso.* 107 Ga. 199, 33 S. E. 65; *Bank of University v. Tuck*, 107 Ga. 211, 33 S. E. 70; *Georgia R. Co. v. Hart*, 60 Ga. 550; *Crawford v. United States*, 212 U. S. 183, 195, 196, 53 L. ed. 465, 470, 471, 29 Sup. Ct. Rep. 260, 15

ciation is interested, see note to *Stone v. Monticello Constr. Co.* post, 978.

As to membership in a religious society or denomination as a disqualification to serve as a juror in a case involving its rights, see note to *Searle v. Roman Catholic Bishop*, 25 L.R.A.(N.S.) 992.

As to the competency, as a juror, of an employee, or relative of an employee, of a party or person interested in an action, see note to *Hufnagle v. Delaware & H. Co.* post, 982.

But little direct authority has been found upon the precise question under annotation. In *State v. Thompson*, 24 Utah, 314, 67 Pac. 789, it was held that a director and stockholder, who is also a debtor, of a corporation whose store has been burglarized, is not competent as a juror upon the trial of the alleged burglar.

And in *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501, it was held, in accord with *MILLER v. UNITED STATES*, that a brother-in-law, a nephew, a grandson, a first cousin, and a second cousin, respectively, of stockholders of a corporation are all incompetent as jurors in a prosecution for fraudulently mutilating and destroying the books of the corporation; and it was further held to be immaterial, upon a motion for a new trial on the ground of such relationships of jurors who sat in the case, that they did not

Ann. Cas. 392; *Powers v. State*, 27 Tex. App. 700, 11 S. W. 646; *Page v. State*, 22 Tex. App. 551, 3 S. W. 745; *State v. Walton*, 74 Mo. 270; *Jaques v. Com.* 10 Gratt. 690; *Carnal v. People*, 1 Park. Crim. Rep. 272; *Ledford v. State*, 75 Ga. 856; *Waters v. State*, 51 Md. 430.

Messrs. Clarence R. Wilson and James M. Proctor, for appellee:

In the District of Columbia, the right to as many sets of challenges as there are counts in an indictment has never been claimed. In other jurisdictions, it is held with almost complete uniformity that upon the trial of such an indictment the defendant has no right to claim as many sets of challenges as there are counts in the indictment.

State v. Skinner, 34 Kan. 256, 8 Pac. 420, 6 Am. Crim. Rep. 307; *Com. v. Walsh*, 124 Mass. 32; *Smith v. State*, 8 Lea, 386; *United States v. Groesbeck*, 4 Utah, 487, 11 Pac. 542; *United States v. Bromley*, 4 Utah, 498, 11 Pac. 619.

Van Orsdel, J., delivered the opinion of the court:

Appellant, John Barton Miller, defendant below, was indicted and convicted in the supreme court of the District of Columbia, of the crime of fraudulently taking away or concealing records belonging to the First Co-operative Building Association of Georgetown, District of Columbia, of which he was secretary-treasurer, and, under a

know, at the time of the trial, that their respective relatives were stockholders of the corporation.

In *Billis v. State*, 2 McCord, L. 12, however, where it appeared that the foreman of the jury which had tried the defendant upon an indictment for having passed a counterfeit note of a certain bank, was a director of the bank, though not a stockholder, which was not known to the defendant or his counsel prior to the verdict, although it was held that objections to a juror come too late after a verdict, the court said that the objection in this case was entirely without foundation, as the juror, owning no stock in the bank and not even receiving a pecuniary compensation for his services on the board, could have no other interest in the institution than was common to all the citizens of the state.

And in a criminal prosecution for conspiracy to embezzle the property of a bank, and to obtain its money and property by means of false pretenses, mere creditors of the bank are not incompetent as jurors, in the absence of any actual bias or prejudice against the defendants. *Imboden v. People*, 40 Colo. 142, 90 Pac. 608.

As to disqualification of juror as ground for new trial, see note to *Jewell v. Jewell*, 18 L.R.A. 473.

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separate indictment, of the crime of embezzlement of the funds of said association. Though he was separately indicted for each offense, the two indictments were, by order of the court, consolidated and tried together.

It appears that when defendant had exercised his tenth peremptory challenge, a talesman named Libbey was called into the jury box and examined upon his *voir dire*. He testified that his father was a large stockholder in the Georgetown Co-operative Building Association at the time its affairs were closed up. On this statement, defendant challenged the juror for cause. The challenge was overruled by the court. This is assigned as error.

The juror was the son and legal heir of a stockholder in an association affected by the acts of which defendant stands charged. Such a relation has been universally held to disqualify a juror. The rule applies to civil cases, and with added weight to criminal cases. *Crawford v. United States*, 212 U. S. 183, 53 L. ed. 465, 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392. A juror is incompetent to serve in a criminal trial if he is related within the prohibited degree to a person injured by the commission of the offense. *Powers v. State*, 27 Tex. App. 700, 11 S. W. 646; *Page v. State*, 22 Tex. App. 551, 3 S. W. 745; *State v. Walton*, 74 Mo. 270; *Jaques v. Com.* 10 Gratt. 690. A person related to a stockholder of a corporation which has been injured by the acts charged against the accused is disqualified to serve as a juror in the trial of the cause. *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501.

Kinship of a juror to one injured by the acts of which the accused stands charged is as effective a disqualification as business or official relations. Such a juror cannot be said to be impartial, and that is the ground upon which the law rejects him.

In *Jaques v. Com.* supra, the court said: "Though he [the juror] might not have any direct interest in the controversy, yet if he were related to either of the parties to the suit in the ninth degree, such a relationship constituted a principal cause of challenge which left no discretion to the court. A principal cause of challenge being grounded on such a manifest presumption of partiality that if it be found true the law sets aside the juror, whereas a challenge to the favor leaves it to the discretion of the triers." This rule in criminal practice is grounded upon principles of justice, and is essential to the proper protection of the constitutional rights of the accused.

The trial court held that since defendant's counsel simply challenged the juror for cause, without stating the specific

ground of the challenge, and the court was not called upon to pass upon that point, it could not be advanced for the first time in support of the motion for a new trial. In a criminal case, where an error so gross as the one before us has been committed, we are not disposed to indulge in technicalities. The juror had just uttered the statement that his father was a stockholder in the association defrauded at the time its affairs were closed, when the challenge was interposed. It was sufficient to call the attention of the court to any ground for challenge disclosed in the examination for cause, and the promptness with which the objection was overruled, without inquiry of counsel for the reasons for the challenge, was equivalent to a declaration to counsel that the ruling of the court was advisedly made and final. "In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception." *Crawford v. United States*, supra.

Of like weight is the objection of counsel for the government that it does not appear that the father was a stockholder at the date the alleged offenses were committed. It is sufficient that it does not affirmatively appear that he was not a stockholder at that time. It was conceded at bar that the affairs of the association were closed within a very short period after the offenses are alleged to have been committed, and it is not to be presumed that he became a stockholder in a concern passing through the stages of bankruptcy. The matter of procuring an extra juror is so insignificant in comparison to the duty of securing to one accused of crime an impartial trial by an unbiased jury of his peers that courts, in furtherance of justice, will resolve all reasonable presumptions in favor of the accused. It is well said in *Crawford v. United States* that "to maintain that [the jury] system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead on that account to any doubt on that subject." We deem the granting of a new trial in this cause of little consequence, in view of the great principle involved; hence, we have no difficulty in reaching the conclusion that the court, in refusing to sustain the challenge to the competency of the juror Libbey, committed reversible error.

When the panel of jurors was under examination upon *voir dire*, and before either the prosecution or defense had exercised any peremptory challenges, defendant requested the court to rule as to whether he would be permitted to exercise ten peremptory challenges, the number allowed by the statute in felony cases (Code, D. C. § 918 [31 Stat. at L. 1338, chap. 854]), or would be given, in view of the consolidation, ten peremptory challenges for each indictment. On this point the court refused to rule. When defendant had exercised ten peremptory challenges and sought to challenge another juror the court ruled that he had exhausted all his challenges. This ruling of the court defendant assigns as error. He also assigns error in the refusal of the court to advise him in advance of the number of peremptory challenges which he would be permitted to exercise.

At the outset it is important to observe that no objection was made by the defendant to a single trial under the two indictments. These cases were tried together under § 1024, Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 720, which is as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated."

In *McElroy v. United States*, 164 U. S. 76, 41 L. ed. 355, 17 Sup. Ct. Rep. 31, it is held that where there were several indictments charging different assaults and different arsons committed at different times, depending upon different evidence and different testimony, and requiring separate verdicts, it was error to consolidate them under § 1024. The court said: "The order of consolidation under this statute put all the counts contained in the four indictments in the same category as if they were separate counts of one indictment, and we are met on the threshold with the inquiry whether counts against five defendants can be coupled with a count against part of them, or offenses charged to have been committed by all at one time can be joined with another and distinct offense committed by part of them at a different time." This case is referred to not on the question of the propriety of consolidation in the present case, which is impliedly conceded, but for the purpose of ascertaining the class of cases that may

be consolidated under § 1024. From the language in the above case, it would seem that any consolidation under this statute has the effect of placing all the indictments "in the same category as if they were separate counts of one indictment."

This construction of § 1024 is quoted with approval in *Bass v. United States*, 20 App. D. C. 232. In that case, the indictments were for offenses committed in violation of the postal laws. Section 5480, Revised Statutes, U. S. Comp. Stat. 1901, p. 3696, permitted the insertion of three counts in one indictment when the offenses were committed within the same six calendar months. There were two indictments, each charging offenses committed within a different six months' period. In holding the consolidation improper, the court said: "It would, therefore, seem to necessarily follow that if § 5480 permits the insertion of three counts in one indictment only, when the offenses have been committed within the same six calendar months, and under § 1024 the consolidation under this statute puts all the counts contained in the 'two indictments in the same category, as if they were separate counts of one indictment,' the joining in this case by the consolidation of the two indictments, of three offenses not committed within the same six months, was error, and we, therefore, must sustain this exception of the appellant." From the foregoing authorities we think the consolidation of indictments authorized by § 1024 is only in cases where the offenses charged in the separate indictments might have been embraced in separate counts in one indictment. The consolidation, therefore, has the effect of bringing the various charges together for one trial.

Section 918, Code D. C. provides: "In all trials for capital offenses the accused and the United States shall each be entitled to twenty peremptory challenges. In trials for offenses punishable by imprisonment in the penitentiary, the accused and the United States shall each be entitled to ten peremptory challenges. In all other cases, civil as well as criminal, in which the plaintiff is the United States or the District of Columbia, each party shall be entitled to three peremptory challenges; and if there are several defendants, they shall be treated as one person in the allowance of such challenges." [31 Stat. at L. 1338, chap. 854, as amended 32 Stat. at L. 536, chap. 1329]. It will be observed from the language of this act that the number of peremptory challenges is not based upon the number of defendants or the number of counts in the indictment, but upon the single trial. Conceded, as it must be, that if, instead of two indictments in this case, the two offenses

had been embraced in separate counts of one indictment, defendant would have been entitled to only ten peremptory challenges, it is not apparent why a different rule should be applied when the consolidation has accomplished the same result. As we have seen, the act in question can only be involved where this condition exists.

Counsel for defendant rely chiefly upon *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. ed. 707, 12 Sup. Ct. Rep. 909, and *Betts v. United States*, 65 C. C. A. 452, 132 Fed. 228. The former involved a number of civil cases in each of which there was a separate defendant. The cases were tried together under § 921, Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 685, which is as follows: "When causes of a like nature or relative to the same question are pending before a court of the United States, or of any territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so." It is apparent that, while these civil cases with separate defendants could be joined in a single suit, they could not have been consolidated into one action for the purpose of trial under § 1024. Each case had a different defendant and required a separate verdict and judgment. In the case at bar there is one defendant, and the two indictments were capable of consolidation as if separate counts in one indictment.

In the case of *Betts v. United States*, supra, there were nine indictments, each charging three offenses for violation of the postal laws under § 5480, supra. This case was unlike the *Bass Case*, in that all the offenses charged in the nine indictments were committed within a single period of six months. The cases were tried together under § 921. The court held defendant entitled to three peremptory challenges for each indictment, but, in doing so, distinctly held that, inasmuch as the statute under which the indictments were found limited the government to charging only three offenses in each indictment, the indictments could not have been consolidated under § 1024,—in other words, that, since all the offenses charged in the nine indictments could not, by reason of the inhibition of § 5480, have been embraced in separate counts in one indictment, they could not be consolidated under § 1024. The court pointed out the distinction as follows:

"We have not referred to § 1024 of the Revised Statutes, which relates especially to 40 L.R.A. (N.S.)

consolidations of indictments. This section originated in 1853, while § 921 originated in 1813. So far as we can discover, both sections, under proper rules of construction, have full effect. So far as the topic we are discussing is concerned, § 1024 makes no provision for trying indictments together, but only that the court may order them to be consolidated. If this means anything more than was done in the present case, it certainly could have no just application to the indictments at bar. That § 1024 contemplates a proper consolidation may well be inferred from what has appeared in reference to it in the Supreme Court in *Logan v. United States*, 144 U. S. 263, 267, 296, 36 L. ed. 429, 431, 440, 12 Sup. Ct. Rep. 617, and *Williams v. United States*, 168 U. S. 382, 42 L. ed. 509, 18 Sup. Ct. Rep. 92. In *McElroy v. United States*, 164 U. S. 76, 77, 41 L. ed. 355, 356, 17 Sup. Ct. Rep. 31, the opinion rendered by the chief justice in behalf of the Supreme Court, referring to § 1024, says: "The order of consolidation under this statute put all the counts contained in the four indictments in the same category as if they were separate counts of one indictment." This indicated that in the mind of the Supreme Court a proceeding under this section operated as a true consolidation. Therefore, in view of the special provisions of § 5480, to which we have referred, proceedings on the indictments before us could not have been taken under § 1024, because so to do would be to defeat the letter and purpose of the statutory direction that only three distinct offenses should be included in one indictment."

We are here confronted, not by the joining of independent cases for trial under § 921, but by a "true consolidation" of two indictments under § 1024, with a single defendant, upon charges which properly might have been embraced in separate counts in a single indictment. In this view of the law it was not error to refuse to grant defendant the statutory number of peremptory challenges for each indictment.

It is unnecessary to determine whether the court committed reversible error in refusing to advise defendant in advance of the number of peremptory challenges he would be permitted to exercise. It is sufficient to suggest that, since the trial judge had full charge of the proceedings in the case and was charged with the duty of securing to defendant a fair and impartial trial, the ends of justice should have indicated the propriety of making the ruling in advance, as requested, in order that defendant could have governed himself properly in the exercise of his statutory rights.

It is unnecessary to consider the other

assignments of error, inasmuch as it is improbable that they will be involved in another trial.

The judgment is reversed, and the cause remanded, with instructions to grant the defendant a new trial.

KENTUCKY COURT OF APPEALS.

E. O. STONE et al., Appts.,
v.
MONTICELLO CONSTRUCTION COMPA-
NY.

(135 Ky. 659, 117 S. W. 369.)

Corporation — action to enforce subscription — right of corporation.

1. An action to enforce an agreement to take stock in a corporation, which shall not be binding until a certain amount has been subscribed, may be maintained in the name of the corporation, although the defense is that the conditions had not been complied with.

Jury — competence — relatives of stockholders.

2. Relatives of stockholders of a corporation are not disqualified to sit as jurors in actions by the corporation to enforce payment of unpaid subscriptions by other persons, but the fact of such relationship may be brought out to aid the exercise of the right of peremptory challenges.

Corporation — subscription to stock — good faith.

3. Subscriptions by persons who are not apparently able to pay them when called for

cannot be counted in determining whether or not the condition that a certain amount shall be subscribed in good faith to the capital stock of a proposed corporation before the subscription shall become binding has been met.

Evidence — good faith of subscription — hearsay.

4. Upon the question whether or not subscriptions to the stock of a corporation were made in good faith, evidence as to the ability of the subscribers to pay must be limited to facts known by the witnesses, although upon the question whether or not the directors exercised ordinary care in accepting the subscriptions, evidence is admissible of statements made in their presence as to the ability of subscribers.

Corporation — subscription to stock — good faith — unauthorized corporate subscriptions.

5. That corporations which have paid their subscriptions to the stock of another corporation had no authority to make the subscriptions will not require such subscriptions to be ignored in determining whether or not the requisite amount of subscriptions made in good faith had been received to make other subscriptions binding under the conditions of the contract.

(March 19, 1909.)

A PPEAL by defendants from a judgment of the Circuit Court for Wayne County in plaintiff's favor in an action brought to enforce payment of unpaid subscriptions to the stock of a corporation organized for the building of a railroad. Reversed.

The facts are stated in an opinion.

Note. — Jury: relationship to private corporation or association for profit which will disqualify a juror in a civil action in which it is interested.

As to the relationship to a private corporation or association interested in a criminal prosecution which will render one incompetent to sit as a juror therein, see note to Miller v. United States, ante, 973.

As to membership in a religious society or denomination as a disqualification to serve as a juror in an action involving its rights, see note to Searle v. Roman Catholic Bishop, 25 L.R.A. (N.S.) 992.

As to the competency, as a juror, of an employee, or relative of an employee, of a party or person interested in an action, see note to Hufnagle v. Delaware & H. Co. post, 982.

Stockholder or member.

While the cases directly in point are not numerous, it seems clear that stockholders in a corporation are incompetent as jurors in an action to which the corporation is a party or in which it is directly interested. Thus, stockholders in a railroad corporation are incompetent as jurors in a proceeding

by the corporation to condemn and appropriate lands for its use. Peninsular R. Co. v. Howard, 20 Mich. 18.

And a stockholder in a bank is incompetent as a juror in an action by the bank upon a promissory note held by it. Murchison Nat. Bank v. Dunn Oil Mills Co. 150 N. C. 683, 64 S. E. 883.

And a stockholder in a corporation at the time of the institution of a suit against it and for some time afterward, and who, by statute, became liable for his proportion of the costs incurred during such time, is incompetent to sit as a juror upon the trial of the case, although he has sold out all of his stock before being called as a juror. Fleeson v. Savage Silver Min. Co. 3 Neb. 157, 8 Mor. Min. Rep. 153.

Likewise, members of a mutual fire insurance company, liable to be assessed and to pay in case of a recovery against the company, are incompetent as jurors in an action against the company for damages under a policy of insurance. Martin v. Farmers' Mut. F. Ins. Co. 139 Mich. 148, 102 N. W. 656.

And in an action against a fraternal benefit society on a benefit certificate of life insurance, members of the society,

Messrs. McQuown & Beckham, for appellants:

The petition is insufficient to authorize recovery of damages for breach of contract to subscribe for stock.

Mt. Sterling Coal Road Co. v. Little, 14 Bush, 429; 1 Morawetz, Priv. Corp. § 46.

Relationship to the stockholders of a corporation which is a party to a suit is cause for challenge.

17 Am. & Eng. Enc. Law, 1126; Dailey v. Gaines, 1 Dana, 530; Siller v. Cooper, 4 Bibb, 90; London & L. F. Ins. Co. v. Rufer, 89 Ky. 525, 12 S. W. 948.

Created for the sole purpose of dealing in merchandise, the grocery company was not, and could not be, bound by this alleged subscription of stock.

whose assessments will be affected by the result, are incompetent to serve as jurors. Edmonds v. Modern Woodmen, 125 Mo. App. 214, 102 S. W. 601.

Where, by contract between two railroads, the net income of both is to be divided between them in proportion to the cost of each, a stockholder of one road is incompetent as a juror in an action against the other road for damages for the laying out of the latter road across certain private land. Page v. Contoocook Valley R. Co. 21 N. H. 438.

And a stockholder in a corporation which is the owner of stock in another corporation is incompetent as a juror in an action against the latter company. McLaughlin v. Louisville Electric Light Co. 100 Ky. 173, 34 L.R.A. 812, 37 S. W. 851.

So, a stockholder and director in a corporation is incompetent as a juror in a cause in which the corporation has an interest. Silvis v. Ely, 3 Watts & S. 420.

And in an action for personal injuries, the officers and stockholders of a casualty company which had insured the defendant against liability for such injuries are incompetent as jurors. Featherstone v. Lowell Cotton Mills, — N. C. —, 74 S. E. 918; Norris v. Holt-Morgan Mills, 154 N. C. 474, 70 S. E. 912.

In Com. v. Boston & M. R. Co. 3 Cush. 25, however, it was held that where two separate cases against a railroad company for the recovery of damages for the taking of two adjoining pieces of land for a right of way are to be tried in succession by the same jury, it is no objection to the competency of a juror to serve on the first case that he is a stockholder in the corporation which is the petitioner in the second case, although such corporation is indirectly interested in the amount of the award in the first case, in that it is likely to have an important influence upon the amount of the award in the second case.

And a stockholder in a company which is a business rival of one of the parties to an action is not incompetent as a juror, where he states that he does not know such party, 40 L.R.A. (N.S.)

Rhorer v. Middlesboro Town & Lands Co. 103 Ky. 146, 44 S. W. 448; Phillips v. Covington & C. Bridge Co. 2 Met. (Ky.) 219; Cook, Stock & Stockholders, § 180.

Messrs. Stone & Wallace and Harrison & Harrison also for appellants.

Messrs. Cress & Cress, with Messrs. O. H. Waddle & Son, for appellee.

Hobson, J., delivered the opinion of the court:

Some years ago a corporation, known as the "Cumberland River & Nashville Railway Company," was organized for the purpose of building a railroad from Corbin, Kentucky, through Wayne county into Tennessee. It made a contract for the building of the road from Tateville to Monticello,

and can fairly and impartially try the case. Rogers Grain Co. v. Tanton, 136 Ill. App. 533.

Nor are stockholders of a railroad company which has leased in perpetuity the property and franchises of another company disqualified from serving as jurors on the trial of an action against the lessor company, for an alleged wrongful death which occurred prior to the loss,—it not appearing that, by reason of their connection with the lessee company, or otherwise, they had any interest in the result of the trial. Augusta Southern R. Co. v. McDade, 105 Ga. 134, 31 S. E. 420.

So, in an action against a subordinate lodge of Odd Fellows for sick benefits, while members of the defendant lodge are incompetent to serve on the jury, this incompetency does not extend to members of any other lodge of Odd Fellows. Delaware Lodge No. 1, I. O. O. F. v. Allmon, 1 Penn. (Del.) 160, 39 Atl. 1098.

And members of subordinate lodges of the society of Free Masons, which, in its financial policy, is a purely charitable corporation, are competent as jurors in an action against a third person by the grand lodge of the state, as they cannot be said to have any pecuniary interest in the result of the suit. Burdine v. Grand Lodge, 37 Ala. 478.

Relative of stockholder or member.

The same rule as to the competency of stockholders has generally been applied to relatives of stockholders in an interested corporation. Thus, the son (Georgia R. Co. v. Hart, 60 Ga. 550) or a nephew (Young v. Marine Ins. Co. 1 Cranch, C. C. 452, Fed. Cas. No. 18,163) of a stockholder in a corporation is incompetent as a juror in an action against the corporation.

And under a statute authorizing challenges to a juror for any cause "which, in the opinion of the court, renders him an unfit person to sit on the jury," the court does not abuse the discretion intrusted to it by sustaining challenges to jurors who are, respectively, a half brother and the

and this contract was sublet by the original contractors to Plunkett, Edwards, & Clark. Some work was done upon the road between Tateville and Monticello, and then it developed that the railroad company was without means. The people about Monticello were very anxious to secure a railroad, and they began to organize a construction company which was to finance the building of the road from Tateville to Monticello. With this view the following written contract was signed by a number of persons interested in the building of the railroad: "Whereas it is proposed to organize a corporation with a capital stock of \$100,000, divided into shares of \$100 each, under the name of the Monticello Railroad Construction Company, with its chief office at Monticello, Kentucky; said corporation to be organized for the purpose of constructing and building railroads, and especially for the purpose of constructing and building the Cumberland River & Nashville Railroad, and taking over to itself all contracts now existing for building the said railroad from the Cincinnati Southern Railway, near Tateville, Kentucky, to Monticello, Kentucky, and for such other work of construction as may be contracted for: Now we, the undersigned, agree to take the number of shares set opposite our names, and to pay for same at the rate of \$100 each, in instalments as called for by the directors hereafter to be elected. It is further agreed that this subscription shall not be binding until there shall have been \$80,000 of the capital stock of the said company subscribed for in good faith. It

is further agreed that this subscription shall not be binding until an agreement and contract is entered into by a committee of the subscribers hereto, and the Cumberland River & Nashville Railroad Company, for the construction of said railroad from Tateville to Monticello, Kentucky, nor until satisfactory arrangements shall have been made with the present contractors now at work and holding contracts for work upon said line. Done at Monticello, Kentucky, this October 1, 1907." In October, 1907, when the necessary subscription was said to have been made, the Monticello Construction Company was organized. After the organization of the company, satisfactory arrangements were made with the contractors holding contracts for work upon the line, and a contract was entered into by a committee of the subscribers and the Cumberland River & Nashville Railroad Company for the construction of the railroad from Tateville to Monticello. Certain subscribers refused to pay their subscription when called for, and this suit was brought against them by the Monticello Construction Company to recover the amount they had subscribed. The defendants pleaded that \$80,000 had not been in good faith subscribed, and relied on this fact to defeat the action on the subscription paper. On a trial of the action, there was a judgment in favor of the plaintiff, and the defendants appeal.

It is insisted for the defendants that the contract is simply an agreement to subscribe for stock when the corporation should be organized and the conditions set

father of stockholders in a bank which is the defendant in the case on trial. *National Bank v. Ragland*, — Tex. Civ. App. —, 51 S. W. 861, affirmed on other points in 181 U. S. 45, 45 L. ed. 738, 21 Sup. Ct. Rep. 536.

And relatives within the prohibited degree of stockholders of a plaintiff corporation are incompetent as jurors, although they are ignorant, at the time, that their kinsmen are stockholders. *Bank of University v. Tuck*, 107 Ga. 211, 33 S. E. 70.

Under a statute providing that no person shall be sworn as a juror who is of kin to either party to any cause within the fourth degree of consanguinity or affinity, relatives within the prescribed degree of persons insured with a corporation, who, under the law of its organization, are members of the corporation, subject to the payment of assessments for all losses sustained by it, are incompetent as jurors in an action against the company on one of its policies. *Price v. Patrons' & Farmers' Home Protection Co.* 77 Mo. App. 236.

And a nephew, a first cousin, a second cousin, a brother-in-law, an uncle by marriage, and a nephew by marriage, respectively 40 L.R.A. (N.S.)

ly, of different policy holders of a mutual fire insurance association, who have to bear their proportionate shares of any sum for which the association may be liable, are incompetent as jurors in an action against the association on one of its policies, although they do not know, at the time of the trial, that their respective relatives are policy holders in the defendant association. *Moore v. Farmers' Mut. Ins. Asso.* 107 Ga. 199, 33 S. E. 70.

On the other hand, in *Benedict v. Pennsylvania Coal Co.* 6 Kulp, 221, it was held that the fact that one of the jurors was a brother-in-law of one of the officers and witnesses of the defendant company would not legally disqualify him from serving.

And the father of the widow of a deceased half nephew of the president of a defendant corporation is not incompetent as a juror in an action in which the corporation is interested. *Miller v. South Covington & C. Street R. Co.* 25 Ky. L. Rep. 207, 74 S. W. 747.

As to disqualification of juror as ground for new trial, see note to *Jewell v. Jewell*, 18 L.R.A. 473.

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out in the agreement complied with, and that under the ruling of this court in *Mt. Sterling Coalroad Co. v. Little*, 14 Bush, 429, no action can be maintained upon the contract in the name of the corporation; but the later cases fully maintain the right of action, holding that the rule was correctly stated in the case referred to, but by inadvertence was incorrectly applied. *Twin Creek & C. Turnp. Road Co. v. Lancaster*, 79 Ky. 552; *Bullock v. Falmouth & C. H. Turnp. Road Co.* 85 Ky. 184, 3 S. W. 129; *Cadiz R. Co. v. Roach*, 114 Ky. 934, 72 S. W. 280; *Curry v. Kentucky Western R. Co.* 25 Ky. L. Rep. 1372, 78 S. W. 435.

On the trial of the case, the defendants desired to interrogate the jurors as to whether any of them were related by blood or marriage to any of the other stockholders in the construction company. The court refused to allow the question answered, and of this the defendants complain. The other stockholders in the construction company were not parties to the action. They had no interest in the action except such as the mere fact that they were stockholders in the corporation gave them. The rule is that a juror or judge is not always disqualified in a suit by a corporation merely because he is related to some of the stockholders in the corporation. The stockholders themselves would not be qualified to be jurors, but it would be carrying the rule further than it has been carried to say that in a case like this all their relatives were also disqualified. It was held in *New York L. Ins. Co. v. Johnson*, 24 Ky. L. Rep. 1867, 72 S. W. 762, that a policy holder in a mutual life insurance company was not disqualified as a witness, under § 606 of the Civil Code of Practice, on the ground that his interest was so infinitesimal as not to amount to a real interest. We see no reason why this should not apply here, for it clearly appears from the record that the other subscribers to the contract have no real interest in the controversy. Their object was simply to get a railroad, and the proof shows their stock is worth nothing. The authorities holding that a kinsman of a stockholder in a corporation is incompetent as a juror rest upon the ground that the stockholder is beneficially interested in the result of the litigation. 24 Cyc. 274; 17 Am. & Eng. Enc. Law. 1126. Here the stockholders have no real interest in the litigation. On another trial the court will allow counsel for defendants to ask the panel the questions indicated, as they will thus be enabled to exercise their right of peremptory challenge more intelligently. Questions may be asked the panel, 40 L.R.A. (N.S.)

though the answer to them would not disqualify the juror, where the facts sought might be ground for the party striking off the juror. As he has the right to strike off three without cause, he may ask questions which may enable him to know who the jurors are and their relationships.

At the conclusion of the evidence, the court properly instructed the jury that they should find for the plaintiff unless they believed from the evidence that \$80,000 had not been subscribed to the capital stock of the company in good faith, and that in this event they should find for the defendants. To define what was a subscription in good faith, he then gave the jury the following instruction: "If the jury believe from the evidence that the stock subscribed to the plaintiff company was subscribed with the intent and expectation to pay for it, and that the party would be able to do so, and without any purpose or intention to engage or assist in the commission of a fraud, then any such subscriptions were made in good faith; but if any subscription was made without intending and without ability to pay, and for the purpose of committing or assisting in the commission of a fraud upon the cosubscribers and upon the plaintiff, the Monticello Construction Company, and its board of directors knew of such intention or inability to pay and such purpose or intention to assist in committing a fraud, then any such subscriptions would not have been made in good faith." In 1 Morawetz on Private Corporations, § 141, the rule on the subject is thus stated: "It is necessary also that the required amount of capital be subscribed by persons apparently able to pay the assessments which may be made upon their shares. Fictitious subscriptions, or subscriptions made by persons unable to contribute their proportion of the capital, do not satisfy the requirement that the whole capital of a corporation shall be subscribed before its members can be assessed; but, if the required number of subscriptions has been obtained in good faith from persons apparently able to perform their duties as shareholders, it is no defense to an action against a shareholder that some of the subscribers have proved to be insolvent." See also *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 239; 10 Cyc. 400, 20 Am. & Eng. Enc. Law. 937. The purpose in getting up the Monticello Construction Company was to get up the money necessary to build the railroad. A subscription which was not made by a person apparently able to pay it would not be a subscription in good faith within the meaning of the contract, although it was not made for

the purpose of committing a fraud, and the defendants were not required to show that the board of directors knew of any such fraudulent intention. In lieu of the instruction given, the court should have told the jury that a subscription in good faith was one made by a person apparently able to pay the assessments which might reasonably be expected to be made upon the stock, although the subscriber proved to be insolvent, but that a subscription was not in good faith if made by a person whose apparent ability was not such as a person of ordinary prudence would have deemed reasonably sufficient to meet the assessments on the stock as they might be expected to be made. While the proof was conflicting, there was some evidence tending to sustain the defense. The instruction given by the court did not fairly present the case to the jury, and was prejudicial to the substantial rights of the defendants under the evidence.

The proof, on another trial, as to the ability of the subscribers in contest to pay, will be limited to the facts known to the witnesses. Hearsay and information from others will be omitted, except it may be shown what information the directors had as to the ability of the subscribers in contest, as this will illustrate whether they exercised ordinary care in accepting the subscriptions as made by persons of apparent ability to pay. The court will allow proof of all statements made in the presence of any of the directors by any of the subscribers, tending to show a want of apparent ability to pay on their part.

The subscriptions made by corporations which have been paid are not invalid because not warranted by their articles of incorporation. When the corporation has waived this defense and paid its subscription, it cannot be said not to have been made in good faith.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

PENNSYLVANIA SUPREME COURT.

J. G. HUFNAGLE

v.

DELAWARE & HUDSON COMPANY,
Appt.

(227 Pa. 476, 76 Atl. 205.)

Jury — competence — employee of corporation.

1. An employee of a corporation is not a competent juror in an action against it. 40 L.R.A. (N.S.)

Evidence — journal entries — opinion of writer.

2. An employee of the weather bureau cannot be allowed to testify from journal entries made by a predecessor in the office, that the weather at a certain time had caused streams to rise rapidly and to overflow adjoining land, since it consists largely of the individual opinion of the writer.

Same — opinion — extraordinary precipitation.

3. An employee of the weather bureau who has testified to the temperature and precipitation on a certain date, and what would or would not constitute extraordinary precipitation, cannot state his opinion whether or not the precipitation on that date was extraordinary.

Same — collateral evidence — discretion to reject.

4. In a suit for damages for injury to land by the damming back of the water of a river at a certain date, the court may, in its discretion, exclude evidence as to the precipitation at another date for the purpose of explaining conditions shown in photographs taken at the time, the matter being on a collateral point.

Same — opinion — necessity of personal knowledge.

5. That witnesses have not gained their knowledge of the condition of land injured by flood, by personal observation, does not prevent their giving an opinion upon the cost of restoring it, where its condition was described by other witnesses.

Appeal — refusal of requested charges — matter in general charge.

6. Refusal to affirm requests to charge is not reversible error if the points are sufficiently covered in the general charge.

(March 14, 1910.)

APPPEAL by defendant from a judgment of the Court of Common Pleas for Lackawanna County in plaintiff's favor in an action brought to recover damages for the damming back of water upon his property to its injury. Affirmed.

The facts are stated in the opinion.

Note. — Jury: competency as juror of employee, or relative of employee, of party or person interested in an action.

The rule seems to be well settled that an employee of a party to an action is incompetent to sit as a juror in a case. Louisville & N. R. Co. v. Cook, 168 Ala. 592, 53 So. 190; Central R. Co. v. Mitchell, 63 Ga. 173; Atlantic Coast Line R. Co. v. Bunn, 2 Ga. App. 305, 58 S. E. 538; Hubbard v. Rutledge, 57 Miss. 7; Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 So. 360; Pearce v. Quincy Min. Co. 149 Mich. 112, 112 N. W. 739, 12 Ann. Cas. 304; Burnett v. Burlington & M. R. Co. 16 Neb. 332, 20 N. W. 280; Blevins v. Erwin Cot-

Messrs. Willard, Warren & Knapp, and Welles & Torrey, for appellant:

Expert evidence as to the cause of the floods was admissible.

Grigsby v. Clear Lake Waterworks Co. 40 Cal. 405; Ohio & M. R. Co. v. Neutzel, 143 Ill. 46, 32 N. E. 529; Ohio & M. R. Co. v. Webb, 142 Ill. 404, 32 N. E. 527; Ball v. Hardesty, 38 Kan. 540, 16 Pac. 808.

The records of the United States Weather Bureau are public records, and as such are admissible in evidence.

Nolt v. Crow, 22 Pa. Super. Ct. 113; Evanston v. Gunn, 99 U. S. 660, 25 L. ed. 306.

ten Mills, 150 N. C. 493, 64 S. E. 428; Houston & T. C. R. Co. v. Smith, — Tex. Civ. App. —, 51 S. W. 506.

As said in Barnett v. Burlington & M. R. Co. 16 Neb. 332, 20 N. W. 280: "At common law, it is good cause for challenge that a juror . . . is the party's . . . servant. . . . Jurors must be indifferent between the parties, and have neither motive nor inducement to favor either. The fact that the defendant is a corporation does not change the rule, nor render an employee eligible to sit on a jury in an action where the corporation is a party."

In Goodrich v. Burdick, 26 Mich. 39, however, the court said: "Though it might not have been erroneous for the court to have allowed Stewart, the clerk of the defendant, to sit as a juror, no other cause being shown against him, there was no error in rejecting him for this cause, and we think his rejection judicious and proper."

And in Hopkins v. State, 52 Fla. 39, 42 So. 52, a criminal prosecution of a baggage master of a railway company for embezzlement of the property of a passenger intrusted to him for delivery at the passenger's destination, in which case the trial court had overruled challenges for cause to jurors who were employees of the railway company, while all the members of the appellate court were of the opinion that it is the better practice to excuse jurors under such circumstances, yet they were equally divided as to whether the trial court could be held in error for refusing to do so, and this point was, therefore, not decided.

But in Crawford v. United States, 212 U. S. 183, 53 L. ed. 465, 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392, reversing 30 App. D. C. 1, it was held that an employee of the United States government is incompetent as a juror in a criminal prosecution instituted by the government.

Likewise, in an action to recover damages for personal injuries, an agent or employee of a casualty company which had insured the defendant against liability for such injuries is incompetent as a juror. Norris v. Holt-Morgan Mills, 154 N. C. 474, 70 S. E. 912; Featherstone v. Lowell Cotton Mills, — N. C. —, 74 S. E. 918.

And employees of a lessee railroad company which is operating the railroad of the

Messrs. John P. Kelly, R. W. Rymer, I. H. Burns, and M. J. Martin, for appellee:

One who is in the employ of one of the parties is incompetent as a juror at common law.

17 Am. & Eng. Enc. Law, 2d ed. 1127; Thompson & M. Juries, 197, § 185; Co. Litt. 157b; 3 Bl. Com. 363; Tidd, Pr. 4th Am. ed. 853; Central R. Co. v. Mitchell, 63 Ga. 173; Hubbard v. Rutledge, 57 Miss. 7; Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 So. 360; Burnett v. Burlington & M. R. Co. 16 Neb. 332, 20 N. W. 280.

lessor are incompetent as jurors in an action by a passenger against the lessor corporation for personal injuries received through the negligence of servants of the lessee. Georgia R. & Bkg. Co. v. Tice, 124 Ga. 459, 52 S. E. 916, 4 Ann. Cas. 200.

So, in an action of replevin, the court may properly exercise its discretion in excusing for cause a juror who is a clerk in the employ of a firm on intimate relations with one of the parties, and which became such party's bondsman upon the instrument which secured him in the possession of the property in the original controversy. Hill v. Corcoran, 15 Colo. 270, 25 Pac. 171.

And in an action by a county clerk against the county to recover for *ex officio* services, the trial judge does not abuse his discretion by excusing for cause jurors who are employees of the county commissioners. Calhoun County v. Watson, 152 Ala. 554, 44 So. 702.

On the other hand, in Tucker v. Buffalo Cotton Mills, 76 S. C. 539, 121 Am. St. Rep. 957, 57 S. E. 626, it was held that in an action for personal injuries by an employee of a cotton mill against the milling corporation, the mere fact that jurors are employees of the defendant corporation and of another milling corporation having the same president, or of a store operated by both corporations, does not render them incompetent to sit in the case.

And the mere fact that one is a clerk in a corporation whose president is also the president of another corporation which is the defendant in an action does not, in the absence of actual bias or prejudice, render him incompetent to sit as a juror in the case. Glasgow v. Metropolitan Street R. Co. 191 Mo. 347, 89 S. W. 915.

Nor does the fact that one of the jurors in an action against a corporation is a clerk for a firm which has an interest in the defendant company legally disqualify him from serving. Benedict v. Pennsylvania Coal Co. 6 Kulp, 221.

Where each of two parties has sued out an attachment against a common debtor on the same day, on the same ground, through the same attorney, and under the same circumstances, and both attachments have been levied on the same property, and

Moschzisker, J., delivered the opinion of the court:

At the trial in the court below it was charged that the defendant by the construction of a narrow gauge mine railroad, and by the deposit in the bed of the stream of material from an old mine drift, had so obstructed the channel of a river that the water became dammed up and broke the banks, overflowing and causing serious damage to plaintiff's property. Holes or ravines were washed in the surface, and large quantities of culm were deposited upon the land of the plaintiff. The injury occurred during certain floods in the years 1901 and 1902.

The defendant denied that the river broke the banks because of any obstructions placed therein by it; contending that the breaks had come from the natural force of the stream in flood times, and that the overflow had followed well-defined water channels over the land of the plaintiff; further, that the floods in question were extraordinary in character, and the real damage was not caused by the breaking of the banks of the river, but by the overflow of a creek in the vicinity, which carried culm and ashes down upon the land of the plaintiff. The defendant claimed that the railroad

track complained of could not have caused the damage which came from the early flood of 1901, since it was not constructed until a later period. A verdict was rendered for the plaintiff, and the defendant has taken an appeal to this court. There are twenty-seven assignments of error, which for the purposes of our present consideration may be grouped into four classes: (1) The rulings of the trial judge in sustaining challenges to certain jurors. (2) Rulings on evidence. (3) Answers to certain of defendant's points. (4) Complaints against portions of the charge.

In the calling of the jury counsel for the plaintiff challenged two of the panel for cause, alleging that they were employed by the defendant company. The court sustained the challenge, stating: "Taking it as a fact that the only ground for challenge for cause is that these two jurors are simply employees, one a miner and the other a division superintendent of some of the collieries of the defendant company, the court is of opinion that the challenge should be sustained." While no Pennsylvania case with facts precisely like the one under consideration has been called to our attention, yet the general principle is laid down in our cases that no person should be

the debtor has brought suit on each of the attachment bonds, the mere fact that a juror in one of these two suits, involving the same issues, pending in the same court, and set down for trial on the same day, is an employee of the defendant in the other suit, does not, in the absence of a showing of actual bias, render him incompetent to serve. *Calhoun v. Hannan*, 87 Ala. 277, 6 So. 291.

And employees of a railroad company which has leased in perpetuity the property and franchises of another company are not disqualified from serving as jurors on the trial of an action against the lessor company, for an alleged wrongful death which occurred prior to the lease,—it not appearing that by reason of their connection with the lessee company or otherwise they have any interest in the result of the trial. *Angusta Southern R. Co. v. McDade*, 105 Ga. 134, 31 S. E. 420.

In an action against a city, a juror is not rendered incompetent by the mere fact that he has previously performed some clerical work for the city. *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607.

And the mere fact that a juror has occasionally been employed by a railroad company to do temporary jobs when wanted, without having any contract for the work, and without being on the company's pay roll, does not render him incompetent as a juror in an action against the company. *Thompson v. Cleveland, C. C. & I. R. Co.* 9 Ohio Dec. Reprint, 209.

Nor does the mere fact that a juror has 40 L.R.A. (N.S.)

been in the former employment of one of the parties to an action, if he is otherwise competent, render him incompetent to serve in the case. *Murphy v. Southern P. Co.* 31 Nev. 120, 101 Pac. 322, 21 Ann. Cas. 502; *East Line & R. River R. Co. v. Brinker*, 68 Tex. 500, 3 S. W. 99.

In an action against a railroad company to recover damages for the negligent killing of an employee, it is no ground for setting aside the verdict, that one of the jurors had a brother and another two nephews in the service of the defendant. *Stewart v. Louisville & N. R. Co.* 136 Ky. 717, 125 S. W. 154.

And the mere fact that a juror is an employee of a stockholder of a corporation does not render him incompetent to serve in an action to which the corporation is a party (*Dimmack v. Wheeling Traction Co.* 58 W. Va. 226, 52 S. E. 101), even though the employer is the owner of a large majority of the capital stock of the corporation (*Sansouwer v. Glenlyon Dye Works*, 28 R. I. 539, 68 Atl. 545), or is also its president (*Frederickton Boom Co. v. McPherson*, 13 N. B. 8).

Nor does a trial court abuse its discretion in rejecting a juror who states that he is an employee of men who are officers of the defendant corporation, and that if the testimony is evenly balanced his prejudice would be in favor of the defendant, but that he can render a fair verdict on the evidence. *Richey v. Missouri P. R. Co.* 7 Mo. App. 581.

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permitted to serve on a jury who stands in any relation to a party to the cause that would "carry with it *prima facie* evident marks of suspicion of favor," as where a litigant is in a position where "he might exercise a control over the juror," such as the relation of master and servant: *Pipher v. Lodge*, 16 Serg. & R. 214; *Harrisburg Bank v. Forster*, 8 Watts, 304; *Cummings v. Gann*, 52 Pa. 484. In the present case the trial judge applied the rule to the relation of employer and employee, and in this there was no error.

We find no reversible error in any of the rulings of the trial judge on the admission or rejection of evidence. The only assignments under this heading which require special notice are those going to the rulings upon the testimony of the weather bureau official, and upon the testimony of certain witnesses as to the expense of restoring the land to its condition before the flooding. The weather bureau station was about six miles from the location of the land in question. The official in charge was permitted to read from the records, and to testify at large upon the temperature and precipitation at or about the times of the various floods complained of, and to tell the nature thereof, whether rain or snow. Being then asked to turn to his journal, and, having done so, he gave an answer which did not contain exact *data*, but stated facts concerning the weather at a certain time; namely, that it had caused the rivers and streams to rise rapidly and to overflow low lying adjacent lands, that certain lives had been lost, and "had it not been for the warning to prepare for floods and the snow melting rapidly the loss of life and damage would doubtless have been greater." An objection to this answer was sustained and the testimony ordered stricken from the record, the trial judge stating: "The court is of opinion that the regular official record of the weather bureau as to the amount of precipitation each day might fairly be considered proper testimony, but as to the mere diary kept by someone in the office we clearly think it is objectionable, because it is largely the opinion of the man who writes it." It is true that in answer to a leading question as to whether the diary was required to be kept by the government and was one of the official records, the witness said "Yes." But it appeared that the book had not been kept by the witness, but by someone in the office several years before he had become attached to the station. Under these circumstances, considering the fact that the matter sought to be proven by the diary was in no sense scientific *data*, but consisted largely of the in-

dividual opinion of the person who made the entries, there was no error in its exclusion. The question was put to this witness, "I will ask you whether, from the records which you have in your office and to which you have referred in your opinion, the storm of February 26,—27 and 28—1902, was or was not an extraordinary flood." The question was objected to and the objection sustained. The witness was not upon the ground in 1902. He could and did give the *data* as to the temperature and the precipitation on the dates in question, and he also expressed his professional opinion as to what would and what would not constitute an extraordinary precipitation, giving figures; as these *data* were before the jury, it was for them to determine the question of the character of the flood from the evidence, and there was no necessity for the witness's opinion on the subject. Counsel for the defendant offered to "show the precipitation immediately prior to October 12, 1903, for the purpose of showing that there had been a considerable flood at that time, which, in connection with the testimony of Mr. Kemp as to the time when some of the photographs were taken, would tend to explain to the jury the conditions as they appear in these photographs." The offer was objected to and the objection sustained, the trial judge saying: "This is a kind of argument, from premises to conclusion, the court believes is based upon premises too uncertain to permit the fact going to the jury to determine the matter." The flood of October 12, 1903, was not directly in issue, and as the matter offered was on a collateral point, it was within the discretion of the trial judge to say whether or not he would allow it.

The plaintiff and his witnesses gave testimony sufficiently describing the character and condition of the property before the floods which caused the damage; thereafter witnesses were offered to state the expense of restoring the land to its prior condition. The fact that some of these witnesses had not gained their knowledge of the condition of the land prior to the floods by personal investigation would not debar them from giving the cost of restoring the property to the condition the other witnesses said it had then been in.

As to the refusal to expressly affirm certain of the defendant's points, we may say that the trial judge is not bound to adopt the language of points, but may choose his own form of expression, and if it gives the law fully and with substantial accuracy, nothing further is necessary. *Com. v. Lewis*, 222 Pa. 302, 71 Atl. 18. In the present case the points in question were suf-

ficiently covered in the general charge, which was all that the defendant was entitled to ask.

It would serve no useful purpose to further discuss the various assignments, except to state that none of them show anything approaching reversible error. The case was submitted to the jury in a comprehensive and accurate charge wherein all of the issues were plainly pointed out with clear and relevant instructions on the law; and at the end the trial judge said: "The court desires to know from counsel on both sides if it has omitted to charge upon any substantial matter, or made any mistake." To which counsel for the defendant answered: "No." The complaints now made concerning abstract parts of the charge are without merit and cannot be sustained.

The assignments of error are all overruled, and the judgment is affirmed.

IOWA SUPREME COURT.

T. W. BARHYDT

v.

W. C. CROSS et al., Appts.

(— Iowa, —, 136 N. W. 525.)

Tax — attack on assessment — burden of proof.

1. One attacking a tax assessment on the ground that he has not the property assessed has the burden of showing that fact, and his assessment cannot be canceled be-

Note.— *Is a domicile lost by abandonment without intention of returning, before acquiring a new one.*

For cases on the question when a person who intends to leave a state permanently, but has not done so, becomes a nonresident, see the note to *Brown v. Beckwith*, 1 L.R.A.(N.S.) 778.

For change of domicile as affected by removal for the benefit of health, see the note to *Pickering v. Winch*, 9 L.R.A.(N.S.) 1159.

For cases on gaining new domicile or residence before abandoning occupation of old residence, by purchasing or hiring property in new locality with intention of establishing permanent residence there, see the note to *People v. Turpin*, 33 L.R.A.(N.S.) 766.

For cases on when a new domicile is acquired where a man goes to the new place first, his family remaining in the old place, see the note aforesaid to *People v. Turpin*.

The reader will bear in mind that the rule that a domicile once acquired continues until a new one is acquired is a rule of substantive law, as distinguished from the rule that a domicile once acquired is presumed to continue until it is shown to have 40 L.R.A.(N.S.)

cause of absence of proof that he possessed the property.

Same — objection to assessment — specification.

2. To make available an objection that money and credits placed by a board of review on the tax list of a protesting taxpayer were not itemized, such objection must be made before the board.

Same — change of domicile — intention — necessity of acquisition.

3. One does not lose his domicile so as to be exempt from taxation there, by starting on an extended journey with the intention of establishing the domicile elsewhere, until he has actually established such domicile.

(June 6, 1912.)

A PPEAL by defendants from a decree of the District Court for Des Moines County canceling a tax assessment against the property of petitioner. Reversed.

The facts are stated in the opinion.

Messrs. Poor & Poor, for appellants:

The court will presume in the first instance that the board acted properly and upon sufficient evidence as to values, and the burden is on the appealing taxpayer to overthrow this presumption and to establish the injustice or inequity of the raised assessment.

Frost v. Board of Review, 114 Iowa, 108, 86 N. W. 213; *First Nat. Bank v. Easterville*, 136 Iowa 203, 112 N. W. 829.

The domicile of the owner is the place of taxation of moneys and credits.

Code, § 1313; *Barber v. Farr*, 54 Iowa,

been changed, which is merely a rule of evidence. 1 Wharton, Conf. L. 3d ed. 119-121.

"It is a settled principle that no man shall be deemed to be without a domicile." 14 Cyc. 836.

And it is a general rule that a domicile is not lost until a new one is gained. Side by side with this rule, however, is the exception of the English cases, that the domicile of origin will attach where there is abandonment of a domicile or choice without acquisition of a new domicile of choice. This exception has not in general found favor in America, at least where the domicile of origin and that of choice are both domestic.

Domicil of origin.

The domicile of origin returns on sailing for the home of origin with the intent to abandon the domicile of choice. The Indian Chief, 3 C. Rob. 17.

And the same seems to have been held in *Re Bianchi*, 3 Swabey & T. 16, 8 L. T. N. S. 171, 11 Week. Rep. 240.

It may here be noted that in *Les Trois Freres*, Stewart, Vice-Adm. Rep. N. S. 1, where a Frenchman naturalized in America sailed for home with the intent of giving

57, 6 N. W. 134; *Gilbertson v. Oliver*, 129 Iowa, 568, 4 L.R.A. (N.S.) 953, 105 N. W. 1002; *Glotsfelty v. Brown*, 148 Iowa, 124, 126 N. W. 797.

Where one acquires a residence, that residence is presumed to continue until he acquires another, and the burden is on him to show a change and the acquisition of a new residence.

Tuttle v. Wood, 115 Iowa, 509, 88 N. W. 1056; *Glotsfelty v. Brown*, 148 Iowa, 124, 126 N. W. 797; *Re Titterington*, 130 Iowa, 358, 106 N. W. 761; *Nugent v. Bates*, 51 Iowa, 79, 33 Am. Rep. 117, 50 N. W. 76.

A change in residence for purpose of taxation must be something more than mere intent.

Pickering v. Cambridge, 144 Mass. 244,

up his American domicile, and while at sea, hearing that there was a war, he changed his course to Boston, and was captured. it was held, on his stating that he had intended, when steering for Boston, to abandon his plan of going to France until after the war, that his American domicile had not been lost.

In *Munro v. Munro*, 7 Clark & F. 842, *Cottenham, L. C.*, said: "So firmly, indeed, did the civil law consider the domicile of origin to adhere, that it holds that if it be actually abandoned, and a domicile acquired, but that again abandoned, and no new one acquired in its place, the domicile of origin revives."

In *Udny v. Udny*, L. R. 1 H. L. Sc. App. Cas. 441, 9 Eng. Rul. Cas. 782 (the leading English case), a Scotchman went to London, where he resided thirty-two years and then departed for the continent to escape his creditors, and lived in Boulogne in a hired house for some nine years, when he came to England in order that his mistress should have English treatment, and while there a son was born; and it was held that at the time of the birth of this son, the father was a Scotchman, and that therefore the subsequent marriage of the parties legitimized the son. There was some difference of opinion in the court as to whether the father had ever acquired an English domicile, although two of the three judges who spoke on the subject considered that it had been acquired, but that, at the moment of departure for the continent, the Scotch domicile revived. The court overrules *Munroe v. Douglas*, 5 Madd. Ch. 379, where it was held that the domicile of origin did not revive upon the abandonment of the domicile of choice.

In *King v. Foxwell*, L. R. 3 Ch. Div. 518, where an Englishman emigrated to America and acquired a domicile here, and then went back to England, forming no settled home, but travelling around in various places until he died, in the Island of Jersey, it was held that he had abandoned his American domicile. *Jessel, M. R.*, said: "A man having acquired a domicile of choice may abandon it, without it being incumbent on him

10 N. E. 827; *Church v. Crossman*, 49 Iowa, 448; *Tuttle v. Wood*, 115 Iowa, 509, 88 N. W. 1056; *Re Titterington*, 130 Iowa, 358, 106 N. W. 761.

Messrs. Blake & Wilson, for appellee: "Money and credits," is not such an assessment of property as is sufficiently specific.

Worthington v. Whitman, 67 Iowa, 190, 25 N. W. 124; *Appanoose County v. Vermilion*, 70 Iowa, 365, 30 N. W. 616; *Brown v. Grand Junction*, 75 Iowa, 489, 39 N. W. 718; *Cedar Rapids & M. R. Co. v. Cedar Rapids*, 106 Iowa, 477, 76 N. W. 728; *Watkins v. Couch*, 134 Iowa, 1, 111 N. W. 315; *Kehe v. Blackhawk County*, 125 Iowa, 549, 101 N. W. 281; *Wahkonsa Invest. Co. v. Ft. Dodge*, 125 Iowa, 148, 100 N. W. 517.

to acquire a new domicile of choice; that is to say, he may abandon his domicile of choice without acquiring, in strictness, any new domicile, because his domicile of origin reverts. That doctrine is laid down by *Lord Westbury in Udny v. Udny*, supra, and consequently all that has to be proved in this case is the abandonment of the American domicile; it is not incumbent on the defendants to prove the acquisition of a new domicile of choice."

See also the *obiter* statement of the rule in *Re Johnson* [1903] 1 Ch. 821, 72 L. J. Ch. N. S. 682, 51 Week. Rep. 444, 88 L. T. N. S. 161, 19 Times L. R. 309.

As heretofore stated the rule of *Udny v. Udny*, has not in general found favor in America. That the automatic revival of the domicile of origin should not occur where both domiciles are domestic was held in *First Nat. Bank v. Balcom*, 35 Conn. 351, where it appeared that a native of the state of New York, who afterwards resided in Missouri, and later at Branford, Connecticut, in the spring of the year left Branford with his wife, with the intention to abandon their residence there, and went to Geneseo in the state of New York for the health of his wife and himself, intending to spend the summer there in the house of his brother-in-law, where his wife died in the latter part of July; and it was held that the domicile of the husband at the time of the death of the wife was in the state of Connecticut. The court said: "It is claimed that, inasmuch as he left Branford with no intention of returning to that place to reside, and went to the state of New York, and remained there in fact for a time, no matter what the character of his abiding may have been, he became domiciled there, on the principle that a native domicile easily reverts. Would it be claimed that if Mr. Lewin had left Branford with the intent to take up his residence in the state of Ohio, and on his way so-journed a few days in the state of New York, that would be sufficient? And what real difference is there between that case and the present? In both cases Mr. Lewin had no intention of permanently remaining

The board of review cannot put on the tax book a statement that they think one ought to pay, under a certain classification, about a specified amount, unless there is a listing and a valuing of specific property belonging under said classification, amounting to that sum.

Brown v. Grand Junction, 75 Iowa, 488, 39 N. W. 718; Wahkonsa Invest. Co. v. Ft. Dodge, 125 Iowa, 153, 100 N. W. 517.

Appellee was a nonresident of Iowa.

Ludlow v. Szold, 90 Iowa, 175, 57 N. W. 676; Nugent v. Bates, 51 Iowa, 77, 33 Am. Rep. 117, 50 N. W. 76; Botna Valley State Bank v. Silver City Bank, 87 Iowa, 479, 54 N. W. 472; Paine, Elections, § 47; McCrary, Elections, § 105; Johnson v. Smith, 43 Mo. 499; Re Titterington, 130 Iowa, 359,

106 N. W. 761; Cohen v. Daniels, 25 Iowa, 88; Hinds v. Hinds, 1 Iowa, 40; State v. Groome, 10 Iowa, 315; Cover v. Hatten, 136 Iowa, 63, 113 N. W. 470; Scrimgeour v. Chase 145 Iowa, 368, 124 N. W. 193.

Deemer, J., delivered the opinion of the court:

The facts are not in dispute. We quote from appellants' brief such as are deemed controlling:

Prior to October 8, 1909, T. W. Barhydt resided at No. 420 Iowa street, in the city of Burlington, Iowa; the same being an eleven room brick house, with brick laundry and barn, on a lot 180x117 feet, where he had lived continuously for over forty years. On October 8, 1909, while still living in

in the state of New York. All the difference there is consists in the fact that in one case his mind is made up in regard to his future residence, and in the other it is not. His abiding in both cases is temporary. We said in another case upon the present circuit, that a temporary residence did not change its character by mere lapse of time. Whether it is longer or shorter, it is temporary still. But the principle that a native domicile easily reverts applies only to cases where a native citizen of one country goes to reside in a foreign country, and there acquires a domicile by residence without renouncing his original allegiance. In such cases his native domicile reverts as soon as he begins to execute an intention of returning,—that is, from the time that he puts himself in motion bona fide to quit the country *sine animo revertendi*,—because the foreign domicile was merely adventitious and *de facto*, and prevails only while actual and complete. . . . This principle has reference to a national domicile in its enlarged sense, and grows out of native allegiance or citizenship. It has no application when the question is between a native and acquired domicile, where both are under the same national jurisdiction. . . . Mr. Lewin had no domicile in the state of New York when his wife died, but his domicile at that time remained in the town of Brantford, in accordance with the maxims that universally prevail in relation to this subject, that every person must have a domicile some where, that he can have but one domicile for one and the same purpose, and that a domicile once acquired continues until another is established."

In Steers's Succession, 47 La. Ann. 1551, 18 So. 503, it was said that the theory of the domicile of birth as recognized in England depended upon different ideas from those obtaining in America; there the idea being to keep the family together; here there was often a great change of locality in families and individuals. The court said: "We conclude that it will require the same facts only to show a change of domicile from the domicile of birth that it would

require to show a change from one selected domicile to another. The revival of the intention to return to the domicile of birth does not apply when the domicile of origin and of selection are both domestic."

In Plant v. Harrison, 36 Misc. 649, 74 N. Y. Supp. 411, Levintritt, J., said: "The English rule that the domicile of origin reverts at once upon the abandonment of the domicile of choice (Udny v. Udny, supra) has not been followed in this country, where the rule seems to be that a domicile once acquired continues not only until it is abandoned, but until another is acquired."

But in Allen v. Thomason, 11 Humph. 536, 54 Am. Dec. 55, the court, while deciding the case in the main on another ground, was of the opinion that where the domicile of origin had been Tennessee, and the person had afterwards gone to Arkansas and lived there, and then left Arkansas with the intention of returning to Tennessee, while on the way in another state the domicile would be Tennessee.

So, in Sheldon v. Forsman, 17 Lanc. L. Rev. 85, it is suggested that the domicile of birth reverts as soon as one departs from the domicile of choice with intent to resume his native domicile.

The domiciles were in different countries in Re Wrigley, 8 Wend. 134, where the chancellor said: "Although the plaintiff in error was an inhabitant of New York while he was actually located there and doing business as a commission merchant, yet the moment he broke up his residence and sailed for his native land, *sine animo revertendi*, he was no longer an inhabitant of New York, but he resumed his domicile of origin." But Allen, Senator, in his opinion, apparently adopts the English view of the domicile of origin. (The time as of which the question was to be determined was subsequent to the journey to the native country).

So, also, Story, J., in Catlin v. Gladding, 4 Mason, 308, Fed. Cas. No. 2,520, seems to consider American states as mutually foreign, so far as relates to the domicile of origin and that of choice.

that house, he and his wife started on a trip of travel, study, information, and sight-seeing around the world, via New York, the Suez canal, Egypt, India, China, Japan, and Hawaii, the destination being San Francisco, California. He left his furnished home at Burlington in charge of a caretaker. After leaving New York, the only place where they were in territory controlled by the United States before reaching their destination was at Manila, Philippine Islands, on December 19, 20, and 21, 1909, and at Honolulu January 23 and 24, 1910. They reached San Francisco, California, on January 31, 1910, where their water trip ended; and, after resting a few days there, they went direct to Los Angeles and Pasadena, Los Angeles county, Cali-

fornia, spending part of the time in each place, while Mr. Barhydt looked over different properties he had in view to purchase, first purchasing No. 90 South Grand avenue, Pasadena, late in March. At the same time, he had made an offer on No. 909 San Pasqual street, Pasadena, which was accepted within a few days, both of which properties he owns now. Mr. Barhydt remained in Pasadena until April 15th, when he and his wife returned to Burlington and such portions of the summer as they were in that city occupied No. 420 Iowa street, their old home, and lived there until December 20, 1910. At the date of the trial below, March 7, 1911, his house and furniture in Burlington were in charge of a caretaker. Prior to this trip around the

There are some *obiter* observations by Washington, J., in *The Venus*, 8 Cranch, 253, 3 L. ed. 553, where in considering domicils in different countries, he said: "This national character which a man acquires by residence may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. To use the language of Sir W. Scott, it is an adventitious character gained by residence, and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion bona fide to quit the country *sine animo revertendi*. The *Indian Chief*, 3 C. Rob. 17. The reasonableness of this rule can hardly be disputed. Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal bona fide, and without an intention of returning."

Result of abandonment of domicil.

Where the domicil which is abandoned is the domicil of origin, it will remain the domicil of the person abandoning it until he has acquired another domicil.

In *Somerville v. Somerville*, 5 Ves. Jr. 750, Arden, M. R., said: "The original domicil, or, as it is called, the *forum originis*, or the domicil of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and taking another as his sole domicil."

In *Bell v. Kennedy*, L. R. 1 H. L. Sc. App. Cas. 307, 9 Eng. Rul. Cas. 764, where the domicil of origin was Jamaica, and the person in question had left the island for good, and was sojourning in Scotland with some thought of settling down there, it was held that his domicil of origin remained. The court said that there was nothing in the proof to show that his personal status of

domicil had been changed by that which alone could change it, his assumption of domicil in another country.

In *Mather v. Cunningham*, 105 Me. 326, 29 L.R.A.(N.S.) 761, 74 Atl. 809, 18 Ann. Cas. 692, the court, in discussing the question whether it was possible for the person in question to have acquired a domicil in Shanghai, and in deciding that question in the affirmative, said: "Although the decedent may have abandoned his domicil of origin so far as his acts and intentions were concerned, yet it is conceded, if he was prevented by law from acquiring a domicil of choice, that his domicil of testacy or intestacy would continue from necessity to be that of origin."

So, in *Re Tootal*, L. R. 23 Ch. Div. 532, it was held that an Englishman who went to Shanghai and remained there, with the intention of spending the rest of his life there, retained his English domicil, because he could not acquire a Chinese domicil.

See also, as stating the rule, *DeMeli v. DeMeli*, 120 N. Y. 485, 17 Am. St. Rep. 652, 24 N. E. 996.

It is the general American rule, at least so far as American domicils are concerned, that there can be no loss of domicil until the acquirement of a new one. The cases in general do not explain whether the relinquished domicil was one of origin or of choice. *BARHYDT v. Cross*; *Lamar v. Mahony*, *Dudley* (Ga.) 92; *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61; *State ex rel. White v. Scott*, 171 Ind. 349, 86 N. E. 409; *Otis v. Boston*, 12 Cush. 44; *Cobb v. Rice*, 130 Mass. 231; *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424; *Ayer v. Weeks*, 65 N. H. 248, 6 L.R.A. 716, 23 Am. St. Rep. 37, 18 Atl. 1108; *Kellogg v. Winnebago County*, 42 Wis. 97.

See also, as stating the rule, *Abington v. North Bridgewater*, 23 Pick. 170; *Thorn-dike v. Boston*, 1 Met. 242; *Opinion of Justices*, 5 Met. 587; *Cobb v. Rice*, 130 Mass. 231; *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 430; *Crawford v. Wilson*, 4 Barb. 504; *Hegeman v. Fox*, 31 Barb. 475.

In *Re High*, 2 Dougl. (Mich.) 515, the court, in holding that a new domicil had

world, they were accustomed to spend most of their winters in Burlington, taking occasional trips, but never going away before February or March.

At the time of taking Mr. Barhydt's deposition (January 30, 1911), he was living at No. 969 San Pasqual street, Pasadena, California, having occupied that house since December 23, 1910, the house having been purchased in March, 1910; and Mr. Barhydt took possession of the same by placing a caretaker in charge of it on April 22, 1910. Mr. Barhydt testified that he left Iowa with the purpose and intention of ceasing to have a residence and domicile there, on October 8, 1909. Previous to leaving Burlington, he said he looked up several places

in California in view of becoming a resident and citizen of that state.

An assessment was made against Barhydt by the assessor for the year 1910 of two dogs, one horse, three vehicles, and household furniture amounting to \$1,000, and on this assessment roll was a statement that Barhydt lived at Pasadena, California. And also the following statement: "I own twenty shares of Merch. Nat. Bank stock, and demand that my indebtedness be deducted from value of personal property." On this roll Barhydt also listed his debts, which he claimed amounted to \$47,741. This roll was made out for Mr. Barhydt by his attorney, and was returned by the assessor to the board of review.

When the matter reached the board of

been acquired in Michigan by a man formerly domiciled in Cuba, said that the domicile in Cuba had undoubtedly been abandoned, and, "as we have seen, he must at the same time have acquired a new one somewhere else."

In *Lamar v. Mahony*, Dudley (Ga.) 92, where a man gave up his residence and set out with the intent of removing to one of the western counties of the state, but his journey was interrupted at an intervening county, where he was served with a writ, it was held that at the time of service he still retained his old domicile.

In *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61, where a woman resident of Bloomington, Illinois, married a resident of Ohio, and afterwards they acquired and retained for several years a residence in St. Louis, which they afterwards abandoned, intending ultimately to become residents of either Bloomington or Salem, in Illinois, but before they had determined which place, or had adopted any home in either, she died intestate, it was held that she was a resident of Missouri.

In *Otis v. Boston*, 12 Cush. 44, where no stress is laid upon the fact that the old domicile was that of origin, Shaw, Ch. J., said: "In general, it is laid down as a fixed rule on this subject, that every man must have a domicile; that he can have but one; and that, of course, a prior one will not cease until a new one is acquired. It is then asked, What is the condition of one who has purchased or hired a house, or otherwise fixed his place of abode in another place, left the town of his last abode, with all his property and furniture, and is on his way to his new abode; is he an inhabitant of the place from which he has departed. If his removal were towards another town in this state, we think his place of being an inhabitant would not be changed. He would certainly continue to be an inhabitant of the state, and taxable in some town; and the only question would be, in which he was an inhabitant on the 1st of May. Three might claim him: The one he has left, the one he is in, and the one to which he is proceeding. In 40 L.R.A. (N.S.)

such case we think the rule would apply, and his home would not be changed, either to the place of his actually bodily presence or of his destination, because in neither would the fact of actual presence and the intent to reside concur. Not the place where he was *in itinere*, for want of the intent; nor of his destination, for want of his actual residence. If he had left the state and actually passed its limits on his way to a distant state, it would certainly be a question of more difficulty in its various aspects as fixing his citizenship with a view to succession and the like."

In *Ayer v. Weeks*, 65 N. H. 248, 6 L.R.A. 716, 23 Am. St. Rep. 37, 18 Atl. 1108, where it appears that the person in question had stated before the trial of the action that his absence was temporary, the court, however, seems to have considered the case as if he had left his home with the intention of abandoning it, and said: "The case shows that Weeks's domicile was in Somersworth, and the fact is found that he had not acquired a domicile or residence elsewhere. The fact that he left Somersworth with the intention never to return did not destroy his domicile there. Until he had gained a domicile elsewhere, he remained a resident within the jurisdiction of the insolvency court, and liable to be proceeded against in insolvency."

In *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424, the court opposed the theory of *Briggs v. Rochester*, 16 Gray, 337, that an "inhabitant" means something different than a "person domiciled in," for the purposes of taxation, and held that they meant the same thing under the Massachusetts Constitution and the statutes, and in sending the case back for a new trial, stated that the plaintiff had not shown that he had changed his residence or lost his residence in the commonwealth before tax day, and said: "Although he might have left the commonwealth with the fixed purpose to abandon it as a residence, he did not leave it on his way to a place certain, which he had determined upon as his future residence, and was proceeding to with due despatch; and, upon the

review, it changed the assessment, as follows: "(11) Moneys and credits raised from nothing to \$250,000. Household furniture raised from nothing to \$2,000." The \$2,000 is scratched out, and written below said \$2,000 are the figures "\$1,000;" such change being made in red ink.

Against this change the plaintiff filed the following protest with the board:

To the Board of Review of the City of Burlington, Iowa:—

Gentlemen:—

I, T. W. Barhydt, protest against the assessment made by this board of review reported as follows: "Moneys and credits raised from nothing to \$250,000. Household furniture raised from nothing to \$2,000."

general rule that, having had a domicile in this commonwealth, he remains an inhabitant, for the purpose of taxation, until he has acquired a new domicile, the intention and fact had not concurred at the time when this tax was assessed."

In *BARHYDT v. CROSS*, the court says, "The only discordant note is found in *Indlow v. Szold*, 90 Iowa, 175, 57 N. W. 676." In that case a person whose business was broken up, his home vacated, and his family "gone," appeared for a few days, until the morning of the 16th of the month, without his family in another county, with some apparent intention of entering business there, and then disappeared. It was held that such latter county was the place of his residence on the 15th of the month. The court said: "To hold that abandonment can be established only by evidence that a new residence has been acquired would render it impossible to show abandonment in the cases of those whose whereabouts are unknown. While the fact that a new residence has been acquired is convincing evidence that the old has been abandoned, it is not the only evidence by which abandonment may be proven. The presumption of continued residence may be rebutted by any competent facts that show abandonment; that show an actual change of habitation, with an intention to make a new residence."

The same American rule applies where a person is *in itinere* from the old domicile to a new one, as has been held,

—when the person in question is in another subdivision of the same state on the way to another state. *Church v. Crossman*, 49 Iowa, 444; *Bulkley v. Williams-town*, 3 Gray, 493; *Gorman v. B. & O. & C. R. Co.* 11 Ohio Dec. Reprint, 649;

—when in an intervening town, *Littlefield v. Brooks*, 50 Me. 475;

—when in one of the intervening states. *Boyd v. Com.* 149 Ky. 764, — L.R.A. (N.S.) —, 149 S. W. 1022.

In *Shaw v. Shaw*, 98 Mass. 158, a married pair domiciled in Massachusetts left that state for Colorado, and while on the way, in Pennsylvania, the husband treated

(1) This board is without legal jurisdiction or authority to make said assessment. (2) T. W. Barhydt is not a resident of the state of Iowa, and was not on the 1st day of January, 1910, nor at any time since October 8, 1909. (3) T. W. Barhydt, on January 1, 1910, had no moneys and credits taxable in this jurisdiction under the laws of the state of Iowa. (See affidavit attached.) As to household furniture: (1) The return of Mr. Barhydt of household furniture at \$1,000 is fair and equitable, and is the full value of his household furniture subject to taxation. (See affidavit attached.) Wherefore you are respectfully asked to cancel said proposed change.

This was supported by an affidavit of

the wife so cruelly that she returned to Massachusetts and applied for a divorce there on account of the acts committed in Pennsylvania, and it was held that the legal domicile of the pair remained in Massachusetts. The court said: "There is no authority for saying that a former domicile can be lost while one is *in transitu* and before he has arrived at another place in which he intends to establish himself."

In *Briggs v. Rochester*, 16 Gray, 337, and in *Colton v. Longmeadow*, 12 Allen, 598, it was held that a person *in itinere* to another state on tax day was not taxable in Massachusetts as an "inhabitant," as that word did not have the same meaning as "domiciled in;" but this theory was disapproved in *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424, *supra*.

In *Cross v. Black*, 9 Gill & J. 198, the court said that the true question involved in the case was "whether a citizen of Maryland intending to break up his establishment, and leaving this state with the avowed design of becoming a resident of another state, and actually going out of this state in pursuance of such design, may, before he reaches the point of his intended destination, change his purpose and return into Maryland, with his slaves, who had accompanied him, without violating the" statute prohibiting the bringing of slaves into the state. The court said: "The numerous mischiefs suggested in argument would inevitably result, if the master could be considered as having lost his claim to be considered a citizen of Maryland before he had become a resident of another place, placing him at the mercy of all who might officiously or malevolently oppose his just claims to the quiet enjoyment of his property, and denying him the character of a citizen of any one of the states, in which character alone, he could invoke the aid of the laws and legal tribunals of that government which is common to all the states."

Of course, the same rule would apply if the old domicile was that of origin. See *Graham v. Public Administrator*, 4 Bradf. 127, where a person in transit from Scotland to Canada died in the city of New

Barhydt made on the 22d day of April, 1910, in which he said: "I am not now, and I was not on the 1st day of January, 1910, nor at any time since said date, a resident of the state of Iowa; that I removed from the state of Iowa to the state of California, leaving Iowa for said state on the 8th day of October, 1909, and at no time since said date have I been, nor am I now, a resident of the state of Iowa, but am a resident of the state of California.

My removal from the state of Iowa was in good faith; and I have no purpose of again becoming a citizen or resident of Iowa. I further state that on the 1st day of January, 1910, I was not the owner of moneys and credits subject to taxation in Iowa, aside from national bank stocks and savings bank stocks, said bank stocks all being taxable only at the place of the location of the bank and all being paid by said banks; nor did I have in my posses-

York, and it was held that the law of Scotland must determine the distribution of her personal property.

Where the journey is taken to resume the domicile of origin, there is little in the modern American authorities directly decisive of the question which of the two domicils attaches *in itinere*. As has been seen in *Allen v. Thomason*, 11 Humph. 536, 54 Am. Dec. 55, the court's opinion favored the domicile of origin even between American states, though the decision was in the main on another ground; and in *Sheldon v. Forsman*, 17 Lanc. L. Rev. 85, a similar view seems to be suggested. The obiter remarks of the courts in *Re Wrigley*, 8 Wend. 134, and in *The Venus*, 8 Cranch. 253, 3 L. ed. 553, favoring the domicile of origin, relate to cases where the two domicils were in different countries, but do not in terms exclude a similar view between two domestic domicils.

Miscellaneous.

In *Hicks v. Skinner*, 72 N. C. 1, the court said as to Skinner, whose domicile was determined to be at the place where he resided: "His domicile of origin was Perquimans county, North Carolina, and thence it is inferred that his domicile continued until he acquired a new domicile. And doubtless that is the rule; but it is subject to exceptions, else one would not abandon one domicile until he had acquired another. Whereas it is well settled that one may abandon his domicile of origin, either with the design of acquiring no other; and then until he acquires another, he is without domicile, except the domicile of actual residence. Wharton on the Conflict of Laws, § 78, has this head: 'When a person may be without a domicile.' 'This, according to Savigny, may occur in the following instances: When a prior domicile has been abandoned, and a new one is sought, but not yet determined on. When the business of life is traveling, *e. g.*, agencies, etc., there being no home as a central point of interest.' Then the only course is to assume residence to be domicile. And this, as it seems to me, is the case of Thomas Skinner." It will be seen that the court is merely enforcing the modern doctrine, that no one can be without a domicile.

In *State v. Poydras*, 9 La. Ann. 165, where the statute provided: "Residence once acquired shall not be forfeited by absence on the business of the state or of the 40 L.R.A. (N.S.)

United States; but a voluntary absence from this state for two years, or the acquisition of residence in any other state of this Union shall forfeit a residence within this state," and it appeared that the residence of the person in question had been in France, the court said: "But even though he had acquired no domicile in France, he had forfeited his residence in Louisiana by a voluntary absence from the state of two years." The person in question was a native of France, who had lived for many years in Louisiana and had then returned to France, and the question was one as to the amount of inheritance tax.

In *Re Dumas*, 32 La. Ann. 679, the *Poydras* Case was followed, where the question was as to jurisdiction of the Louisiana court. Dumas was a native of Louisiana, but had lived for a good many years in Paris, and it was held that the court had no jurisdiction; that he had given up his domicile in New Orleans. The court said: "The conclusion is irresistible that he forfeited his domicile here, even if he acquired none in France; and that the lower court had no jurisdiction over him, and therefore over the suit brought to interdict him."

In *State ex rel. White v. Scott*, 171 Ind. 349, 86 N. E. 409, where the relator left his home in Indiana, stating that he was going to the Southwest to make it his home, or that he was going to locate in the Southwest, and about a month afterwards he returned to his old home, the court said, in holding that there was nothing to show that he had selected any place as a new home, and that the presumption of his continued residence in Indiana had not been overcome: "A journey into another state or territory for inspection, accompanied with an intent permanently to remove to such other state if a satisfactory place is found, does not amount to a change of residence until an approved location has been not only discovered and chosen, but some affirmative step taken in the transfer of personal effects from the former to the latter place, as the only and bona fide home."

It may be noted that in *Olson's Will*, 63 Iowa, 145, 18 N. W. 854, where a man left his domicile in Illinois with the intention not to return, and before locating permanently he was taken sick and went to the home of his mother in Iowa, where he died, it was held that his domicile was at the home of his mother, where he died.

B. B. B.

sion, nor did I own, any moneys and credits in any sum issued by any Iowa corporation or other Iowa resident, or in any manner secured by Iowa property, save and except two mortgages, one for \$3,000 and one for \$1,000; and on said January 1, 1910, I was indebted as stated in my original return in excess of the sum of \$47,000, more than one half of which indebtedness was due and owing to Iowa creditors. As to household furniture, I have paid taxes on household furniture at a valuation of something like \$1,000 for very many years. My taxable household furniture is very old and worn, and its taxable value does not exceed the sum which I returned, to wit, \$1,000. And further deponent sayeth not."

This protest was unavailing, and plaintiff appealed to the district court, and upon trial there the assessment on moneys and credits in the sum of \$250,000 was canceled. Plaintiff at that trial introduced no testimony showing, or tending to show, that he did not have the amount of moneys and credits with which he was assessed. On the contrary, his testimony was directed wholly to the issue as to his residence on January 1, 1910.

The appeal for and on behalf of the defendants challenges the ruling of the trial court in canceling the assessment on moneys and credits. As no testimony was adduced by plaintiff showing that he was not possessed of the amount of moneys and credits with which he was assessed, the finding of the trial court cannot be sustained on the theory that defendants offered no evidence that he had such property subject to taxation. *King v. Parker*, 73 Iowa, 757, 34 N. W. 451.

2. In support of the court's ruling, it is contended that the assessment made by the board of review cannot be sustained, because it was upon moneys and credits without specification as to items. The exact point here is that the board acts simply as and for the assessor; and that, as it was the duty of the assessor to list the kind and character of items under the head of moneys and credits, as, notes, bonds, money in bank, book accounts, etc., so it was the duty of the board to do likewise; and that its assessment of "moneys and credits raised from nothing to \$250,000" is irregular and illegal, and should be set aside. The statute provides for such a listing by the assessor (see Code Supp. § 1360), with forms there given. But this seems to be largely for convenience, in order that it might be deducted from the net amount as brought forward onto the roll in another place. There is no provision of this kind with reference to the action of the board of review. Without passing upon the ne-

cessity of such a course, it is enough for the present to say that, in making his protest before the board of review, plaintiff made no such claim as is now insisted upon. We have fully set forth all the specifications contained in that protest; and none of them, as it seems to us, covers the matters now under consideration. That plaintiff is confined to the objections there made is elementary. *Brown v. Grand Junction*, 75 Iowa, 489, 39 N. W. 718; *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106 Iowa, 477, 76 N. W. 728; *Gibson v. Cooley*, 129 Iowa, 529, 105 N. W. 1011; *Farmers' Loan & T. Co. v. Fonda*, 114 Iowa, 728, 87 N. W. 724.

By no stretch of the imagination can it be said that the question as to the validity of the schedule was made before the board. It is quite important that such objection be made before the board, in order that it may make a correction at the time, and thus require of the taxpayer that he bear his just proportion of the burdens. Unless so made, he should ever after hold his peace, and not be allowed to question the form of the assessment.

3. But a single question is left, and that the primary one: Was Barhydt domiciled at Burlington on January 1, 1910, or had he such a residence there as subjected his property to taxation in that district? It is perfectly manifest that that was his home until he started on his trip around the world, and that he did not gain a residence or domicil at any other place until after the 1st of January, 1910. Although on the ocean on January 1st, he had a residence or domicil somewhere; for he could not fully expatriate himself. Had he died on his journey, or gone down with his ship, as so many brave men have recently done, there could be no question as to his domicil. His will, if he had made one, would undoubtedly have been probated at Burlington; and his estate, if he left no will, would have been administered by the courts of this state, and in Des Moines county. As Barhydt must have had a residence and domicil somewhere, it is for the courts to decide where that was, under the record now presented. Residence and domicil have no uniform meaning in law; and when it becomes necessary to interpret them, much depends upon the nature of the action.

Cases of abandonment of residence, as applied to homesteads, or as to residence where it is not essential that one have a homestead at all, or a definite residence, for the purposes of the case, are not applicable to such controversies as this, where a man must have a residence or domicil somewhere. Courts endeavor to construe

revenue laws so that each one will share his just burden of taxation; and he should pay his taxes somewhere. Hence it is the universal rule, in construing revenue statutes, that, as a man must have a domicile or taxing residence somewhere, his old residence will be deemed his present one until a new one is acquired. If this were not the rule, a man might escape taxation altogether. Assuming, for the purposes of argument, as we must, that the laws of California are the same as our own, Barhydt would escape all taxation for the year 1910, were he successful on this appeal; for he could not, under the record, be taxed in California. Our own cases, with possibly one exception, sustain this view, and, as we shall see, this is the holding elsewhere. Of our own cases supporting the conclusion here reached, see *Tuttle v. Wood*, 115 Iowa, 509, 88 N. W. 1056; *Glotsfelty v. Brown*, 148 Iowa, 124, 126 N. W. 797; *Re Titterington*, 130 Iowa, 358, 106 N. W. 761; *Nugent v. Bates*, 51 Iowa, 79, 33 Am. Rep. 117, 50 N. W. 76; *Cover v. Hatten*, 136 Iowa, 65, 113 N. W. 470.

In *Cover's Case*, it is said: "Where one acquires a residence, that residence is presumed to continue until he acquires another; and the burden is upon him to show a change, and the acquisition of a new residence. . . . This change, for purposes of taxation, must be something more than a mere intent. It involves a change in place as well. . . . In other words, the mere intent of the plaintiff to change his residence, no matter how expressed, will not constitute a change, unless there be a change in abode as well."

In *Titterington's Case*, we said: "A man must have a domicile somewhere. He cannot have two at the same time; and a domicile once gained remains until a new one is acquired. Two things must concur to effect a change of domicile. There must be actual residence and the intent." In *Tuttle's Case*, this was said: "The change [of domicile] cannot be made except *facto et animo*. Both are alike necessary. Either, without the other, is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be animus to change the prior domicile for another. Until the new one is acquired, the old one remains."

The other cases use like expressions; and the only discordant note is found in *Ludlow v. Szold*, 90 Iowa, 175, 57 N. W. 676, relied upon by appellee. That decision was by a divided court, however, and the question involved was not one of taxation. In so far as any of the language used is at variance with that used in the taxation cases since decided, and to which we have 40 L.R.A. (N.S.)

made reference, it must be regarded disapproved. For purposes of taxation, the word "residence," as used in our statutes, means "domicil." *Barber v. Farr*, 54 Iowa, 57, 6 N. W. 134; *Gilbertson v. Oliver*, 129 Iowa, 568, 4 L.R.A. (N.S.) 953, 105 N. W. 1002; *Glotsfelty v. Brown*, 148 Iowa, 124, 126 N. W. 797.

We make this reference for the purpose of showing the applicability of cases from other jurisdictions which support the rule we have adopted. Thus, in *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424: "One domiciled in Boston, Massachusetts, went to Europe in 1876 with his family, for an indefinite term of absence, and remained abroad until 1879. On leaving, he had determined never to return to reside in Boston, and before May 1, 1877, he had decided to take up his residence, on his return, in Waterford, Connecticut; and on his return he went there to reside. Held, that his 'domicil,' for the purposes of taxation, was in Boston on the 1st of May, 1877."

In the opinion, it is said: "Upon the whole, therefore, we can have no doubt that the word 'inhabitant,' as used in our statutes when referring to liability to taxation, by an overwhelming preponderance of authority, means 'one domiciled.' While there must be inherent difficulties in the decisiveness of proofs of domicile, the test itself is a certain one; and, inasmuch as every person, by universal accord, must have a domicile, either of birth or acquired, and can have but one, in the present state of society, it would seem that not only would less wrong be done, but less inconvenience would be experienced, by making domicile the test of liability to taxation, than by the attempt to fix some other necessarily more doubtful criterion. . . . The plaintiff does not bring himself within this rule; for, although he might have left the commonwealth with the fixed purpose to abandon it as a residence, he did not leave it on his way to a place certain, which he had determined upon as his future residence, and was proceeding to with due despatch; and upon the general rule that, having had a domicile in this commonwealth, he remains an inhabitant, for the purpose of taxation, until he has acquired a new domicile, the intention and fact had not concurred at the time when this tax was assessed." See also *Bulkley v. Williams-town*, 3 Gray, 493.

The court there said: "The general rule, and, for practical purposes, a fixed rule, is that a man must have a habitation somewhere; he can have but one; and therefore in order to lose one, he must acquire another. This is the test, the practical test; and it is hardly necessary to say how im-

portant it is to have a practical rule, and a general rule. One of the fixed rules on the subject is this: That a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicil. The fact and the intent must concur. He must remove, without the intention of going back. The question here is whether he can abandon one, without acquiring another; and we think it has always been held that he cannot. If he goes into another state, and returns for his family, his personal presence there, concurring with the intent, may fix his domicil there. But if he has not previously removed to the other state, he has not acquired a domicil there, or lost one here."

This case followed *Kilburn v. Bennett*, 3 Met. 199, to which reference is made. These cases are closely in point, and seem to rule the one now before us. In addition to that, they support all our later cases. See also *Kellogg v. Winnebago county*, 42 Wis. 97, wherein it is said: "For the purpose of taxation and the discharge of those duties which every person owes to society and the government that protects him, a person cannot be without a residence or domicil, so that, if he quits a place with intent to take up his residence or domicil in another, he may, while *in transitu*, have no domicil. 'But the more correct principle would seem to be that the original domicil is not gone until a new one has been actually acquired *facto et animo*.' Story, Conf. L. § 47. We use the words 'residence' and 'domicil' interchangeably, as synonymous terms under our statute. *Hall v. Hall*, 25 Wis. 600. And, in the language of Shaw, Ch. J., we say: 'The general rule, and, for practical purposes, a fixed rule, is that a man must have a habitation somewhere; he can have but one; and therefore, in order to lose one, he must acquire another. This is the test, the practical test; and it is hardly necessary to say how important it is to have a practical rule, and a general rule. One of the fixed rules on the subject is this: That a purpose to change, unaccompanied by an actual removal or change of residence, does not constitute a change of domicil.'"

The following also support the rule we have adopted: *Littlefield v. Brooks*, 50 Me. 475; *Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 805, and the many cases cited. Indeed, there seems to be no discordant note in the cases, in so far as they relate to the subject of taxation.

On the 1st day of January, 1910, Barhydt was domiciled in Burlington, Iowa; and that was the place of his residence for the purposes of taxation. He had not, by the widest stretch of imagination, become

a resident of California, and at that time had not determined for himself where his residence would be in that state after his arrival there.

The District Court was in error in canceling the assessment, and its judgment must be, and it is, reversed.

TENNESSEE SUPREME COURT.

R. H. NEVILLE

v.

SOUTHERN RAILWAY COMPANY, Plf.
in Certiorari.

(— Tenn. —, 146 S. W. 846.)

Carrier — assault on passenger — excess of agent's authority.

A railroad company is liable for an assault by its station agent upon a passenger waiting in the station to take a train, although it grew out of a discussion concerning business in which the railroad company was in no way interested.

(April 13, 1912.)

CERTIORARI to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Shelby County, in defendant's favor, in an action brought to recover damages for an alleged assault upon plaintiff by defendant's servant. Affirmed.

The facts are stated in the opinion.

Messrs. Bell, Terry & Bell for plaintiff.

Messrs. Caruthers Ewing and R. E. King for defendant.

Buchanan, J., delivered the opinion of the court:

This case is here on petition for certiorari. From an adverse verdict and judgment in the circuit court, rendered by direction of the trial judge, the plaintiff prosecuted his appeal, and the court of civil appeals reversed and remanded the cause for a new trial.

The theory of plaintiff, apparent in his declaration and proof (no evidence having been offered by defendant), was that at the time of the occurrence of the matter complained of the relation of passenger and common carrier existed between him and defendant. It was averred and proven that in the ticket office of defendant, located in its railway station at Germantown, Tennes-

Note. — See note, post, 999.

As to the degree of care owing to a passenger at a station, see note to *St. Louis, I. M. & S. R. Co. v. Woods*, 33 L.R.A. (N.S.) 855.

see, the agent of defendant in charge of the ticket office and station committed upon the body of plaintiff an unwarranted, unprovoked, brutal, and painful assault and battery, in the presence of other persons in the station assembled, and at a time when plaintiff was waiting for the arrival of one of defendant's trains, bound for Memphis, on which he intended to become a passenger, for which passage he had already paid, and was the holder of a ticket issued by defendant, showing his right to such passage.

It further appears that plaintiff was a colored school-teacher resident in Germantown, but teaching school in Memphis, who daily traveled to and from his work by means of defendant's train; that plaintiff was a man of good character, and that after reaching defendant's station, on the day in question, he was properly conducting himself in the station when the agent called him into the ticket office, also a part of the station, and engaged plaintiff in the discussion of a matter of business which the agent had undertaken to conduct between plaintiff and another, but in which the defendant had no interest whatever, and during the discussion of this business the agent became, without just cause, greatly enraged, and committed the assault and battery about five minutes before the schedule time for the arrival of the train for which plaintiff was waiting.

Defendant, without controverting the facts recited, insists that from them its non-liability appears; that the rule *respondeat superior* is controlling, and that under this rule the moment plaintiff stepped into the ticket office at the invitation of the agent, intending there to transact other business than the pursuit of his journey to Memphis, he ceased to be an intending passenger, and was no longer under the protection of the carrier as such, and that the origin of the assault and battery, being a matter wholly foreign to the contract of carriage, was wholly personal between the agent as an individual and plaintiff as such, and wholly without the scope of the employment of the agent as such, and therefore that defendant is not in law liable to respond for the unlawful and unauthorized act.

It is clear that the trial judge, in directing the verdict, adopted defendant's view, and equally clear to us that he was in error. Plaintiff's declaration was in one count on the facts of the case, and on these his suit is manifestly based upon a breach by the defendant of its duty to him while he was a passenger waiting in its station for the arrival of one of its trains. We must look beyond the limits of the rule *respondeat superior* to find the controlling principle in this case.

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The distinction above suggested is noted by Mr. Thompson in his work on Negligence, in discussing the doctrine of *respondeat superior*, where he says: "It must be borne in mind that, in these cases of the expulsion of trespassers from the vehicles of a carrier, the governing principle is the rule of *respondeat superior*, which we are considering, and is entirely different from the principle which governs in a case of the wrongful expulsion or other maltreatment of a passenger by the servants of the carrier. Such maltreatment is a violation of the duty which the carrier has assumed of transporting the passenger in safety, and it is quite immaterial, in respect of his liability, by what kind or grade of servant the duty has been violated." 1 Thomp. Neg. 2d ed. § 564, p. 523.

We are therefore to look to the broader rule of liability growing out of the relationship of passenger and carrier, and declared by the courts as a matter of sound public policy to be created by the establishment of that relationship. A fair statement of this rule, so far as the purposes of this case are concerned, is to be found in Hutchinson on Carriers, in these words:

"The authority of carriers of passengers to make and enforce such reasonable regulations as are necessary to protect from annoyance, insult, or injury those who are invited to their depots or stations to become passengers cannot be questioned. And the wilful or negligent failure to make and enforce such reasonable regulations will render them liable in damages for any injuries directly resulting to persons who repair there for the purpose of becoming passengers. But since such carriers are required to exercise only ordinary care to protect their passengers, or those intending to become such, from the turbulent or disorderly conduct of persons in their depots, it must appear, in order to establish a liability against a carrier where an injury has arisen from such a source, that the agent in charge of the station knew, or had opportunity to know, that the injury was threatened, and that by prompt intervention he could have prevented or mitigated it. If, however, an agent in charge of the station stands by and allows a passenger, or one intending to become such, to be insulted or injured, without any attempt on his part to prevent the wrongful act, the carrier will certainly be liable. So if he fails to guard against the long-continued and notorious acts of third persons, such as scuffling in the passageways by cabmen, and a passenger is thereby injured, the carrier must respond in damages." 2 Hutchinson, Carr. 3d ed. § 989, p. 1133.

In another text-book of acknowledged merit we find this: "The purchase of a ticket

at a station by one who is waiting to take a train constitutes him a passenger. The relation of carrier and passenger, unless it is terminated in a legal way, continues until the passenger is safely deposited at his destination, and until he has left, or has had a reasonable time in which to leave, the premises of the carrier. If, during the continuance of this relation, though after the passenger has left the train, he suffers injury in consequence either of the negligent, wrongful, or wanton tort of one of the carrier's servants, the carrier is liable." So says Sutherland on Damages, vol. 3, § 941.

In the same section last above quoted it is further said: "Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier, by notice or special contract even, to deprive his passenger of this degree of care. If the passenger does not have such care, but, on the contrary, is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains." See Sutherland, vol. 3, § 941.

Mr. Cooley states the general principles thus: "The responsibility of the carrier begins when the passenger presents himself for transportation; and this he may be said to do when he approaches the place of reception for the purpose. Therefore, if the carrier is negligent in respect to the platforms and other approaches provided for the use of passengers, and in consequence of their being in an unsafe condition the person coming to be carried is injured, he may have his action therefor." 2 Cooley, Torts, 3d ed. § 770, p. 1364.

In 6 Cyc., at page 601, it is said: "But so long as the passenger is being transported or is on the carrier's premises legitimately in connection with such transportation, and the servant is there employed about the business of the carrier in his relation to the passenger, the duty of protection exists. Therefore the carrier is liable for assault upon a passenger by the conductor in charge of the train or car in which the passenger is riding, whether the assault is in the supposed interest of and discharge of the supposed duty to the carrier, or is made as the result of personal malice or desire for revenge for an affront." To support the above text, notes 80 and 81 on the same page cite decisions from as many as twenty 40 L.R.A. (N.S.)

courts of last resort in different states of this Union.

The obligation of a common carrier to maintain safe approaches from its ticket office to its trains, even where a public street was the approachway used between the two points, was by this court enforced by judgment against the carrier in *Louisville & N. R. Co. v. Cheatham*, 118 Tenn. 164, 100 S. W. 902.

This court has said: "The contract to carry passengers is not one of mere toleration and duty to transport the passenger on its cars, but it also includes the obligation on the part of the carrier to guarantee to its passengers respectful and courteous treatment, and to protect them, not only from violence and insults from strangers, but also against violence and insult from the carrier's own servants." *Knoxville Traction Co. v. Lane*, 103 Tenn. 383, 46 L.R.A. 549, 53 S. W. 557, and authorities cited.

The principle set out above from *Knoxville Traction Co. v. Lane* was reaffirmed by this court in *Memphis Street R. Co. v. Shaw*, 110 Tenn. 479, 75 S. W. 713.

The general principle announced in 5 Am. & Eng. Enc. Law, 2d ed. 553, "that whenever a carrier, through its agents or servants, knows or has opportunity to know of threatened injury, or might have reasonably anticipated the happening of an injury, and fails or neglects to take the proper precautions, or to use proper means, to prevent or mitigate such injury, the carrier is liable," was announced and approved in *Nashville, C. & St. L. R. Co. v. Flake*, 114 Tenn. 676, 108 Am. St. Rep. 925, 88 S. W. 326, and it is there stated that the same rule was applied in *Ferry Cos. v. White*, 99 Tenn. 256, 41 S. W. 583.

It is unnecessary in this case to discuss the degree of care which is required by law to be exercised by the common carrier for the safety and protection from insult and injury of a passenger, after he is aboard its vehicle, and in progress of transportation. This subject is fully discussed in *Nashville, C. & St. L. R. Co. v. Flake* and *Ferry Co. v. White*, *supra*, and the authorities in each of them cited. We are concerned in the present case with the degree of care required while the passenger is in the station where the carrier has invited him to come and wait for his train, and where, in response to such invitation, the passenger is there waiting. In such case it is clear that the legal duty of the carrier is to exercise ordinary care in the protection of the passenger from insult or injury, whether caused by the negligence or by the wilful or wanton acts of its own servants, irrespective of the scope of the authority or grade of employment of the

servant, and a breach of this duty by the carrier fixes its liability. Under the facts of this case the carrier cannot escape liability under its plea that the act of its servant was unauthorized, for it may be granted that the act was wholly without authority from the carrier, and yet the fact remains that by the act the legal duty of the carrier was breached, and from this breach the right of action flows, not because the carrier authorized the act, but because it did not prevent it by the exercise of ordinary care.

The judgment of the Court of Civil Appeals was correct, and the prayer of petitioner is denied.

ALABAMA SUPREME COURT.

LEO GASSENHEIMER, Appt.,

v.

WESTERN RAILWAY OF ALABAMA.

(— Ala. —, 57 So. 718.)

Master and servant — assault by servant — liability of master.

A railroad company is liable for an assault committed in the freight house on a consignee of freight, by a delivery clerk, because the consignee complained to superior officers of the delivery clerk's delay in making deliveries.

(February 8, 1912.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Montgomery County, overruling his motion for new trial after judgment in defendant's favor in an action brought to recover damages for assault and battery. Reversed.

The facts are stated in the opinion.

Messrs. Letcher, McCord, & Harold for appellant.

Messrs. Steiner, Crum, & Weil for appellee.

Sayre, J., delivered the opinion of the court:

Plaintiff sent a drayman from his place of business to the freight house of the defendant railway company to fetch some freight. Considerable delay ensuing, plaintiff went to see what was the matter. He found the drayman waiting at the freight house. Then Mabson, one of defendant's delivery clerks, came up, saying: "I will deliver the freight." The freight bills were then handed to Mabson, and plaintiff went to the office in another part of the building, where he complained of the delay to

Mabson's superiors. He does not seem to have mentioned Mabson's name. Mr. Lutz, commercial agent for the railway, and Mr. Stanley, chief clerk, then walked down the freight house in company with the plaintiff, inquiring of several of the delivery clerks what they knew about plaintiff's dray having to wait for freight. When they reached Mabson, who was then and there engaged in defendant's business of delivering freight, he, without a word, or, so far as the evidence shows, a demonstration of any sort from plaintiff, applied to plaintiff a most offensive epithet, and struck and kicked him. The assault left behind it no physical injury. Plaintiff sued the railway company for the assault and battery committed by its agent, and, the jury having acquitted the defendant, made a motion for a new trial on the ground that the verdict was contrary to the law and the evidence. From a judgment overruling the motion, plaintiff appeals.

The court below makes it clear that the motion was overruled on the theory that the jury might have inferred that Mabson assaulted plaintiff because plaintiff had made complaint to his superior officers, and that an assault committed for such reason was not within the scope of Mabson's employment. In this the court erred. It is well settled in the decisions of this court that corporations are liable for the wrongful acts of their agents or employees, done in the course of their employment, or in the line of their assigned duties. The difficulty in particular cases arises in the proper application of this principle of law to the facts. The case of *Case v. Hulsebush*, 122 Ala. 212, 26 So. 155, is strikingly like the case at bar in all essential respects. In that case the tax collector of Mobile county was held personally liable for an assault and battery committed by his deputy upon a taxpayer who had gone to the collector's office to pay taxes. The assault grew out of a dispute about a fee the deputy sought to collect. In the case at hand there is nothing to indicate, however remotely, that the assault grew out of anything but the delay in the delivery of plaintiff's freight. The trial court referred the assault, or held that the jury might have referred it, to the fact that plaintiff had complained to Mabson's superior officers. But the complaint was about the delay, and we have no difficulty in taking all that occurred between plaintiff and Mabson and Mabson's superiors as part and parcel of one transaction. In this state of the evidence the plaintiff was entitled to have the verdict set aside. "There is no more sacred duty resting on the presiding judge than to set aside a verdict which is rendered in palpable diare-

gard of the evidence." Alabama G. S. R. Co. v. Powers, 73 Ala. 248. And since the passage of the act permitting the review of rulings on such motions this court has frequently reversed judgments where the preponderance of the evidence against the conclusions reached in the trial courts was so decided as to involve the conviction that they were wrong and unjust. Birmingham Nat. Bank v. Bradley, 116 Ala. 142, 23 So. 53; Southern R. Co. v. Lollar, 135 Ala. 375, 33 So. 32, and cases cited. No doubt the court below, but for the theory entertained in respect to the origin to which the jury might have referred the difficulty as suffi-

cient to take the assault upon plaintiff without the scope or course of Mabson's assigned duties, would have granted a new trial. But that theory of fact and law, under the authority of our rulings heretofore, was misconceived. Case v. Hulsebush, 122 Ala. 212, 26 So. 155, and cases there cited. It results that the judgment must be reversed, and the cause remanded for another trial on the facts as they may then appear.

Reversed and remanded.

All the Justices concur, except Dowdell, Ch. J., not sitting.

Note.—Liability of a carrier for the wilful torts of his servants to passengers.

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I. Introduction.

In this note it is proposed to consider how far the liability of a master for the wilful torts of his servant is affected by the circumstance that the relation of carrier and passenger existed between him and the injured person at the time when the injury complained of was inflicted. The cases relating to the subject are so extremely conflicting, and their weight as precedents depends so largely upon the date at which they were decided, that it will be advisable in the first place to re-

view them chronologically with reference to each jurisdiction. It should be mentioned, however, by way of caution, that the precise doctrinal standpoint of the courts is, in many of the cases, a matter of considerable uncertainty.

It is scarcely necessary to observe that, in any view of the obligations of a carrier with regard to the indemnification of a passenger for the wilful act of his servant, no action can be maintained against him unless it appears that the act was, in point of fact, tortious.¹

II. Effect of decisions in each jurisdiction.

a. United Kingdom and the British Colonies.

In an early case, Lord Kenyon, Ch. J.,

observed, *arguendo*, that an assault committed upon a passenger by a member of the crew of a vessel was an act which "did not respect the shipowner's duty to him."² As the doctrine which then prevailed in England was that a master was not liable for the wilful torts of a servant, whether they were within the scope of his employment or not, it may be presumed that this remark was made with reference to that doctrine, rather than with reference to the idea that an assault was to be regarded as a tort which was in every instance outside the scope of a servant's employment. Be this as it may, it is apparent from the later cases that, in that country as well as in other parts of the British empire, the liability of a carrier for the wilful tort of his servants in respect of passengers is

¹ In *Graville v. Manhattan R. Co.* (1887) 105 N. Y. 525, 59 Am. Rep. 516, 12 N. E. 51, reversing (1885) 13 Daly, 32, the non-liability of a railway company for the act of a brakeman in compelling the plaintiff to leave the platform of a moving train was predicated on the ground that it was his duty to go inside when directed to do so, and that the assault committed by the brakeman in enforcing compliance with the direction was consequently justifiable.

In *Rose v. Wilmington & W. R. Co.* (1890) 106 N. C. 168, 11 S. E. 526, it was held that the defendant could not be held liable in damages because its conductor informed a husband, in a brusque manner, in the presence of his wife, whose head was resting on a pillow, as though she was an invalid, that they must pay their fares or get off, and after waiting until the train reached the next station, said in a decided or rude tone that they must get off.

In *Grayson v. St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730, plaintiff, while a passenger with his son on a street car, in answer to a question from the conductor, said his son was nine years of age, whereupon the conductor answered: "You can't give me a stiff like that. He is fourteen years old;" thereby charging plaintiff with lying. Held, that, as mere words, unaccompanied by bodily injury, are not actionable unless they are defamatory in a legal sense, no recovery could be had against the company.

In *Spade v. Lynn & B. R. Co.* (1899) 172 Mass. 488, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747, it was held that a railway passenger on whom a drunken man was thrown by being jostled while the conductor was removing another drunken man from the car, rightfully and without negligence, could not maintain an action against the carrier. Holmes, J., said: "When we . . . take a case like the present, where all parties concerned are in a conveyance, and to maintain order and keep the car clear of obnoxious persons is the defendant's right, and its duty to the plaintiff and the other passengers, no passenger can complain

of any consequence which the performance of that duty necessarily entails. We assume for present purposes that carriers of passengers owe the same degree of care in respect of such matters as they owe in respect of the construction and management of their vehicles; but if that care is shown, probably the injury must be regarded as an inevitable accident. We find some difficulty in seeing upon what ground the jury were warranted in finding for the plaintiff. So far as appears, the conductor was acting rightly in putting the drunken man off the car. As against the plaintiff, he was doing one of the things which she had to contemplate as liable to happen when she got into the car. We all know that, if people are standing in the passageway of a street car, you cannot remove a man forcibly through the passageway without more or less contact. If the fall upon the plaintiff was the necessary consequence of a lawful and reasonable act, then it was one of the risks which she assumed when she took her passage." It was also laid down that a street car conductor's knowledge of the peculiar sensitiveness of a lady passenger does not increase the carrier's obligation toward her, although in case of a wrong toward her the carrier will be liable for the actual consequences, even if the effect would have been less upon a normal person.

In *Macon R. & Light Co. v. Mason* (1905) 123 Ga. 773, 51 S. E. 569, a conductor of an electric car, in putting on the brake, struck a passenger who was standing on the platform of a "trailer." It was conceded that this was unintentional, but there was a dispute as to whether it was negligently done. The plaintiff demanded of the conductor what he meant by treating a gentleman that way; and the conductor responded that the passenger had no business to be standing there. Held, that the words of the conductor did not constitute such an insult or abusive treatment as would entitle the plaintiff to damages.

² *Ellis v. Turner* (1800) 8 T. R. 531, 5 Revised Rep. 441.

tested by precisely the same criterion as in cases where privity of contract is not involved. That is to say, such torts are treated as being imputable or not imputable to him, according as they were or were not within the scope of the employment of the tortfeasors. Such was the footing

upon which recovery has been allowed in cases where the acts from which the plaintiff's injuries resulted were these:—the seizure of a passenger's person for the purpose of preventing him from entering a train;³ the forcible removal of a passenger by a porter from one carriage to another

³ In *Bayley v. Manchester, S. & L. R. Co.* (1872) L. R. 8 C. P. (Exch. Ch.) 148, 25 Eng. Rul. Cas. 115, affirming (1872) L. R. 7 C. P. 415, the porters were directed by rule 92 of the railway company to prevent passengers from leaving trains while in motion, and to do all in their power to promote the comfort of the passengers and interests of the company, and specially given powers of removal under certain specified circumstances not applicable to the particular case. By a case stated in an action for injury to a passenger in his removal from a carriage by a porter, under the mistaken idea that he was in the wrong train, it was found that he was violently removed just as the train was moving, that it was the duty of the porters to prevent passengers going by wrong trains as far as possible; but if they were on such trains, to request them to alight, and, on refusal, report them, with a view to charging an excess of fare, but not to remove them. Held, that there was evidence on which the jury might find that the act of the porter was done in the course of his employment as the defendants' servant. In the judgment delivered by Willes, J., for the court of common pleas, he said: "If a porter roughly and negligently showing or helping a passenger into a carriage were to mislead or injure him, he would be acting in the course of his employment within the scope of rule 92, and the company would be liable; and why not for the passenger's being by the same servant, acting in the supposed interest of the company, roughly and negligently put out of a carriage where he was entitled to be? The distinction would be a refinement for which the law as yet furnishes no precedent. There was evidence of an authority to remove a person in a wrong carriage, abused by a blundering servant of the company in pulling the plaintiff out of the right one, in the supposed 'interest of the company,' and the rule to enter a nonsuit ought to be discharged." In the Exchequer Chamber, Kelly, C. B., said: "Here it is unquestionably found that it was the duty of the porters to prevent persons from traveling in the wrong carriages, as far as they were able to do so. The porter in this case sees the plaintiff in what he conceives to be the wrong carriage. Does he not act in what he may well suppose to be the performance of his duty when, having no other means of preventing the plaintiff from traveling in such carriage, he pulls him out? In the present case no doubt the porter acted blunderingly, and the results were unfortunate to the company, but one can well imagine a case in which the porter might rightly conceive it to be for the interests 40 L.R.A. (N.S.)

of the company and his imperative duty, at any risk, to remove a person from a carriage, even if force were necessary. A carriage might be so dangerously overcrowded as to expose the company to the risk of incurring serious responsibility as the consequence of such overcrowding. Various other grounds may be suggested on which it might be the porter's duty to remove a person from a carriage. The present case is distinguishable from the cases of isolated acts unconnected with other circumstances, done by a servant in direct disobedience to the orders of a master. Here, among many precepts and directions to the porters, we find it distinctly provided that they are, as far as they are able, to prevent persons from traveling in the wrong carriage. We do find it no doubt also stated that it was not the duty of the porters to remove a person from the wrong carriage; but where orders are given to some extent inconsistent, and such that it may not always be easy under all circumstances to comply literally with the provisions of all of them,—for instance, where, as in the present case, there is a general order to prevent persons from traveling in the wrong carriage if possible, accompanied by a direction not to remove them from the carriage,—it is obviously very likely that the servant may, while acting in the performance of the general duty cast upon him, neglect the particular direction as to the mode of doing it. But it appears to me that he will be none the less acting within the scope of his employment. Again, the rules expressly provide that the porters shall do all in their power to promote the interests of the company; and if a porter, intending to act in the performance of the duty so cast upon him, and doing something with a view to the interests of the company, happens to disobey another direction really to some extent inconsistent with the general orders given to him, it is very difficult to say that in so doing he is not acting within the scope of his employment. On the whole, I think the porter here was so acting; he was interfering in a case in which it was obviously his duty to interfere, and to act to the best of his ability for the protection of the interests of the company; under these circumstances, if in so doing he acted wrongfully or negligently, I think the company must be liable." Martin, B., said: "I am of the same opinion. I am disposed to think that we must be governed in deciding this case by the general principles of the law of master and servant, and that it is really quite immaterial what the rules and by-laws of the company were. The question appears to me to be principally one of fact. And if in fact the porter

in the same train; ⁴ the wrongful ejection of a passenger from the vehicle on which

he was being transported; ⁵ the wrongful arrest by, or at the instance of, an em-

thought that this man was in the wrong carriage, and, acting as the servant of the company, pulled him out of a carriage of the company where he thought he had no right to be, the company are responsible for his wrongful act in so doing." Blackburn, J., said: "The question here, therefore, is whether there was evidence that the porter, in what he did, was acting within the scope of his employment. If he were so acting, then, however much he may have abused his authority,—however improperly and blunderingly he may have acted,—the defendants are liable. It seems to me that the judgment of the court below puts the case upon its fair footing. It is stated, in the third paragraph of the case, that it was the duty of the porters, as far as possible, to prevent persons from going in the wrong carriages. Even without the statement it would be tolerably obvious that such is their duty. It is, likewise, expressly provided by the rules that the porters are to promote the comfort of passengers and the interests of the company. In this particular case the porter, in a stupid, blundering manner, did what, certainly, in the result, did not promote the comfort of the passengers nor the interests of the company; but he was given authority, as far as he could, to prevent passengers from traveling in the wrong carriage, and general directions to promote the interests of the company to the utmost of his power; and if, thinking that the plaintiff was really in the wrong carriage, and that he could get him out without hurting him before the train had got into motion, he acted as he did, it seems to me impossible to say that in so acting he was acting beyond the scope of his authority."

In *Hanlon v. Glasgow & S. W. R. Co.* (1899) 1 Sc. Sess. Cas. 5th Series, 559, it was held that a prima facie cause of action was shown by allegations to the effect that A., having observed that one of two companions with whom he intended to travel on one of the defender's trains was not allowed to enter it because it was just starting, did not attempt to enter, but remained on the platform; that thereupon one of the defender's servants seized A. by the collar of his coat, and pushed him violently, so that he fell between the train and the platform. Lord Young said: "With regard to the relevancy of the action, I think that it is clearly essential to the pursuer's case to prove that the defender's servant erroneously thought that the deceased was going to get into a moving train, and that it was his duty to do what he could to prevent him, and that following up that mistake he proceeded to act in such a clumsy manner that the pursuer's son was hustled over the platform, run over by the moving train, and killed. The idea that this ticket collector committed a wanton assault upon a man whom he did not know, and had never seen before, is, I think, absolutely ridiculous. 40 L.R.A. (N.S.)

The case is one within the region of those authorities, and the rule of law which they illustrate, in which a servant, while discharging what it was within the scope of his duty to discharge, acted under a mistaken notion of his own in such an unjustifiable or careless manner as to render his employer responsible. . . . If it is proved here that one of the defender's servants mistook his duty and proceeded to discharge it in a blameworthy manner, then the pursuer will be entitled to a verdict; but if otherwise, not."

⁴In *Lowe v. Great Northern R. Co.* (1893) 9 Times L. R. 516, where a collier holding an ordinary third-class ticket was forcibly removed by porters to a carriage set apart for pitmen, on the ground that his clothes were dirty, a nonsuit was held to have been improperly granted. Mathew, J. (as reported in the Times L. R.) said: "The porters, under the authority of the station master, must have power to remove passengers improperly traveling in certain carriages. In the present case they supposed they were acting in pursuance of this authority, and they made a mistake, for which the company are liable." It is to be observed, however, that during the argument of counsel this judge, as well as Wright, J., made remarks which seem to import that, even apart from the consent of a station master, porters are authorized to remove passengers from one carriage to another.

⁵*Seymour v. Greenwood* (1861) 7 Hurlst. & N. (Exch. Ch.) 355, affirming (1861) 6 Hurlst. & N. 359 (pretext of ejection was that the passenger was drunk). Williams, J., who delivered the judgment of the court, said: "We think there was evidence for the jury that the guard, acting in the course of his service as guard of the defendant's omnibus, and in pursuance of that employment, was guilty of excess and violence not justified by the occasion; or, in other words, misconducted himself in the course of his master's employment, and therefore the master is responsible. . . . It is said that, although it cannot be denied that the defendant authorized the guard to superintend the conduct of the omnibus generally, and that such authority must be taken to include an authority to remove any passenger who misconducts himself, yet the defendant gave no authority to turn out an inoffensive passenger, and the plaintiff was one. But the master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibus, and he puts the guard in his place; therefore, if the guard forms a wrong judgment, the master is responsible."

In *Butler v. Manchester, S. & L. R. Co.* (1888) L. R. 21 Q. B. Div. (C. A.) 207, 57 L. J. Q. B. N. S. 564, 60 L. T. N. S. 89,

ployee whose functions are connected with the operation of trams; ⁶ an assault committed by the servants of a ferry company in attempting to enforce a regulation; ⁷

an assault made by the purser or a steamboat upon a passenger with whom he had had a dispute regarding the payment of the fare. ⁸

36 Week. Rep 728, 52 J. P. 611, the authority of a ticket inspector to remove from a train a passenger who had lost his ticket was not questioned. The only question discussed was the justifiability of the removal under the given circumstances.

In *Adams v. National Electric Tramway & Lighting Co.* (1893) 3 B. C. 199, where the plaintiff recovered for an assault committed by the conductor of a tram car in ejecting him therefrom, it was unsuccessfully contended that the act of ejection was *ultra vires* for the reason that the only power which the statute incorporating the defendant company had conferred upon it in respect of dealings with a passenger who refused to pay the fare was to summon him and have him fined.

⁶ *Moore v. Metropolitan R. Co.* (1872) 42 L. J. Q. B. N. S. 23, 18 L. R. 8 Q. B. 36, 27 L. T. N. S. 579, 21 Week. Rep. 145. The plaintiff traveled with a ticket which entitled him to leave the train at N. station. Before the train arrived there it stopped at E. station, whereupon he got out of the carriage, and upon being asked for his ticket, handed it to the collector. He was told by the collector that it was not available, and that he must pay the sum of 2 pence excess fare. He refused to do so unless a receipt was given to him, and was given into custody by the inspector of the station at E. station, and charged with having, on arriving at that station, refused to deliver up his ticket or pay his legal fare, and thereby defrauding the company of 2 pence. The charge was preferred before a magistrate and dismissed. Held, that in an action against the company for false imprisonment the question whether the inspector was authorized, expressly or impliedly, to give the plaintiff in charge, should have been submitted to the jury.

In *Eastern Counties R. Co. v. Broom* (1851) 6 Exch. (Exch. Ch.) 314, 20 L. J. Exch. N. S. 196, 15 Jur. 297, the railway company was held not to be liable for the arrest of the plaintiff by a ticket collector in its service. As was pointed out by Blackburn, J., in *Goff v. Great Northern R. Co.* (1861) 3 El. & El. 672, 30 L. J. Q. B. N. S. 148, 7 Jur. N. S. 286, 3 L. T. N. S. 850, this decision is apparently inconsistent with a later one rendered by the same court. *Giles v. Taff Vale R. Co.* (1863) 2 El. & El. 822. Its validity as a precedent is therefore very questionable, so far as it turns upon the authority of the inspector to make the arrest under the given circumstances. But no question was raised regarding the quality of the given act as being done by him in the capacity of a servant.

⁷ *Robertson v. Baldwin New Ferry Co.* (1906) 6 New South Wales, St. Rep. 195, 23 W. N. 70. The plaintiff was a person

who, after having missed a boat, was leaving the wharf with the intention of taking passage at another ferry. The regulation which he refused to comply with was one which prescribed that everyone should pay a certain sum before leaving the wharf, whether he had used the ferryboat or not. Held, that the action was maintainable.

⁸ *Emerson v. Niagara Nav. Co.* (1883) 2 Ont. Rep. 528. There the plaintiff, who had purchased a special excursion ticket from Toronto to Niagara, and return on the same day, by a steamer of the defendants, and which had been taken up by the purser on that day, claimed the right to return by it on the following day, under an alleged agreement with the purser, which the latter denied. On the purser's demanding the fare and the plaintiff's refusing to pay it, the porter, by the purser's direction, laid hold of a valise which the plaintiff was carrying, and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured. Held (Olser, J., dissenting), that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act. Wilson, Ch. J., said: "It appears to me that although the purser was acting in the interest and for the benefit of his employers, he was not acting in the due course of his employment, and within the line of his authority. He was committing an assault, and he might as well have seized the watch from the person of the plaintiff, or put his hand into the plaintiff's pocket and held the watch, or paid himself by force from the plaintiff's money, as wrest the valise from the plaintiff's hands. The company and the purser for them had the right, if in possession of the valise, to keep it for the unpaid fare, assuming it to have been unpaid, but neither the company nor the purser had the right to commit an assault for the purpose of acquiring a lien, and in my opinion the company are not liable for the unauthorized act of the purser." Galt, J., said: "It is not disputed that the defendants have a lien on the luggage of a passenger to secure payment of his fare, and consequently that any person appointed by them as their officer to collect such fare has an authority derived from them to exercise such right, and that in so doing he must and should be considered as acting under such authority, and they are responsible for his acts. If, therefore, the person whose duty it is to collect the fares of the passenger should, under a mistaken belief that a passenger had not paid his fare, insist on detaining the luggage of a passenger until his fare was paid, the defendants would be responsible for his act, as he was engaged in discharging a duty specially delegated to him, and exer-

b. Federal courts of the United States.

In a case where the master of a ship was held to be personally liable in damages for continued and wanton cruelty to passengers, Justice Story, sitting as a circuit judge, based his conclusion upon the broad ground that the defendant had violated a duty which his contract imposed upon him with regard to the proper treatment of the aggrieved parties.⁹ As the reason thus assigned would obviously have been equally controlling if the action had been brought against the defendant's employer, the de-

cision may be regarded as having involved by implication the doctrine that the liability of a carrier to a passenger is predicable in respect of any acts of a servant which constitute a breach of the contract of carriage, and not merely in respect of acts done by the servant with relation to the actual work of transportation. About fifty years after the decision was rendered, it was cited as authority for that doctrine in a case where an action for an assault was held to be maintainable against the carrier.¹⁰ The same theory as to the responsibility of the

cising a right which they possessed. But the defendants have no right or authority to exercise the power of forcibly taking possession of the passenger's luggage which is in his actual personal possession, by way of asserting a lien, and, consequently, they can confer none on their servants. If, therefore, their officer does act in that manner, he cannot be said to be acting under their authority, and they are not responsible." This, it is submitted, was a case in which recovery should have been allowed on the ground that the servant had resorted to an improper method of doing something which was within the scope of his authority,—*viz.*, enforcing the payment of the fare.

⁹ *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,675: "In respect to passengers," said the learned judge, "the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room and personal existence on board, but for reasonable food, comforts, necessities, and kindness. It is a stipulation, not for toleration, merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females it proceeds yet farther: it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors by the excitement of terror and cool malignancy of conduct to inflict torture upon susceptible minds. What can be more disreputable and at the same time distressing, than habitual obscenity, harsh threats, and immodest conduct, to delicate and inoffensive females? What can be more oppressive than to confine them to their cabins by threats of personal insult or injury? What more aggravating than a malicious tyranny, which denies them every reasonable request and seeks revenge by withholding suitable food and the common means of relief in cases of seasickness and ill health. It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched,

if the acts do not amount to an assault and battery, they are not to be redressed. The law looks on them as unworthy of its cognizance. The master is at liberty to inflict the most severe mental sufferings, in the most tyrannical manner, and yet if he withholds a blow, the victim may be crushed by his unkindness. He commits nothing within the reach of civil jurisprudence. My opinion is that the law involves no such absurdity."

¹⁰ *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922 (passenger on a steamer, who had had an altercation with the clerk about the fare, was seized by him and pushed down to another deck). Clifford, J., said: "Unjustifiable as the conduct of the clerk was, the case must be viewed as between these parties just as it would be if no dispute had arisen as to the fare, and the questions to be decided are whether the defendant is liable for the injuries inflicted upon the plaintiff by the clerk, and, if so, upon what ground does that liability rest. Sufficient has already been remarked to show that the owner of the steamer is liable to the plaintiff for the injuries inflicted upon him by the agent of the owner, but it is quite important in case of a new trial to ascertain upon what ground that liability arises,—whether merely as a principal answering for the acts of his agent in the course of his employment, or as a carrier of passengers, answering as such for a breach of the obligation which he assumed as such carrier, that the plaintiff, as his passenger, should not be ill-treated by himself or his employees, and that he and they should use all due care and proper exertion to protect him as such passenger from any degree of violence or any kind of abuse or ill-treatment from other passengers, or other persons coming on board during the trip. . . . He may have his remedy against the carrier, it is said, if he can prove that the carrier was negligent, or that the active person was the agent of the carrier, and was in the course of his employment, but, if not, he must be content with his remedy against the assailant of his person. Adjudged cases may be referred to which support that proposition without qualification, but they do not give full scope and effect to the obligation which the carrier assumes

carrier was subsequently adopted by the Supreme Court of the United States.¹¹ It

has also been applied in several cases decided by inferior tribunals both before

towards his passenger, nor to the rights and duties which those relations create and imply. Passengers do not contract merely for ship room and transportation from one place to another, but they also contract for good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance, and for the fulfilment of those obligations the carrier is responsible as principal, and the injured party, in case the obligation of good treatment is broken, whether by the principal or his employees, may proceed against the carrier as the party bound to make compensation for the breach of the obligation.

Conductors and employees of a railroad company represent the company in the discharge of their functions, and, being in the line of their duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of their authority, whether of omission or commission; and the same rule must be applied in a suit against the owner of a steamer as the carrier of passengers for the misconduct of the master, as the owners of a vessel carrying passengers for hire are liable for breaches of duty of the master to the passengers equally as they are in case of merchandise committed to their care."

In addition to *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575, Clifford, J., cited *Nieto v. Clark* (1858) 1 Cliff. 145, Fed. Cas. No. 10,262, where the doctrine laid down in that case was invoked as a ground for a decision to the effect that a steward of a ship, who had attempted to ravish a female passenger, had been justifiably discharged at a foreign port, the passenger having refused to stay on board unless he should be discharged. Other cases cited were *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474; *Keene v. Lizardi* (1833) 5 La. 431, 25 Am. Dec. 197, and *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39. But the New York case, properly speaking, is not an authority for imputing to a carrier misconduct of the description which the learned judge was considering.

¹¹In *New Jersey S. B. Co. v. Brockett* (1887) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039, where the plaintiff recovered damages for being ejected with unnecessary violence from a part of a steamer where he had no right to be, it was contended that, as the plaintiff was in the forbidden part of the steamer, no case was made that would sustain an action upon the contract of transportation, and that a request to instruct the jury to find for the defendant should have been granted. But the court said: "This argument assumes that the plaintiff could not claim protection under the contract for safe transportation in respect to an injury done him by the company's servants while he was upon 40 L.R.A. (N.S.)

a part of the boat other than that to which he was restricted by the rule or regulation printed on his ticket. This position cannot be sustained. We shall not stop to inquire whether the regulation in question is shown to be a part of the contract for transportation; and we assume, for the purposes of this case, that the plaintiff stipulated that, during the voyage, he would remain upon the part of the boat to which deck passengers were assigned; still, it would not follow that his violation of that stipulation deprived him of the benefit of his contract. Such violation only gave the carrier the right to compel him to conform to its regulation, or, upon his refusing to do so, to require him to leave the boat, using, in either case, only such force as the circumstances reasonably justified. If the injuries necessarily arose from his violation of the regulation established for deck passengers, the carrier would not be responsible therefor. But if they were not the necessary result of his being, at the time, on a part of the boat where he had no right to be, and were directly caused by the improper conduct of the carrier's servants, either while acting within the scope of their general employment, or when in the discharge of special duties imposed upon them, he is not precluded from claiming the benefit of the contract for safe transportation. . . . What will be misconduct on the part of its servant towards a passenger cannot be defined by a general rule applicable to every case, but must depend upon the particular circumstances in which they are required to act. In the enforcement of reasonable regulations established by the carrier for the conduct of its business, the servant may be obliged to use force. But the law will not protect the carrier if the servant uses excessive or unnecessary force. This doctrine is well illustrated in *Sanford v. 8th Ave. R. Co.* (1861) 23 N. Y. 345, 80 Am. Dec. 286." An instruction that, as a matter of law, more force was used than was necessary where a deck passenger out of his proper place on a steamer was awakened from sleep by a blow with a cane, and without any violence on his part was caught, after being struck several times, by the collar of his coat, and pulled headlong against a barrel standing near, seriously injuring his shoulder, was held not to be erroneous. In the headnote the effect of this case is thus stated: "A common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed in executing the contract of transportation, and acting within the general scope of their employment." This statement was adopted as correct in *New Orleans & N. E. R. Co. v. Jones* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109, where the question chiefly discussed was whether the plea of self-defense was made out.

Pullman's Palace Car Co. v. Campbell

and after that court had expressed its views.¹²

c. State courts.

Alabama.—The doctrine that a carrier impliedly stipulates that his passengers

shall be properly treated, and that he must answer for any tort of his servants which amounts to a breach of his stipulation in this regard, and which is committed by them while engaged in the discharge of their duties, was adopted in the two earli-

(1894) 154 U. S. 513, 38 L. ed. 1069, 14 Sup. Ct. Rep. 1151, affirming (the court being equally divided) (1890) 42 Fed. 484, where the right of a female passenger to recover damages for an indecent assault made upon her by the porter of a sleeping car was declared by Shiras, J., on the ground that the tortious act was "unquestionably a violation of duty owing from defendant."

¹²In *Gallena v. Hot Springs R. Co.* (1882) 4 McCrary, 371, 13 Fed. 116, the conductor of a train refused to honor a return ticket on the ground that certain formalities had not been satisfied, and afterwards the jury were thus charged by Caldwell, J.: "The law requires railroad companies to carry their passengers safely and treat them respectfully. They are under obligations to use proper precautions and exertions to protect passengers while in the cars from the violence and insults of strangers and copassengers, and they are bound, of course, to protect them from the assaults, insults, and violence of their own conductors and servants."

On the ground that it is the duty of a railroad company to protect its passengers from insult and injury so far as it can, it was held in *Murphy v. Western & A. R. Co.* (1885) 23 Fed. 637, that if the conductor and brakeman on a train conspire with passengers thereon to remove another passenger who has a right to be on such train, or see such passengers eject their fellow passenger, and make no effort to prevent it, or make no attempt to repair the mischief by restoring him to his seat, the company will be liable.

In *Mann-Boudoir Car Co. v. Dupre* (1893) 21 L.R.A. 289, 4 C. C. A. 540, 13 U. S. App. 183, 54 Fed. 646, a passenger who had been unlawfully ejected from a berth in a sleeping car was held to be entitled to recover. Nothing, however, was said regarding the characteristic duty of a carrier.

In *Texas & P. R. Co. v. Williams* (1894) 10 C. C. A. 463, 23 U. S. App. 379, 62 Fed. 440, the facts and law of the case were thus discussed by the court: "The testimony here shows that he approached Williams for his fare, but was informed that he was being passed by the road master; but, upon being told by the party that he had not given Williams permission to ride, he went back to Williams, and again demanded his fare, and in doing this, he admits that he may have used strong language, may have sworn, and said that he was a 'damned liar.' How far this was proven by the testimony of the plaintiff, which was before the court, the record does not disclose, and we can only determine what preceded the assault by the admission 40 L.R.A. (N.S.)

of Nicely himself. He was at that time acting within the scope of his employment, and when his abuse was answered by something which implied the same insult he had been heaping upon Williams, and which had naturally been drawn out by his own language and conduct, we do not consider that it can be properly claimed that he immediately abandoned his employment as conductor, and commenced an attack solely in his personal capacity. If, as is claimed, he was resenting a fancied insult as a man, it plainly appears from his own testimony that it was one which he had provoked as conductor, and we consider that such character should reasonably be held to cover the whole transaction, and that the entire evidence, when properly considered, cannot reasonably raise a question whether he was not acting beyond the scope of his employment, which should have been submitted to the jury." Having regard to the plainly expressed opinion of the Supreme Court with regard to the absolute quality of a carrier's liability (see note 11, *supra*), it is not easy to understand why so much pains should have been taken in this case to refute the contention that the conductor was not acting as such when he made the assault complained of.

In *Rohrbach v. Pullman's Palace Car Co.* (1909) 166 Fed. 797, the court laid it down that "the carrier is liable absolutely as an insurer for the protection of the passengers against assaults and insults at the hands of its own servants, but none of the cases include passengers who are alone the cause of the trouble." The court cited *Hutchinson, Carr.* § 1145; 3 *Thomp. Neg.* § 3184. But the decisions of the Supreme Court do not warrant the attribution of this absolute liability to carriers, unless, that is to say, the court understood the word "insurer" in a qualified sense, as being applicable to those classes of servants who are "acting in the line of their duty, etc." (see *Pendleton v. Kinsley*, note 10, *supra*), where they have personal dealings with passengers.

In *Goodwin v. Cincinnati Traction Co.* (1910) 99 C. C. A. 661, 175 Fed. 61, a passenger in a street car, after having had a dispute about a transfer, was assaulted by B., one of the company's inspectors, after he had left the car and was awaiting the arrival of another car for which he held a transfer ticket. The defense offered was that, at the moment of the assault made by B., he was not acting within the scope of his employment as an inspector, because he had directed the passengers where to go to make the transfer, and had put them in the care of H., another inspector, and was then engaged in switching the car from which the plaintiff had alighted. The evi-

est cases decided in this state.¹³ A subsequent decision seems to be scarcely reconcilable upon the facts with the doctrine applied in those cases, or only reconcilable with it by ascribing to it an unwarrantably narrow sphere of operation.¹⁴

dence being conflicting as to whether the plaintiff was in point of fact under the direction of B. or of H. at the time when the assault was committed, it was held that the trial judge had improperly nonsuited the plaintiff. It was distinctly laid down by the court that the liability of a carrier for an assault committed upon a passenger depends upon whether the servant was, at the time of the assault, acting "within the scope of his employment,"—a phrase which here means "engaged in the performance of duties in respect of the particular passenger whose remedial rights are in question."

¹³ In *Louisville & N. R. Co. v. Whitman* (1885) 79 Ala. 328, the clearly established doctrine was declared to be this,—that railroad corporations are liable for all acts of wantonness, rudeness, or force done by their employees in and about the duties assigned to them; but that the liability does not extend to any tort, wantonness, or wrongful act which an employee might commit in a matter not connected with his service to the carrier. The action in the case was brought by a person who had purchased a ticket, but having got on the wrong train, was ejected from it while it was in rapid motion. Such an ejection would clearly have been within the scope of the duty of the servants in charge of the train, so that the above statement was an *obiter dictum*, in so far as it may be supposed to embody the doctrine of a carrier's absolute liability. The phraseology of the above statement, moreover, is somewhat ambiguous with relation to that doctrine. But the actual position of the court is indicated by the fact that the case of *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, which is a clear authority for that doctrine, was cited as a valid precedent.

In *Lampkin v. Louisville & N. R. Co.* (1894) 106 Ala. 287, 17 So. 448, the settled rule was said to be that a carrier's obligation requires him to protect his passengers against the violence and assaults of its servants. It was held that a complaint which alleged that one "who was a brakeman or flagman on defendant's train, and an employee of defendant," insulted and threatened plaintiff, who had paid full fare for a first-class ticket, and was traveling on defendant's train, and "did assault and beat plaintiff while he was getting off the train at his destination," sufficiently charged that the acts complained of were committed while plaintiff was a passenger, by a brakeman in the employ of defendant, while in the discharge of his duty as brakeman. The court cited the *Goddard Case*, supra, and also *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504, 40 L.R.A. (N.S.)

But this apparent departure, if departure it was, from the original position, was merely temporary. The theory of the carrier's absolute liability has once more been reaffirmed in emphatic language of an extremely wide connotation.¹⁵

which is one of the leading decisions regarding the absolute duties of a carrier. Yet it also adverted to several cases in which "the line has also been carefully and distinctly drawn between such acts as are here complained of, when committed by an agent of the railroad, while acting in the line and discharge of his duty, and when committed by him as an individual, and not connected with his service to his company." Most of the cases cited had relation to the claims of mere strangers. The circumstances that two entirely distinct lines of authorities were thus relied upon is calculated to raise a suspicion that the court did not clearly apprehend the fundamental difference between the theories to which they are referable.

¹⁴ *Goodloe v. Memphis & C. R. Co.* (1894) 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 166. There a trainman, while engaged in a friendly scuffle with a coservant, accidentally pushed the plaintiff off the platform of a car. The grounds upon which the act was held not to be imputable to the company were thus stated: "What these parties did to cause plaintiff's injury was not in the line of their respective engagements, or that of either of them, to their employer; it was not fairly incidental to their employment; it was not done in pursuance of an express or implied authority from the master to do it; it was the result of the conduct of these employees, who, in the commission of the injurious act, however innocently done, had stepped aside from the purposes of the agency committed to them, and inflicted an independent wrong on the plaintiff; and they, if anybody, and not the defendant company, are liable for it." From the language, as well as from the actual decision, it is, to say the least, not an unreasonable inference that the carrier's duty to protect passengers was not regarded as extending beyond acts done by servants with relation to the actual work of transportation. That this was the doctrinal standpoint of the court is also indicated by its citation of *Gilliam v. South & North Ala. R. Co.* (1881) 70 Ala. 268,—a case which involved an injury to a person not standing in any contractual relation to the carrier, and which was necessarily decided with reference to the ordinary rule that a master is not liable for acts done by a servant outside the scope of his employment. On the other hand, one of the precedents relied upon is the *Lampkin Case*, note 13, supra, which is clearly inconsistent with any such narrow conception of the carrier's liability.

¹⁵ In *Birmingham R. & Electric Co. v. Baird* (1901) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456, the conduct-

Arkansas.—This is one of the jurisdictions in which the doctrine as to the absolute liability of a carrier has been adopted with respect to assaults by servants.¹⁶ In one case the nonliability of a street rail-

or of a street car seized the bell rope to prevent its being pulled again by a passenger who had already rung the bell twice, and immediately came toward the passenger and assaulted him. "But as between the carrier and its passengers an entirely different rule prevails. As to them the contract of carriage imposes upon the carrier the duty not only to carry safely and expeditiously between the termini of the route embraced in the contract, but also the duty to conserve by every reasonable means their convenience, comfort, and peace throughout the journey. And this same duty is, of course, upon the carrier's agents. They are under the duty of protecting each passenger from avoidable discomfort and from insult, from indignities and from personal violence. And it is not material whence the disturbance of the passenger's peace and comfort and personal security or safety comes or is threatened. It may be from another passenger, or from a trespasser or other stranger, or from another servant of the carrier, or, *a fortiori*, from the particular servant upon whom the duty of protection peculiarly rests. In all such cases the carrier is liable in damages to the injured passenger. And it is of no consequence, when the wrong is committed by the carrier's own servant,—even that servant particularly charged with the duty of conserving the passenger's well being *en route*,—that the act bears no connection or relation with or to the duties of such servant to the carrier, and is not committed as an incident to the discharge of any duty, but is utterly violative of all duty, and apart and away from the scope of employment as that term is understood in the class of cases first above referred to. The carrier is liable in such cases because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment, and it is manifestly immaterial that the act may have been one of private retribution on the part of the servant, actuated by personal malice towards the passenger, and having no attribute of service to the carrier in it. It is wholly inapt and erroneous to apply the doctrine of scope of employment as ordinarily understood, to such an act. Its only relation to the scope of the servant's employment rests upon the disregard and violation of a duty imposed by the employment. This is, beyond question, we think, the true doctrine, on principle; and while, as indicated above, there are adjudications against it, the great weight of authority supports it." The court, after referring to the general rule which precludes recovery against the mas-

way company for the arrest of a passenger at the instance of a servant was affirmed on the ground that his act was beyond the scope of his authority.¹⁷ But more recently the doctrine that a carrier is an

ter unless the tortious act was within the scope of the servant's employment, proceeded thus: It was held that the court had erred in instructing the jury with respect to "scope of employment," but that the error was nonprejudicial as regards the defendant. It is somewhat strange that the *Goodloe Case*, *supra*, was not referred to. The difficulty, if not impossibility, of reconciling it with the language of the above extract, would seem to have been a point demanding some notice by the court.

In *Birmingham R. Light & P. Co. v. Parker* (1909) 161 Ala. 248, 50 So. 55, the court relied upon the above case and quoted with approval the following statements in *Hutchinson on Carriers*, §§ 982, 1101: "The contract of carriage as to female passengers embraces an implied stipulation that the carrier will protect them against general obscenity, immodest conduct, or wanton approach." The duty which a carrier owes to a female passenger to protect her from indecent assaults by its servants cannot be frittered away by questions of whether the servants were acting within the scope of their authority."

See also *Birmingham R. Light & P. Co. v. Mullen* (1903) 138 Ala. 614, 35 So. 701 (where the actual point upon which the decision turned was the justifiability of an assault); *Alabama City, G. & A. R. Co. v. Sampley* (1910) 169 Ala. 372, 52 So. 142 (absolute duty recognized in a case which turned on the question whether the aggrieved party had ceased to be a passenger at the time when he was assaulted).

In *Louisville & M. R. Co. v. Perkins* (1905) 144 Ala. 325, 39 So. 305, it was held that a good cause of action was stated by a complaint which alleged the wrongful, wilful, wanton, and intentional ejection of a passenger from a train by a conductor, and that it was not necessary to aver that the defendant's employees knew of the plaintiff's peril when he was ejected. The motive which prompted the ejection is not stated. The case is therefore one of indecisive import in the present connection.

¹⁶ *St. Louis, I. M. & S. R. Co. v. Dowgiallo* (1907) 82 Ark. 289, 101 S. W. 412 (defendant liable for a wrongful and unprovoked assault). The court cited with approval 2 *Hutchinson, Carr.* §§ 1093, 1094; 4 *Elliott, Railroads*, § 1638; *Thomp. Neg.* § 3186; 2 *Fetter, Carr. Pass.* §§ 365, 366.

¹⁷ *Little Rock Traction & Electric Co. v. Walker* (1898) 65 Ark. 144, 40 L.R.A. 473, 45 S. W. 57, where it was held that a conductor, who was merely empowered by the company's rule to remove from the car passengers who did not pay their fare, had no authority to make an arrest for this cause.

insurer against all acts of violence on the part of his employees was held to be applicable to wrongful arrests.¹⁸

California.—The only relevant cases which so far have been decided in this state proceeded upon the ground that the torts in question were committed within the scope of the tortfeasor's authority.¹⁹ In one of them, it will be observed, the court expressly declined to consider whether

the tort in question could be imputed to the defendant on the ground of his being bound to protect the plaintiff from maltreatment.

Colorado.—The theory of an absolute obligation on the carrier's part has been adopted in this state.²⁰

District of Columbia.—In one case a street car company was held to be liable for injuries caused to a passenger whom

¹⁸ In *Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 97 Ark. 24, 32 L.R.A.(N.S.) 525, 133 S. W. 168, the court made the following remarks with reference to a hypothetical situation the existence of which was in point of fact negatived by the evidence: "A railroad company as a common carrier of passengers is bound to use extraordinary care not only to carry its passengers safely, but also to protect them during the carriage from assault or injury from its agents in charge of the train and from others. By its contract the railroad company assumes the obligation to protect the passenger against any negligent or wilful misconduct of its servants while performing the carriage; it also assumes the obligation to exercise diligence and care in protecting its passengers while in transit from violence or wrongful misconduct of others on the train. The conductor has control not only over the movements of the train, but over persons on it, and has authority to compel the observance of the rules of the company by all persons on the train. He has therefore the power, under ordinary circumstances, to protect them from violence or wrongful injury from others, and the law makes the company liable for an injury to a passenger resulting from a negligent failure to exercise such power. It is therefore liable for any wrongful arrest of a passenger, made or procured by its servants in charge of the train; and it is also liable for an illegal arrest of the passenger, made by others, which, in the exercise of due diligence, it could have prevented."

In *Moore v. Louisiana & A. R. Co.* (1911) 99 Ark. 233, 34 L.R.A.(N.S.) 299, 137 S. W. 826, a demurrer was held to have been erroneously sustained to a complaint which alleged that the auditor of a railroad company, while he was in charge of a train, falsely accused a passenger of stealing a watch fob, and had him illegally arrested, but did not state that the auditor in doing this was acting within the scope of his authority. The case cited in note 17, *supra*, was relied on by counsel for defendant, but not referred to the court.

¹⁹ In *Turner v. North Beach & M. R. Co.* (1868) 34 Cal. 594, it was held that a colored passenger whom the conductor of a street car had wrongfully ejected was entitled to recover actual damages, even though the misfeasance constituted a violation of the carrier's express orders, and was prompted by malicious motives. The *ratio decidendi* was simply that the conductor had acted within the scope of his agency. 40 L.R.A.(N.S.)

In *Trabing v. California Nav. & Improv. Co.* (1898) 121 Cal. 137, 33 Pac. 644, a motion for a nonsuit was held to have been properly denied, because the evidence tended to support a complaint which alleged that the defendant's servants and agents in charge of the steamer wrongfully placed handcuffs on the plaintiff, took him to the lower deck of the defendant's steamer, chained him to a post in such a way as to cause him great bodily pain, kept him chained thereto until the steamer reached a place short of the destination to which he had paid his fare, and there wrongfully ejected him from the steamer. The sufficiency of the complaint as against a special demurrer was affirmed on the grounds thus explained: "The wrongs and injuries complained of are alleged to have been committed by the defendant's servants and agents 'who were at said time in charge of said steamer.' This allegation sufficiently distinguishes between those who were authorized to represent the defendant in the management and control of the boat and its business, and those who, though employees and servants, were merely laborers and under the immediate control of those 'in charge of said steamer.' Whether, if these alleged wrongs and injuries had been perpetrated by the deck hands of their own motion, and without the direction of anyone in control of the steamer and its business, the defendant would not be liable, upon the ground that it was its duty to prevent it, need not be considered. . . . The answer of defendant, as well as the evidence given on behalf of the plaintiff, shows that all the acts of the captain constituting the alleged wrongs and injuries were done and performed upon defendant's boat in its operation as a common carrier by the captain in charge thereof, in the line of his employment. That he was authorized by the defendant to see that persons being transported upon the said steamer paid their fare, and to collect the same, and to remove from the steamer those who, not having paid their fare, refused to pay it when demanded, cannot be questioned. That was not only 'in the line of his employment,' but one of the very purposes for which he was employed."

²⁰ *Bleecker v. Colorado & S. R. Co.* (1911) 50 Colo. 140, 33 L.R.A.(N.S.) 386, 114 Pac. 481 (fact that a railroad conductor was not instructed by the company to use insulting language toward a passenger, and did not ratify his act in using it, would not relieve it from liability for the mental anguish

a conductor had wilfully ejected from a moving car.²¹ It would seem that the court intended merely to adopt the restricted doctrine that the existence of the contract of carriage operated to render the carrier liable for the wilful as well as the negligent acts of his servant, in so far as they are done in the course of the employment.²²

Florida.—In this state the doctrine of the absolute liability of a carrier for the torts of his servants has been adopted.²³

Georgia.—The provisions of the Civil Code which are material in the present connection are the following: Code 1895, § 3817 (Code 1910, § 4413), declares that "every person shall be liable for torts committed by his . . . servant by his command, or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary." By Code 1895, § 2321 (Code 1910, § 2780), it is enacted that "a railroad company shall be liable for any damage done . . . by any person in the employment and service of such company, unless the company shall make

it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

Code 1895, § 2266; Code 1910, § 2714. "A carrier of passengers is bound also to extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers. But he is not liable for injuries to the person after having used such diligence."²⁴

It has been held that under these provisions the liability of a railway company to a passenger for the wilful torts of their servants is determinable upon the same footing as at common law.²⁵ The doctrine applied in the cases decided from this standpoint is thus stated in the head-note written for one of them by the court itself. "Railroad companies are responsible to passengers for the torts of conductors and other servants employed in running trains, where such torts are committed in connection with the business intrusted to such servants, and spring from, or grow immediately out of, such business."²⁶

caused to the passenger); *Denver Tramway Co. v. Reed* (1894) 4 Colo. App. 500, 38 Pac. 557 (wrongful ejection of passenger from street car by conductor).

²¹ *Converse v. Washington & G. R. Co.* (1876) 2 MacArth. 504.

²² The authority mainly relied on was *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474, which goes no further than this.

²³ *Pelot v. Atlantic Coast Line R. Co.* (1910) 60 Fla. 159, 53 So. 937. The syllabus written by the court runs as follows: Passengers do not contract with carriers merely for ship room and transportation from one place to another, but for good treatment and against personal rudeness and want of interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance; and whatever may be the motive which incites a carrier's servant to commit an unlawful or improper act towards a passenger during the existence of the relation of carrier and passenger, and regardless of whether the wrong is committed in the execution of the servant's employment, the carrier is liable for the act and its natural and legitimate consequences.

²⁴ It has been held that where a railway company is sued for a wilful and unjustifiable assault made upon a passenger by one of its servants, but no negligence on the part of that or any other servant is alleged, the law relating to the extraordinary care which a carrier owes to passengers under the provision is not involved, and consequently a charge upon the subject of such care is improper. *Atlanta Consol. Street R. Co. v. Keen* (1896) 99 Ga. 266, 33 L.R.A. 824, 25 S. E. 629; *Seaboard Air-Line R. Co. v. O'Quin* (1905) 124 Ga. 359, 2 L.R.A. 40 L.R.A. (N.S.)

(N.S.) 472, 52 S. E. 427; *Savannah Electric Co. v. Pritchard* (1909) 133 Ga. 747, 66 S. E. 952. In the last-mentioned case the court also disapproved of a charge that the carrier must furnish safe appliances to passengers while traveling, which must be in good condition, and inspected with reasonable care, and that the carrier must use ordinary care in the selection of proper officials upon its cars, having in view the business they are to perform.

In *Mason v. Nashville, C. & St. L. R. Co.* (1910) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225, it was held that, having regard to the phraseology of the provision, it was error to instruct the jury that "carriers must treat their passengers respectfully, and protect them, so far as they reasonably can, from injury or insult on the part of their employees."

²⁵ *Peeples v. Brunswick & A. R. Co.* (1878) 60 Ga. 281.

²⁶ *Gasway v. Atlanta & W. P. R. Co.* (1877) 58 Ga. 216. There recovery was sought under a complaint containing two counts, one of which was to the effect that the baggage master beat and maltreated the plaintiff wrongfully while engaged in having the baggage of his wife checked; the second, to the effect that, when he was riding on the cars with his wife afterwards, the conductor awoke him from sleep, and, recognizing him, threatened to shoot him, and made him jump off the cars while they were running. The court, after showing that under other provisions of the Code, the word "person" must be construed as including corporations, observed: "On the whole, we think that the true principles deducible from our own Code and the general law, and the reason and spirit thereof, are these: First, if the conductor or other officer, on a

Taken literally, this statement might seem to import a responsibility extending only to torts which should be directly related to the actual work of transportation. But the circumstances involved in the case with reference to which it was made show

that it is to be construed as applied to breaches of an assumed duty on the carrier's part to see that his passengers are properly treated. This view of the law is amply confirmed by the decisions of the court.²⁷

railroad train, in the exercise of a general power intrusted to him by the company, in respect to passengers, clothed with authority to exact pay from them, to receive their tickets, to receive, check, and deliver their baggage, to supervise their conduct, to put them off the train if disorderly, to care for their reasonable comfort and protection, —if, in the scope and range of such business, the agent act in a manner to trespass upon the rights of passengers, to insult or maltreat them, to assault or wound or beat them, to frighten them so as to force them off the cars without justifiable excuse or reason, we think that the company is responsible for such tortious conduct of its agents and servants acting where it put them to use discretion and judgment, and within the business it intrusted especially to them. . . . It is a duty that these carriers of passengers owe to the public to employ reliable and gentlemanly agents to conduct and manage their trains; and if they do not employ such, they should be made responsible for torts committed by those whom they have employed, and to whom they have given the power to violate their duty, imposed by law, safely to transport the passenger and decently to treat him on his journey so long as he properly demeans himself."

²⁷In *Peeples v. Brunswick & A. R. Co.* supra, the declaration alleged that plaintiff was a passenger on defendant's road; that he was in the usual passenger coach; that while thus situated, and entitled to the care and protection of defendant, at an intermediate station, he was called out of the train by the conductor in charge thereof, who was defendant's agent, and was beaten, bruised, etc. Held, that the failure to allege in express terms that the agent acted "in the prosecution and within the scope of his business" was not a vital defect, and that the court erred in dismissing the case on general demurrer. *Aliter*, had the injury been inflicted after the delivery of the plaintiff at his destination.

In *Atlanta & W. P. R. Co. v. Conder* (1885) 75 Ga. 51, where a brakeman refused to allow a passenger to pass out of one car into the next while the train was in motion, there being no rule of the company forbidding such passing, the company was held liable for opprobrious language and an assault by the brakeman during an altercation arising out of the refusal.

In *Western & A. R. Co. v. Turner* (1884) 72 Ga. 292, 53 Am. Rep. 842, a person desiring to become a passenger upon a freight train entered the caboose, and the conductor insolently refused to carry him, and struck him with his lantern; the liability.

bility of the railway company was sustained on the ground that the aggrieved passenger was a passenger "within the reason of the Gasway Case," supra. The court said: "The duty of the conductor is twofold: First, if he refused the passenger to do so in a polite manner, he gave him a reasonable opportunity to leave the cab of his own motion. Second, after having done this, the plaintiff refused to leave the cab, then to use reasonable force as was necessary to remove him therefrom. Whatever the conductor's duty in relation to either of these matters, under the facts of this case, clear in the prosecution and within the scope of his business, and the company was liable for his conduct, even though it was not necessary. He had no right to insult the plaintiff by the use of vulgar and profane language and abusive epithets, and then to resort to provocation, to beat him over the head in his face and mouth, and knock him out of his cab door with his lantern."

In *Savannah, F. & W. R. Co. v. Smith* (1897) 103 Ga. 125, 40 L.R.A. 483, 29 S. E. 607, a railway company was held to be liable for an assault by a baggage master upon a female passenger, with intent to commit rape.

In *Wolfe v. Georgia R. & Electric Co.* (1907) 2 Ga. App. 499, 58 S. E. 355, the court, proceeding upon the ground that a common carrier is bound to protect its passengers from insult as well as from injury, and especially from insult by its servants, held that an act of insult maintainable against a railway company for the insult implied in the fact that the conductor, in enforcing Penal Code § 527, which requires conductors to treat white and colored passengers, called the plaintiff, a white man, a negro, or in other words, that he was of African descent.

In *Georgia R. & Electric Co. v. Smith* (1904) 120 Ga. 991, 48 S. E. 355, the court held that the trial judge had improperly sustained a demurrer to a petition alleging that a conductor maliciously and in an ungentlemanly manner remained in the car to annoy a female passenger. The review of this case after the trial court's decision upon the overruling of the demurrer had taken place, the court held that, in order to warrant a recovery in an action by a passenger to recover damages for an insult given by the conductor in a street car, his acts must have been such as not only humiliate and insult the passenger but such as would reasonably tend to humiliate any person in similar circumstances. (1907) 1 Ga. App. 832, 58 S. E. 88.

For other cases in which the liability of railway companies in respect of

Idaho.—In this state the doctrine that a carrier is subject to an absolute duty to protect passengers against the misfeasance of his employees has been applied in a case where the plaintiff was wrongfully ejected from a train.²⁹

Illinois.—In the earliest relevant case in this state the scope of the servant's authority was explicitly treated by the

supreme court as the gauge of the carrier's liability.³⁰ Subsequently the court applied the doctrine that a carrier impliedly guarantees that his passengers shall be protected against violent acts or insulting language on the part of the servants whom he places in charge of the vehicle by which the passengers are conveyed.³⁰ If the language of the supreme court should be con-

and insults by servants was treated as being absolute, see *Peavy v. Georgia R. & Bkg. Co.* (1888) 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70 (question chiefly discussed was whether provoking words of passengers excused defendant); *Savannah Street R. Co. v. Bryan* (1890) 86 Ga. 312, 22 Am. St. Rep. 464, 12 S. E. 307; *East Tennessee, V. & G. R. Co. v. Fleetwood* (1892) 90 Ga. 23, 15 S. E. 778 (passenger insulted and assaulted by a conductor on account of personal animosity); *Columbus & R. R. Co. v. Christian* (1895) 97 Ga. 56, 25 S. E. 411 (the court laid it down *arguendo* that a railroad company is liable if its freight agent takes advantage of the opportunity afforded by the presence of a patron at his place of business to bring about a difficulty with the patron upon the occasion of some previous private quarrel); *Georgia R. & Bkg. Co. v. Richmond* (1896) 98 Ga. 495, 25 S. E. 565; *Brunswick & W. R. Co. Moore* (1897) 101 Ga. 684, 28 S. E. 1000 (main question involved was whether plaintiff was entitled to a passenger's rights at the time when he was assaulted); *Cole v. Atlanta & W. P. R. Co.* (1897) 102 Ga. 474, 31 S. E. 107 (passenger insulted); *Georgia R. & Bkg. Co. v. Hopkins* (1899) 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965 (passenger assaulted); *Central R. Co. v. Brown* (1901) 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989 (passenger assaulted); *Dannenberg v. Berkner* (1903) 118 Ga. 889, 45 S. E. 682 (first appeal, 116 Ga. 955, 60 L.R.A. 559, 43 S. E. 463; *Macon R. & Light Co. v. Mason* (1905) 123 Ga. 773, 51 S. E. 569); *Savannah Electric Co. v. Pritchard* (1910) 133 Ga. 747, 66 S. E. 952.

In *Central of Georgia R. Co. v. Motes* (1903) 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990, the violent act alleged had a direct relation to the enforcement of a regulation, so that the company would have been liable in any view of its obligations if the act had been wrongful.

In *Mason v. Nashville, C. & St. L. R. Co.* (1911) 135 Ga. 741, 33 L.R.A.(N.S.) 280, 70 S. E. 225, the following remarks were made: "At the outset it is well to remember that in dealing with the general question of whether a master is liable for a wilful tort of his servant, the doctrine of *respondet superior* furnishes the basis for decision if there are no statutory provisions on the subject, but that in certain instances there is a relation between the master and the injured person, out of which arises a duty of protection; and this duty is to be considered in addition to the general doctrine mentioned above. This is true as 40 L.R.A.(N.S.)

to a carrier and its passengers. The carrier owes to its passengers a duty of protection even against outsiders. *A fortiori* it must protect its passengers against its own employees engaged in the performance of its contract of carriage, and for whose acts in so doing it is responsible."

In *Savannah Electric Co. v. Wheeler* (1907) 128 Ga. 550, 10 L.R.A.(N.S.) 1176, 58 S. E. 38, where a drunken street-car conductor, during an altercation with a passenger about the fare, fired several shots, one of which hit him, while another struck and killed the plaintiff's decedent, a foot-passenger in the street, it was laid down *arguendo*, that the railway company was liable for the injury received by the passenger, because the conductor, in dealing with the passenger and shooting at him, was "acting in the prosecution and scope of the business intrusted to him," within the meaning of the law. Having regard to the other cases cited in this note, it is clear that the phrase within the quotation marks must be understood in the broad sense of, "performing as the representative of his master absolute contractual duties."

²⁹ *Lindsay v. Oregon Short Line R. Co.* (1907) 13 Idaho, 477, 12 L.R.A.(N.S.) 184, 90 Pac. 984 (not necessary to allege or prove that the tortfeasor, a brakeman, was acting within the scope of his employment).

³⁰ In *Chicago, B. & Q. R. Co. v. Bryan* (1878) 90 Ill. 126, the ground assigned for holding the railway company liable in an action for assault committed upon a passenger who was conducting himself in an orderly and decent manner, and had offered to pay the proper fare, was that his expulsion from the car in a forcible manner by the conductor was unjustifiable, and that the company was liable for acts performed by its conductor within the scope of his authority.

Chicago & N. W. R. Co. v. Williams (1870) 55 Ill. 185, 8 Am. Rep. 641, where it was held that the defendant was liable if a colored woman was denied the privilege of the ladies' car, owing to "mere wantonness on the part of the brakeman," the only point discussed was the propriety of the exclusion. That the brakeman was acting within the scope of his authority was taken for granted.

³⁰ In *Chicago & E. R. Co. v. Flexman* (1882) 103 Ill. 546, 42 Am. Rep. 33, affirming (1881) 9 Ill. App. 250, a passenger, on arriving at the place to which he had paid his fare, missed his watch, and supposing it to have been stolen while he was asleep,

strued literally, and treated as having both an exclusive and an inclusive connotation, the carrier would not be chargeable with the torts of every servant whose appointed functions have some relation to the performance of the contract of carriage. But his liability for the misfeasance of servants

whose duties are merely accessory to the actual work of transportation would probably be affirmed if a case involving the point should be presented. In two of the cases decided after the doctrine of absolute liability was recognized the precise standpoint of the court is not shown by the

refused to leave the train until he should recover it. The conductor consented that he should remain on the train until it reached another station. After the train had been started and a partial search had been made, another passenger asked who he thought had his watch. He replied, "That fellow," pointing at a brakeman, who immediately struck the man in the face with a lantern. Held that the facts showed a right of action against the railroad company for the injury inflicted by its servant, and that the company occupied the same position towards the passenger as if he had paid his fare to such other station. Referring to the contention that the case was controlled by the doctrine that a master is not liable for the wilful torts of his servants, the court said: "The doctrine announced is no doubt correct when applied to a proper case. If, for example, a conductor or brakeman in the employ of a railroad company should wilfully or maliciously assault a stranger,—a person to whom the railroad company owed no obligation whatever,—the master in such a case would not be liable for the act of the servant; but when the same doctrine is invoked to control a case where an assault has been made by the servant of the company upon a passenger on one of its trains, a different question is presented,—one which rests entirely upon a different principle.

. . . The appellant was a common carrier of passengers. As such it was not an insurer against any possible injury that a passenger might receive while on the train, but the company was bound to furnish a safe track, cars and machinery of the most approved quality, and place the trains in the hands of skilful engineers and competent managers,—the agents and servants were bound to be qualified and competent for their several employments. . . . So, too, the contract which existed beyond appellant as a common carrier and appellee as a passenger was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal, and justice demands that it should be held responsible for their wrongful acts towards passengers while in charge of the train. Any other rule might place the traveling public at the mercy of any reckless employee a railroad company might see fit to employ." In the affirmed judgment of the court of appeal we find the following statement: "In every contract for carriage, the carrier undertakes not only that the utmost vigilance, care, and

skill shall be exercised to safely transport a passenger to his destination, but that during the passenger's transit, he shall be treated humanely, and protected from all dangers, from whatever source arising, so far as the efforts of the carrier or his servants can be made available for the protection of such passengers."

In *McMahon v. Chicago City R. Co.* (1909) 239 Ill. 334, 88 N. E. 223, affirming (1908) 143 Ill. App. 608, the plaintiff and her husband were passengers on a street car, and held transfers from another line of the same company, entitling them to ride. A dispute arose between the husband and the conductor of the car concerning further transfers, which lasted for some time. The testimony showed that the conductor renewed the controversy several times as he passed by them in the car; that he addressed vituperative, profane, obscene language to them; that the altercation finally culminated in a scuffle between the conductor and the husband; that the conductor started the scuffle by attempting to strike the husband; that while he was struggling in the grasp of some of the passengers who were trying to prevent him from making a physical assault on the husband, his arm or elbow struck the wife and knocked her against the corner of a seat; and that afterwards in the *melee* she was thrown over and seriously injured. At the time the conductor attempted to strike the husband, his wife was sitting across the aisle. The liability of the defendant for the injuries thus inflicted was affirmed on the authority of the *Flexman Case*, *supra*. An instruction that the jury should not find for the plaintiff if they believed she could have avoided the injury by the use of ordinary care was held to have been properly refused as misleading, where its only basis was the argument that if she had kept to her seat during the scuffle she would not have been hurt.

In *Pullman Palace Car Co. v. Lawrence* (1897) 74 Miss. 782, 22 So. 53, the porter of a sleeping car, having been asked by a passenger at a somewhat late hour to bring him a sandwich, made an uncivil reply. The passenger threatened to report him and was thereupon assaulted by him. The assault occurred while the train was in Illinois. The Mississippi court, treating the action as being *ex delicto*, determined the right of recovery with reference to what it regarded as the law of that state, and held that the passenger was entitled to punitive damages, for reasons thus explained: "The porter who made the assault upon appellee was at that time engaged in the company's business, and was acting

opinions.³¹ The facts involved were in both instances such that the right of recovery might appropriately have been predicated with reference either to the test of scope of employment, or to the conception of an absolute contractual obligation. In another recent case the concept explicitly relied upon was that the action in question was within the scope of the tortfeasor's authority.^{31a} In a case where a street car conductor gave a passenger into custody

on a charge of having given him a counterfeit coin in payment of the fare, the liability of the railway company was affirmed on the ground that the conductor's act was within the scope of his authority.³² The effect of the carrier's obligation in respect of protecting passengers was not adverted to.

Indiana.—The doctrine applied in all the earlier cases which bear upon the subject was that the wilful torts of a carrier's

within the scope of his employment. And if he was not, it is difficult to imagine a case where a servant, committing a wanton and wilful wrong, could ever be said to be acting within the scope of his employment. He was the waiter, charged with the duty of attending the calls of passengers and of serving food; he did go into the smoking compartment in answer to repeated calls for his attendance; and he did make his brutal assault in the course of the interview had with him by appellee and his traveling companion, Henderson, in their effort to have food supplied appellee." This decision does not actually go any further than to hold a carrier to be liable for punitive damages in respect of torts committed by a servant within the scope of his employment. But the court appears to have reasoned on the assumption that in Illinois only torts of that description are imputable to the carrier. If this was really its position, it clearly conflicted with the doctrine already established by the former of the above cases.

In *Chicago, R. I. & P. R. Co. v. Barrett* (1884) 16 Ill. App. 17, an action for the ejection of a passenger with undue violence, the court observed that, in every contract of carriage, "there is a stipulation implied by the law that the passenger shall be humanely treated, and a guaranty that the servants of the carrier, engaged in the performance of their master's contract, shall not unjustifiably assault or beat him, or otherwise maltreat him, while the master sustains such contract relations to him;" and the master is liable for any breach of this contract, regardless of the motive of the servant in committing the act which constitutes the breach.

The duty of a railway company to protect passengers against the assault of trainmen was the rationale of the decision in *Illinois C. R. Co. v. Sheehan* (1888) 29 Ill. App. 90 (unnecessary force used in removing an intoxicated man from a car).

In *Hanson v. Urbana & C. Electric Street R. Co.* (1897) 75 Ill. App. 474, the conception of a guaranty on the carrier's part was the rationale of the recovery allowed in a case where a motorman on a street car had quarrelled with a passenger about a personal matter, and struck him without any justifying provocation.

In *Coal Belt Electric R. Co. v. Young* (1906) 126 Ill. App. 651, an employee of a street railway company, in attempting to

reach a person whom the superintendent had ordered him to arrest, dragged the complainant off a car which he was entering. The liability of the defendant was affirmed on the ground that "any act or order which might directly affect the comfort or safety of a passenger could be within the apparent scope of his employment." The phrase "scope of employment" is evidently used here in a more extended sense than it bears in cases where the remedial rights of third persons are in question.

In *Chicago City R. Co. v. Cooper* (1906) 128 Ill. App. 528, where a motorman threw off a street car a newsboy who was getting on, not to sell newspapers, but to become a passenger, recovery was denied for the reason that there was "no averment or proof that the alleged wrongful act was within the scope of the motorman's employment." This decision, it is submitted, is essentially inconsistent with the theory of the supreme court as to an absolute duty on the carrier's part.

³¹ In *Wabash, St. L. & P. R. Co. v. Rector* (1882) 104 Ill. 296, the liability of a railway company for the act of a conductor who used force in order to prevent a passenger from mounting the rear car of a train at the same time as himself was conceded, but the verdict was set aside on the ground of errors in the instructions. This decision might clearly have been rendered under any of the theories as to the extent of a carrier's responsibility.

In *Illinois C. R. Co. v. Davenport* (1898) 177 Ill. 110, 52 N. E. 286, the company was held liable, where a brakeman, acting under orders of the conductor, ejected from a moving train a person whom they both believed to be a trespasser, but who was really entitled to the rights of a passenger.

^{31a} In *Chicago Union Traction Co. v. McClevey* (1906) 126 Ill. App. 21, the ground upon which the court proceeded was that a conductor in charge of a street car is the agent of the company, and the power inherent in the company to expel from its cars persons who refuse to pay the customary fare is vested in him; and that if, by an error in judgment, he expels one who is entitled to the rights of a passenger, the company is responsible for such error, for in legal contemplation the company is present, and is acting in the person of its conductor.

³² *West Chicago Street R. Co. v. Luleich* (1899) 85 Ill. App. 643.

servant were or were not imputable to his employer, according as they were or were not committed within the scope of his employment; that phrase being used in its narrower sense, as one connoting merely such functions as were directly connected with the actual work of transportation.³³

³³In *Evansville & C. R. Co. v. Baum* (1866) 26 Ind. 70, the complaint alleged that the plaintiff had paid his fare and was seated in the car, when he was violently assaulted and beaten, and ejected from the car by a servant of the company; that the duty and employment of said servants was to provide seats for passengers and exercise care for their comfort, and that he then had charge of said car, and committed said trespass in the course of his business as such servant. Held, that the expulsion of the plaintiff from the car, where he lawfully was, if done without unnecessary violence, would give a right of action against the company, and that as this state of facts might have been proved under the allegations of the complaint, a demurrer to the complaint was correctly overruled. The court said: "The first paragraph of the complaint presents a question of more difficulty. We think that it shows that the employee, Wilson, had general charge and control of the car in which the plaintiff was seated, and that it does not appear by the averments that his duties were confined to providing seats for passengers, and caring for their comfort. The violence committed by him was not, therefore, as is insisted for the appellant, wholly disconnected with the business which he was employed to do, assuming, as we must on demurrer, that the paragraph is true. The case made, then, is one where the servant needlessly does an act under color of his employment, in a brutal and inhuman manner, wilfully and violently, without express authority from the master to use such brutality; and a question presented and discussed is whether, in such a case, the maxim *respondeat superior* applies. . . . If the act of the servant complained of was necessary to be done to accomplish the purpose of the servant's employment,—if it was essential as a means to attain the end directed by the master, and was intended for that purpose,—then it was implied in the employment; and the master is liable, though the servant may have executed it wilfully and maliciously. But when it is unnecessary to the performance of the master's service, and not really intended for that purpose, but is committed by the servant merely to gratify his own malice, though under pretense of executing his employment, it is not done to serve the master, and is not, in fact, within the scope of the employment; and the master is therefore not liable." The verdict against the company was, however, set aside on the ground that the servant who committed the assault had not general charge of the car. The doctrinal standpoint of the court is clearly indicated 40 L.R.A.(N.S.)

The original position taken in this state, therefore, was the same as that of the English courts. But the theory of an absolute obligation on the carrier's part with regard to the protection of his passengers against all the tortious acts of his servants, while they are engaged in per-

by the fact that several of the precedents cited related to the claims of third persons. Neither in this case nor in any of the others mentioned in this note was the case of *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474, referred to.

In *Jeffersonville R. Co. v. Rogers* (1871) 38 Ind. 116, 10 Am. Rep. 103, where the defendant was held liable for exemplary damages in respect of the act of a conductor who had wrongfully ejected a passenger from a train, "in a spirit of oppressive malice or wantonness," the *ratio decidendi* was "that a corporation is liable for the wilful acts and torts of its agents, committed within the general scope of their employment, as well as acts of negligence; and that the corporation is thus bound, although the particular acts were not previously authorized nor subsequently ratified by the corporation."

In *Indianapolis, P. & C. R. Co. v. Anthony* (1873) 43 Ind. 183, involving the liability of a railway company for the acts of a conductor who had ejected a passenger on the ground of his having been guilty of improper conduct in regard to a woman, the court thus discusses the law of the case: "The conductor of a railroad train has the right to eject a passenger for a refusal to pay his fare, or for indecent and disorderly conduct. The act of the conductor in ejecting a passenger for either of the above causes would come within the general scope of his employment, and the master would be liable, if the act was wrongful, without reference to the question of whether the purpose of the conductor was to serve his master or to gratify his private malice. The intent of the conductor should not have any influence upon the question of the liability of the master, where the act performed comes within the general scope of his employment. If, in the case supposed, the passenger refuses to pay his fare, or is guilty of indecent conduct, and the conductor, for such cause, ejects him from the train, the act would come within the general scope of his employment, and the master would not be liable, although the agent was actuated by private malice, because the conduct of the passenger justified the act. If, on the other hand, the conductor should be misinformed as to the conduct of a passenger, and in reliance upon such information should eject him, the master would be liable, although the agent had no private malice, but was actuated solely by the earnest desire to serve his master. The act of the agent within the general scope of his employment is the act of the master, and whether the act was necessary to be done will depend

forming the contract of carriage in his behalf, was subsequently adopted.³⁴ In

some cases decided since its adoption, the right of recovery has been discussed with

upon the facts surrounding it. If the act done is within the general scope of employment, and is wrongful, the master is liable, although the act was unnecessary to the performance of the master's service, and was not intended for that purpose. We therefore think that the liability of the master does not depend upon the necessity for the act or the intent with which it was done, but upon whether the act was wrongful and within the general scope of the employment of the agent."

See also *Terre Haute & I. R. Co. v. Fitzgerald* (1874) 47 Ind. 79 (right of a passenger to recover for the act of a conductor in wrongfully ejecting him was put upon the ground that such an act is within the scope of the conductor's agency); *Pittsburgh, C. & St. L. R. Co. v. Theobald* (1875) 51 Ind. 246 (a complaint not demurrable which alleged that the plaintiff, while he stood upon the platform of a car, waiting for the train to stop, had been "wantonly, forcibly, and maliciously" thrown off by the conductor while the train was in motion).

³⁴ In *Terre Haute & I. R. Co. v. Jackson* (1881) 81 Ind. 19, the liability of a railway company for the act of a brakeman in dashing a jet of water upon a passenger who had refused to pay him for watering certain cattle belonging to the passenger was affirmed on the ground thus stated: "It is therefore immaterial whether the conductor or brakeman had been required or authorized to wash out the cars of the company for any purpose. The appellant had undertaken to carry the plaintiff, as a passenger, upon its train, and was bound to do it safely. For this purpose the appellant was represented by its agents in charge of the train, and if they did anything inconsistent with the safe carriage and delivery of the plaintiff at his destination, unharmed, the appellant, upon the plainest principles of law, as well as good policy, is liable for the injury. The drenching of a passenger with water, either negligently or wilfully, is a clear and direct breach of the duty to carry safely, and it is immaterial upon the question of the company's liability, whether it resulted from the fault of the brakeman alone, or of the conductor, or of both of them. They were each agents of the company for the running of the train, and the company, therefore, responsible for the acts of either, or both, in so far as such acts affected the passenger. It follows that if the conductor was faultless in raising the valve and in throwing the water into the caboose, which could hardly be, when he knew there was a passenger there, liable to be injured, and the brakeman designedly procured the plaintiff to go to the door of the caboose in order that the water might strike him, the company is clearly liable for the injury; that the evidence tends to show this state of facts is not disputed."

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In *Louisville & N. R. Co. v. Kelly* (1883) 92 Ind. 371, 47 Am. Rep. 149, where a passenger was either carelessly or purposely jostled by a brakeman while he was obeying the direction of the conductor to go to another car, it was contended that an instruction to the following effect was erroneous: "The defendant's obligation was to carry the plaintiff safely and properly; and, if the defendant intrusted this duty to servants, the law holds the defendant responsible for the manner in which they executed it. The carrier is obliged to protect the passenger from violence from its own servants, and from every source whatsoever." The court, however, said: "It is established law that carriers are responsible for the negligent and wilful wrongs of their servants, suffered or done in the line of their employment. It is also true, as a general rule, that carriers are under a duty to protect their passengers from violence from all sources. . . . There rests on carriers this obligation to protect passengers from violence, and an instruction which asserts in general term this obligation cannot, in such a case as the present, be deemed erroneous. It is no doubt true that if the violence could not have been foreseen or prevented by the highest degree of care, the carrier would be absolved from liability. *Thomp. Carr. Pass.* 364, 365; *Hutchinson, Carr.* § 552; *Grand Rapids & I. R. Co. v. Boyd* (1879) 65 Ind. 526. This, however, does not prove that the statement of the general rule is incorrect, for the duty of protecting passengers from violence does rest on all carriers, although this duty is not an absolute one. If the care which the law requires is exercised by the carrier, then the duty is discharged and there is no liability. A carrier is responsible for injuries wilfully or carelessly inflicted upon passengers by servants engaged in the performance of duties within the general scope of their employment, whether the particular act was or was not authorized by the master. The question in such cases is whether the servant was, when he inflicted the injury, acting within the line of his duties, and not whether the particular act was authorized."

In *Wabash R. Co. v. Savage* (1886) 110 Ind. 156, 9 N. E. 85, where a brakeman wantonly inflicted an injury upon a passenger whom he was ejecting from a wrong train, the railway company was held to be liable, although, in the absence of express orders, the brakeman was not authorized to eject passengers. This liability was declared to be "based upon the doctrine that a passenger, while traveling on a train, is under the care and control of the railway company, and is hence entitled to be protected against the wilful misconduct of the company's agents and servants in charge of the train, and to whose authority he is required for the time being to yield a greater or less obedience." This language

is to be understood in its broader sense,—that is, as embracing all the duties which are owed to passengers under the contract of carriage, and not merely those which

is broad enough to import an adoption of the theory as to the absolute liability of a carrier with respect to all the torts committed by servants belonging to the specified class. Yet it was also laid down that an averment that the injury was inflicted by the "defendant, acting through its agents and servants," was equivalent to an averment that the defendant acted through its duly authorized agents and servants, and was sufficient to present the question whether the persons who performed the acts charged were the agents and servants of the defendant, and acting at the time within the line of duty. This ruling, it would seem, cannot be reconciled with the statement just referred to except upon the supposition that the court intended to distinguish cases where a trainman is on duty from those in which he is traveling on a train, but has no functions to discharge with relation to it.

In *Memphis & C. Packet Co. v. Pikey* (1895) 142 Ind. 304, 40 N. E. 527, where an action for the death of a passenger who was shot by the second mate of a river steamer was held to be maintainable, it was held that the defendant could not escape liability by showing that a quarrelsome and violent class of men are usually employed on such vessels. The report does not show how the altercation arose.

In *Citizens' Street R. Co. v. Clark* (1904) 33 Ind. App. 190, 104 Am. St. Rep. 240, 71 N. E. 53 (on demurrer), where a passenger was ejected with unnecessary violence from a street car, his right to recover was put upon the ground that the assault was a breach of the railway company's duty to protect him, and that its liability for a breach of this duty did not depend upon whether the tort was committed by a servant acting within scope of his employment.

In *Baltimore & O. S. W. R. Co. v. Davis* (1909) 44 Ind. App. 375, 89 N. E. 403, where the plaintiff was assaulted by a conductor in the course of a dispute about the amount of the fare, the court laid it down that the duty of a railroad company "to carry passengers safely and expeditiously, and to conserve, by every reasonable means, the convenience, comfort, and peace of the passengers," rests on its agents, who must "protect each passenger from bodily discomfort, insult, indignities, and personal violence, from whatever source;" and that though the act of an agent violating such duty is one which "bears no relation to the duty of the carrier, and is not connected as an incident to the discharge of any duty," the company is liable, for the reason that its duty has been violated. In this case it was also held not to be error to instruct the jury that a carrier is liable for 40 L.R.A. (N.S.)

west of transportation.
Iowa.—In one case the right of the plaintiff to recover for an assault was determined with reference to the question whether the injurious act was or was not

all damages to passengers from acts of an agent in the course of his employment, though the acts were not ordered or ratified by the carrier.

In *Indianapolis Union R. Co. v. Cooper* (1892) 6 Ind. App. 202, 33 N. E. 219, an action for an assault committed by a gate keeper at a station, an averment that it was committed by the defendant railway company through its employees was held to be sufficient. The prima facie liability of the company was affirmed, both on the ground that it was within the general scope of the duty of that employee "to lay hands upon and use force, if necessary in proper cases, to prevent persons from going through the gate, or to compel their return, if they improperly passed it," and also on the ground that the company owed to plaintiff the affirmative duty to protect him from the violence and insults of its own servants, and that for a breach of this duty it is liable, irrespective of the fact whether or not the servant, "in the performance of the act, was within the scope of his employment."

²⁵ In *Citizens' Street R. Co. v. Willoebey* (1893) 134 Ind. 563, 33 N. E. 627, the court thus stated the grounds upon which a complaint alleging that a conductor in the employ of a street railway company jerked from a moving car a boy who was getting on, with the intention of paying his fare, was deemed to be sufficient to withstand an attack made for the first time by an assignment of error: "It is somewhat difficult to determine the theory upon which this complaint proceeds, but whether it is to be regarded as proceeding upon the theory that the appellant was guilty of a violation of its contract duty as a common carrier of passengers, or upon the theory that one of its servants, acting within the scope of his employment, was guilty of inflicting a wilful and wanton injury upon the appellee, it is certainly sufficient to bar another action against the appellants, on account of the wrongs set forth therein.

. . . It is true that every complaint must proceed upon some single, definite theory; but such theory is to be gathered from the general scope of the pleading, and not from detached allegations. *Louisville, N. A. & C. R. Co. v. Schmidt* (1885) 106 Ind. 73, 5 N. E. 684; *Rollet v. Heiman* (1889) 120 Ind. 511, 16 Am. St. Rep. 340, 22 N. E. 666. When the complaint now before us is thus construed, we think it appears that it does not proceed upon the theory that the appellant has been guilty of a breach of its contract, as a common carrier of passengers, to safely carry the appellee to the end of his journey, but that it proceeds upon the theory that the servant

within the scope of the tortfeasor's employment.³⁶ A few years afterwards, in a case where the judgment of the trial court was reversed for errors in the instructions to the jury, it was taken for granted that the defendant railway company might be held liable for abusive words used by a conductor to a female passenger.³⁷

As the report does not show what was the precise doctrinal standpoint of the court, this decision is of ambiguous import for the purposes of the present discussion. But the theory that a carrier is bound to

afford protection to passengers against the misconduct of the servants to whom he delegates the performance of the contract of carriage has now been categorically adopted.³⁸

Kansas.—This is one of the states in which the theory of an absolute duty on the part of a carrier to protect passengers against the misconduct of his servants has been recognized.³⁹ In one case the court seems to have intended to proceed upon the ground that the theory regarding the absolute duty of a carrier to protect pas-

sengers of the appellant, while acting within the scope of his employment, inflicted upon the appellee a wilful injury. That the master would be liable for such injury is too well settled in this state to be open to controversy."

In *Louisville, N. A. & C. R. Co. v. Wood* (1887) 113 Ind. 544, 14 N. E. 572, 16 N. E. 197, where a passenger on a train which had been stopped at a station and started again before he had time to carry out his intention of alighting was seized and thrown off by the conductor, the railway company was held liable on the ground that the conductor "was guilty of a tort, while engaged in the line of his duty."

On the same ground a railway company was held liable in *Baltimore & O. R. Co. v. Norris* (1897) 17 Ind. App. 189, 60 Am. St. Rep. 166, 46 N. E. 554, where a conductor expelled with unnecessary violence a passenger who offered to pay his fare to a certain station where the train did not stop, and in whose behalf a companion offered to pay his fare to the next regular stopping place.

³⁶In *McKinley v. Chicago & N. W. R. Co.* (1876) 44 Iowa, 314, 24 Am. Rep. 748, where the misconduct of a brakeman in wilfully assaulting a gentleman who had attempted to enter a car in which gentlemen unaccompanied by ladies were not permitted to travel was held to be imputable to the railway company, the *ratio decidendi* was the general principle that a master is liable for the wilful and criminal acts of a servant, done in the course of his employment, or in executing what he supposed to be the orders of his master.

³⁷*Bryan v. Chicago, R. I. & P. R. Co.* (1884) 63 Iowa, 464, 19 N. W. 295.

³⁸*Garvik v. Burlington, C. R. & N. R. Co.* (1906) 131 Iowa, 415, 117 Am. St. Rep. 432, 108 N. W. 327, where a female passenger was held to be entitled to recover damages for a rape committed by a brakeman. (On the first appeal [1904] 124 Iowa, 691, 100 N. W. 498, a verdict for the defendant was set aside for errors in procedure.) The court treated the tort as a "breach of implied duty," and cited with approval 3 Thomp. Neg. § 3184.

³⁹In *Missouri, K. & T. R. Co. v. Weaver* (1876) 16 Kan. 456, where the plaintiff had been wrongfully expelled from a train, after a sharp scuffle, in which he received some

blows, the opinion was mainly devoted to a discussion of the question whether excessive damages had been awarded; but the doctrinal position of the court is shown by its citation of *Goodard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, and its statement that a carrier is bound to protect his passengers not only "against the violence and insults of strangers and copassengers, but against the violence and insults of his own servants."

In *Southern Kansas R. Co. v. Rice* (1888) 38 Kan. 398, 5 Am. St. Rep. 766, 16 Pac. 817, the carrier's duty was relied upon as the reason for holding a passenger who had been wrongfully ejected from a train to be entitled to maintain an action.

In *Atchison, T. & S. F. R. Co. v. Henry* (1895) 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952, the plaintiff, being unable to produce his pass when asked for it, was obliged to pay the fare. Afterwards, the pass was found, and upon the conductor's refusing to return the money paid, a dispute arose, during which the plaintiff was struck by a brakeman. When the train reached the next station he was given into the custody of a policeman by the conductor, acting upon the advice of the superintendent. The court said that the assault was "a gross violation of the duty of the railroad company toward a passenger. . . . If, through the negligence of the company in affording him the care and protection to which he was entitled, the passenger had suffered an injury, the company would be liable, and certainly the liability is no less where the injury is intentionally inflicted by an employee of the company, who was required to exercise care and protection toward the passenger." It was also observed that the motive which actuated the tortfeasor was immaterial, so far as the carrier's liability was concerned.

In *Missouri P. R. Co. v. Divinney* (1903) 66 Kan. 776, 71 Pac. 855, where a railway company was held liable for an assault by a station agent, the *ratio decidendi* was that the company was under an absolute duty to protect its passengers against maltreatment by its employees, irrespective of whether, at the time in question, such employees are or are not engaged in the discharge of their duties. On the first hearing ([1902] 69 Pac. 351) the right of recovery was denied on the ground that, un-

sengers is applicable as a criterion of responsibility in actions for wrongful arrest.⁴⁰

Kentucky.—The doctrine laid down in the earliest decision which bears upon the subject was that the contract of carriage

"guarantees to the passenger immunity from violence at the hands of those whose duty it is to afford him that protection" against insult and injury to which he is entitled in consideration of the payment of the fare.⁴¹ The theory indicated by the

der the evidence as presented, the plaintiff had not the status of passenger at the time when he was assaulted. On the second hearing the court changed its opinion as to this aspect of the case.

With the above decisions it is not altogether easy to reconcile the language of the court in *Sachowitz v. Atchison, T. & S. F. R. Co.* (1887) 37 Kan. 212, 15 Pac. 242. There it was proved that the plaintiff, while standing upon the platform of one of the cars of a train, which he was about to enter as a passenger, was knocked off and robbed, just as the train started, by a person holding a lantern in one hand and a club in the other. The only specific evidence that the tortfeasor was an employee of the railroad company was that he carried a lantern with letters on it, and wore a cap with a badge upon it. It was not shown that the assault was made in ejecting, or attempting to eject, the plaintiff from the cars, by anyone connected with the operation of the train, or having any charge of the depot, its grounds, or the road. It appeared further that the alleged assault was wholly disconnected from any service in which any employee of the railroad company was engaged. Held, that the plaintiff could not recover under a petition charging that plaintiff was assaulted and injured by the servant and employees operating and controlling the train. The court said: "The evidence of the plaintiff is insufficient, in not showing that the person who assaulted him was in the employ of the defendant. Even if we concede he has shown that much, yet his evidence is fatally defective in not showing that the wrongful acts alleged were done by the servant or agent of the defendant in the course or within the scope of his employment. *Hudson v. Missouri, K. & T. R. Co.* (1876) 16 Kan. 470. This action was not brought against the defendant for its negligence in not protecting the plaintiff while a passenger on its train from the assault of some third party; and it nowhere appears in the evidence that he was thrown from the train by any person connected in any way with its operation." As the plaintiff in the case cited was a third person, not a passenger, the most obvious inference would seem to be that, in the view of the court, the carrier's liability was to be determined upon the same footing as if the element of privity of contract had not been involved. But, under the circumstances as proved, the denial of the right of action may be justified upon the ground that the tortfeasor, even supposing him to have been a servant, was not shown to have been intrusted with any functions which had reference to the performance of the contract.

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In *Long v. Chicago, K. & W. R. Co.* (1892) 48 Kan. 28, 15 L.R.A. 319, 30 Am. St. Rep. 271, 28 Pac. 977, where a person, while purchasing a ticket at a railway station, was infected with a disease from which the station agent was suffering, the nonliability of the company was affirmed on the ground that "the negligent or accidental act, if any, of the agent in imparting a contagious disease to Long, the purchaser of the railroad ticket, was not within the scope of his authority, so as to charge the company, his master. The sickness of an agent with a contagious disease cannot be presumed to be authorized or directed by the master, and is not an incident in any way to the employment of selling tickets, or acting as agent at a station."

⁴⁰ In *Atchison, T. & S. F. R. Co. v. Henry*, supra, the facts of which are stated in note 39, supra, the liability of the company in respect of the plaintiff's arrest was put upon the ground "that the conductor procured the false arrest to be made while in the line of his employment, and at a time when the relation of passenger and carrier existed between the company and Henry. It is well settled that when one in charge of a train, and engaged in the business which has been intrusted to him by the company, causes the arrest of a passenger, the company for which he is acting cannot escape liability. . . . The action of the conductor, who must be held to have been acting for the company, was clearly a breach of the contract between the carrier and the passenger which required that Henry should be carried in safety to his destination and protected from interference by strangers, or against the misconduct of the company's servants. When the relation of carrier and passenger exists, it is held that no matter what the motive is which causes a servant of the carrier to commit an unlawful act, or to wrongfully inflict an injury upon a passenger, the carrier is responsible for the act and its natural and legitimate consequences."

⁴¹ *Sherley v. Billings* (1871) 8 Bush, 147, 8 Am. Rep. 451. There the third clerk of a steamboat, while he was engaged in the performance of his duty of collecting the passage money due from the deck passengers, approached the plaintiff and demanded his fare, which was promptly paid. The clerk immediately charged him with having hidden under the boilers, and when the charge was denied, instantly assaulted him. Held, that the defendant was liable. "In this case," said the court, "Williams, the clerk, at the time of the assault, was engaged in collecting from the deck passengers the passage money due from them. The amount due from Billings had actually

language of the court seems to be that which treats the liability of the carrier as being absolute only in respect of the acts of servants who were engaged in carrying out his contract with the aggrieved party. With this conception of a carrier's liability none of the later cases are consistent.⁴³ An intention to adopt it is apparently indicated by the explicit phraseology used in one of those cases.⁴⁴ But the statement referred to is affirmative merely as regards the class of servants mentioned, and does not necessarily import an exclusion of other classes.

The duty of the carrier to protect pas-

sengers against the misconduct of his servants was the *ratio decidendi* in a case where the plaintiff had been assaulted and thrust off a street car by the conductor, and given into the custody of a policeman after the altercation had been prolonged for some time upon the street.⁴⁴

Louisiana.—The views of Story, J., as set forth in a case already cited,⁴⁵ were approved in the two earliest cases in which the supreme court of this state had occasion to determine the extent of a carrier's liability for the maltreatment of passengers by his servants.⁴⁶ The adoption of these views imported an acceptance of the theory

tractual obligation of carrier to protect passengers was recognized *arguendo*).

In *Southern R. Co. v. Thurman* (1906) 121 Ky. 716, 2 L.R.A.(N.S.) 1108, 90 S. W. 240, it was held that the railroad company would be liable if the brakeman in question, when requiring a female passenger to remove to the car reserved in pursuance of statute for colored persons, did not in good faith believe that she was a colored person, or, in the exercise of reasonable care, did not have a right to believe that she was such a person, or used insulting language.

⁴³ *Louisville R. Co. v. Kupper* (1909)—Ky. —, 118 S. W. 266, where the court said: "It is also well settled that an act which amounts to a breach of duty on the part of a carrier towards a passenger, whether an assault, false arrest, insult, or abusive language, etc., makes the carrier liable for the acts performed by the servant who is placed in charge of or has control over the passengers. The law makes no distinction in the kind or character of the wrong done if such wrong amounts to a breach of the undertaking to transport the passenger safely."

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⁴⁵ *Louisville R. Co. v. Kupper*, *supra*.

⁴⁶ *Chamberlain v. Chandler* (1893) 3 Mason, 242, Fed. Cas. No. 2,575.

⁴⁷ In *Keene v. Lizardi* (1833) 5 La. 431, 25 Am. Dec. 197, it was held that a good cause of action was shown by a petition which stated that the officer in command of the vessel treated the petitioner and his wife inhumanely and indecently, that he did not extend to them that protection and care which is usual, that he stimulated his crew to commit outrages on them, and that during the space of fourteen days they were, in consequence of his conduct, in constant danger of their lives. The court said: "The exposition just given of the duties of the master in relation to the passengers [reference to *Chamberlain v. Chandler*, *supra*] renders it easy to ascertain the extent of the responsibility of the owners for a breach of those duties. The law is clear and perfectly well settled, that owners of vessels are responsible for all acts of the master, while acting within the scope of his duties, even for his torts. When the proprietors of vessels use them for the purpose of carrying passengers for money, they sub-

been handed him; but before they separated, and almost simultaneously with the payment, the charge upon the passenger of having hidden under the boilers was made, and immediately thereafter the injuries inflicted. The entire affair was substantially one transaction. An appreciable interval of time may have intervened between the reception of the money and the assault, but it cannot be said that the officer was not at the time engaged in the discharge of a prescribed duty. He was charged with the collection of the passage money from Billings; and whether he had or not the right to inquire as to his conduct in reference to the alleged hiding under the boilers, he was at the time discharging 'a supposed or pretended duty.' The precedent relied upon was *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39.

⁴³ *Winnegar v. Central Pass. R. Co.* (1887) 85 Ky. 547, 4 S. W. 237 (held that an action would be either in contract or tort against a street railway company for the act of its conductor in wantonly assaulting a passenger and throwing him off a car); *Louisville & N. R. Co. v. Ballard* (1887) 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. 530 (contractual obligations of carrier recognized in general terms in a case where a female passenger, who had been put off at a place between two stations, was held not to be entitled, under the circumstances shown, to exemplary damages); *Wise v. Covington & C. Street R. Co.* (1891) 91 Ky. 537, 16 S. W. 351 (street railway company liable for insulting language used by a driver); *Louisville & N. R. Co. v. Donaldson* (1897) 19 Ky. L. Rep. 1384, 43 S. W. 439 (liability of the defendant for the abusive language used by a conductor to a passenger from whom he had demanded the payment of fare, on the ground that his ticket was not good, was affirmed for the reason that the insulting words were spoken in the course of his official duties); *Lexington R. Co. v. Cozine* (1901) 111 Ky. 799, 98 St. Rep. 430, 64 S. W. 848 (liability of the defendant for a malicious assault made by a conductor upon a passenger was taken for granted, the only controverted point being the propriety of awarding exemplary damages); *Illinois C. R. Co. v. Gunterman* (1909) 135 Ky. 438, 122 S. W. 514 (con-

that a passenger who sustains injury from the wilful tort of a servant whose duties are connected with the performance of the contract of carriage is entitled, irrespective of the quality of the tort, to hold the carrier liable. With that theory the more recent decisions are consistent.⁴⁷ In two cases the liability of the carrier for the arrest of a passenger was determined with reference to the question whether the servant in question was acting within the scope of his authority when he gave the complainant into custody.⁴⁸ The supreme court of this state, therefore, is one of those which have

adopted the scarcely logical doctrine that a carrier's liability for the wrongful use of criminal process by his servants is less extensive than it is in respect to other descriptions of wilful torts.

Maine.—The unqualified language used by the supreme court in a leading case would, if taken literally, justify the conclusion that a carrier was regarded as being absolutely liable to his passengers for the wilful torts of his servants, irrespective of the character of their duties.⁴⁹ But having regard to the early date of the decision, and also to the authorities relied upon, it was probably intended merely to

ject themselves to the same responsibility for a breach of duty in their officers to those passengers, as they would for their misconduct in regard to merchandise committed to their care. No satisfactory distinction can be drawn between the two cases."

In *Block v. Bannerman* (1855) 10 La. Ann. 1, where the master of a ship had, without any reasonable excuse, broken open the portmanteau of a passenger and suffered him to be assaulted, the shipowner was held liable.

⁴⁷ In *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85, the plaintiff, a passenger traveling in an ordinary first-class car, being unable to procure any water to wash with, went back to a sleeping car, in pursuance of a brakeman's direction. Having met the porter as he entered it, he made a jesting remark about being charged for the privilege of washing, and was immediately assaulted. Held, that the railroad company was liable for the injuries caused by the assault. In the opinion first delivered the court adverted to "the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to have the privilege, and that in addressing the porter he was dealing with him as a servant of the company." In the second opinion the conclusions of the court were thus stated: "The preponderance of the evidence on that point, although very conflicting, shows to our entire satisfaction that plaintiff did ask permission of the porter to wash his hands, and that after an exchange of a few unpleasant words, the porter struck him on the head with a blunt instrument, while plaintiff was standing at the threshold of the door of the Pullman car. He was stunned by the blow, which felled him to the platform, whence he was picked up and brought to the forward car by one of his friends."

Hence we conclude that the attack was unprovoked, unjustifiable, and wilful on the part of the porter, for whose conduct the defendant company must be held liable in damages. As the Pullman Car Company, the immediate and direct employer or master of the wrongdoer, has been shielded from responsibility by our previous decree, the

case may be a hard one on the defendant, but under the authorities by which we have been guided, the hardship appears inevitable."

In *Lafitte v. New Orleans City & Lake R. Co.* (1890) 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701, a street car company was held to be liable for abuse and defamation of a passenger by the driver of a street car, who had charged him with having given counterfeit money for the fare, and threatened to have him arrested.

⁴⁸ *Lafitte v. New Orleans City & Lake R. Co.* supra; *Schmidt v. New Orleans R. Co.* (1906) 116 La. 311, 7 L.R.A.(N.S.) 102, 40 So. 714.

⁴⁹ In *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, shortly after the plaintiff had, on request, surrendered his ticket to a brakeman authorized to demand and receive it, the brakeman, without provocation, approached him, and, accosting him in a loud voice, denied, in the presence of the other passengers, that he had seen or received the plaintiff's ticket, and, in language coarse, profane, and grossly insulting, called the plaintiff a liar, charged him with then attempting to evade the payment of his fare, and with having done so before; and leaning over the plaintiff, then in feeble health and partially reclining in his seat, and bringing his fist down close to his face, violently shook it there and threatened to split the plaintiff's head open and to spill his brains right there. Discussing the contention of the defendants that they were not liable, because the brakeman's assault upon the plaintiff was wilful and malicious, and was not directly nor impliedly authorized by them, the court said: "The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes a stranger. It may be true that, if the carrier's servant wilfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he intrusts the performance of his duty to

assert the carrier's liability for the misconduct of servants engaged in performing the contract in respect of the passenger in question.⁵⁰

Maryland.—The two earliest relevant decisions in this state proceeded upon the ground that the acts complained of were incidental to the duties of the servants in question. Nothing was said regarding the operation of the contract of carriage.⁵¹

his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and copassengers, but *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the wilful misconduct of the carrier's servant, the carrier is necessarily responsible."

In *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404, the defendant was held liable for an assault made upon a passenger by a brakeman, after they had had an altercation about the proposal of the latter to put the plaintiff's dog off the train while it was in motion. The court said: "It is the duty of the conductor and other employees upon a train of cars to treat the passengers with civility, and to abstain from all unnecessary violence toward them."

⁵⁰ Among the cases cited were *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474; *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575, and *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922, none which extend the carrier's liability beyond the limits indicated in the text.

⁵¹ In *Baltimore & O. R. Co. v. Blocher* (1867) 27 Md. 277, the plaintiff, who had been compelled, under threat of expulsion, to pay his fare after he had given up his ticket, was held entitled to maintain an action. The defendant's prayers for instructions confining its liability to such tortious acts as it had authorized or approved were held to have been properly refused, for the reason that "the conductors and employees of the corporation, . . . being in the line of their duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of their authority, whether of omission or commission."

In *Philadelphia, W. & B. R. Co. v. Larkin* (1877) 47 Md. 155, 28 Am. Rep. 442, where 40 L.R.A. (N.S.)

But the supreme court has now definitely adopted the doctrine that the effect of the contract is to impose upon the carrier the obligation of protecting his passengers against all torts committed by his servants while they are "engaged in and about the performance of their prescribed duties."⁵² In one case the liability of a carrier for the wrongful arrest of a passenger was determined solely with reference to the

a passenger was removed from a train for using bad language when he was asked for his ticket, the essential point involved was merely whether the removal had been effected in such a manner as to entitle him to exemplary damages.

⁵² In *Philadelphia, B. & W. R. Co. v. Green* (1909) 110 Md. 32, 71 Atl. 986, the court laid down the law as follows: "The plaintiff was required to show, as a condition precedent to his right to recover, first, that the wrongs sued for were done by an agent or employee of the defendant; secondly, that the employee was acting at the time within the scope of his employment. Without legally sufficient evidence tending to establish these two facts no case of this nature should be submitted to the jury; and, when submitted, no verdict against the defendant should be rendered unless the jury are satisfied of the existence of these essential facts." It was held that a declaration which merely alleged that the plaintiff was assaulted, arrested, and imprisoned by a servant of the defendant, and contained no words showing that the servant was acting within the scope of his employment, was demurrable; but that a count averring that the plaintiff, while in the defendant's waiting room, was assaulted by a servant in charge of the room, showed sufficiently that the wrong was done by a servant of the defendant, in the course of his duties.

In the earlier case of *Central R. Co. v. Peacock* (1888) 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709, the plaintiff, before he alighted from a street car, had threatened to report the driver, and was followed by him to the sidewalk and there assaulted. Under these circumstances the contract of carriage had ceased, and the right of recovery was manifestly conditional upon the ability of the plaintiff to show that the assault was within the scope of the driver's employment. Having been prompted by personal resentment, it clearly was not of that character. But the doctrinal position of the court is indicated by the following passage in the opinion: "The Supreme Court of the United States, in *New Jersey S. B. Co. v. Brockett* (1886) 121 U. S. 645, 30 L. ed. 1050, 7 Sup. Ct. Rep. 1039, decide unequivocally that the carrier of passengers must protect his passengers from the violence of the carrier's employees, as also from that of other passengers; but there is nothing in the decision in conflict with the doctrine that to render [the carrier] liable the employee must be at the time acting in the employment of the railroad, and

question whether the tortfeasor was authorized to make the arrest.⁵³ But the doctrine that a carrier is under an implied obligation to protect a passenger from a tort of this description has more recently been adopted.⁵⁴

Massachusetts.—In the earliest cases which bear upon the extent of a carrier's liability the right of the plaintiff to recover for an assault by a servant of a carrier was treated as being dependent upon whether the wrongful act was or was not within the scope of the general authority vested in him, with respect to the functions which he was discharging when the

act was done.⁵⁵ The doctrinal standpoint from which the remedial rights of the passengers were determined seems to have been the same as that of the English courts,—the contract of carriage being apparently regarded as an entirely negligible factor, except in so far as it served to show the duties and powers of the employee in question.⁵⁶ But in the same year that the second case was decided, an assault actuated by the personal resentment of the servant was held to be imputable to the carrier, on the ground that it constituted a breach of the contract of carriage in respect of the manner in which passengers

were to be carried, and that the decision assumes that the party injured is a passenger when injured; for that was the fact in the case." This statement was quoted with approval in *Tolchester Beach Improv. Co. v. Scharngal* (1907) 105 Md. 199, 65 Atl. 916.

⁵³ In *Central R. Co. v. Brewer* (1894) 78 Md. 401, 27 L.R.A. 63, 28 Atl. 615, the liability of a street railway company for an arrest procured by its superintendent was denied on the ground that no express antecedent authorization by the company had been proved, and that no such authorization could be implied from the character of his position as superintendent.

⁵⁴ In *Baltimore & O. R. Co. v. Cain* (1895) 81 Md. 87, 28 L.R.A. 688, 31 Atl. 801, the court, in discussing the propriety of denying a prayer for the withdrawal of the case from the jury, said: "We find no error in this. If the plaintiff had been guilty of no breach of the peace, his arrest at the instance of the conductor was unlawful; and having been made in the defendant's depot whilst the plaintiff, a passenger, was still entitled to be protected by the defendant against assaults and injuries by the defendant's own employees, if wrongfully made by or at the request of the defendant's own servants, whilst they were in and about the performance of their prescribed duties, the master would be liable. There was some evidence before the jury that the arrest had been made without a warrant, and therefore the second prayer was properly rejected."

In *Tolchester Beach Improv. Co. v. Scharngal*, supra, the doctrinal position of the court was stated thus: "The relation of passenger and carrier being shown to exist between the appellant company and Joseph Scharngal, the law imposed upon the carrier a primary duty to protect him during the existence of that relation, and if he were unjustifiably assaulted or arrested, or imprisoned whilst that relation continued, by the servants or agents of the carrier, while acting within the scope of their duty, the carrier would be liable. This proposition is so firmly settled in this state and elsewhere that it seems needless to quote authorities to support it."

See also *Philadelphia, B. & W. R. Co.* 40 L.R.A. (N.S.)

v. Green (1909) 110 Md. 32, 71 Atl. 986, cited in note 52, supra.

⁵⁵ In *Moore v. Fitchburg R. Corp.* (1855) 4 Gray, 465, 64 Am. Dec. 83, where the court sustained a verdict in favor of a passenger who had been forcibly put out of the cars by a conductor for not paying his fare, which he had in fact paid, it was held to be no ground for exception by the company that the jury was instructed that, if the conductor removed the plaintiff in the wrongful exercise of a discretionary power conferred upon him by the corporation, they were liable; but that the conductor would have a right to remove a passenger who refused to pay his fare, if there was a rule or regulation of the corporation to that effect.

In *Ramsden v. Boston & A. R. Co.* (1870) 104 Mass 117, 6 Am. Rep. 200, the court said: "The use of unwarrantable violence in attempting to collect fare of the plaintiff was as much within the scope of the conductor's employment as the exercise or threat of unjustifiable force in ejecting a passenger from the cars. Neither the corporation nor the conductor has any more lawful authority to needlessly kick a passenger or make him jump from the cars when in motion, than to wrest from the hands of a passenger an article of apparel or personal use, for the purpose of compelling the payment of fare. Neither is an unlawful assault; but if committed in the exercise of the general power vested by the corporation in the conductor, the corporation, as well as the conductor, is liable to the party injured." "The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers as well as the subordinate servants of the corporation, and the collection of fares. He may even eject a passenger for not paying fare."

⁵⁶ In the second of the above cases the court cited several decisions with regard to claims by third persons, and made no reference to *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474, and its restricted doctrine regarding the operation of the contract of carriage. In neither of the cases did the court advert to the earlier

were to be treated.⁵⁷ As the exception thus relied upon would have sufficed as a foundation for the preceding decisions, and so rendered quite superfluous all inquiry regarding the extent of the tortfeasor's authority, it seems impossible to avoid the conclusion that this ruling must be taken as indicating a new departure in doctrine, —an abandonment of the court's original position as to the extent of a carrier's responsibility, and an adoption of the theory that he is chargeable with the misfeasances of a servant, even though they may be outside the scope of the servant's authority.⁵⁸ Considering its date, the decision was prob-

ably not intended to embody any wider doctrine than that which treats the carrier as answerable for any tort committed by servants who represent him in the performance of the contract of carriage as regards the particular passenger who complains of the injury. But the notion of an absolute liability, comprehending, as it would seem, all descriptions of servants, has now been adopted.⁵⁹

Michigan.—In the earliest relevant case decided in this state, the liability of the carrier for the tort complained of was predicated upon the broad ground that it

Louisiana decision which proceeded upon the ground of a contractual duty.

⁵⁷ In *Bryant v. Rich* (1870) 106 Mass. 180, 8 Am. Rep. 311, where the owners of a steamboat was held to be liable for an assault and battery committed by their steward and table waiters on a passenger, from resentment at his having interfered by a proper remark with their rude treatment of his relative, a fellow passenger, in reference to a meal which he had taken on the boat, the court explained its position as follows: "The case thus presented differs in one respect from that of *Howe v. Newmarch*, 12 Allen, 49, for in that case the plaintiff was a stranger both to the master and the servant. But here the plaintiff is entitled to all the rights which he derived from the contract of the defendants as carriers. The implied contract differs in some respects from that of carriers of goods. So far as this case is concerned, we have only to consider what it is in respect to the conduct of their servants. Nor do we deem it necessary to consider what it is in regard to selecting suitable persons as servants, or in regard to retaining incompetent servants after notice of their incompetency; for there is nothing in the bill of exceptions tending to show that they were in fault in this respect. We shall consider the matter on the assumption that they had not been negligent in selecting or retaining their servants. . . . In this case, the servants who committed the wrong, being the steward and table waiters, were those who were engaged in providing meals, waiting on the tables, and collecting the pay for meals. They were treating the plaintiff's relative with gross rudeness in connection with this business, and the plaintiff interfered only by a remark that was proper, whereupon the assault was committed. It was not as if a quarrel had occurred on shore, and disconnected with the duties of these persons on shipboard. It violated the contract of the defendants as to how the plaintiff should be treated by their servants who were employed on board the ship and during the passage. For a violation of such a contract either by force or negligence, the plaintiff may bring an action of tort, or an action of contract." The court quoted with approval the statements made by Story, J., 40 L.R.A.(N.S.)

and Clifford, J., regarding the terms of the contract for carriage by water in *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575, and *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922. The case of *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, was also relied upon.

⁵⁸ Having regard to the change of standpoint which this case manifestly imports, when compared with those which are cited in note 55, supra, the fact that all three are cited together in *Jackson v. Old Colony Street R. Co.* note 59, infra, as authorities which sustain the theory of a carrier's absolute liability, is a noteworthy illustration of the manner in which so many courts have, either from a confusion of thought, or from the desire of showing at all costs an apparent continuity of doctrine, advanced to the adoption of that theory without formally overruling precedents which essentially conflict with it.

⁵⁹ In *Hayne v. Union Street R. Co.* (1905) 189 Mass. 551, 3 L.R.A.(N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219, the conductor of one of defendant's cars in sport threw a dead hen at the motorman of another car on which plaintiff was riding. The hen missed the motorman, struck the window of the car near where plaintiff was sitting, and injured her. Held, that the defendant was liable in spite of the fact that the conductor was not a member of the crew of the car in which plaintiff was riding.

In *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A.(N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615, where most of the discussion was devoted to the availability of the defenses raised by the carrier, the court observed *arguendo*: "By the plaintiff's contract, the duty rested upon the defendant of affording him full protection from unlawful violence at the hands of the conductor, to whom, as its representative, the management of the car had been intrusted." This statement embodies only the more restricted doctrine of *Bryant v. Rich*, note 2, supra; but its form was evidently determined by the character of the facts under consideration. The broader principle established by the *Hayne Case*, supra, was not criticized nor doubted,

was committed "in the line of his employment."⁶⁰

Having regard to the date of this case, it is perhaps a permissible inference that the phrase thus used should be understood as having reference to a conception of responsibility similar to that which is indicated by the English rulings. But the doctrine has since been enunciated that it is the duty of a railroad to protect passengers from the wilful misconduct of its servants while performing the contract to carry, even if the injuries are inflicted by the servant when not "acting within the scope of his authority."⁶¹

Minnesota.—The doctrinal situation in this state is not altogether clear. But the decisions and the reasoning by which they

are supported indicate that the supreme court considers a carrier to be absolutely responsible to a passenger for the tort of every servant whose functions are directly connected with the performance of the contract of carriage.⁶²

Mississippi.—In this state the conception of an absolute duty on the part of the carrier's servants to protect passengers from injury has been explicitly adopted.⁶³

Missouri.—The effect of the earliest relevant decision in this state was, that a carrier was not liable for the wilful and malicious misconduct of a servant in respect of a passenger, but only for his negligence, incapacity, or unskilfulness.⁶⁴ From the form given to this decision it is apparent that the enforceability of a passen-

⁶⁰ *Great Western R. Co. v. Miller* (1869) 19 Mich. 305 (ejection of passenger from train). The court made the following remarks with regard to the right of the plaintiff to recover for the act of a conductor wrongfully removing him from a train: "It was urged on the hearing that the railroad company could not be held liable for any wrongful expulsion under this statute, because it would be the personal wrong of the conductor, in violation of law, for which he must be held to have exceeded his known agency. And the same exemption was claimed for them from liability for any expulsion, unless under circumstances where they may be supposed to have authorized it by their instructions, general or special. There is, however, so far as we have seen, no authority which would exempt them from some amount of responsibility for any wrongful expulsion of a passenger by a conductor. He represents them in the whole management of his train, and the power to do any serious mischief is chiefly derived from their investing him with the control of this large agency. He occupies the same position as the master of a ship, and his action in the case supposed must be regarded as done in the line of his employment."

In *Hufford v. Grand Rapids & I. R. Co.* (1887) 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544, the case turned upon the question whether the ejection of a passenger from a train for refusing to pay fare was, under the given circumstances, wrongful. Nothing was said which bears upon the subject now under discussion.

⁶¹ *Johnson v. Detroit, Y. & A. A. R. Co.* (1902) 130 Mich. 453, 90 N. W. 274 (passenger struck by conductor during an altercation regarding the passenger's right to travel on a certain ticket).

⁶² In *Cain v. Minneapolis & St. L. R. Co.* (1888) 39 Minn. 297, 39 N. W. 635, where the defendant was held liable for the act of its brakeman in violently pushing a passenger from the rear of a car when the train was going at a speed that rendered it dangerous, the decision was put upon the 40 L.R.A. (N.S.)

ground that the "acts of those servants in and about the management of the train, and in receiving, excluding, or putting off passengers, were the acts of defendant."

In *Conger v. St. Paul, M. & M. R. Co.* (1891) 45 Minn. 207, 47 N. W. 788, a verdict against a railroad company for an assault committed upon a passenger was held to be sustained by evidence that the assailant was at the time acting as brakeman under the authority of the defendant, though not on his regular train, and had suddenly struck the plaintiff without any warning. The nature of the preceding dispute is not mentioned. The court said: "There is very little doubt that at the time of the assault he was in fact acting as a brakeman on the car upon which plaintiff was a passenger; and, from the evidence, the jury might fairly infer that he was so acting by the authority expressed or to be implied from acquiescence of defendant's agent or agents, whose authority to place him on duty as brakeman on that car was not disputed, so that the jury might find that he was in the line of his duty as one of the crew in charge of the train."

⁶³ *St. Louis & S. F. R. Co. v. Sanderson* (1911) — Miss. —, 54 So. 885, in that case, where a conductor fired a pistol while the plaintiff's intestate was alighting from a train, the rule that a master is not responsible for torts committed by a servant outside the line of his duty, and not in the service of his master, was declared not to be applicable in actions brought by passengers against carriers.

In the earlier case of *Louisville, N. O. & T. R. Co. v. Patterson* (1891) 69 Miss. 421, 22 L.R.A. 259, 13 So. 697, where a conductor refused the plaintiff's request for a seat, and accompanied his refusal with insulting language, the railway company was held liable. The precise *ratio decidendi* is not shown by the report, but the decision seems to require for its support the doctrine of an absolute duty.

⁶⁴ *McKeon v. Citizens' R. Co.* (1867) 42 Mo. 83.

ger's claim was treated as being determinable with reference to the rule under which, at the date of the decision, third persons were still precluded in many jurisdictions from maintaining action against masters for injuries caused by the wilful torts of their servants.⁶⁵ A few years afterwards, however, the conception of an impliedly

stipulated duty in respect of the proper treatment of passengers was explicitly recognized.⁶⁶ Except in one instance, where the right to maintain an action was predicated with reference to the extent of the tortfeasor's powers,⁶⁷ that conception has served as the criterion of liability in all the cases subsequently decided.⁶⁸ An

⁶⁵ The case of *Weed v. Panama R. Co.* (1858) 17 N. Y. 302, 72 Am. Dec. 474, in which that rule was declared not to be applicable in actions by passengers against carriers, was evidently not brought to the attention of the court.

⁶⁶ *Malecek v. Tower Grove & L. R. Co.* (1874) 57 Mo. 17. There a street railway company was held liable for an assault committed by a driver upon a passenger for the purpose of constraining him to pay a fare which he declared to have been already paid. The authority relied upon was *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575. The *McKeon Case*, note 64, *supra*, was not even referred to for the purpose of overruling it.

⁶⁷ In *Travers v. Kansas P. R. Co.* (1876) 63 Mo. 421, where the conductor snatched from the plaintiff a check given in place of a ticket, charged him with having stolen it, and then ejected him, a verdict against the company was sustained. The position of the court is indicated by its statement that, in an action for such an injury, it was not necessary to allege or prove that specific authority was conferred on the conductor by the company to perform such acts, because it appeared from the testimony that he was intrusted with "all authority which concerned the reception or rejection of passengers," and that he was acting within the scope of the general authority devolved on him by his position.

⁶⁸ In *Spohn v. Missouri P. R. Co.* (1894) 122 Mo. 1, 26 S. W. 663, it was held that an action might be maintained against the defendant by a passenger on a train, who had been so alarmed by threats made in sport by a conductor and some of the other passengers that he jumped off. This case was tried and appealed four times. On the first appeal (87 Mo. 74), a verdict for the plaintiff was set aside, as being against the weight of evidence. The court, however, recognized the general rule, that a carrier is bound to use the utmost care to protect passengers from violence and insults. In the second trial the verdict was again in favor of the plaintiff (1890) 101 Mo. 417, 14 S. W. 880. But a new trial was ordered on the ground that the following instruction was erroneous: "Reasonable cause to jump from the train, as used in the instructions given in this case, means a cause sufficient to have induced plaintiff, having regard to his intelligence, experience in life, situation and surroundings at the time of his injury, to have jumped from the train while the same was in motion and under the circumstances in evidence in this case." The court said: "The defendant is not necessarily responsi-

ble for any act a passenger may do in consequence of some breach of duty on the part of its employees. It is liable only for such results as are natural and probable consequences of such breach of duty. The agents of defendant are not chargeable with knowledge of a passenger's 'intelligence and experience in life.' They are authorized to act upon the appearances before them where they have no notice of the facts. They may have in charge an insane passenger, but unless that condition is obvious or is made known to the carrier, the latter would be justified in assuming him to be as he appeared." On the third appeal, a similar verdict was set aside for errors in the instructions and admission of evidence, and also because the court was of opinion that it was not supported by the evidence. (1893) 116 Mo. 617, 22 S. W. 690. The verdict obtained by the plaintiff in the fourth trial was allowed to stand, although the evidence was substantially the same as on the second and third trials,—having been merely strengthened slightly by some additional testimony corroborating the plaintiff's story. The *ratio decidendi* was simply that there was evidence to support the conclusion of the jury.

In *O'Brien v. St. Louis Transit Co.* (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939, the court quoted with approval the statement in *Thompson on Negligence*, §§ 3185, 3186, that "the carrier is liable absolutely, as an insurer, for the protection of the passenger against assaults and insults at the hands of his own servants, because he contracts to carry the passenger safely and to give him decent treatment *en route*."

In *Neuer v. Metropolitan Street R. Co.* (1910) 143 Mo. App. 402, 127 S. W. 669, the absolute liability of the defendant for acts of a conductor was affirmed by the court in commenting on the correctness of certain instructions.

For other cases in which the actions were held to be maintainable, see *Randolph v. Hannibal & St. J. R. Co.* (1885) 18 Mo. App. 609 (passenger was wrongfully accused of attempting to evade the payment of his fare, and afterwards insulted and struck by the conductor); *McGinnis v. Missouri P. R. Co.* (1886) 21 Mo. App. 399 (plaintiff ejected on the ground that his ticket did not authorize him to travel on the train; also accused of fraud by the conductor); *Eads v. Metropolitan R. Co.* (1891) 43 Mo. App. 536 (conductor of a street car ejected the plaintiff after a dispute with him as to whether the money offered for his fare was good); *Tanger v. Southwest Missouri Electric R. Co.* (1900)

examination of the actual circumstances involved will show that none of these cases require for their support the hypothesis of a guaranty against the misconduct of servants outside the category of those who, in the ordinary course of their duties, are commonly brought into personal contact with passengers. In one instance it was apparently assumed that the guaranty was applicable only as regards servants of that description.⁶⁹ In three cases the liability of a street railway company for a wrongful arrest or malicious prosecution of a passenger by a conductor has been affirmed on the ground that the act complained of was within the scope of his authority.⁷⁰

Nebraska.—In this state a carrier has been held liable for an assault made by a servant in the course of a personal altercation.⁷¹ Such decision necessarily imports an adoption of the theory of a duty incumbent on the carrier to protect his passengers; but the report does not show the precise ground upon which the court proceeded.

Nevada.—The contractual duty of a carrier to protect his passengers against the misconduct of his servants has been recognized in this state.⁷²

New Jersey.—In this state the carrier's liability is determined with reference to the theory that he impliedly stipulates

85 Mo. App. 28 (court rejected contention that defendant was not liable to a passenger who had been assaulted and ejected from a street car, because the wrongful act was wanton, and outside the scope of the servant's employment); *Shaefer v. Missouri P. R. Co.* (1903) 98 Mo. App. 445, 72 S. W. 154 (aggravated assault by conductor); *Strauss v. St. Louis Transit Co.* (1903) 102 Mo. App. 644, 77 S. W. 156 (conductor, without any provocation, assaulted plaintiff while attempting to get on a street car); *O'Donnel v. St. Louis Transit Co.* (1904) 107 Mo. App. 34, 80 S. W. 315 (unprovoked assault upon a passenger by conductor of street car); *Flynn v. St. Louis Transit Co.* (1905) 113 Mo. App. 185, 87 S. W. 560 (street car company liable for act of conductor in committing an unprovoked assault upon an old man by pushing and kicking him while he was attempting to alight from a car); *Keen v. St. Louis, I. M. & S. R. Co.* (1908) 129 Mo. App. 301, 108 S. W. 1125 (brakeman assaulted passenger on a mixed train, whom he found in a freight car, instead of the passenger coach, where he should have been); *Shelby v. Metropolitan Street R. Co.* (1910) 141 Mo. App. 514, 125 S. W. 1189 (plaintiff, who sought to put a stop to a fight which then was in progress between his brother and the conductor and motorman, in consequence of a dispute about the payment of fare, was struck by the motorman).

In *Murphy v. St. Louis Transit Co.* (1902) 96 Mo. App. 272, 70 S. W. 159, where the conductor of a street car wantonly pushed the plaintiff as he was about to alight, an instruction to the effect that it was defendant's duty to treat its passengers with respect, and not subject them to insult or violence by its servants, was approved.

⁶⁹ In *Ephland v. Missouri P. R. Co.* (1896) 71 Mo. App. 597, where the plaintiff was injured as a result of having followed a direction given wantonly and maliciously by a brakeman, to jump from a train on account of threatened danger, the ground upon which the railway company was held to be liable was that the direction was within the scope of his duty. An instruction which omitted all reference

to the question whether he was acting in the line of his employment was held to be erroneous. But this ruling may possibly be merely an example of the improper use of the phrase, "in the line of his employment."

⁷⁰ *Grayson v. St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730; *Ruth v. St. Louis Transit Co.* (1903) 98 Mo. App. 1, 71 S. W. 1055; *Dwyer v. St. Louis Transit Co.* (1904) 108 Mo. App. 152, 83 S. W. 303.

⁷¹ *Haman v. Omaha Horse R. Co.* (1892) 35 Neb. 74, 52 N. W. 830, where a man acting as driver and conductor of a horse car struck passenger during an altercation which ensued when the passenger, after his fare had been paid by a companion, was requested to pay it again.

⁷² In *Quigley v. Central P. R. Co.* (1876) 11 Nev. 350, 21 Am. Rep. 757, the court remarked with reference to an instruction: "It is admitted by counsel for appellant that the act of the conductor in ejecting plaintiff from the cars was within the scope of his authority, in the prosecution of the business intrusted to him by defendant, and that if the act was unwarranted and unlawful, the defendant was liable in damages therefor, notwithstanding the fact that the conductor acted in good faith, in the honest belief that the plaintiff had no right to a passage. . . . While there is some conflict in the decided cases, we are of opinion that the weight of reason and authority is decidedly in favor of the rule that a corporation is liable for the wanton and malicious acts of its agents. If the agent or servant of a corporation assaults a stranger, the corporation is not in any way liable; but the rule is different where the assault is made upon a passenger of the corporation. It is the duty of every railroad corporation to carry its passengers safely, and to treat them respectfully. They should protect their passengers from violence and insult, and are bound to use such reasonable precautions as human judgment and ordinary foresight are capable of, in order to make the journey safe and comfortable. In the language of the authorities, they are bound to protect their passengers not only against the violence and insults of strangers and copassengers, but *a fortiori*, against the

to protect his passengers against maltreatment by his servants.⁷³

New York.—The language used in the earliest case in which the liability of a carrier for the wilful torts of his servants was considered in this state shows that the court of appeals did not intend to go any further than to except actions by passengers against carrier from the scope of the doctrine which then prevailed, that the

wilful torts of a servant, even though committed within the scope of his employment, were not imputable to his master.⁷⁴

The rationale of the position thus taken was that an obligation to convey a passenger in accordance with the provisions, express or implied, of the contract of carriage, was absolute, and that the quality of the act which produced a breach of that obligation was consequently immaterial so

violence and insults of their own conductors, agents, and servants; and if this duty is not performed, they should, of course, be held responsible."

⁷³ In *Haver v. Central R. Co.* (1898; Err. & App.) 82 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 648, 41 Atl. 916, where the plaintiff was without cause or provocation assaulted by a baggage master, the court thus discussed the principles upon which the right of recovery turned: "The case now before the court depends not upon the law of liability of a master for the acts of his servants, but upon the duty imposed on the railroad company in the carriage of the plaintiff as a passenger. The duty of a carrier of passengers is to safely and securely carry persons who bear to it the relation of passengers. The carrier is under obligation to use the utmost care and diligence in providing suitable and sufficient vehicles for the conveyance of its passengers, to carry the passenger therein to the end of his route, to protect him against assault and other ill-treatment by those employed by and under the carrier's control while on the way, and to exercise the utmost vigilance and care in maintaining order and guarding the passenger against violence from whatever source arising, which might reasonably be anticipated or naturally expected to occur in view of all the circumstances and the number and character of persons on board. Cooley, Torts, 644; 5 Am. & Eng. Enc. Law, 2d ed. 541. In the application of this principle the grade of the employee by whom the injury was done, or the scope of his employment, is immaterial."

In an earlier case, where a conductor ejected with unnecessary violence a passenger from the cars, who refused to pay his fare, the company was held liable for the injuries inflicted. *New York, L. E. & W. R. Co. v. Haring* (1885) 47 N. J. L. 137, 54 Am. Rep. 123. The duty of protection was not adverted to, the ejection being regarded as an act clearly within the scope of the tortfeasor's authority.

⁷⁴ *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474. There a railway passenger detained on her journey by reason of the wilful act of the conductor of the train was held to be entitled to recover damages. After referring to *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507, and *Richmond Turnp. Co. v. Vanderbilt* (1841) 1 Hill, 480, s. c. on subsequent appeal (1849) 2 N. Y. 479, 51 Am. Dec. 315, in which the nonliability of a master to

third persons for the wilful acts of a servant had been affirmed, the court proceeded thus: "It cannot fail to be seen that there is an important difference between those cases and the one before the court. The former are cases of wilful, unauthorized wrongful acts by agents, unapproved by their principals, occasioning damage, but which do not involve nor work any omission or violation of duty by their principals to the persons injured; wrongs by the agents only, with which the principals are not legally connected. In the present case, by means of the wrongful, wilful detention by the conductor, the obligation assumed by the defendants to carry the wife with proper speed to her destination, unless this wilful wrong of the conductor was an excuse to them, was broken. The real wrong to the wife in this case, and from which the damage proceeded, was the not carrying her in a reasonable time to Aspinwall, as the defendants had undertaken to do; and this was a wrong of the defendants, the carriers, unless the law excused them for their delay on account of the misconduct of their agent. It is for this alleged wrong of the defendants in not performing their duty as carriers with reasonable diligence, from which injury has been experienced, that this action was brought; and the only question in relation to the point under consideration would seem to be, whether they can defend themselves by showing that the delay on the route was the wilful wrong of one of their servants. . . . Viewing the general question as it appears to be clear we must, as being whether the defendants have discharged their duty as carriers, and the particular point of inquiry, whether the circumstance that the detention was a wilful act of their servant will excuse what would otherwise be a want of proper diligence, this part of the case is relieved from difficulty. If the detention had resulted from negligence of the conductor, the liability of the defendants would be unquestionable. A master is answerable for negligence of his servants in the performance of their duties. . . . No reasons exist for holding a master liable for injuries from negligence of his servants in his employment, which do not equally and with like force preclude him from alleging an intentional default of a servant as an excuse for delay in the performance of a duty the master has undertaken. In the former case the negligence of the servant is that of the master, and that is the ground of the master's liability; in the latter, the act of the servant is the

far as the remedial rights of a person injured by the breach were concerned. But, having regard to the evidence under review, it is manifest that the doctrine, as propounded, was not formulated with reference to any other classes of torts than those arising out of the discharge of functions which had a direct connection with the actual work of transporting passengers.

Nothing that was said by the court can

be reasonably construed as importing a recognition of the duty subsequently recognized (see *infra*), which requires a carrier to protect passengers against the violence and insolence of his servants. In all the cases cited below it was obviously taken for granted that the liability of the defendants was predicable only within the limits thus indicated.⁷⁵ In one of the cases decided during this period, it would

act of the master, constituting negligence of the master; the motive of the servant making no difference in regard to the legal character of the master's default in doing his duty. The obligation to be performed is that of the master, and delay in performance, from intentional violation of duty by an agent, is the negligence of the master."

⁷⁵ In *Blackstock v. New York & E. R. Co.* (1859) 20 N. Y. 48, 75 Am. Dec. 372, affirming (1857) 1 Bosw. 77, a railroad company was held to be responsible for damages resulting from a delay to transport freight in the usual time, which was caused by a great number of its servants suddenly and wrongfully refusing to work. The court said: "The position that the defendants are not responsible, because the misconduct of their servants was wilful, and not negligent, cannot be sustained. The action is not brought on account of any injury done to the property by the engineers, but for an alleged nonperformance of a duty which the defendants owed to the owner of the property. If their inability to perform was occasioned by the default of persons for whose conduct they are responsible, they must answer for the consequences without regard to the motives of those persons. In the common case of a contract for services, as for building a house, which the builder had been unable to perform, because his workmen had abandoned his service, proof that their conduct was wilful and every way unjustifiable would not give the party injured an action against them, nor would it excuse the party who had made the contract. The cases in which it has been held that if a servant, while generally engaged in his master's business, wilfully commit a trespass, as by intentionally driving his master's carriage against the carriage of another person, the master is not liable, have no application to the present case." The doctrine of this case was approved in *Geismer v. Lake Shore & M. S. R. Co.* (1886) 102 N. Y. 563, 55 Am. Rep. 837, 7 N. E. 828, but its applicability as a precedent was denied on the ground that the tortfeasors in question had left the defendant's service before the wrongful acts which it was sought to impute to the carrier had been committed.

In *Meyer v. Second Ave. R. Co.* (1861) 8 Bosw. 305, an action for injuries caused by the act of the driver of a street car who had ejected a passenger from the front platform, the plaintiff was held to have been improperly nonsuited on the ground that his own evidence showed that "the

driver forcibly and wantonly, and without any provocation, pushed the plaintiff off the car, and that such misconduct was not an act done in the course of his employment." The court said: "The precise question which the first ground of nonsuit presents is this: Is the company liable if the driver acts maliciously in ejecting the passenger? . . . In the case before us, according to the plaintiff's testimony, he entered the cars as a passenger, intending to pay his fare, and having money with which to pay it. And the driver, under circumstances that might occur, was authorized to eject him in a proper manner, and was also authorized to determine whether occasion to eject him existed. Had he ejected him so negligently as to injure him, the defendant would be liable; and the fact that the driver ejected him maliciously, instead of negligently merely, makes no difference as to the defendant's liability." This case was cited with approval in *Shea v. Sixth Ave. R. Co.* (1875) 62 N. Y. 180, 20 Am. Rep. 480.

In *Higgins v. Watervliet Turnp. & R. Co.* (1871) 46 N. Y. 23, 7 Am. Rep. 293, upon one theory propounded by the defendant, viz., that the act of a conductor in removing the plaintiff from a car was unlawful, and was not justified by the circumstances, the trial judge refused a request for an instruction to the effect that the plaintiff could not recover for any personal injuries occasioned by the assault of the conductor, because there was no evidence of authority from the company to commit it. Upon another theory of the case, viz., that the expulsion was justified by the conduct of the plaintiff, but that unnecessary force occasioning injury was used in ejecting him, the judge charged that the defendant was liable for the resulting injury. Held, that the charge requested had been properly refused, and that the charge given was correct. The court said: "There is no evidence that the act of the conductor was prompted by malice or any wrongful intention, or by any motive except to discharge what he supposed to be his duty under the circumstances. The request to charge must be regarded as having been made with reference to this view of the facts; otherwise it was irrelevant and inapplicable to the case. The expulsion of the plaintiff, if not justified by his misconduct, was an unlawful assault, and the question arises whether the defendant is responsible for the injury occasioned by the unlawful act of its servant, done under a mistake of facts, or a mistake of judgment upon the facts, though

In *Meyer v. Second Ave. R. Co.* (1861) 8 Bosw. 305, an action for injuries caused by the act of the driver of a street car who had ejected a passenger from the front platform, the plaintiff was held to have been improperly nonsuited on the ground that his own evidence showed that "the

in the course of the business of his master. This question must be answered in the affirmative, in view of the nature of the service in which the conductor was engaged, and the principle upon which the liability of the master for the acts of the servant rests. The conductor was put by the defendant in charge of the car. Passengers were bound to conform to the reasonable rules and regulations of the company, and to behave themselves in an orderly manner, promoting thereby the mutual interest of the company and the public. The company had the right to enforce order and decency by expelling from the car a passenger guilty of disorderly and indecent conduct. The defendant could only act through agents. The appointment of a conductor carried with it as an incident, authority to maintain order, and to eject a passenger who had forfeited his right to be carried by his misconduct. . . . Whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondet superior* applies, provided only that the agent was acting at the time for the principal, and within the scope of the business intrusted to him." Some *obiter dicta* of a contrary tenor in *Hibbard v. New York & E. R. Co.* (1857) 15 N. Y. 455 (where the actual point decided was that the plaintiff had been properly ejected for refusing to show his ticket), were disapproved.

In *Jackson v. Second Ave. R. Co.* (1872) 47 N. Y. 274, 7 Am. Rep. 448, where the plaintiff, a passenger on a street car, had been struck during a scuffle which occurred while the conductor was removing him from the car for refusal to pay the fare, the grounds upon which the action was held to have been wrongfully dismissed were thus stated: "It cannot be doubted but that the defendants are so far responsible for the act of the conductor, their agent, that, if they had not the right to demand the 6 cents fare, and hence had not the right to remove any passenger from their car for not paying that sum, they would have been liable for any force used by their agent upon the person of such passenger, though confined strictly within a degree necessary to effect such removal, and used solely for that purpose and with that intent. See *Ramsden v. Boston & A. R. Co.* (1870) 104 Mass. 117, 6 Am. Rep. 200. And for the reason that he was in their business, using a physical force upon another which he had no right to exert, and which they had no right to instruct and authorize him to exert, and any force was an excess of right. Does it not follow that where they have the right to instruct and authorize to the use of force, and their agent, acting in the pursuit of his duty to them, and under authority which they have given, exceeds, through zeal or impetuosity of temper, the degree of force necessary and proper to accomplish the purpose, and injury and damage ensue, that they must respond? So we have held in *Higgins v. Watervliet Turnp.* 40 L.R.A. (N.S.)

& R. Co. supra. But it is said that the act of the conductor in striking the plaintiff a blow in his face was wilful and malicious; that it was not done by him because he mistakenly conceived it a necessary use of force to effect the removal of the plaintiff, but as a wanton act of rage and passion. This, it appears to us, was a question to be decided. And conceding the law to be clear that the defendant would not have been liable for the act of the conductor, if it was wilful and malicious on his part, still it was a question of fact."

In *Hamilton v. Third Ave. R. Co.* (1873) 53 N. Y. 25, the liability of a street car company for the wrongful ejection of a passenger was affirmed upon the ground that "it was an act done within the scope of his authority from the defendant, in the prosecution of its business intrusted to him."

In *Shea v. Sixth Ave. R. Co.* (1875) 62 N. Y. 180, 20 Am. Rep. 480, the plaintiff alleged that, while passing over the platform of the defendant's car, under such circumstances, he was "forcibly, wilfully, and violently" seized and thrown off by the driver and seriously injured; that the driver was acting at the time as "the servant and agent and in the employment of the defendant." Held (Folger, J., dissenting), that a demurrer to the complaint was properly overruled; that it might be assumed from his position that the driver was acting within the line of his instructions in keeping the platform clear, and that the act complained of was an error of judgment in the course of his employment, for which the company was liable; also that the averment that the act was "forcibly, wilfully, and violently" done would not be considered as a charge that it was malicious, but that it was done in the performance of his duty, he using more force and violence than was necessary. The court said: "If, without comprehending the precise nature of the legal rights of the defendant, or that the obstruction of the street by the stopping of the cars conferred any privilege upon persons who desired to cross, and supposing and believing that the plaintiff had no such right, and was a trespasser unlawfully there, the driver did the act complained of, it was an error of judgment,—a mistake committed in the course of his employment,—for the consequences of which the defendant is liable. If it was an abuse of authority conferred which induced him to seize and eject the plaintiff, the same rule is applicable."

In *Peck v. New York C. & H. R. R. Co.* (1877) 70 N. Y. 587, affirming (1875) 4 Hun, 236, 6 Thomp. & C. 436, where a male passenger was held to be entitled to recover for the improper manner in which he had been ejected from a car reserved for females, the court argued thus: "The jury have found that there was an excess of force made use of by an agent or servant of the defendant, without any purpose of his own; and the question is now, whether it was in

the course of his employment. It is idle to debate whether the defendant, having made the rule, made it for nothing, and did not intend to carry it out, and to some extent preserve the car set apart for females from the intrusion, in the first instance, of males traveling alone. To insure the observance of the rule, they hung out placards giving notice of it. More effectually to insure it, they placed their servant at the door of the coach. It then became his immediate employment in their service to keep that coach free from males going without females in their company. It is true, that the oral commission of authority to him was to direct such male persons to another car. But the object of his giving the direction, and of the placing him there to give it, was that one car should be kept clear of such persons. Thus it became his duty to the defendant to use his best efforts to that end, up to the limit of that oral commission; hence, it was his employment in the service and business of the defendant to effect the object for which he was especially detailed. That he went beyond the limit of his instructions, if the overstep was made with an honest purpose of doing the duty put upon him, without wilfulness, or malice, or purpose of his own, did not take him beyond the scope of his employment for the defendant, or out of the sphere of its business. . . . It was his employment at that moment for the defendant, to see to it that the regulation made by it was observed by all whom it concerned. Though he was not instructed to carry it out by physical means, when he used those means he was acting, in his conception, in the purpose for which he was stationed there; he was acting in the scope of his employment; and though he may have exceeded not only his instructions, but the rights of the defendant to use force, if he did so only in excess of zeal, or impetuosity of natural temper, and without malice towards the person removed, and with no purpose of his own, he was still the agent of the defendant, and it is liable for his act."

In *Townsend v. New York C. & H. R. R. Co.* (1875) 4 Hun, 217, 6 Thomp. & C. 495, where a plaintiff recovered damages for the act of a conductor in ejecting him from a railway car, the only question discussed was the propriety of the ejection under the given circumstances.

In *Parker v. Erie R. Co.* (1875) 5 Hun, 57, where a conductor used insulting language to a passenger in the course of a dispute which had arisen between them in regard to the failure of the train to stop at the station for which the passenger had taken his ticket, the liability of the railway company was denied upon grounds thus stated: "If a wrong was done by the conductor while he was in the performance of his duty, the defendant is liable. . . . He was in the discharge of his duty in taking up the ticket held by plaintiff, and when he passed the station at which they were entitled to be let off. But was he in

the discharge of his duty when, after the train had passed the station, he went into the car and used insolent and insulting language to the plaintiff? It would seem that he went into the car with the intention of picking a quarrel with the plaintiff, and used the power which a little brief authority gave him, to insult and outrage the feelings of a harmless passenger. If the conductor had used the language testified to by the plaintiff while he was doing any legitimate act in the line of his duty, the defendant would have been liable. But it would be unjust to hold the company liable for insulting words used, or wrongful acts done, by an employee, unless done while performing duties incident to the business in which they are employed."

In *Schultz v. Third Ave. R. Co.* (1880) 14 Jones & S. 211, an action for injuries received by a boy thrown off a horse car by the conductor, who erroneously supposed that he intended to steal a ride, it was held that the trial judge had properly instructed the jury that, if the conductor "acted neither maliciously nor with the view to effect some purpose of his own, but within the general scope of his employment, while engaged in the defendant's business and with a view to the furtherance of that business and the defendant's interest, believing, upon the appearance before him, and upon which he had to exercise his judgment, that his duty to the defendant required him to act, then the defendant is responsible for the manner in which he acted, and the consequences of his act, though he may have acted in excess of his real authority." This decision was reversed in (1882) 89 N. Y. 242, on the ground that certain evidence had been improperly admitted; but the court laid it down that the act of the conductor would be imputable to the defendant even though it was wilful, reckless, and malicious.

In *Murphy v. Central Park, N. & E. River R. Co.* (1882) 16 Jones & S. 96, an action for injuries received by a boy who was thrown off by the conductor of a street car, so that he fell against a passing team, it was held that the trial judge had improperly refused to charge that if the conductor acted wilfully, and from personal motives assaulted the plaintiff, the company was not liable.

In *Flynn v. Central Park R. Co.* (1883) 17 Jones & S. 81, the conductor of a street railroad car and a passenger had a long altercation, in which the passenger was angry and excited and used abusive and insulting language to the conductor, and finally, coming out on the back platform to see where he was, said to the conductor, "I'll fix you in the morning. I will go right up to the depot and report you. I am not going to lose 20 cents by you." Whereupon the conductor, without stopping the car, which was moving fast, pushed the passenger off. A verdict against the railroad company was upheld.

seem that, under the given circumstances, the criterion thus adopted was improperly applied, to the prejudice of the passenger.⁷⁶

After the right of action had been determined upon this footing for about a quarter of a century, the court of appeals

rendered a decision which embodied the broader theory that the contract of carriage is violated by any act which constitutes a breach of the duty to treat passengers properly.⁷⁷ An abandonment of the more restricted view of the carrier's

⁷⁶ *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 122, 7 Am. Rep. 418. The grounds upon which the decision was based were thus stated: "In the present case an act was done by the conductor completely out of the scope of his authority, which there can be no possible ground warranted by the evidence for supposing the defendant authorized, and which it could never be right under any circumstances for the defendant to do. 1st. The car was in motion, and for no cause could the plaintiff have been thrust out into the street against her will while the car was in motion. The law forbids it, and the defendant could not lawfully have done it, and therefore no authority could be implied in the conductor to do it. 2d. There is no pretense that the conductor ejected or put the plaintiff from the car, or claimed to exercise such power for disorderly conduct, nonpayment of fare, or any other cause. 3d. The act was not in aid and assistance of the plaintiff in leaving the car. She was not in the act of getting off the car, but was standing on the platform, demanding that the car should be fully stopped, and protesting, as she had a right to do, that she would not attempt to leave the cars while they were in motion. 4th. The act was wanton and reckless, and was committed with great force and violence; such force as to throw the plaintiff clear off, and over the step, and on the pavement. It was not in the performance of any duty to the defendant, or of any act authorized by it. It was a criminal act for which the conductor could have been punished criminally, as well as made to respond in a civil action. It was a wanton and wilful trespass, and was not the natural or necessary consequence of anything which the defendant had ordered to be done." In *Mott v. Consumers' Ice Co.* (1878) 73 N. Y. 543, doubts were expressed concerning the correctness of this decision. These doubts seem to have been fully justified, for even if the plaintiff had been a trespasser, she would have been entitled to recover under the evidence as presented. The "illegality" of ejecting a trespasser from a moving train has never been recognized as a ground for absolving a railway company from responsibility for his injuries, and it needs no argument to show that the position of a passenger cannot be less favorable in this regard.

⁷⁷ *Stewart v. Brooklyn & C. T. R. Co.* (1882) 90 N. Y. 588, 43 Am. Rep. 185. There an action was held to be maintainable where the plaintiff, while traveling as a passenger on one of the defendant's street cars, was unjustifiably attacked and beaten by the driver, who also acted as conductor, the moving cause of the assault being that

the plaintiff had expostulated with the driver for having committed an assault upon a third person outside the vehicle. Referring to the dismissal of the complaint by the trial judge on the ground that the defendant's servant, in assaulting the plaintiff, had not acted within the scope of his employment, but had attacked the plaintiff to gratify some wicked and malicious purpose of his own, the court said: "Had the person assaulted been one to whom the defendant owed no duty, the dismissal of the plaintiff's complaint would probably have been correct: but the rule which applies in such a case has no application as between a common carrier and his passenger. In such a case a different rule applies. By the defendant's contract with the plaintiff it had undertaken to carry him safely and to treat him respectfully; and while a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. . . . In the present case the defendant had intrusted the execution of the contract to the driver of the car, and the plaintiff was under his protection. Any breach of the contract committed by the driver was a breach committed by the defendant. It is conceded that any injury arising from the mere negligence of the servant constitutes a breach of the contract. Had the driver, while executing the contract, carelessly and negligently injured the plaintiff, the defendant's liability would not have been doubted. Can it be less a breach of the contract that the injury was intentionally inflicted? An act which would amount to a breach of the carrier's contract, if negligently done, would be equally a breach if done wilfully and maliciously. It is immaterial whether a breach of contract results from the negligence or wilfulness of the defendant's agent. *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474. It is the injury that was suffered by the plaintiff while in the defendant's car, and not the motive which induced it, which constitutes the gist of the action. No reason exists for holding a master liable for the negligence of servants in his employment which does not with equal force preclude him from alleging intentional default of the servant as an excuse for not performing a duty which he has undertaken. In the former case the negligence of the servant is that of the master, and that is the ground of the master's liability; in the latter, the act of the servant is the act of the master, the

liability which is reflected in the earlier decisions was clearly involved in the position thus taken;⁷⁸ for its essential import was that, in an action by a passenger for injuries caused by a wilful act of a carrier's servant, it was not a prerequisite to recovery that the act should have been done within the scope of the servant's employment in the sense in which that phrase had previously been understood,—that is to say, as one which did not embrace any acts

except those directly connected with the work of transportation.⁷⁹

In one of the subsequent cases it was declared that "no matter what the motive is which incites the servant of the carrier to commit an unlawful or improper act towards the passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural and legitimate consequences."⁸⁰ In another of the cases we find the fol-

motive of the servant making no difference in regard to the legal character of the master's default in doing his duty. In the present case the master had undertaken to transport the plaintiff safely. He was injured while on the defendant's car, by the act of the agent to whom the defendant had intrusted the execution of the contract. It is the defendant's failure to carry safely and without injury that constitutes the breach, and it is no defense to say that that failure was the result of the wilful or malicious act of the servant. A rule which should make the carrier liable when the act resulting in the injury was carelessly but unintentionally done, and exonerate him when the injury was the result of the intentional act of the servant, would lead to most absurd results. By such a rule a stage company who should place a lady passenger under the protection of its driver, to be carried over its route, would be liable if, by his unskilful driving, he upset the coach and injured her; but if, taking advantage of his opportunity, he should assault and rob her, the carrier would go scot free. If the porter of a sleeping car, employed to guard the car while the passengers sleep, should himself fall asleep, or, abandoning his post, allow a pickpocket to enter and rob the passengers, the company would be liable; but if the guardian should himself turn pickpocket, and rifle the pockets of the passengers, the company would not be responsible for his acts. The carrier selects his own servants and agents, and we think he must be held to warrant that they are trustworthy as well as skilful and competent."

⁷⁸ The failure of the court to realize that this was the actual extent of the theory announced in *Weed v. Panama R. Co.* note 74, supra, and that it was now giving effect to a theory of a broader scope, is indicated not only by the fact that that case is cited, without any qualifying comment, as a precedent which justifies its conclusions, but also by its criticism on *Isaacs v. Third Ave. R. Co.* note 76, supra. That case was disapproved for the reason that it was decided without reference to the consideration that the plaintiff was a passenger suing a carrier. The omission to advert to this element was certainly a somewhat remarkable oversight; but the point to be noted in the present connection is that, even if it had been taken into account, the result, so far as the rights of the plaintiff were con-

cerned, would have been the same. The ground upon which recovery was denied was that the tortfeasor had transcended the scope of his authority. This defense, supposing it to have been established by the evidence,—which, in the writer's opinion, was not the actual situation (see note 76, supra),—would have been a valid one, even if the doctrine embodied in the *Weed* Case had been professedly followed.

⁷⁹ Two of the authorities cited were *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, and *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504. It is clear that neither of these cases could have been decided in favor of the plaintiff by a court which proceeded upon the grounds indicated by the cases reviewed in note 75, supra.

⁸⁰ *Dwinelle v. New York C. & H. R. R. Co.* (1890) 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319. The defense in this case was based mainly upon the theory that the performance of the contract of carriage had been temporarily suspended when the plaintiff was assaulted by a sleeping car porter.

The statement given in the text was adopted as correct in *Gillespie v. Brooklyn Heights R. Co.* (1904) 178 N. Y. 347, 66 L.R.A. 618, 102 Am. St. Rep. 503, 70 N. E. 857, reversing (1903) 80 App. Div. 640, 81 N. Y. Supp. 1127. There a female passenger on a street railway car tendered the conductor an amount more than the fare, but not in excess of that permitted by the company, and asked for a transfer. After the conductor had attended to another passenger she demanded the change, whereupon the conductor denied having received any amount in excess of her fare, and in abusive and impudent manner not only refused to return the change, but grossly insulted her by calling her a dead beat and a swindler, and by the use of other insulting and improper language, even after a fellow passenger had informed him that she had given him the amount claimed. Held, that she was entitled to compensatory damages for the humiliation and injury to her feelings, and that it was error to direct a verdict for the mere amount of the change, upon the ground that this was the extent of the company's liability. The court said: "In this case there was obviously a breach of the defendant's contract and of its duty to its passenger. It was its duty to receive any coin or bill not in excess of the amount per-

following statement: "A carrier is liable absolutely as an insurer for the protection of a passenger against assaults and insults at the hands of his own servants, because he contracts to carry the passenger safely and to give him decent treatment *en route*. Hence, an unlawful assault or an insult

to a passenger by his servant is a violation of his contract by the very person whom he has employed to carry it out."⁸¹

The doctrine embodied in the above statement has been explicitly recognized in most of the cases decided by the inferior courts of the state.⁸² In some

mitted to be tendered for fare on its car under its rules and regulations, and to make the change and return it to the plaintiff or person tendering the money for the fare. That certainly must have been a part of the contract entered into by the defendant, and the refusal of the conductor to return her change was a tortious act upon his part, performed by him while acting in the line of his duty as the defendant's servant. To that extent, at least, the contract between the parties was broken; and as an incident to and accompanying that breach, the language and tortious acts complained of were employed and performed by the defendant's conductor. This brings us to the precise question whether, in an action to recover damages for the breach of that contract and for the tortious acts of the conductor in relation thereto, the conduct of such employee and his treatment of the plaintiff at the time may be considered upon the question of damages and in aggravation thereof. That the plaintiff suffered insult and indignity at the hands of the conductor, and was treated disrespectfully and indecorously by him under such circumstances as to occasion mental suffering, humiliation, wounded pride, and disgrace, there can be little doubt. At least the jury might have so found upon the evidence before them. This question was treated on the argument as a novel one, and as requiring the establishment of a new principle of law to enable the plaintiff to recover damages in excess of the amount retained by the defendant's conductor which rightfully belonged to her. In that, we think counsel were at fault, and that the right to such a recovery is established beyond question."

In *Graville v. Manhattan R. Co.* (1887) 105 N. Y. 525, 59 Am. Rep. 516, 12 N. E. 51, the court referred to the fact that the refusal of the plaintiff to comply with the request of a brakeman to leave a car platform and go into the car "tended to mitigate and explain the conduct of the brakeman, and to show that the assault was not wanton or malicious." The emphasis laid upon the aspect of the evidence was apparently due to inadvertence. Under the doctrine of the *Stewart Case*, supra, the defendant was clearly liable, irrespective of whether the assault was or was not "wanton or malicious."

⁸¹ *Busch v. Interborough Rapid Transit Co.* (1907) 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460, quoting *Thomp. Neg.* § 3186.

In another case decided during the same year it was laid down that "a carrier is an absolute guarantor of the safety of its passengers against the assaults of its em-

ployees while it is performing its contract of carriage." *Zeccardi v. Yonkers R. Co.* (1907) 190 N. Y. 389, 17 L.R.A. (N.S.) 770, 83 N. E. 31, reversing (1906) 113 App. Div. 649, 99 N. Y. Supp. 936. There the right of recovery was denied on the ground that the performance of the contract of carriage had been temporarily suspended at the time when the plaintiff was assaulted.

⁸² *Weber v. Brooklyn, Q. C. & Suburban R. Co.* (1900) 47 App. Div. 306, 62 N. Y. Supp. 1 (defendant liable for assault made by conductor who took offense at the protest of the plaintiff against the manner in which a drunken passenger had been treated); *Monnier v. New York C. & H. R. R. Co.* (1902) 70 App. Div. 405, 75 N. Y. Supp. 521 (passenger who had been unable to procure a ticket, owing to the absence of a station agent, was ejected for refusing to pay the extra amount of fare which passengers having no tickets were required by statute to pay); *Baumstein v. New York City R. Co.* (1907; App. Div.) 56 Misc. 498, 107 N. Y. Supp. 23 (dismissal of complaint held to be improper, where a conductor first assaulted and then gave into custody a passenger who had asked him several times for a transfer); *Miller v. Brooklyn Heights R. Co.* (1908) 124 App. Div. 537, 108 N. Y. Supp. 960 (discussion turned mainly upon whether the relation of carrier and passenger had been terminated when the plaintiff was assaulted); *Lyons v. Broadway & S. A. R. Co.* (1890; City Ct. of New York) 32 N. Y. S. R. 232, 10 N. Y. Supp. 237 (action maintainable where the driver of a street car, having taken offense at a passenger's ringing up the conductor, threw him off the front platform); *Smith v. Manhattan R. Co.* (1892; N. Y. C. P.) 45 N. Y. S. R. 865, 18 N. Y. Supp. 759 (action maintainable where trainman tried to eject a passenger who had jumped on the rear platform, in violation of the rule of the company).

In *Brewster v. Interborough Rapid Transit Co.* (1910; App. Div.) 68 Misc. 348, 123 N. Y. Supp. 992, where an employee of a street railway company warned plaintiff, who was waiting on a station platform, not to push, or he would smash his head. Plaintiff told him to go ahead and do it; whereupon the employee knocked plaintiff down. Dismissal of the complaint was held to be error on the ground that the company could not avoid liability on the plea that the assault was not within the scope of the assailant's employment.

In *Schwartzman v. Brooklyn Heights R. Co.* (1903) 84 App. Div. 608, 82 N. Y. Supp. 890, an instruction to the effect that if the conductor of the defendant street car com-

of them it would seem to have been disregarded.⁶³

But owing to the ambiguity of the phrase, "in the course of the employment," and its equivalents, as used by the courts in cases involving the liability of carriers,

the precise rationale of some of the decisions which seem to be a reversion to the theory originally adopted in this state is not entirely certain.

As the general statements of doctrine quoted above from the opinions of the court

pany took hold of the plaintiff and threw him from the car, but the act was done wilfully and maliciously, the defendant would not be liable, was held to be erroneous. The court said: "It is true that this portion of the charge was coupled with the suggestion that, in order to relieve the defendant from liability, it must appear that the conductor's wilful and malicious act was not done in the management and running of the car, but there was no fact or circumstance in the case tending to indicate that there was any time when the conductor was not engaged in the running and management of the car, and the jury must have understood the charge as applicable to the facts of the case, and not as a mere abstract proposition of law. The effect of the charge was to instruct the jury that they might find the conductor's act to have been wilful, but personal, in the sense of being outside of the field of his duty, the precise language being: 'If he did it maliciously and outside of the running and management of the car of the defendant, then the verdict must be for the defendant.' It needs no citation of authority to show that this is not a correct statement of the law as applicable to the conceded fact that the conductor was engaged at the time in the actual running and management of the car. The true rule is frankly admitted by the learned counsel for the respondent . . . as follows: 'This we understand to be the correct rule of law, if the conductor made the assault while in the management of the car, whether maliciously done or negligently done, the defendant would be responsible. The charge to the contrary could have no possible effect but to mislead the jury into the belief that if they found that the act of the conductor was a wanton one, it could nevertheless in some way be so dissociated from the discharge of his duty as a servant of the defendant as to relieve the latter from its consequences; and as nothing whatever in the case even remotely suggests the possibility of such dissociation, the instruction constituted reversible error.'

For other cases in which the rule that a wilful assault upon a passenger involves a violation of the contract of carriage was recognized, but which turned upon points of pleading, see *Hart v. Metropolitan Street R. Co.* (1901) 65 App. Div. 494, 72 N. Y. Supp. 797, adopting the doctrine laid down on the first appeal (1901) 34 Misc. 521, 60 N. Y. Supp. 906; *Block v. Third Ave. R. Co.* (1901) 60 App. Div. 191, 69 N. Y. Supp. 1107; *Willis v. Metropolitan Street R. Co.* (1902) 76 App. Div. 340, 78 N. Y. Supp. 478; *Connell v. New York, O. & W. R. Co.* (1909) 134 App. Div. 231, 118 N. Y. Supp. 944.

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In several cases where the tort complained of was the ejection of the passenger, either from the vehicle in which he was being transported, or from the carrier's premises, the precise doctrinal point of view from which the right of recovery was asserted is not apparent from the report. *Muckle v. Rochester R. Co.* (1894) 79 Hun, 32, 29 N. Y. Supp. 732 (unjustifiable ejection of passengers from street car); *Wells v. New York C. & H. R. R. Co.* (1898) 25 App. Div. 365, 49 N. Y. Supp. 510 (gatemanager ejected from a station a passenger who was ill and unable to take care of himself); *Charbonneau v. Nassau Electric R. Co.* (1908) 123 App. Div. 631, 108 N. Y. Supp. 105 (passenger having a transfer entitling him to travel on a car was ejected for refusing to pay another fare).

In *De Felice v. Compagnie Francaise de Navigation* (1903) 83 App. Div. 73, 82 N. Y. Supp. 552, where the officer of a ship, being actuated by some feeling of personal resentment, countenanced the throwing of a passenger's valise overboard, the court took the position that the rule formulated in the *Stewart Case*, note 77, supra, was broad enough to cover such an injury. The right of action under such circumstances would seem to be preferably predicated on the ground that the shipowners were liable as common carriers of the passenger's baggage.

⁶³ In *Rown v. Christopher & T. Street R. Co.* (1885) 34 Hun, 471, the right of a passenger to recover for being wrongfully ejected from a street car was put upon the ground that his removal from the car by the driver was "in the nature of an unlawful assault in the judgment of the law;" and that "the acts performed by him were in the regular course of his employment, and within the authority possessed by him as the driver and manager of the car."

In *Mars v. Delaware & H. Canal Co.* (1889) 54 Hun, 625, 8 N. Y. Supp. 107, the following language was used: "The general rule is well settled that if a servant misconducts himself in the course of his employment, his acts are the acts of his master, who must answer for them, even if the acts are wilful and malicious. But if a servant goes outside of his employment, and without regard to his service, acting with malice, or in order to effect some purpose of his own, wantonly causes damage to another, the master is not liable." This statement seems to be clearly and unmistakably inconsistent with the modern New York doctrine. See further as to the case, note 84, infra.

In *Wright v. Glens Falls, S. H. & Ft. E. Street R. Co.* (1898) 24 App. Div. 617, 48 N. Y. Supp. 1026, where a conductor, who

of appeals are sufficiently broad to cover injuries inflicted by servants other than those whose functions have an immediate relation to the performance of the contract of carriage, it seems not improbable that whenever the question is directly presented, it may be held that the carrier's implied duty in respect of protection extends to all classes of servants. It is true that the language used and the conclusions arrived at by the supreme court in one case were inconsistent with the theory of an obligation of so wide a scope.⁸⁴ But

the significance of that case as an index of judicial opinion is considerably diminished by the fact that it was earlier in date than the statements above referred to. In all the cases in which the court of appeals has so far had occasion to consider the liability of a carrier for the arrest of a passenger, the right of recovery has been considered with reference to the criterion of the scope of the authority delegated to the servant.⁸⁵ As two of these cases are of later date than that which established the doctrine of a carrier's absolute liability for assaults, it

had made a representation—held to be binding on the company—that a street car would carry a passenger between two points for a specified fare, ejected the passenger before the second point was reached, on the ground of his having refused to pay the extra amount demanded, it was held to be a question for the jury whether, at the time of the assault in question, the conductor was engaged in the performance of his duties as agent of the company.

In *Moritz v. Interurban Street R. Co.* 84 N. Y. Supp. 162, where a passenger who had stepped on the front step of a street car was struck by the motorman and told to get off, the company's liability was affirmed upon the ground that a master is liable for the acts of his servant which involve a departure from the authority conferred, if they are done in the course of the employment. The court laid down the rule that a carrier is liable "for all the unlawful acts of its servant done in the prosecution of the business intrusted to him, if its passengers are thereby injured."

⁸⁴In *Mars v. Delaware & H. Canal Co.* (1889) 54 Hun. 625, 28 N. Y. S. R. 228, 8 N. Y. Supp. 107, an engine which had been left on a side track with the fires banked was started by some person unknown, and ran out on the main track, where it came into collision with a passenger train on which the plaintiff was traveling. Held (1) that, as it appeared, or the jury were authorized to find, that the engine was moved maliciously to the main track by an employee of defendant or by some other person, the defendant was entitled to have the jury instructed that, if the engine was maliciously started by one of defendant's employees, other than the man left in charge of it, the defendant was not liable; and (2) that the exception to the charge given by the trial judge, that, if the person who committed the act was an employee of the company, then, whether the act was done carelessly or wilfully, the defendant was not relieved of liability, was well taken. The court said: "Whoever did put the engine on the south-bound track and start it north, whether an employee or not, did an act in violation of the rules of the company, without authority (because McFarland [servant in charge of the engine during the night] only had, at that time, authority over the engine), and if an em-

ployee, not in the discharge of, or in the line of, his duty as employee, but outside of it. . . . If an employee of defendant moved the engine, he was not acting for defendant; he was not doing an act within his employment, or that he had a right to do, but he was committing a most heinous crime. As to that the relation of master and servant did not exist between defendant and him. Hence we think that, assuming the engine was moved by some person from where it was placed by defendant, such act was a theft of the engine, a criminal act, and whether done by an employee of defendant or other person, the defendant is not responsible therefor."

⁸⁵*Lynch v. Metropolitan Elev. R. Co.* (1882) 90 N. Y. 77, 43 Am. Rep. 141 (arrest of passenger by gatekeeper for nonproduction of ticket which had been lost during the journey); *Mulligan v. New York & R. B. R. Co.* (1892) 129 N. Y. 506, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952, reversing 39 N. Y. S. R. 20, 14 N. Y. Supp. 456 (plaintiff was pointed out by ticket agent as having paid for his ticket with a bill believed to be counterfeit); *Palmeri v. Manhattan R. Co.* (1892) 133 N. Y. 261, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001, affirming (1891) 39 N. Y. S. R. 23, 14 N. Y. Supp. 468 (woman who had purchased a ticket was followed to the platform by, the ticket agent, and temporarily detained on the ground of her having paid in counterfeit money).

For decisions of lower courts which proceeded upon the same ground, see *Rown v. Christopher & T. Street R. Co.* (1885) 34 Hun. 471 (conductor ejected passenger and caused him to be arrested); *Corbett v. Twenty-Third Street R. Co.* (1886) 42 Hun. 587 (driver ejected passenger and then caused him to be arrested); *Shea v. Manhattan R. Co.* (1890; C. P.) 15 Daly, 528, 29 N. Y. S. R. 313, 8 N. Y. Supp. 332, affirming 27 N. Y. S. R. 33, 7 N. Y. Supp. 497 (passenger arrested by platform man for alleged disorderly conduct).

In *Zeccardi v. Yonkers R. Co.* (1907) 190 N. Y. 389, 17 L.R.A. (N.S.) 770, 83 N. E. 37, reversing (1906) 113 App. Div. 649, 99 N. Y. Supp. 936, the rationale of the decision was that the alleged misconduct for which the plaintiff had been arrested had no connection with the contract of carriage.

would appear upon the cases as they stand, that a distinction is taken between the obligations of a carrier in respect of torts of that character and in respect of wrongful arrests. Such a position, however, is scarcely logical, and it may reasonably be anticipated that both descriptions of torts will ultimately be dealt with on the same footing.⁸⁶ It should be observed that in two recent cases the theory that a carrier is liable as an insurer for the wrongful arrest was adopted by the supreme court.^{86a}

North Carolina.—In this state the liability of a carrier for the wilful torts of his servants is determined with reference to the theory of an implied contract on his part that passengers shall be properly

treated.⁸⁷ In two cases the court seems to have argued upon the hypothesis that the absolute liability of a carrier extends to the protection of passengers against wrongful arrests.⁸⁸ But more recently the court has pronounced explicitly in favor of the view that the liability of the carrier in respect of such a tort depends upon whether it was committed within the scope of the tortfeasor's employment.⁸⁹

Ohio.—In the only cases in which the matter has been considered by the supreme court, the position has been explicitly taken that a carrier is not chargeable with the wilful torts of his servant, except in so far as they are within the scope of the servant's authority or employment, in respect of the functions which he was hired to per-

⁸⁶ The language of the court in *Palmeri v. Manhattan R. Co.* (see preceding note) is suggestive of a curious "halting between two opinions," for although its argument as a whole differentiates quite distinctly between acts which are, and acts which are not, done in the furtherance of the master's business, the following statement is also found in its judgment: "Once the relation of carrier and passenger is entered upon, the carrier is answerable for all consequences to the passenger of the wilful misconduct or negligence of the persons employed by it, in the execution of the contract which it has undertaken towards the passenger." The doctrine thus laid down seems to be rather that which presupposes the existence of an absolute obligation, than that which treats the scope of the tortfeasor's employment as being the criterion of the carrier's liability.

^{86a} In *Baumstein v. New York City R. Co.* (1907, — App. Div. —) 56 Misc. 498, 107 N. Y. Supp. 23, where the conductor of a street car assaulted a passenger who had asked for a transfer, and then caused him to be arrested, that theory was adverted to as the ground on which the dismissal of the complaint was treated as error.

In *McLeod v. New York, C. & St. L. R. Co.* (1902) 72 App. Div. 116, 76 N. Y. Supp. 347, the plaintiff was searched by a railway detective who charged him with having robbed another passenger. The conductor was appealed to for protection, but refused to interfere, and the plaintiff was then arrested and put in prison. Held, that the dismissal of the complaint on the ground that in respect of what was done the detective and the conductor were not acting within the scope of their employment was error, and that the jury should have been asked whether the maltreatment of the plaintiff was a breach of the defendant's duty to carry him safely to his destination.

See also *East v. Brooklyn Heights R. Co.* (1906) 115 App. Div. 683, 101 N. Y. Supp. 364.

In *Parke v. Fellman* (1911) 145 App. Div. 836, 130 N. Y. Supp. 361, where the arrest

was made by a special officer, the question of authority or of guaranty could not arise, because the tort was clearly committed in the exercise of the tortfeasor's normal functions.

⁸⁷ In *White v. Norfolk & S. R. Co.* (1894) 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191, where the engineer on a steamboat struck a passenger whom he accused of making a disturbance, the action was held to be maintainable; the liability of the defendant company being predicated "upon the distinct principle of its obligation to protect its passengers from insult or harm." The question whether the wrongful act was done by the engineer while acting within the scope of his employment was declared to be of no moment.

In *Williams v. Gill* (1898) 122 N. C. 967, 29 S. E. 879, it was held that the trial judge had properly refused to instruct the jury that as the plaintiff's testimony showed that the brakeman struck the plaintiff directly after he had applied a vile epithet to the brakeman, the brakeman was not acting within the scope of his authority, and the defendant was not to be held responsible for the brakeman's act.

In *Strother v. Aberdeen & A. R. Co.* (1898) 123 N. C. 107, 31 S. E. 386, it was held that a railroad company was liable in damages for an insulting proposition made by its conductor to a female passenger on his train.

In *Daniel v. Petersburg R. Co.* (1895) 117 N. C. 592, 4 L.R.A.(N.S.) 485, 23 S. E. 327, the doctrine as to the carrier's absolute liability was recognized; but the right of recovery was by the majority of the court discussed upon the hypothesis that when the plaintiff's intestate was shot, he had ceased to be a passenger.

⁸⁸ *Owens v. Wilmington & W. R. Co.* (1900) 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259; *Bowden v. Atlantic Coast Line R. Co.* (1907) 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783.

⁸⁹ *Berry v. Carolina, C. & O. R. Co.* (1911) 155 N. C. 287, 71 S. E. 322 (arrest for disorderly conduct).

form with regard to the actual work of conveying passengers.⁹⁰ But as more than forty years have elapsed since those cases

were decided, and the theory exemplified by them has been abandoned in most of the American states, it is possible that they

⁹⁰In *Little Miami R. Co. v. Wetmore* (1869) 19 Ohio St. 110, 2 Am. Rep. 373, the ground upon which the plaintiff, who had been struck by a baggage-checker at a railway station, during an altercation provoked by his own conduct and words, was held not to be entitled to maintain an action against the railway company, was thus stated: "For the plaintiff below, it is insisted that the servant was impliedly invested with such powers as were essential to the regular and certain performance of his duties; that for the despatch of his business, in certain emergencies, he must be considered as authorized to suppress by force, if necessary, an interference with, or obstruction of, the quick and certain discharge of his duties. Without undertaking to lay down a general rule to govern all cases, it may safely be admitted that the servant is invested with authority to use the necessary means to the performance of the duties assigned him; and that the character of the means that may be used will vary according to the nature of the duty to be performed and the attending circumstances. But, in looking at the evidence, it is to be noticed that the assault complained of was not committed in endeavoring to eject the plaintiff from the space inclosed by the tables, over which the servant may be supposed to have had a special control. The plaintiff, according to his own statement, had gone outside of the tables, and was shaking his finger in Halpine's face, and addressing him with an opprobrious epithet. It seems to us the assault was in no way calculated to facilitate or promote the business for which the servant was employed by the master; nor could it have been supposed to be, or intended as, an act done with that view or object. It is not a case of excess of force and violence in executing the authority of the master, but rather an act beyond such authority and foreign to the objects of the employment. There was no evidence tending to show that Halpine had any charge of the portions of depot not allotted for the purpose of checking baggage; neither did his employment imply any authority or control over the persons of passengers or other who might be found there. Nor is this the case of an act done from a wrong judgment in regard to a matter committed by the master to the discretion of the servant." Discussing the second contention of the plaintiff, "that the assault was an act of the servant done in part execution of the contract of carriage between the plaintiff and the company," the court said: "This is merely presenting the question in a different form, the principle being the same as that already referred to, namely, whether the act was done in the execution or performance of the service for which the servant was engaged. Whether the service to be rendered by the master is in the

performance of a contract, or in the discharge of any other duty resting on him, can, it is conceived, make no difference; the question being, in either case, whether the act is within the scope of the servant's express or implied authority in respect to the master's service. In order to withdraw this case from the operation of the general rule, and hold the company responsible on the ground of its contract with the plaintiff as a passenger, it is necessary to maintain that the company, in requiring the plaintiff to apply to its servant for the purpose and as the only means of getting his baggage checked, impliedly undertook to vouch for and warrant the good conduct of the servant towards the plaintiff while the two were engaged in transacting the business. Whether this position is tenable, we do not find it necessary in the decision of the case now before us to express a definitive opinion. The case was not tried on this theory in the court below, nor has this phase of the question been argued here." The court would, no doubt, have dealt with this aspect of the case, if it had been aware of the decision in *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474, but its attention was not called to this authority.

In *Passenger R. Co. v. Young* (1871) 21 Ohio St. 518, 8 Am. Rep. 78 (a decision on demurrer), the court thus explained its reasons for holding the company to be liable: "The defendant below was a common carrier of passengers, and the plaintiff and his wife were rightfully seated in one of its cars, to be carried as passengers, and were ready and willing to pay their fare. Being thus lawfully in the car, they were, by the procurement and order of the conductor, forcibly ejected therefrom, and thus received the injuries complained of. The car was under the control of the conductor, who was the only representative of the defendant with whom the public, desiring to avail themselves of the defendant's business as a public carrier, could deal. It was the duty of the defendant to carry the plaintiff and his wife, and in performing this duty it acted towards them, in common with other passengers, solely through its representative, the conductor. What the latter did or refused in respect to the carriage of passengers is, we think, to be regarded as the act of the defendant. The conductor, by being placed in his position, was invested by the defendant with the implied authority of excluding improper persons from the car. This necessarily included the authority of determining who ought to be admitted and who excluded. . . . In dealing with persons as passengers, whether in admitting or excluding them from the cars, or in assigning them places after they have entered, the conductor in charge is acting in the course or

would not now be treated as valid precedents.⁹¹

Pennsylvania.—The theory of an implied obligation on the carrier's part to protect passengers against the wrongful acts of his servants has in one instance been recognized by the Supreme Court of the United States. But the right of action has usually been treated as being determinable with reference to the doctrine that a car-

rier is not liable for any wilful torts committed by a servant except those which are within the scope of his authority,⁹² or, in the phraseology of the more recent cases, "in the line or course of his duty or employment."⁹³ From the decisions which have been rendered upon this footing, it is apparent that these phrases are to be understood in their more restricted sense, as connoting torts which are directly connect-

within the scope of his employment. When this is the character of the act, the master is responsible for it civilly even if it be an act of positive malfeasance or misconduct.⁹⁴

⁹¹ The conception of an absolute duty on the carrier's part to protect his passengers was recently recognized to a limited extent by one of the inferior tribunals. See *Baltimore & O. R. Co. v. Reed* (1909) 31 Ohio C. C. 521, where the court, after referring to Rev. Stat. §§ 3433, 3434, which confer police powers upon conductors, proceeded as follows: "We think the provisions of these statutes were not solely for the purpose of enabling the railroad companies to protect their properties, but also for the purpose of enabling them to protect passengers from assaults of fellow passengers or from the servants of the road, and in other respects to preserve and secure the peace, safety, and convenience of passengers. And if a conductor, while in charge of his train, makes an assault upon a passenger who is then in the peace of the state, and not violating any rule of the company, as a matter of law he would be held to be acting within the scope of his authority and the master would be liable." The phrase, "scope of his authority," in this passage, is clearly not used in the same sense as in the earlier cases cited in note 90, supra.

⁹² In *Pittsburg, A. & M. Pass. R. Co. v. Donahue* (1871) 70 Pa. 119, the ground upon which it was held that no action would lie against a street railway company for the act of a driver of a horse car in striking with an iron bar, and then throwing off the car, a boy who had got on it with the intention of becoming a passenger, was that such an act must be taken to be outside the scope of the driver's authority, because no such company would ever confer authority to beat even trespassers on their cars. Upon the facts, it is submitted that the decision was erroneous in any point of view, for the objection of persons who had, or were supposed to have, no right to be on the car, was clearly one of the functions of the driver, and the company was therefore responsible for the manner in which he discharged it.

⁹³ In *Scanlon v. Sutar* (1893) 158 Pa. 275, 27 Atl. 963, it was held that the plaintiff had been properly nonsuited, where the testimony showed that deceased came to his death in consequence of a quarrel with the ferryman employed by defendant, and that the death was either an accident or the result of unlawful violence on the

part of the ferryman, outside of the line of his duty, and committed without the authority or consent of defendant.

The *ratio decidendi* in *McFarlan v. Pennsylvania R. Co.* (1901) 199 Pa. 408, 49 Atl. 270, was that "for a wilful or intentional trespass by an employee outside of the line of his duty under his employment, it is settled that the employer is not responsible, even though it be committed while the servant is in the exercise of his employment." In that case plaintiff declared for an unprovoked assault upon him by the conductor as he was about to enter the train, and the defense was a total denial that any such assault took place. The defendant argues that, as the jury had found in the plaintiff's favor that the assault was committed, the supreme court was bound to take the plaintiff's version of it, and that made out a clear case of wilful and unprovoked trespass outside the line of the conductor's employment. The court, however, said: "This view ignores some of the evidence. The jury were bound, in finding their verdict, to consider and determine not only the fact of the assault, but also its character and the circumstances under which it was made. The plaintiff testified that he was an intending passenger and was in the act of entering the car. *Prima facie*, therefore, he was within the authority and control of the conductor in the course of his employment, and there was other testimony to the same effect. Thus, Mrs. Barton, a witness, testified that when the conductor caught hold of the plaintiff, he said: 'Stay off until the people get out.' This was evidence that what the conductor did was not only in the course of his employment, but in the supposed performance of his duty in the orderly management of the passengers leaving and entering the train. If in so doing he used unnecessary violence, the employer would be liable, and the jury have so found."

In *Berryman v. Pennsylvania R. Co.* (1910) 228 Pa. 621, 30 L.R.A. (N.S.) 1040, 77 Atl. 1011, the grounds upon which the court refused to accept the contention of counsel that a special officer employed by a railway company was acting in the line of his duty when he assaulted the plaintiff were thus stated: The decisions cited "deal either with cases where a special duty towards the injured party, arising out of the contract relation, was violated, as in the case of a conductor who, in collecting fares or tickets from passengers, or in preserving peace and order in his car, commits

ed with the actual work of transportation, or with the performance of such incidental and supplementary duties as may be imposed upon them by specific instructions regarding the conduct to be observed towards passengers. In a case where the plaintiff had been wrongfully arrested on a train by police officers, acting in pursuance of a telegram received from the defendant's agent, it was declared by the court that if the conductor of the train had participated in the tort of a telegram received from the company's agent, the defendant would

have been liable, both for the reason that "the subject was within the general line of his duty," and also for the reason that "it was his duty under ordinary circumstances, as already said, to protect his passengers from trespass while under his care; and if he stood by and saw them illegally molested in any way without an effort to protect them, it would be negligence for which the defendant would be liable."⁶⁴

But the second of the grounds thus assigned reflects a conception of the carrier's

a wilful and malicious assault on a passenger; or, where an officer makes violent assault while engaged in making arrests. In every such case the employee is directly in the line of his duty, in the sense that he presently engaged in doing the work for which he was employed. It is the duty of the conductor to make his collections, and it is the duty to maintain order in the car for the protection of passengers; and it is as well the duty of the policeman to make arrests when proper occasion arises. It is for such purposes these employees are engaged. If the assault in this case had been made by Bledsoe in the course of an attempt to arrest the plaintiff, it might be contended that it was done when in the line of his duty, and it would be a question for the jury to decide; but, as we have said, every circumstance shows that here no arrest was intended; the plaintiff does not assert that it was, shows no circumstance that indicates it, while Bledsoe positively asserts that it was not. Or, if it had been made in the attempt to do anything that Bledsoe was employed to do, as, for instance, keeping the peace, suppressing disorderly conduct, discovering crime, a like result would follow. This is the extent to which the cases cited go. The distinction is too apparent to require further discussion. Ordinarily whether the assault was committed in the line of the servant's duty is a question for the jury; but no question of fact is ever submitted to a jury except it is raised by the evidence."

In *Artherholt v. Erie Electric Motor Co.* (1905) 27 Pa. Super. Ct. 141, the case was held to be for the jury where there was testimony warranting the inference that the conductor, being angered because the plaintiff rang the signal bell, or by mistake pulled the cord which registered fares, made a wanton and malicious assault upon him, which was neither instigated nor authorized by his employer, but was in violation of the standard rules of the company requiring the conductors to treat passengers civilly. In the *Greb Case*, *infra*, this decision was said to proceed upon the ground that as the conductor "was the employee to whom the company had intrusted the safe carriage of the plaintiff, the company owed to him the duty to protect him against the conductor's unprovoked and wanton assault committed while the plaintiff was being transported,

and the conductor was engaged in executing the contract of carriage."

In *Greb v. Pennsylvania R. Co.* (1909) 41 Pa. Super. Ct. 61, 72, where a passenger, after having alighted from a train, was pursued along the station platform by the baggage master and the conductor of the train, and wantonly and maliciously assaulted, the liability of the railroad company was denied on the ground that the acts of the assailants were outside of the scope of their employment. The court reviewed all the Pennsylvania decisions, and expressed the opinion that they did not sustain the broad proposition upon which the instructions of the trial judge must be taken to have proceeded, *viz.*, that "it is the absolute duty, of the carrier to protect the passenger against the assaults and violence of its servants, not only while the passenger is being transported, but so long as the relation exists; therefore if the passenger is anywhere on the carrier's premises legitimately, as an intending or departing passenger, the range or scope of employment of the servant who commits an unprovoked, unlawful, and malicious assault upon him is immaterial in determining as to the carrier's liability." It was remarked that "if the brakeman had followed the plaintiff into the waiting room of the station, if there was one, and there committed the assault, or had vindictively assaulted an intending passenger the moment he entered the defendant's station, or if, to use the illustration suggested by appellant's counsel, the assault on the plaintiff on the station platform had been made by a track walker, who, after the train had left, had deserted his duty of inspecting the tracks, the case would not be different in principle. While general expressions may be found in cases outside this commonwealth, which, considered apart from the context and the facts of the case, may seem to give support to the proposition as above stated, yet a careful examination will show that in most of these cases some other element entered into the decision. At any rate, no Pennsylvania case that has been cited, or that we have been able to find after diligent investigation, goes to that extreme."

⁶⁴ *Duggan v. Baltimore & O. R. Co.* (1893) 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186.

liability which is plainly inconsistent with the position indicated by some cases.

South Carolina.—In this state a passenger apparently cannot recover for an assault by the carrier's servant, unless it was committed by him in the course of his employment; this phrase being understood in the same restricted sense as it bears in the Pennsylvania cases.⁹⁵

Tennessee.—In this state the liability of a carrier is determined with reference to the theory of an implied obligation on his part to protect passengers against the wilful torts of his servants.⁹⁶ In a case where the imprisonment of an innocent person on a charge of attempting to pass counterfeit money was wrongfully procured by a railroad detective while acting within the scope of his authority, the railroad company was declared to be liable, although in this particular matter he exceeded his authority and acted contrary to his instructions respecting the caution to be exercised in dealing with supposed offenders.⁹⁷ The

ground thus relied upon seems to indicate that this is one of the jurisdictions in which the liability of the carrier for a wrongful use of criminal process is determined upon a footing different from that which is adopted in actions for other wilful torts.

Texas.—In the earliest case in which the supreme court had occasion to consider the subject of a carrier's liability, an action was held to be maintainable in respect of an assault which was manifestly within the scope of the tortfeasor's employment, and the language of the opinion does not show whether the right of recovery was viewed as being conditional upon the torts being of that description.⁹⁸ Shortly afterwards, however, it was declared to be "settled law that unwarrantable assaults upon passengers by a carrier's servants are breaches of the contract of carriage, and as such impose liability upon the carrier."⁹⁹ A few years later the theory of a contractual obligation on the carrier's part to protect

⁹⁵ In *Redding v. South Carolina R. Co.* (1871) 3 S. C. 1, 16 Am. Rep. 681, the enforceability of the claim was held to be a question for the jury upon evidence that a negro passenger had been assaulted and dragged out of the parlor at a station by an employee who attended to the cleaning of the room, and that the employee had been ordered to exclude negroes from the room.

That the above decision, although rendered more than forty years ago, is still regarded as a valid precedent, would seem to be a permissible inference from the recent ruling in *Taber v. Seaboard Air Line R. Co.* (1908) 81 S. C. 317, 62 S. E. 311, to the effect that a passenger may recover punitive damages against a carrier for such wilful acts of his servants as are done within the apparent scope of their authority.

⁹⁶ In *R. R. Springer Transp. Co. v. Smith* (1886) 16 Lea, 498, 1 S. W. 280, the owners of a steamboat were held to be liable for injuries resulting from an unwarrantable assault made by the mate upon a deck passenger, whom he had ordered to move to another place. The defense unsuccessfully put forward was that, as the act of moving had been completed before the assault was committed, the tortious act was not within the scope of the mate's employment. The authority relied on was *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922.

In *Pullman Palace Car Co. v. Gavin* (1893) 93 Tenn. 53, 21 L.R.A. 298, 42 Am. St. Rep. 902, 23 S. W. 70, the liability of a sleeping car company for the theft of a passenger's money by the porter of a sleeping car was put upon the ground that he was charged with the performance of the company's duty in respect of watching and protecting the property of passengers.

In *Louisville & N. R. Co. v. Ray* (1898) 101 Tenn. 1, 46 S. W. 554, the court affirmed 40 L.R.A. (N.S.)

a verdict in favor of a person who had been pushed off the step of a train, although he was unable to say who had struck him, and could only testify that it was a person who wore the uniform of a railway employee. The court laid it down that "a passenger [of a train] is not only entitled to civil treatment at the hands of all employees, but to their protection, and the railroad company will be held liable for any act of rudeness and oppression resulting in injury to a passenger at the hands of any of its employees while on the train, the safety and proper treatment of the passengers being within the scope of employment and range of duties of every employee."

In *Knoxville Traction Co. v. Lane* (1899) 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557, the misconduct of a motorman of a street car in making indecent and insulting remarks to and concerning a female passenger was held to be imputable to the railway company, on the ground that it was a breach of the carrier's absolute contractual duty to protect its passengers from the violence and insults of its servants.

⁹⁷ *Eichengreen v. Louisville & N. R. Co.* (1896) 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219.

⁹⁸ *Texas & P. R. Co. v. Graves* (1882) 2 Posey, Unrep. Cas. (Tex.) 306 (passenger had been struck by a conductor, acting under the mistaken impression that he was a bad character and was about to rob another passenger).

⁹⁹ *International & G. N. R. Co. v. Kentle* (1883) 2 Tex. App. Civ. Cas. (Willson) 262. The precedent relied upon was *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922. The ruling of the court that a plea alleging that the servant was acting beyond the scope of his authority would, if sustained by the testimony, constitute a good defense, is presumably to be understood as

his passengers was again explicitly adopted.¹⁰⁰ For a considerable period that the-

ory was applied without any qualification.¹ Recently, however, the position has been

having reference to a range of functions which would embrace the proper treatment of passengers. Otherwise it would be inconsistent with the statement quoted in the text.

¹⁰⁰ In *Dillingham v. Anthony* (1889) 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139, the plaintiff, who was standing on the platform of a railway car, refused to comply with the conductor's order to enter the car, and in the altercation that ensued some blows were exchanged between them. The conductor then went away for a while, and, when he returned, struck the plaintiff with a ticket punch. Held, that the receivers operating the railway were liable in their official capacity for the injury. The court said: "It is urged that the court erred in charging that defendants would be liable if the acts of the conductor were wilful and malicious. There is no doubt that ordinarily the master is not liable for an injury resulting from the wilful and malicious acts of his agent, not done in the course of his employment. This is the rule in all cases in which the liability of the master depends on the sole fact that the person who inflicted the injury was in some business his servant; and if upon inquiry it be found that the act was not done while in the transaction of the master's business, then the act is not to be deemed the act of the master, for as to that the wrongdoer was not his servant. The rule, however, cannot be applied in a case in which the master, by contract, express or implied, is under obligation to protect the injured person from the servant's wrongful act as well as his own. When a duty is thus imposed on the master the servant employed to discharge it is the representative of the master, for whose acts, whether of omission or commission, resulting in injury to the person entitled to have the duty performed, the master must be held as fully responsible and liable to make at least actual compensation as though the act were his own personal act. In such cases if the servant does what the master could not do nor suffer to be done without violation of the particular duty resting upon him, or if the servant omits to do that requisite to the full discharge of the master's incumbent duty, then the master must be held responsible for the servant's wrongful or malicious act or omission; for otherwise it would result that a master might relieve himself from obligation to perform a duty fixed by contract or otherwise by the employment of servants to conduct the business to which the duty attaches. The master's obligation cannot thus be avoided; and whether the servant's act violative of the master's duty be wilful or malicious is a matter of no importance in determining the liability and obligation of the master to make actual compensation to the injured person."

¹ In *Texas Midland R. Co. v. Dean* (1905) 40 L.R.A.(N.S.)

98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135, the tort involved was a wrongful arrest.

In *International & G. N. R. Co. v. Miller* (1894) 9 Tex. Civ. App. 104, 28 S. W. 233 (writ of error denied in (1895) 87 Tex. 430, 29 S. W. 235), a railroad company was held liable for injuries inflicted upon a negro, of which the proximate cause was the excessive and unnecessary force used by a passenger called upon by the conductor to assist him in removing her from the car set apart to whites.

In *Missouri, K. & T. R. Co. v. Kendrick* (1895) — Tex. Civ. App. —, 32 S. W. 42, it was held that a breach of the company's duty as to protection was not predicable on the ground that the station agent refused to give a passenger, waiting to take a train, the name of a town where she could procure accommodation for a sick child.

In *Texas & P. R. Co. v. Bowlin* (1895) — Tex. Civ. App. —, 32 S. W. 918, a railroad company, which employed a policeman at a depot to look after passengers, was held to be liable to a passenger for loss of an eye, caused by the policeman striking him with a billy. The passenger, after having been roused from a drunken sleep, had started to his train, and at the time when he was assaulted was merely attempting to come back into the depot.

In *Houston & T. C. R. Co. v. Washington* (1895) — Tex. Civ. App. —, 30 S. W. 719, where a brakeman assaulted and ejected a passenger who had tendered his fare, the court rejected the contention that the defendant could not be held liable unless the brakeman had acted within the scope of his employment.

In *St. Louis Southwestern R. Co. v. Johnson* (1902) 29 Tex. Civ. App. 184, 68 S. W. 58, a railway company was held to be liable for an unwarranted assault committed by a conductor upon a disorderly passenger whom he was trying to quiet.

In *Gulf, C. & S. F. R. Co. v. Luther* (1905) 40 Tex. Civ. App. 517, 90 S. W. 44, where the right of the plaintiff to recover damages in respect of insults offered to his wife by a negro woman employed to take care of a waiting room was affirmed, the court explained its position as follows: "The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult from whatever source arising. He is not regarded as an insurer of his passengers' safety against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passengers' journey safe and comfortable. He must not only protect his passengers against the violence and insults of strangers and copassengers, but, *a fortiori*, against the violence and insults of his own servants. If his duty to the passenger is not performed, if this protection is not furnished, but, on the con-

taken that the carrier's duty to protect a given passenger is not absolute, but is predi-

cable only in respect of servants whose delegated functions have an immediate con-

trary, the passenger is assaulted and insulted through the negligence or the wilful misconduct of the carrier's servant, the carrier is necessarily responsible. And it seems to us it would be a cause of profound regret if the law were otherwise. The carrier selects his own servants, and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust."

In *Carpenter v. Trinity & B. Valley R. Co.* (1909) 55 Tex. Civ. App. 627, 119 S. W. 335, the remarks of a conductor that, if other conductors had carried her child without pay, he, if in her place, would not give them away, and would not tell it on them, are not open to the construction of charging her with undue infamy with them. The judgment entered on this verdict was set aside, but merely on account of error in an instruction by which the jury were told that the plaintiff was guilty of a criminal offense if her child had been carried without payment of fare.

In *Missouri, K. & T. R. Co. v. Morgan* (1911) — Tex. Civ. App. —, 138 S. W. 216, plaintiff's wife, desiring to go to A., where she resided, and believing that defendant's fast train stopped there to let off interstate passengers such as she was, boarded the train in accordance with the direction of defendant's station agent, who sold her a ticket. After having been directed to change from one car to another en route, she was informed by the defendant's conductor that the train would not stop at A., and that she would either have to pay her fare to D., or alight at the last stopping place before the train reached A. She declined to do either of these things, whereupon the conductor said to her that, if she lived at A., she knew that the train did not stop there, and then, before attempting to eject her, said, "Do not disgrace yourself here." He then pulled her up out of her seat and called on the auditor to help him to eject her. She then paid the fare demanded to the next station. Held, that the statements of the conductor imputed a falsehood to her as well as a charge of disgraceful conduct, and that, if this distressed and humiliated her, plaintiff was entitled to recover damages therefor.

In *Missouri, K. & T. R. Co. v. Brown* (1911) — Tex. Civ. App. —, 135 S. W. 1076, an instruction to find for the plaintiff if his decedent was pushed from the train by the porter, and the porter was acting "within the apparent scope of his authority," was held to be error, for the reason that the uncontradicted evidence showed that it was no part of the porter's duty, express or implied, to collect fares or put parties off the train. "But it was error in favor of appellant. If the deceased was a passenger on appellant's train, and was wrongfully pushed therefrom by the porter or any other servant of appellant, the appellant would be responsible for such wrongful act, 40 L.R.A. (N.S.)

without reference to the authority of such servant, real or apparent."

In *Fielder v. St. Louis, B. & M. R. Co.* (1908) 51 Tex. Civ. App. 244, 112 S. W. 699, where the plaintiff was assaulted by a roadmaster in the course of a personal altercation between them, it was held that, as he was entitled at least to nominal damages, even though the damages alleged resulted from other causes (defense was that injuries were due to plaintiff's alcoholism), it was error to instruct the jury to find for defendant if the damages did not result from the assault.

The carrier was also held liable in *Texas & P. R. Co. v. Edmond* (1895) — Tex. Civ. App. —, 29 S. W. 518 (passenger kicked off the step of a car, was held entitled to recover, although he was drunk at the time); *Texas & P. R. Co. v. Jones* (1897) — Tex. Civ. App. —, 39 S. W. 124 (woman insulted in waiting room by station agent's wife); *Galveston H. & S. A. R. Co. v. La Prelle* (1901) 27 Tex. Civ. App. 496, 65 S. W. 488 (conductor assaulted passenger with whom he had quarreled about the payment of the fare); *Houston & T. C. R. Co. v. Batchler* (1904) 37 Tex. Civ. App. 116, 83 S. W. 902 (similar facts); *Missouri, K. & T. R. Co. v. Gaines* (1904) 35 Tex. Civ. App. 257, 79 S. W. 1104 (plaintiff assaulted and insulted by conductor); *San Antonio Traction Co. v. Lambkin* (1907) — Tex. Civ. App. —, 99 S. W. 574 (insulting language used by conductor of street car); *Texas & P. R. Co. v. Cassidy* (1911) — Tex. Civ. App. —, 137 S. W. 389 (point principally discussed was whether relationship of carrier and passenger had ended when the latter was assaulted by a porter).

In the following cases where the right of recovery was affirmed, the existence of the duty of protection was presumably taken for granted, although it was not explicitly referred to; *Texas & P. R. Co. v. Tarkington* (1901) 27 Tex. Civ. App. 353, 66 S. W. 137 (words of conductor importing that a female passenger who had brought a child on the train without taking a ticket for it was attempting to evade the payment of its fare); *Denison & S. R. Co. v. Randell* (1902) 29 Tex. Civ. App. 460, 69 S. W. 1013 (ejection of a passenger who had paid his fare); *San Antonio Traction Co. v. Crawford* (1902) — Tex. Civ. App. —, 71 S. W. 306 (motorman addressed a female passenger in an insulting manner, and shook his fingers and an iron bar in her face, after she had, against her will, been carried past her destination); *El Paso Electric R. Co. v. Alderete* (1904) 36 Tex. Civ. App. 146, 81 S. W. 1246 (passenger ejected by conductor from a street car for refusing to unfold his transfer ticket upon handing it to the conductor; such refusal not a valid reason for ejection); *Missouri, K. & T. R. Co. v. Gerren* (1909) 57 Tex. Civ. App. 34, 121 S. W. 905 (assault by train auditor); *Dallas Consol. Electric Street R. Co. v. Gil-*

Washington.—It was recently laid down that the contract on the part of a carrier is "to safely carry its passengers, and to compensate them for all unlawful and tortious injuries inflicted by its servants."⁶ From this unqualified language the only reasonable inference is that, in respect, at least, of torts other than the wrongful use of criminal process, a carrier's liability in this state is deemed to be absolute.⁷ In one case the right of plaintiff to recover against

a carrier in respect of a wrongful arrest was denied on the ground that the servant at whose instance he was arrested was not shown to have been acting within the scope of his authority.⁸

West Virginia.—The doctrine adopted in this state is that, "in the case of a passenger, the carrier is not allowed to say that the assault or wilful wrong of the servant was an excess, outside his duty, and his own personal act."⁹ In one case

trust." The language of the court in *New Jersey S. B. Co. v. Brockett* (1887) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039, was also referred to with approval.

See also *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018, where a railway company was held liable for the act of a brakeman in assaulting, without justification, a disorderly passenger after the latter had been removed to another car. The statement of the law in *Hutchinson on Carriers* was adopted as correct.

⁶ *Blomsness v. Puget Sound Electric R. Co.* (1907) 47 Wash. 620, 17 L.R.A. (N.S.) 763, 92 Pac. 414 (assault).

⁷ In the context of the passage quoted in the text it was remarked that the defendant would not be liable, unless the act complained of was "within the scope of the servant's employment," and also within the apparent scope of the master's business. These statements, if taken literally, might be thought to connote a narrower range of liability than that of a guarantor; but their actual significance is indicated by the circumstances that the question upon which the decision actually turned was whether the relationship of carrier and passenger had ceased at the time when the alleged assault was made.

⁸ *Cunningham v. Seattle Electric R. & P. Co.* (1892) 3 Wash. 471, 28 Pac. 745 (arrest by conductor for disorderly conduct). The only precedent cited was *Galveston, H. & S. A. R. Co. v. Donahoe* (1882) 56 Tex. 162.

⁹ *Bess v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234. "It is among the implied provisions of the contract between a passenger and a railway company that the latter has employed suitable servants to run its trains, and that passengers shall receive proper treatment from them; and a violation of this implied duty or contract is actionable in favor of the passenger injured by its breach, though the act of its servant was wilful and malicious, as for a malicious assault upon a passenger, committed by any of the train hands, whether within the line of his employment or not. The duty of the carrier towards a passenger is contractual, and among other implied obligations is that of protecting a passenger from insults or assaults by other passengers or by their own servants. 2 Wood, *Railway Law*, p. 1194. There is no inquiry in such a case as to whether the wrong to the passenger is within the scope of his authority, or whether his act is wanton." 40 L.R.A. (N.S.)

In *Ricketts v. Chesapeake & O. R. Co.* (1890) 33 W. Va. 433, 7 L.R.A. 354, 25 Am. St. Rep. 901, 10 S. E. 801 (decided a year before the above case), the liability of the carrier for an assault made by a brakeman during a personal altercation between him and a passenger who was smoking in the ladies' car was taken for granted; the only question considered being the right of the plaintiff to recover exemplary damages.

The doctrine that a carrier is under an absolute contractual duty to protect passengers from wilful and unlawful injury by its servants was also applied in *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103, where the plaintiff's decedent was shot by a special policeman in the course of an altercation which arose out of the nonpayment of the fare. The effect of the decision is thus stated in the syllabus of the court: A public officer, specially employed by a carrier to perform services for it, is its servant while acting within the scope of his employment; and if he, in the performance of such services, wrongfully inflicts an injury upon a passenger, the carrier is liable, though the injury was wilful and malicious, and prompted by personal motive, such as resentment of insults or punishment for a wrong perpetrated upon himself. It was held not to be error for the trial judge to refuse an instruction to the effect (1) that the jury should find for the carrier if the injurious act, which was incident to the particular transaction in which the employee was engaged, was not within the scope of his duty, and (2) that, if he left defendant's train, engaging in a quarrel with the employee or special police officer by whom he was killed, defendant was not liable. The latter instruction was held to have been properly modified by the insertion of the word "unlawfully" before "engaging." It should be observed that the words "within the scope of his employment," as used in the syllabus, and the words "within the scope of his duty," as used in the instruction disappeared, have two entirely different connotations. The former phrase relates to the distinction predicable between acts done by the tortfeasor as a public officer and acts done by him as a servant. The latter has reference to the general rule which limits the vicarious liability of a master to such torts as have an immediate connection with the performance of the servant's duties,—a rule which has sometimes been viewed as not

the liability of a railway company to a passenger who had been wrongfully arrested was affirmed on the ground that the tort was a violation of the company's contract to treat passengers properly and carry them safely.¹⁰

Wisconsin.—The actual scope of the earliest relevant decision in this state was that the effect of the contract of carriage was to render the defendant railway company liable to passengers in respect of the wilful as well as of the negligent acts of its servants, but that this liability was restricted to such wilful torts as were within the scope of the tortfeasor's employment.¹¹ The court avowedly followed the leading

New York case in which a doctrine of a similar purport had been enunciated two years previously. Fifteen years later, however, the conception of a carrier's absolute liability in respect of the indemnification of passengers emerges in a statement to the effect that the defendant railway company was "responsible for the acts of the officers in the conduct and government of the train, to the passengers traveling by it, as the officers would be for themselves, if they were themselves the owners of the road and train."¹² The theory upon which two subsequent decisions proceeded was that of an absolute obligation on the carrier's part to protect his passenger against the

being applicable at all in cases where a passenger is suing a carrier, and sometimes as being applicable only in a special sense, determined by the existence of the contract of carriage and its resulting obligations.

For other cases which embody the doctrine stated in the text, see *Smith v. Norfolk & W. R. Co.* (1900) 48 W. Va. 69, 35 S. E. 834 (defendant held liable for an aggravated and unjustifiable assault by a conductor upon a passenger who was being ejected for disorderly conduct); *Teel v. Coal & Coke Co.* (1909) 66 W. Va. 315, 66 S. E. 470 (main question discussed was whether assault by brakeman was justifiable as being made for defensive purposes); *McDade v. Norfolk & W. R. Co.* (1910) 67 W. Va. 582, 68 S. E. 378 (similar remark applies).

¹⁰ *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243 (plaintiff, having been mistaken for the actual culprit, was given into custody by a conductor on a charge of disorderly conduct). The court said: "It makes no difference what was the conductor's motive for doing the act,—how exclusively personal it may have been, or how foreign to the master's business then in hand, of transporting the passenger, if the act was in violation of the master's duty to the passenger, which it was the conductor's duty to discharge and perform as the master's servant and in the master's place. And the same principle applies to other acts in the same circumstances, such as assault and battery." In answer to one of the interrogatories the jury had stated that the conductor had been authorized by the company to cause the arrest, but did not give the name of any special official, or the manner or the time of conferring the authority. Commenting upon this answer the court said: "No special authority from any official was needed. The liability of the company grew out of its obligation to answer for any injury inflicted upon the passenger by the wilful misconduct or negligence of its servant, who was put in charge of the train for the purpose and with the duty of carrying the passengers safely. This special question also was, therefore, immaterial; and if it had been answered as 40 L.R.A. (N.S.)

to the special official with a 'No' instead of a 'Yes,' it would still have been the duty of the court not to permit it to control the general verdict."

¹¹ *In Milwaukee & M. R. Co. v. Finney* (1860) 10 Wis. 388, where a conductor had wrongfully expelled a passenger from a train, the court, in laying down the law with reference to a new trial, thus commented upon *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474, "The rule established by that case, as we think with much reason, is, that where the misconduct of the agent causes a breach of the obligation or contract of the principal, then the principal will be liable in an action, whether such misconduct be wilful or malicious, or merely negligent. The action, though undeniably in tort, is treated virtually as an action *ex contractu* and governed by the same rule as to damages, unless the malice or wantonness of the agent is brought home and directly charged to the principal. In this case the contract between the plaintiff and defendants was, that in consideration of his having paid to them the fee demanded, they were carefully to transport him in their cars from Madison to Edgerton. It is no defense for their breach of this contract that it was occasioned by the wilful act of their agent. The corporation was incapable of executing it except through the medium of its agents. If in so doing they violate it, no matter from what motive, their acts are the acts of their principals, who hold them out to the world as capable and faithful in the discharge of their duties. In no other way could the company be held to a performance of its contracts. The case differs materially from those cases where the agent or servant goes out of the line of his duty in the service of his principal or master, and commits a wilful injury. Such wrong involves no violation of duty or contract on the part of the master or principal."

¹² *Bass v. Chicago & N. W. R. Co.* (1874) 36 Wis. 450, 17 Am. Rep. 495 (defendant liable for wrongful expulsion of passenger from a train by a conductor). It should be observed that, as the tort here involved was clearly within the scope of the tortfeasor's authority, the decision in favor of

wrongful acts of his servants.¹⁴ In a still later case, we find the carrier's liability predicated upon the ground that the tort was committed by the servant "within the scope of his employment."¹⁵

Although the opinion does not allude to

the contractual obligations of a carrier, it seems probable, in view of the earlier rulings, that this phrase was used in its broader sense. But it is somewhat remarkable that the doctrinal standpoint of the court was not defined more clearly.

the plaintiff did not require for its support so broad a doctrine as that which was formulated.

¹⁴In *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504, a verdict in favor of a female passenger against a railroad company whose conductor had attempted improper familiarities with her was sustained. The court reasoned thus: "We do not understand it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would have been liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that, though the principal would be liable for the negligent failure of the agent to fulfil the principal's contract, the principal is not liable for the malicious breach by the agent, of the contract which he was appointed to perform for his principal; as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*. The radical difficulty in the argument is, that it limits the contract. The carrier's contract is to protect the passenger against all the world; the appellant's construction is, that it was to protect the respondent against all the world except the conductor, whom it appointed to protect her; reserving to the shepherd's dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity. . . . We are unwilling to waste time or patience in discussing the conductor's violation of the appellant's contract with the respondent. Every woman has a right to assume that a passenger car is not a brothel; and that when she travels in it, she will meet nothing, see nothing, hear nothing, to wound her delicacy or insult her womanhood. It is enough to say that the appellant's contract of careful carriage with the respondent was not kept,—was tortiously violated by the officer appointed by the appellant to keep it." The decision in *Wilson v. Young* (1872) 31 Wis. 574, was overruled.

In *Fisk v. Chicago & N. W. R. Co.* (1887) 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527, an employee left in charge of the ticket office by the ticket agent failed to return the proper change upon the sale of a ticket, and, upon being asked therefor by the purchaser, assaulted and struck him. Held, 40 L.R.A. (N.S.)

that the railway company was liable. The court said: "Of course the defendant owed the plaintiff the duty of treating him respectfully and properly. Certainly it was bound to protect him against the violent acts of misconduct of its agents. There would probably be no controversy as to the correctness of this view of the law, or as to the liability of the defendant for the wilful act of a servant while acting in the course of his employment. . . . While it may be true that Edward W. Davis was not the regular ticket agent, yet, under the circumstances, he must be regarded as authorized to issue the ticket. The special verdict finds that at this time the 'fracas' occurred, or the unlawful assault was committed. Now, to say that Edward W. Davis was a servant of the defendant in selling the ticket and receiving pay for it, but while in the act of refusing to return the proper change and in making the assault was acting outside the course of his employment, is refining too much upon the transaction. It is not as though the fracas had occurred at a subsequent time and place, disconnected with the act of selling the ticket and making change. . . . It would be unjust to hold that the defendant, which was bound to use all due diligence to carry the plaintiff safely to his destination, was not bound to protect him against the violent act of its servant under the circumstances of the case. True, the jury, in answer to the fourteenth question, find that the striking of the plaintiff by Edward W. Davis was not done by him in the course of his employment. But this, in view of the other findings, amounts only to a conclusion of law, and is not controlling as to the fact." The phrase, "in the course of the employment," clearly cannot be intended to bear the same meaning as attaches to it in cases where no privity of contract is involved; for the assault in question was not made in furtherance of the master's business, but merely to gratify the personal resentment of the servant. The sense which is ascribed to it by the statement in the text seems to be the one which is indicated by the general course of the reasoning in the opinion. It is noteworthy, however, that the *Craker Case*, supra, was cited by counsel, but was not referred to at all by the court.

¹⁵*Lugner v. Milwaukee Electric R. & Light Co.* (1911) 146 Wis. 175, 131 N. W. 342 (assault committed by conductor in attempting to eject passenger for nonpayment of fare).

In *Robinson v. Superior Rapid Transit R. Co.* (1896) 94 Wis. 345, 34 L.R.A. 205, 59 Am. St. Rep. 890, 68 N. W. 961, where the defendant was held liable for ejecting

III. General discussion of theories respecting the nature and extent of a carrier's liability.

a. Introduction.

The character of the torts for which damages were claimed in the cases cited in the following general review will be merely indicated by brief memoranda. For further information regarding the circumstances involved and the doctrinal position of the courts, the reader will consult the separate sections which deal with the decisions in each jurisdiction. An analysis of those decisions shows that they illustrate three different theories as to the nature and limits of a carrier's liability in respect of injuries resulting from wilful misconduct of his servant.

b. Theory which treats the contract as a negligible factor.

Under one theory, no specific significance is attached to the element of privity of contract as between the carrier and the passenger. In this point of view it is ob-

vious that the only question to be considered is whether the given act was or was not within the scope of the tortfeasor's employment or authority, in the sense in which that phrase is used in actions by strangers. That is to say, the passenger is or is not deemed to be entitled to recover, according as the immediate purpose of the act was or was not the furtherance of the carrier's business. It is upon this basis that the passenger's right of recovery always has been and is still tested in the United Kingdom and the British Possessions generally. The same doctrine has been applied at one time or another in a considerable number of American cases. The decisions rendered with reference to it have involved the following descriptions of torts:

(1) The wrongful removal of a passenger from a vehicle or other place where he had a right to be.¹⁶

(2) The removal of a passenger in an improper manner from a vehicle or other place where he had no right to be.¹⁷

(3) The subjection of a passenger's person to some other kind of violence.¹⁸

a passenger who had paid his fare, the only point actually discussed was whether exemplary damages were recoverable.

¹⁶ For cases in which actions were held to be maintainable by persons who had been ejected from vehicles or railway cars, see *Bayley v. Manchester, S. & L. R. Co.* (1873) L. R. 8 C. P. (Exch. Ch.) 148, 42 L. J. C. P. N. S. 78, 28 L. T. N. S. 366, 25 Eng. Rul. Cas. 115, affirming (1872) L. R. 7 C. P. 415, 41 L. J. C. P. N. S. 278; *Lowe v. Great Northern R. Co.* (1893) 62 L. J. Q. B. N. S. 524, 9 Times L. R. 316, 5 Reports, 535; *Hanlon v. Glasgow & S. W. R. Co.* (1899) 1 Sc. Sess. Cas. 5th series 559; *Turner v. North Beach & M. R. Co.* (1868) 34 Cal. 594; *Chicago, B. & Q. R. Co. v. Bryan* (1878) 90 Ill. 126; *Chicago Union Traction R. Co. v. McClevey* (1900) 126 Ill. App. 21; *Evansville & C. R. Co. v. Baum* (1866) 26 Ind. 70; *Jeffersonville R. Co. v. Rogers* (1871) 38 Ind. 116, 10 Am. Rep. 103; *Indianapolis, P. & C. R. Co. v. Anthony* (1873) 43 Ind. 183; *Terre Haute & I. R. Co. v. Fitzgerald* (1874) 47 Ind. 79; *Pittsburgh, C. & St. L. R. Co. v. Theobald* (1875) 51 Ind. 246; *Moore v. Fitchburg R. Corp.* (1855) 4 Gray, 465, 64 Am. Dec. 83; *Great Western R. Co. v. Miller* (1869) 19 Mich. 305; *Travers v. Kansas P. R. Co.* (1876) 63 Mo. 421; *Passenger R. Co. v. Young* (1871) 21 Ohio St. 518, 8 Am. Rep. 78; *Lugner v. Milwaukee Electric R. & Light Co.* (1911) 146 Wis. 175, 131 N. W. 342.

The action was also held to be maintainable in *Trabing v. California Nav. & Improv. Co.* (1898) 121 Cal. 137, 53 Pac. 644, where the officers of a steamer imprisoned plaintiff and ejected him before he reached his destination, and in *Redding v. 40 L.R.A.(N.S.)*

South Carolina R. Co. (1871) 3 S. C. 1, 16 Am. Rep. 681, where a negro passenger assaulted and dragged out of a waiting room was held to be entitled to damages.

¹⁷ The action was held to be maintainable in *Seymour v. Greenwood* (1861) 7 Hurlst. & N. (Exch. Ch.) 355, 8 Jur. N. S. 214, 30 L. J. Exch. N. S. 327, 9 Week. Rep. 785, 4 L. T. N. S. 833, affirming (1861) 6 Hurlst. & N. 359, 30 L. J. Exch. N. S. 189, 9 Week. Rep. 518; *Converse v. Washington & G. R. Co.* (1876) 2 Mac Arth. 504 (ejection from moving train); *New York, L. E. & W. R. Co. v. Haring* (1885) 47 N. J. L. 137, 54 Am. Rep. 123, (conductor used unnecessary force in ejecting a passenger for refusal to pay his fare); *McKinley v. Chicago & N. W. R. Co.* (1876) 44 Iowa, 314, 24 Am. Rep. 748 (brakeman used excessive force in preventing a man from entering a car reserved for ladies).

¹⁸ The carrier was held liable in *Louisville, N. A. & C. R. Co. v. Wood* (1887) 113 Ind. 544, 14 N. E. 572, 16 N. E. 197 (railway passenger while alighting was seized and thrown off); *Baltimore & O. R. Co. v. Blocher* (1867) 27 Md. 277 (plaintiff was compelled by a threat of expulsion to pay his fare a second time); *Ramsden v. Boston & A. R. Co.* (1870) 104 Mass. 117, 6 Am. Rep. 200 (assault committed to enforce the payment of fare); *Texas & P. R. Co. v. Graves* (1882; Tex. Sup.) 2 Posey Unrep. Cas. (Tex.) 306 (assault made upon plaintiff by conductor for the purpose of protecting another passenger who was supposed to be in danger of being injured by plaintiff); *Robertson v. Balmmain New Ferry Co.* (1906) 6 New South Wales St. Rep. 195, 23 N. W. 70 (recovery allowed

(4) Wrongful arrest, false imprisonment, or malicious prosecution.¹⁹

In several of the jurisdictions in which cases have been decided with reference to this criterion, the conception of an absolute duty on the carrier's part to protect his passengers against the torts of his servants has now been adopted. This, however, is a doctrinal development which, so far as actual right of recovery is concerned, can be material only in relation to circumstances under which claims are nonenforceable, if the carrier is assumed not to be answerable for any torts of his servant except those committed within the scope of his employment or authority. It is obvious, therefore, that, as the plaintiffs were successful in most of the cases cited in the present section, they were in no wise prejudiced by the fact that those cases were decided with reference to the more restricted theory regarding the carrier's liability. The decisions show that that theory has been superseded, as the test of responsibility for wilful torts generally, in Illinois, Indiana, Iowa, Maryland, Massachusetts, Texas, and Wisconsin; and as the test of responsibility for the abuse of criminal process also in Arkansas, Maryland, Missouri, and Texas. The Tennessee cases indicate a su-

persession in respect of torts of the former description only.

c. Theory which treats the contract as a factor extending the carrier's liability to a limited class of acts.

Under another theory the contract of carriage has been regarded as an element which operates so as to extend the carrier's liability to wilful torts in so far as they are "within the scope of the employment" of the tortfeasors; this phrase being used in the same sense as it bears in the class of cases adverted to in the preceding section. This theory was first propounded in New York at a time when the general rule which prevailed both in that jurisdiction and elsewhere limited the vicarious liability of a master to negligent acts. Its adoption, therefore, established an important distinction in favor of passengers as contrasted with strangers. In cases decided in that state both before and after the recognition of the broader doctrine discussed in the following section, it was applied with reference to claims in respect of the following torts:

(1) Misconduct which caused delay in the movement of a train.²⁰

for an assault committed by the servants of a ferry company in attempting to enforce a regulation).

Recovery was denied on the ground of lack of authority, in *Pittsburg, A. & M. Pass. R. Co. v. Donahue* (1871) 70 Pa. 119, where a passenger was struck by a driver with an iron bar, so that he was forced off. But this is a very dubious case.

For cases in which the right of recovery was denied for the reason that the given torts were outside the line of the duty of the tortfeasors, see *Goodloe v. Memphis & C. R. Co.* (1894) 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 106 (passenger accidentally struck while a servant was engaged in a friendly scuffle with a fellow servant; dubious decision, so far as Alabama is concerned); *Little Miami R. Co. v. Wetmore* (1896) 19 Ohio St. 110, 2 Am. Rep. 373 (assault actuated by personal resentment); *Scanlon v. Suter* (1893) 158 Pa. 275, 27 Atl. 963 (assault during personal altercation); *Berryman v. Pennsylvania R. Co.* (1910) 228 Pa. 621, 30 L.R.A. (N.S.) 1049, 77 Atl. 1011 (assault during personal altercation); *Emerson v. Niagara Nav. Co.* (1883) 2 Ont. Rep. 528 (assault made by the purser of a steamboat upon a passenger with whom he had had a dispute regarding the payment of the fare).

In *McFarlan v. Pennsylvania R. Co.* (1901) 199 Pa. 408, 49 Atl. 270, where a conductor assaulted the plaintiff as he was entering a train, a verdict in his favor was sustained on the ground that the evidence

justified the inference that the tort was committed in the course of the conductor's employment.

¹⁹ Recovery was allowed in *Moore v. Metropolitan R. Co.* (1872) L. R. 8 Q. B. 30, 42 L. J. Q. B. N. S. 23, 27 L. T. N. S. 579, 21 Week. Rep. 145; *West Chicago Street R. Co. v. Luleich* (1899) 85 Ill. App. 643; *Berry v. Carolina C. & O. R. Co.* (1911) 155 N. C. 287, 71 S. E. 322; *Eichengreen v. Louisville & N. R. Co.* (1896) 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219; *Duggan v. Baltimore & O. R. Co.* (1893) 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186.

The right of action was denied in *Eastern Counties R. Co. v. Broom* (1851) 6 Exch. (Exch. Ch.) 314, 20 L. J. Exch. N. S. 196, 15 Jur. 297 (ticket collector); *Little Rock Traction & Electric Co. v. Walker* (1898) 65 Ark. 144, 40 L.R.A. 473, 45 S. W. 57 (overruled by later cases); *Lafitte v. New Orleans City & Lake R. Co.* (1891) 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701; *Schmidt v. New Orleans R. Co.* (1906) 116 La. 311, 7 L.R.A. (N.S.) 162, 40 So. 714; *Central R. Co. v. Brewer* (1894) 78 Md. 401, 27 L.R.A. 63, 28 Atl. 615; *Galveston, H. & S. A. R. Co. v. Donahue* (1882) 56 Tex. 162 (now overruled); *Cunningham v. Seattle Electric R. & P. Co.* (1892) 3 Wash. 471, 28 Pac. 745.

²⁰ *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474 (act of conductor which caused delay in movement of train).

(2) A sudden cessation of work, which caused a delay in the transportation of goods. ^{20a}

(3) The wrongful removal of a passenger from a railway car. ²¹

(4) The removal of a passenger in an improper manner from a railway car, ²² or from some part thereof. ²³

(5) The use of insulting language to a passenger. ²⁴

(6) Wrongful arrest and false imprisonment. ²⁵

The original doctrine of the New York courts has been applied in a few other jurisdictions. ²⁶ But as the consensus of judicial opinion is now overwhelmingly in favor of imputing to masters, even where the aggrieved parties are strangers, liability for the wilful torts of their servants, it is obvious that a doctrine of which the essence is merely that the contract of carriage serves to create, in respect of such torts, a liability which would not other-

wise be predicable, no longer possesses much practical importance.

d. Theory which treats the contract as imposing absolute obligations on the carrier.

Under a third theory the contract of carriage is regarded as an element which operates so as to impose upon the carrier an absolute liability in respect of the wilful torts of his servants. The torts in respect of which liability has been imputed to carriers upon this footing have in many instances been of such a nature that the plaintiffs would have been entitled to recover under either of the theories discussed in the two preceding sections.

(1) The wrongful removal of a passenger from a railway car or other place where he had a right to be, by a servant authorized to effect the removal. ²⁷

(2) The removal of a passenger by such

^{20a} Blackstock v. New York & E. R. Co. (1859) 20 N. Y. 48, 75 Am. Dec. 372, affirming (1857) 1 Bosw. 77.

²¹ The liability of the carrier was affirmed in the following cases, decided before the change of doctrine in New York: Higgins v. Watervliet Turnp. & R. Co. (1871) 46 N. Y. 23, 7 Am. Rep. 293; Hamilton v. Third Ave. R. Co. (1873) 53 N. Y. 25; Schultz v. Third Ave. R. Co. (1880) 14 Jones & S. 211; Murphy v. Central Park, N. & E. River R. Co. (1882) 16 Jones & S. 96; Rown v. Christopher & T. Street R. Co. (1885) 34 Hun, 471; Wright v. Glens Falls, S. H. & Ft. E. Street R. Co. (1898) 24 App. Div. 617, 48 N. Y. Supp. 1026.

²² For cases in which the action was held to be maintainable, see Jackson v. Second Ave. R. Co. (1872) 47 N. Y. 274, 7 Am. Rep. 448; Peck v. New York C. & H. R. R. Co. (1877) 70 N. Y. 587, affirming (1875) 4 Hun, 236, 6 Thomp. & C. 436; Meyer v. Second Ave. R. Co. (1861) 8 Bosw. 305.

It is apprehended that the decision in Isaacs v. Third Ave. R. Co. (1871) 47 N. Y. 122, 7 Am. Rep. 418, where the act of a conductor in ejecting a passenger in an improper manner was held not to be within the scope of his employment, was, upon the facts, erroneous.

²³ Shea v. Sixth Ave. R. Co. (1875) 62 N. Y. 180, 20 Am. Rep. 480; Moritz v. Interurban Street R. Co. (1903) App. Div. 84 N. Y. Supp. 162 (action held to be maintainable when motorman struck plaintiff for the purpose of making him get off the front platform of a street car). The last-mentioned case was decided after the change of doctrine.

²⁴ In Parker v. Erie R. Co. (1875) 5 Hun, 57, insulting words uttered by a conductor in the course of a personal altercation were held not to be imputable to the carrier.

²⁵ The actions were held to be maintainable in Lynch v. Metropolitan Elev. R. Co. 40 L.R.A. (N.S.)

(1882) 90 N. Y. 77, 43 Am. Rep. 141; Mulligan v. New York & R. B. R. Co. (1892) 129 N. Y. 506, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952; Palmeri v. Manhattan R. Co. (1892) 133 N. Y. 261, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001; Rown v. Christopher & T. Street R. Co. (1885) 34 Hun, 471; Corbett v. Twenty-Third Street R. Co. (1886) 42 Hun, 587; Shea v. Manhattan R. Co. (1890; C. P.) 15 Daly, 528, 29 N. Y. S. R. 313, 8 N. Y. Supp. 332. It should be observed that all these cases, except the first, were decided after the change of doctrine.

²⁶ The Weed Case (note 20, supra) was relied upon in Converse v. Washington & G. R. Co. (1876) 2 Mac Arth. 504 (ejection from moving train); Milwaukee & M. R. Co. v. Finney (1860) 10 Wis. 388 (ejection from train).

²⁷ In the following cases the plaintiffs were ejected from railway cars by or under the directions of conductors: Murphy v. Western & A. R. Co. (1885) 23 Fed. 637; Louisville & N. R. Co. v. Perkins (1905) 144 Ala. 325, 39 So. 305; Atlanta Consol. Street R. v. Keeny (1896) 99 Ga. 266, 33 L.R.A. 824, 25 S. E. 629; Illinois C. R. Co. v. Davenport (1898) 177 Ill. 110, 52 N. E. 266 (ejection by brakeman acting under orders of conductor); Chicago, R. I. & P. R. Co. v. Barrett (1884) 16 Ill. App. 17; Southern Kansas R. Co. v. Rice (1888) 39 Kan. 398, 5 Am. St. Rep. 766, 16 Pac. 817; Winnegar v. Central Pass. R. Co. (1887) 85 Ky. 547, 4 S. W. 237; Tanger v. Southwest Missouri Electric R. Co. (1900) 85 Mo. App. 28; (1886) 21 Mo. App. 399; Quigley v. Central P. R. Co. (1876) 11 Nev. 350, 21 Am. Rep. 757; Muckle v. Rochester R. Co. (1894) 79 Hun, 32, 29 N. Y. Supp. 732; Smith v. Manhattan R. Co. (1892; C. P.) 45 N. Y. S. R. 865, 18 N. Y. Supp. 759; Macnair v. New York C. & H. R. R. Co. (1902) 70 App. Div. 405, 75 N. Y. Supp. 521;

a servant in an improper manner from a railway car or other place where he had no right to be.²⁸

(3) An assault committed upon a passenger for the purpose of enforcing a regulation which he was bound to observe.²⁹

On the other hand, the wider consequences of predicating an absolute obligation on the carrier's part to protect the passenger against the wrongful acts of his

servants are apparent in decisions by which the liability of the carrier has been affirmed in respect of such misfeasances as these.

(4) The wrongful removal of a passenger from a railway car by a servant not authorized to effect the removal.³⁰

(5) An assault made upon the passenger in the course of a personal altercation between him and a servant.³¹

Schwartzman v. Brooklyn Heights R. Co. (1903) 84 App. Div. 608, 82 N. Y. Supp. 890.

"When a railway company puts a conductor in charge of its train, and he purposely and wrongfully ejects the passenger from the cars, the railway company must bear the blame and pay the damages." *Cooley, Torts*, 2d ed. p. 626, quoted in *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 594, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

The remedial rights of a passenger wrongfully ejected from a railroad train cannot be affected by any rule of the carrier prescribing the duties of its agents or conductors. *Baltimore & O. R. Co. v. Thornton* (1911) 110 C. C. A. 502, 188 Fed. 868 (ejection of person who had purchased a wrong ticket from the company's agent).

The right of a passenger to recover damages for being wrongfully compelled to move to another car in the same train was affirmed in *Southern R. Co. v. Thurman* (1906) 121 Ky. 716, 2 L.R.A.(N.S.) 1108, 90 S. W. 240.

Seaboard Air-Line R. Co. v. O'Quin (1905) 124 Ga. 357, 2 L.R.A.(N.S.) 472, 52 S. E. 427. The law is thus laid down in the syllabus written by the court: "When a common carrier undertakes, through its servants, to exercise its right to eject from its cars passengers who have been guilty of disorderly conduct, it acts at its peril in determining their identity; and if, by mistake, one who has in no way forfeited his rights as a passenger be ejected, the carrier will be liable to respond in damages for the tort thus committed by its servants, their good faith being only available in defeating a recovery of punitive damages."

²⁸ Railway companies were held liable for the acts of conductors in *Gallena v. Hot Springs R. Co.* (1882) 4 McCrary, 371, 13 Fed. 116 (conductor used loaded revolver in ejecting passenger); *Louisville & N. R. Co. v. Whitman* (1885) 79 Ala. 328; *Western & A. R. Co. v. Turner* (1884) 72 Ga. 292, 53 Am. Rep. 842 (unnecessary force used in ejecting person who went on freight train to treat with conductor about a passage in the customary manner); *Illinois C. R. Co. v. Davenport* (1898) 177 Ill. 110, 52 N. E. 266 (passenger ejected from moving train by brakeman acting under order of conductor); *Chicago, R. I. & P. R. Co. v. Barrett* (1884) 16 Ill. App. 17 (unreasonable force used in ejecting a passenger who had misconducted himself); *Illinois C. R. Co. v. Sheehan* (1888) 29 Ill. App. 90 (passenger ejected from moving train); *Baltimore & O. R. Co. v. Norris* (1897) 17 Ind. App. 189, 60 Am. St. Rep. 166, 46 N. E. 554 (unnecessary force used in ejecting person who refused to pay proper fare); *Citizens' Street R. Co. v. Clark* (1904) 33 Ind. App. 190, 104 Am. St. Rep. 249, 71 N. E. 53; *McGinnis v. Missouri R. Co.* (1886) 21 Mo. App. 399; *International & G. N. R. Co. v. Miller* (1894) 9 Tex. Civ. App. 104, 28 S. W. 233, writ of error denied in (1895) 87 Tex. 430, 29 S. W. 235.

Passengers who had been subjected to unwarrantable violence by servants engaged in removing them from one part of a vessel to another were held to be entitled to recover, in *New Jersey S. B. Co. v. Brackett* (1887) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039; *R. R. Springer Transp. Co. v. Smith* (1886) 16 Lea, 498, 1 S. W. 280.

²⁹ *Central of Georgia R. Co. v. Motes* (1903) 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990; *St. Louis Southwestern R. Co. v. Johnson* (1902) 29 Tex. Civ. App. 184, 68 S. W. 58 (conductor used force in trying to quiet a disorderly passenger). See also the cases cited in notes 27, 28, *supra*.

³⁰ *Lindsay v. Oregon Short Line R. Co.* (1907) 13 Idaho, 477, 12 L.R.A.(N.S.) 184, 90 Pac. 984; *Wabash R. Co. v. Savage* (1886) 110 Ind. 156, 9 N. E. 85; *Cain v. Minneapolis & St. L. R. Co.* (1888) 39 Minn. 297, 39 N. W. 635.

³¹ *New Orleans & N. E. R. Co. v. Jones* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109; *Texas & P. R. Co. v. Williams* (1894) 10 C. C. A. 463, 23 U. S. App. 379, 62 Fed. 440; *Gallena v. Hot Springs R. Co.* (1882) 4 McCrary, 371, 13 Fed. 116 (charge to jury); *Rohrbach v. Pullman's Palace Car Co.* (1909) 166 Fed. 797; *Lampkin v. Louisville & N. R. Co.* (1894) 106 Ala. 287, 17 So. 448; *Birmingham R. & Electric Co. v. Baird* (1900) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456; *Birmingham R. Light & P. Co. v. Mullen* (1903) 138 Ala. 614, 35 So. 701; *Alabama City, G. & A. R. Co. v. Sampley* (1910) 169 Ala. 372, 53 So. 142; *St. Louis, I. M. & S. R. Co. v. Dowgiallo* (1907) 82 Ark. 289, 101 S. W. 412; *Pelot v. Atlantic Coast Line R. Co.* (1910) 60 Fla. 159, 53 So. 937; *Gasway v. Atlanta & W. P. R. Co.* (1877) 58 Ga. 216; *Peoples v. Brunswick & A. R. Co.* (1878) 60 Ga. 281; *Atlanta & W. P. R. Co. v. Condon* (1885) 75 Ga. 51; *Peavy v. Georgia R. & Bkg. Co.* (1888) 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70; *Savannah Street R. Co. v. Bryan* (1890) 86 Ga. 312, 22 Am. St. Rep. 464, 12 S. E. 307; *East Tennessee, V. & G.*

- R. Co. v. Fleetwood (1892) 90 Ga. 23, 15 S. E. 778; Georgia R. & Bkg. Co. v. Richmond (1896) 98 Ga. 495, 25 S. E. 505; Brunswick & W. R. Co. v. Moore (1897) 101 Ga. 684, 28 S. E. 1000; Georgia R. & Bkg. Co. v. Hopkins (1899) 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965; Dannenberg v. Berkner (1903) 118 Ga. 886, 45 S. E. 682 (first appeal (1902) 116 Ga. 955, 60 L.R.A. 559, 43 S. E. 463); Savannah Electric Co. v. Pritchard (1910) 133 Ga. 747, 66 S. E. 952; Mason v. Nashville, C. & St. L. R. Co. (1910) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225; Chicago & E. R. Co. v. Flexman (1882) 103 Ill. 540, 42 Am. Rep. 33, affirming (1881) 9 Ill. App. 250; McMahon v. Chicago City R. Co. (1909) 239 Ill. 334, 88 N. E. 223, affirming (1908) 143 Ill. App. 608; Hanson v. Urbana & C. Electric Street R. Co. (1897) 75 Ill. App. 474; Terre Haute & I. R. Co. v. Jackson (1881) 81 Ind. 19; Indianapolis Union R. Co. v. Cooper (1892) 6 Ind. App. 202, 33 N. E. 219; Baltimore & O. S. W. R. Co. v. Davis (1909) 44 Ind. App. 375, 89 N. E. 403; Memphis & C. Packet Co. v. Pikey (1895) 142 Ind. 304, 40 N. E. 527 (passenger shot by second mate of steamer); Atchison, T. & S. F. R. Co. v. Henry (1895) 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952; Missouri P. R. Co. v. Dwinney (1903) 66 Kan. 776, 71 Pac. 855; Sherley v. Billings (1871) 8 Bush, 147, 8 Am. Rep. 451; Wise v. Covington & C. Street R. Co. 91 Ky. 537, 16 S. W. 351; Louisville R. Co. v. Kupper (1909) — Ky. —, 118 S. W. 266; Keene v. Lizard (1833) 5 La. 431, 25 Am. Dec. 197; Block v. Bannerman (1855) 10 La. Ann. 1; Williams v. Pullman Palace Car Co. (1888) 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85; Lafitte v. New Orleans City & Lake R. Co. (1891) 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701; Goddard v. Grand Trunk R. Co. (1869) 57 Me. 202, 2 Am. Rep. 39; Central R. Co. v. Peacock (1888) 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709; McGilvray v. West End Street R. Co. (1895) 104 Mass. 122, 41 N. E. 116; Jackson v. Old Colony Street R. Co. (1910) 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615; Horgan v. Boston Elev. R. Co. (1911) 208 Mass. 287, 94 N. E. 386; Hanson v. European & N. A. R. Co. (1873) 62 Me. 84, 16 Am. Rep. 404; Central R. Co. v. Peacock (1888) 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709; Philadelphia, B. & W. R. Co. v. Green (1909) 110 Md. 32, 71 Atl. 986; Bryant v. Rich (1870) 106 Mass. 180, 8 Am. Rep. 311; Hayne v. Union Street R. Co. (1905) 189 Mass. 551, 3 L.R.A. (N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219; Jackson v. Old Colony Street R. Co. (1910) 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615; Johnson v. Detroit, Y. & A. A. R. Co. (1902) 130 Mich. 453, 90 N. W. 274; Conger v. St. Paul, M. & M. R. Co. (1891) 45 Minn. 207, 47 N. W. 788; Malecek v. Tower Grove & L. R. Co. (1874) 57 Mo. 17; Spohn v. Missouri P. R. Co. (1894) 122 Mo. 1, 26 S. W. 663; O'Brien v. St. Louis Transit Co. (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939; Randolph v. Hannibal & St. J. R. Co. (1885) 18 Mo. App. 609; Eads v. Metropolitan R. Co. (1891) 43 Mo. App. 536; Murphy v. St. Louis Transit Co. (1902) 96 Mo. App. 272, 70 S. W. 159; Shelby v. Metropolitan Street R. Co. (1910) 141 Mo. App. 514, 125 S. W. 1189; Keen v. St. Louis, I. M. & S. R. Co. (1908) 129 Mo. App. 301, 108 S. W. 1125; Strauss v. St. Louis Transit Co. (1903) 102 Mo. App. 644, 77 S. W. 156; O'Donnell v. St. Louis Transit Co. (1904) 107 Mo. App. 34, 80 S. W. 315; Flynn v. St. Louis Transit Co. (1905) 113 Mo. App. 185, 87 S. W. 560; McQuerry v. Metropolitan Street R. Co. (1906) 117 Mo. App. 255, 92 S. W. 912; Haman v. Omaha Horse R. Co. (1892) 35 Neb. 74, 52 N. W. 830; Haver v. Central R. Co. (1898; Err. & App.) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 648, 41 Atl. 916; Stewart v. Brooklyn & C. T. R. Co. (1882) 90 N. Y. 588, 43 Am. Rep. 185; Dwinelle v. New York C. & H. R. R. Co. (1890) 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; Gillespie v. Brooklyn Heights R. Co. (1904) 178 N. Y. 347, 66 L.R.A. 618, 102 Am. St. Rep. 503, 70 N. E. 857, reversing (1903) 80 App. Div. 640, 81 N. Y. Supp. 1127; Busch v. Interborough Rapid Transit Co. (1907) 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460; Zeccardi v. Yonkers R. Co. (1907) 190 N. Y. 389, 17 L.R.A. (N.S.) 770, 83 N. E. 31; Weber v. Brooklyn, Q. C. & Suburban R. Co. (1900) 47 App. Div. 306, 62 N. Y. Supp. 1; Reilly v. New York City R. Co. (1904; App. Div.) 46 Misc. 72, 56 Misc. 637, 107 N. Y. Supp. 629; Brown v. Interborough Rapid Transit Co. (1907) 91 N. Y. Supp. 319; Baumstein v. New York City R. Co. (1907; App. Div.) 56 Misc. 498, 107 N. Y. Supp. 23; Miller v. Brooklyn Heights R. Co. (1908) 124 App. Div. 537, 108 N. Y. Supp. 960; Brewster v. Interborough Rapid Transit Co. (1910; App. Div.) 68 Misc. 348, 123 N. Y. Supp. 992; White v. Norfolk & S. R. Co. (1894) 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191; Williams v. Gill (1898) 122 N. C. 967, 29 S. E. 879; Palmer v. Winston-Salem R. & Electric Co. (1902) 131 N. C. 250, 42 S. E. 604; Louisville & N. R. Co. v. Ray, 101 Tenn. 1, 46 S. W. 554; International & G. N. R. Co. v. Kentle, (1883; Tex. Sup.) 2 Tex. App. Civ. Cas. (Willson) 262; Dillingham v. Anthony (1889) 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139; Houston & T. C. R. Co. v. Bush (1911) — Tex. —, 32 L.R.A. (N.S.) 1201, 133 S. W. 245; International & G. N. R. Co. v. Miller (1894) 9 Tex. Civ. App. 104, 28 S. W. 233, writ of error denied in (1895) 87 Tex. 430, 29 S. W. 235; Texas & P. R. Co. v. Bowlin (1895) — Tex. Civ. App. —, 32 S. W. 918; Houston & T. C. R. Co. v. Washington (1895) — Tex. Civ. App. —, 30 S. W. 719; Texas & P. R. Co. v. Edmond (1895) — Tex. Civ. App. —, 29 S. W. 518; Galveston, H. & S. A. R. Co. v. La Prella (1901) 27 Tex. Civ. App. 496, 65 S. W. 488; San Antonio Traction Co. v. Crawford (1902) — Tex. Civ. App. —, 71 S. W. 306; Houston & T. C. R. Co. v. Batchler (1904) 37 Tex. Civ. App. 116, 83 S. W. 902; Filder v. St. Louis, B. & M. R. Co. (1908)

- (6) The use of insulting language. ³²
 (7) Producing fear with a malicious intent. ³³
 (8) Indecent or otherwise improper conduct in regard to a female passenger. ³⁴

- (9) Wrongful arrest or other abuse of criminal process. ³⁵

The fact that the servant who committed the tort in respect of which it is sought to hold the carrier liable was carefully se-

51 Tex. Civ. App. 244, 112 S. W. 699; Missouri, K. & T. R. Co. v. Gerren (1909) 57 Tex. Civ. App. 34, 121 S. W. 905; Texas & P. R. Co. v. Cassidy (1911) — Tex. Civ. App. —, 137 S. W. 389; Missouri, K. & T. R. Co. v. Brown (1911) — Tex. Civ. App. —, 135 S. W. 1076; Dallas Consol. Electric Street R. Co. v. Gilmore (1911) — Tex. Civ. App. —, 138 S. W. 1134; Norfolk & W. R. Co. v. Brame (1909) 109 Va. 422, 63 S. E. 1018; Blomsness v. Puget Sound Electric R. Co. (1907) 47 Wash. 620, 17 L.R.A.(N.S.) 763, 92 Pac. 414; Ricketts v. Chesapeake & O. R. Co. (1890) 33 W. Va. 433, 7 L.R.A. 354, 25 Am. St. Rep. 901, 10 S. E. 801; Bess v. Chesapeake & O. R. Co. (1891) 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234; Smith v. Norfolk & W. R. Co. (1900) 48 W. Va. 69, 35 S. E. 834; Teel v. Coal & Coke R. Co. (1909) 66 W. Va. 315, 66 S. E. 470; Layne v. Chesapeake & O. R. Co. (1909) 66 W. Va. 607, 67 S. E. 1103 (passenger shot); Fick v. Chicago & N. W. R. Co. (1887) 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527.

³² Lampkin v. Louisville & N. R. Co. (1894) 106 Ala. 287, 17 So. 448; Bleecker v. Colorado & S. R. Co. (1911) 50 Colo. 140, 33 L.R.A.(N.S.) 386, 114 Pac. 481; Atlanta & W. P. R. Co. v. Condor (1885) 75 Ga. 51; Cole v. Atlanta & W. P. R. Co. (1897) 102 Ga. 474, 31 S. E. 107; Georgia R. & Electric Co. v. Baker (1904) 120 Ga. 991, 48 S. E. 355; Macon R. & Light Co. v. Mason (1905) 123 Ga. 773, 51 S. E. 569; Wolfe v. Georgia R. & Electric Co. (1907) 2 Ga. App. 499, 58 S. E. 899; Wise v. Covington & C. Street R. Co. (1891) 91 Ky. 537, 16 S. W. 351; Louisville & N. R. Co. v. Donaldson (1897) 19 Ky. L. Rep. 1384, 43 S. W. 439 (no off. rep.); Southern R. Co. v. Thurman (1906) 121 Ky. 716, 2 L.R.A.(N.S.) 1108, 90 S. W. 240; Louisville, N. & T. R. Co. v. Patterson (1891) 69 Miss. 421, 22 L.R.A. 259, 13 So. 697; Randolph v. Hannibal & St. J. R. Co. (1885) 18 Mo. App. 609; Gillespie v. Brooklyn Heights R. Co. (1904) 178 N. Y. 347, 66 L.R.A. 618, 102 Am. St. Rep. 503, 70 N. E. 857; Strother v. Aberdeen & A. R. Co. (1898) 123 N. C. 197, 31 S. E. 386; Knoxville Traction Co. v. Lane (1899) 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557; Texas & P. R. Co. v. Jones (1897) — Tex. Civ. App. —, 39 S. W. 124; Texas & P. R. Co. v. Tarkington (1901) 27 Tex. Civ. App. 353, 66 S. W. 137; San Antonio Traction Co. v. Crawford (1902) — Tex. Civ. App. —, 71 S. W. 306; Gulf, C. & S. F. R. Co. v. Luther (1905) 40 Tex. Civ. App. 517, 90 S. W. 44; San Antonio Traction Co. v. Lambkin (1907) — Tex. Civ. App. —, 99 S. W. 574; Carpenter v. Trinity & B. Valley R. Co. (1909) 55 Tex. Civ. App. 627, 119 S. W. 335; Missouri, K. & T. R. 40 L.R.A.(N.S.)

Co. v. Morgan (1911) — Tex. Civ. App. —, 138 S. W. 216.

³³ In the following cases the passengers were so alarmed by the threats of servants that they jumped from moving trains: Gasway v. Atlanta & W. P. R. Co. (1877) 58 Ga. 216; Spohn v. Missouri P. R. Co. (1894) 122 Mo. 1, 26 S. W. 663; Ephland v. Missouri P. R. Co. (1896) 71 Mo. App. 597.

³⁴ Pullman's Palace Car Co. v. Campbell (1894) 154 U. S. 513, 38 L. ed. 1069, 14 Sup. Ct. Rep. 1151, affirming (1890) 42 Fed. 484 (indecent assault); Birmingham R. Light & P. Co. v. Parker (1909) 161 Ala. 248, 50 So. 55 (indecent assault); Savannah, F. & W. R. Co. v. Quo (1897) 103 Ga. 125, 40 L.R.A. 483, 68 Am. St. Rep. 85, 29 S. E. 607 (assault with intent to ravish); Carvik v. Burlington, C. R. & N. R. Co. (1906) 131 Iowa, 415, 117 Am. St. Rep. 432, 108 N. W. 327 (rape); Craker v. Chicago & N. W. R. Co. (1875) 36 Wis. 657, 17 Am. Rep. 504 (woman kissed).

"The contract of carriage as to female passengers embraces an implied stipulation that the carrier will protect them against general obscenity, immodest conduct, or wanton approach." Birmingham R. Light & P. Co. v. Parker (1909) 161 Ala. 248, 50 So. 55.

See also the opinion in Chamberlain v. Chandler (1823) 3 Mason, 242, Fed. Cas. No. 2,575 where Story, J., defines the contractual obligations of the master of a ship in respect of female passengers.

³⁵ Mayfield v. St. Louis, I. M. & S. R. Co. (1910) 97 Ark. 24, 32 L.R.A.(N.S.) 525, 133 S. W. 168; Moore v. Louisiana & A. R. Co. (1911) 99 Ark. 233, 34 L.R.A.(N.S.) 299, 137 S. W. 826; Atchison, T. & S. F. R. Co. v. Henry (1895) 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952; Baltimore & O. R. Co. v. Cain (1895) 81 Md. 87, 28 L.R.A. 688, 31 Atl. 801; Tolchester Beach Improv. Co. v. Scharnagl (1907) 105 Md. 199, 65 Atl. 916; Philadelphia, B. & W. R. Co. v. Green (1909) 110 Md. 32, 71 Atl. 986; Grayson v. St. Louis Transit Co. (1903) 100 Mo. App. 60, 71 S. W. 730; Baumstein v. New York City R. Co. (1907; App. Div.) 56 Misc. 498, 107 N. Y. Supp. 23; McLeod v. New York C. & St. L. R. Co. (1902) 72 App. Div. 116, 76 N. Y. Supp. 347; Owens v. Wilmington & W. R. Co. (1900) 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 250; Bowden v. Atlantic Coast Line R. Co. (1907) 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783; Texas Midland R. Co. v. Dean (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135; St. Louis Southwestern R. Co. v. Franklin (1898) — Tex. Civ. App. —, 44 S. W. 701; Gillingham v. Ohio River R. Co. (1891) 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

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That a duty which is, *ex hypothesi*, not absolute, cannot, as it would seem, afford a logical basis for an absolute liability,⁴⁰ and (2) that the wilful misconduct of a servant cannot, without a very undesirable confusion of juristic concepts, be treated as being a breach of the duty to exercise care.

(3) According to another view,—which is the one commonly accepted,—his liability is referable to the consideration that his contract not only binds him to exercise a high degree of care in transporting his passengers, but also embraces an implied stipulation that they shall not, in any event, be subjected to personal maltreatment either by himself or his servants. He is

regarded as being subject, under one part of his contract, to a duty which is qualified in its character and scope, and, under another part, to an absolute duty for the discharge of which he is answerable, irrespective of whether he undertakes to perform it himself or deposes its performance to servants. The resulting situation, so far as regards the cases in which he intrusts the performance of the duty to servants, has been stated in phraseology which is expressive simply of the notion that it is absolute, and therefore nondelegable;⁴¹ and in phraseology which is expressive of the notion that its existence renders the carrier inferentially a guarantor or insurer in

to carry his passenger safely and properly and to treat him respectfully; and if he intrusts the performance of his duty to his servants, the law holds him responsible for the manner in which they execute the trust." *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39.

The duty of a carrier is to protect his passengers from the violence and insults of his servants, "in so far as this can be done by the exercise of a high degree of care." *Dillingham v. Anthony* (1889) 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139.

"A common carrier of passengers impliedly agrees to exercise the utmost care and diligence consistent with the proper management of his business, to protect his passengers from injury through the misconduct of other persons while he is performing his contract for their transportation. They necessarily submit themselves in a large degree to his care and control, and he undertakes to provide for their safety in all those particulars which ought to be under his direction and management. Among these, to a certain extent, are the kind of persons permitted to approach the passengers on the carrier's premises, and the rules and regulations which govern the conduct of the carrier's servants and others, while the contract for carriage is being performed. While the carrier does not guarantee perfection in these particulars, he is under an obligation of implied contract and consequent legal duty to use a very high degree of care to prevent injuries that might be caused by the negligence or wilful misconduct of others. . . . In the application of the rule to injuries caused by servants of the carrier while engaged in the performance of his contract of carriage, it is held that he is liable absolutely for their misconduct." *Hayne v. Union Street R. Co.* (1905) 189 Mass. 552, 3 L.R.A. (N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219.

"A railroad company, as a common carrier of passengers, is bound to use extraordinary care not only to carry its passengers safely, but also to protect them . . . from assault or injury from its agents in charge of the train, and from others." *Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 40 L.R.A. (N.S.)

97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168.

"Unwarrantable assaults upon passengers by the servants of the carrier are a breach of the implied contract of the carrier to convey the passenger safely to his destination." *Thomp. Neg.* § 3184, cited in *Rohrbach v. Pullman's Palace Car Co.* (1909) 166 Fed. 797; *Garvik v. Burlington, C. R. & N. R. Co.* (1906) 131 Iowa, 415, 117 Am. St. Rep. 432, 108 N. W. 327. It should be observed, however, that in a subsequent section of his treatise the learned author, without advertent to the inconsistency between the two positions, cites the cases which refer the carrier's liability to the conception of a nondelegable duty with regard to the proper treatment of passengers. See note 42, *infra*.

⁴⁰ This difficulty may be avoided by taking the position which is indicated by the following statement: "It is no doubt true that if the violence could not have been seen or prevented by the highest degree of care, the carrier would be absolved from liability. . . . The duty of protecting passengers from violence . . . is not an absolute one. If the care which the law requires is exercised by the carrier, then the duty is discharged, and there is no liability." *Louisville & N. R. Co. v. Kelly* (1883) 92 Ind. 371, 47 Am. Rep. 149. But the doctrine that a carrier can escape liability by adducing affirmative evidence which proves that the misconduct which caused the given injury could not have been prevented by the exercise of the obligatory degree of care is apparently not countenanced by any other case.

⁴¹ The obligation which a carrier assumes in regard to the safety of a passenger "includes an implied stipulation for good treatment of the passenger during the passage, trip, or voyage, and especially against ill treatment by the carrier or his employees, and against every degree of violence on their part, or wanton interference with his person." *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922. In another part of the opinion it was said: "Passengers do not contract merely for ship room and transportation from one place to another, but they also contract for good treat-

respect of the protection of his passengers against the misfeasance of his servants.⁴²

ment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance."

By his contract with a passenger the carrier "undertakes to carry him safely and treat him respectfully." *Stewart v. Brooklyn & C. T. R. Co.* (1882) 90 N. Y. 588, 43 Am. Rep. 185.

"The defendant owed the plaintiff the duty to transport him, . . . and during its performance to care for his comfort and safety. This duty of protecting the personal safety of the passenger, and promoting, by every reasonable means, the accomplishment of his journey, is continuous, and embraces other attentions and services than the occasional services required in giving the passenger a seat or some temporary accommodation. Hence, whatever is done by the carrier or its servants which interferes with or injures the health or strength or person of the traveler, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract, and he must be held responsible for it." *Dwinelle v. New York & H. R. Co.* (1890) 120 N. Y. 127, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319.

"As to . . . [passengers] the contract of carriage imposes upon the carrier the duty not only to carry safely and expeditiously between the termini of the route embraced in the contract, but also the duty to conserve by every reasonable means their convenience, comfort, and peace throughout the journey. And this same duty is, of course, upon the carrier's agents. They are under the duty of protecting each passenger from unavoidable discomfort, and from insult, from indignities, and from personal violence." *Birmingham R. & Electric Co. v. Baird* (1900) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456.

"The carrier's duty is to carry his passengers safely and [treat them] respectfully; and if he intrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust." *Norfolk & W. R. Co. v. Anderson* (1893) 90 Va. 1, 44 Am. St. Rep. 884, 17 S. E. 757.

"The carrier undoubtedly owes to the passenger many contractual duties, nonperformance of which is not executed by diligence and good faith, and in respect to which liability follows failure as certainly and inevitably as a right of recovery arises on the nonpayment of a debt. Is the right of a passenger to immunity from intentional injury at the hands of the servants of the carrier within this principle? It seems so. . . . This makes the liability rest not upon instigation, encouragement, or express or implied authorization of the master, but upon the breach of the carrier's obligation; and the inquiry is not whether the servant acted as the carrier's agent in inflicting the injury, but whether the master

has broken his contract for the safe carriage of the passenger. This is the certain import of the decisions of this court." *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 618, 67 S. E. 1103.

The reason for imputing a broader liability to a carrier than to other employers "arises from the fact that the servant, in mistreating the passenger wholly for some private purpose of his own, in the very act, violates the contractual obligation of the employer for the performance of which he has put the employee in his place." *Houston & T. C. R. Co. v. Bush* (1911) — Tex. —, 32 L.R.A.(N.S.) 1201, 133 S. W. 248. In another part of the opinion it was declared to be the duty of the carrier to "carry his passenger safely and provide for his safety and convenience."

That it is the duty of a carrier to protect a passenger from "violence and insults," as well as to carry him safely, was laid down in *Spohn v. Missouri P. R. Co.* (1885) 87 Mo. 74, s. c. on subsequent appeal, (1890) 101 Mo. 417, 14 S. W. 880.

In *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504 the court, after referring to the conflict of opinion which the cases disclosed with respect to the liability of a master for the wilful torts of the servant, proceeded thus: "However that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another, and appoint an agent to furnish it, and the agent, of malice, furnish a stone instead, the principal is responsible for the stone and its consequences."

The duty to treat a passenger properly is also referred to as a distinct obligation in *International & G. N. R. Co. v. Kentle* (1883) 2 Tex. App. Civ. Cas. (Willson) 262.

⁴² "The plaintiff was entitled, in virtue of that contract, to protection against the misconduct or negligence of the carrier's servants. Their misconduct or negligence whilst transacting the company's business, and when acting within the general scope of their employment, is, of necessity, to be imputed to the corporation which constituted them agents for the performance of its contract with the passenger." *New Jer-*

sey S. B. Co. v. Brockett (1887) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039. The following paragraph of the headnote to this case was adopted as a correct statement of the law, in New Orleans & N. E. R. Co. v. Jopes (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109: "A common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed in executing the contract of transportation, and acting within the general scope of their employment."

"While a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger." Stewart v. Brooklyn & C. T. R. Co. (1882) 90 N. Y. 588, 43 Am. Rep. 185.

"A carrier is liable absolutely, as an insurer, for the protection of a passenger against assaults and insults at the hands of his servants." Busch v. Interborough Rapid Transit Co. (1907) 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460, quoting Thompson. Neg. § 3186.

"A carrier is an absolute guarantor of the safety of its passengers against the assaults of its employees while it is performing its contract of carriage." Zeccardi v. Yonkers R. Co. (1907) 180 N. Y. 389, 17 L.R.A.(N.S.) 770, 83 N. E. 31.

"A common carrier of passengers undertakes to protect them from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owed to the passengers." Scott v. Central Park, N. & E. River R. Co. (1889) 53 Hun, 414, 6 N. Y. Supp. 382.

A carrier is bound to protect his passengers "against all wrongs done by employees while engaged in and about the performance of their prescribed duties." Philadelphia, B. & W. R. Co. v. Green (1909) 110 Md. 32, 71 Atl. 986.

The contract "was a guaranty, on behalf of the carrier, that appellee should be protected against personal injury from the agents or servants of appellant (conductor) in charge of the train." Chicago & E. R. Co. v. Flexman (1882) 103 Ill. 546, 42 Am. Rep. 33.

A passenger is "under the protection of the carrier and those of its servants to whom it commits the performance of the various duties to him which it assumes by the contract of carriage." Texas Midland R. Co. v. Dean (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135.

"The duty of the carrier towards a passenger is contractual; and, among other implied obligations, is that of protecting a passenger from insults or assaults by other passengers, or by their own servants." Wood, Railway Law, § 315, quoted in White v. Norfolk & S. R. Co. (1894) 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191.

"The carrier is liable absolutely, as an

insurer, for the protection of the passenger against assaults and insults at the hands of its own servants, because he contracts to carry the passenger safely and to give him decent treatment *en route*. Hence, an unlawful assault or an insult to a passenger by his servant is a violation of his contract by the very person whom he has employed to carry it out. The intentment of the law is that he contracts absolutely to protect his passenger against the misconduct of his own servants whom he employs to execute the contract of carriage." Thompson. Neg. § 3186, quoted in Gillespie v. Brooklyn Heights R. Co. (1904) 78 N. Y. 354, 66 L.R.A. 618, 102 Am. St. Rep. 503, 70 N. E. 857; O'Brien v. St. Louis Transit Co. (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939; St. Louis, I. M. & S. R. Co. v. Dowgiallo (1907) 82 Ark. 289, 101 S. W. 412; Gulf, C. & S. F. R. Co. v. Luther (1905) 40 Tex. Civ. App. 517, 90 S. W. 46.

"The relation (of carrier and passenger) places the carrier under the obligation to carry the passenger safely and properly, and treat him respectfully, and holds him responsible for the conduct of his servants to whom he intrusts the performance of his duty. He is bound to protect his passengers from violence and insults by strangers and copassengers, and *a fortiori* against the violence and insults of his own servants." Buswell, Personal Injuries, § 34, quoted in Tanger v. Southwest Missouri Electric R. Co. (1900) 85 Mo. App. 28.

"As against the assaults and violence of his servants, the passenger has the right to claim an absolute protection, and the carrier will undoubtedly be held responsible for any unnecessary personal abuse or violence of which they may be guilty in their treatment of the passenger whilst engaged in the discharge of their assigned and appropriate duties, although such abuse may consist in an assault or battery upon the person of the passenger, and may be wholly unauthorized by the carrier, and prompted by the vindictive feelings of the servant towards the passenger. And it is undoubtedly well-settled law that, when an assault or battery by the carrier's servant occurs upon the carrier's vehicle, the carrier may be held responsible, even when the servant has seemingly departed from the line of his duty, and has committed the assault or the personal violence upon the passenger aside from and under circumstances wholly unconnected with the discharge of such duty." Hutchinson, Carr. §§ 1093, 1595, quoted in Norfolk & W. R. Co. v. Brame (1909) 109 Va. 422, 63 S. E. 1018; also cited in St. Louis, I. M. & S. R. Co. v. Dowgiallo (1907) 82 Ark. 289, 101 S. W. 412; Louisville & N. R. Co. v. Kelly (1883) 92 Ind. 371, 47 Am. Rep. 149; O'Brien v. St. Louis Transit Co. (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939.

For other cases in which the duty of protection was affirmed, see Birmingham, R. Light & P. Co. v. Parker (1909) 161 Ala. 248, 50 So. 55 ("insult, indignity, and personal violence"); Baltimore & O. S. W. R.

But both these notions are not infrequently reflected in the language of the same opinion.⁴³

The imputation of an absolute liability to the carrier has sometimes been justified on the simple ground that he "selects his own servants and agents," and must therefore "be held to warrant that they are trustworthy as well as skilful."⁴⁴ 'But as

the power of selection has been treated as one of the foundations of the general rule of *respondet superior*, some further consideration would seem to be necessary to afford an adequate support for a liability which is more extensive than that which that rule contemplates. Such a consideration has been found in the circumstance that the carrier's servants are not only selected by

Co. v. Davis (1909) 44 Ind. App. 375, 89 N. E. 403 ("bodily discomfort, insult, indignities, and personal violence"); Central R. Co. v. Peacock (1888) 69 Md. 262, 9 Am. St. Rep. 425, 14 Atl. 709; Johnson v. Detroit, Y. & A. A. R. Co. (1902) 130 Mich. 453, 90 N. W. 274; St. Louis & S. F. R. Co. v. Sanderson (1911) — Miss. —, 54 So. 885; O'Brien v. St. Louis Transit Co. (1904) 185 Mo. 283, 105 Am. St. Rep. 592, 84 S. W. 939 (assaults and insults); Quigley v. Central P. R. Co. (1876) 11 Nev. 350, 21 Am. Rep. 757 ("violence and insults"); Haver v. Central R. Co. (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916 ("assault and other ill treatment"); White v. Norfolk & S. R. Co. (1894) 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191 ("insult or harm"); Louisville & N. R. Co. v. Ray (1898) 101 Tenn. 1, 46 S. W. 554 ("acts of rudeness and oppression"); Layne v. Chesapeake & O. R. Co. (1909) 66 W. Va. 607, 67 S. E. 1103; Craker v. Chicago & N. W. R. Co. (1875) 36 Wis. 657, 17 Am. Rep. 504.

⁴³ "Of course the defendant owed the plaintiff the duty of treating him respectfully and properly. Certainly it was bound to protect him against violent acts or misconduct of the agents." *Fick v. Chicago & N. W. R. Co.* (1887) 68 Wis. 46, 60 Am. Rep. 878, 32 N. W. 527.

"It is among the implied provisions of the contract between a passenger and a railway company that the latter has employed suitable servants to run its trains, and that passengers shall receive proper treatment from them. . . . The duty of the carrier towards a passenger is contractual; and among other implied obligations is that of protecting a passenger from insults or assaults by other passengers or by their own servants." *Bess v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234.

"When . . . [the plaintiff] entered the car of the defendant company and paid her fare, there was an implied contract on the part of the company that she should receive proper, polite, and courteous treatment from its employees, and that she should be protected against hearing obscenity, witnessing immodest conduct, or submitting to wanton approach." The contract "includes the obligation on the part of the carrier to guarantee to its passengers respectful and courteous treatment, and to protect them not only from violence and insults from strangers, but also against violence and insult from the carrier's own servants." *Knoxville Traction Co. v. Lane* 40 L.R.A. (N.S.)

(1899) 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557.

"The carrier is responsible for the malicious and wanton acts of the servant to a passenger, whether done in the line of his employment or service, or not, if done during the course of the discharge of his duty to the master which relates to the passenger. For he owes him, as before stated, not only carriage, but protection also; and if he furnishes a servant who, instead of protecting, insults or assaults or beats the passenger, he has directly failed of his duty to the passenger." *Eads v. Metropolitan R. Co.* (1891) 43 Mo. App. 545. This passage was quoted with approval in *Tanger v. Southwest Missouri Electric R. Co.* (1900) 85 Mo. App. 28.

"It is not merely a question of negligence in such cases, nor is it strictly a question depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as the relation subsists, and a breach of that duty on its part, whether caused by the wilful act of an employee or not. A carrier is bound to discharge the implied duty, arising out of its contract and imposed by law, that its passengers shall be protected from injury by its servants, and shall not be wilfully insulted and harmed by them; and if it commits the discharge of this duty to an employee, it may well be held to do so at its peril, notwithstanding the exercise of care on its part in selecting the servants." 4 Elliott, Railroads, § 1579, quoted in *Gulf, C. & S. F. R. Co. v. Luther* (1905) 40 Tex. Civ. App. 517, 90 S. W. 44; cited also in *St. Louis, I. M. & S. R. Co. v. Dowgiallo* (1907) 82 Ark. 289, 101 S. W. 412; *Haver v. Central R. Co.* (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916.

⁴⁴ *Stewart v. Brooklyn & C. T. R. Co.* (1882) 90 N. Y. 588, 43 Am. Rep. 185.

In *Chicago & E. R. Co. v. Flexman* (1882) 103 Ill. 546, 42 Am. Rep. 33, the court adverted to the circumstance that the railway company had placed the tortfeasors in charge of the train, and that it alone had the power of removing them.

In *Gallena v. Hot Springs R. Co.* (1882) 4 McCrary, 371, 13 Fed. 116, the trial judge, in charging the jury, observed that railroad companies "select and appoint their own conductors without consulting their passengers, and it is but reasonable that they should be held responsible for any act of violence to the passengers of which the conductors may be guilty."

In *Missouri, K. & T. R. Co. v. Weaver*

him, but are also intrusted with functions which necessarily involve the exercise of a large measure of control over his passengers.⁴⁵

"A passenger while traveling on a train is under the care and control of the railway company, and is hence entitled to be protected against the wilful misconduct of the company's agents and servants in charge of the train, and to whose authority he is required for the time being to yield a greater or less obedience." *Wabash R. Co. v. Savage* (1886) 110 Ind. 156, 9 N. E. 85.

f. Carrier's liability considered with reference to the existence or nonexistence of his contractual obligation at the time when the alleged tort was committed.

1. Generally.

A detailed examination of the circum-

(1876) 16 Kan. 456, the court observed that upon the strict accountability of the carrier "in no small degree depends the safety and comfort of passengers. The carrier selects his own agents, and unless he finds that violence and abuse on the part of such agents towards his passengers meet with swift and severe punishment, he will soon become indifferent to the character and conduct of such agent, and rudeness, insult, and violence will take the place of politeness, courtesy, and assistance."

"Either the company or the passengers must take the risk of infirmities of temper, maliciousness, and misconduct of the employees whom the company has placed upon the train, and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is therefore but just to make the company, rather than the passengers, take this risk, and to hold it responsible." 4 Elliott, Railroads, § 1638, quoted in *Haver v. Central R. Co.* (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916; *Knoxville Traction Co. v. Lane* (1899) 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557; *St. Louis Southwestern R. Co. v. Johnson* (1902) 29 Tex. Civ. App. 185, 68 S. W. 58.

⁴⁵ "Shipowners, as well as the proprietors of conveyances by land, select and appoint their own agents without consulting their passengers, and it is but reasonable that they should be held responsible for any act of violence to the passenger of which such employees may be guilty, as the moment the passenger enters the steamer or other conveyance he is more or less under the control of the master or conductor, and subject to their orders. Fit or unfit, humane or brutal, good tempered or morose, the passenger is comparatively helpless, and may

stances under which a carrier's contractual obligations are deemed to have been assumed in respect of a particular person would carry us beyond the scope of the present note. For information on the subject the reader is referred to treatises which deal especially with carriers.⁴⁶

2. Commencement of the relation of carrier and passenger.

The contractual obligations of a railway company or other carrier come into existence as regards a given person when, with the intention of taking his passage, he enters a place provided for the accommodation of passengers, at a time when such a place is open for the reception of persons intending to travel on the vehicle provided by the carrier.⁴⁷ Some cases in which the liability of the defendants for the wilful torts of their servants was determined with reference to this doctrine are cited below.⁴⁸

be obliged to submit for the time without any means of redress." *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922.

⁴⁶ 4 Elliott, Railroads, §§ 1578 et seq.; *Hutchinson*, Carr. 3d ed. §§ 997 et seq.

The liability of a sleeping car company for injury to a passenger on an ordinary car in the same train, who enters the car for the purpose of asking the privilege of washing his hands, and is there, wantonly and without provocation, assaulted and beaten by the porter of the car, is not governed by the principles regulating the liability of common carriers, but by the general law of master and servant. *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631.

⁴⁷ 4 Elliott, Railroads, § 1579.

⁴⁸ In *Horgan v. Boston Elev. R. Co.* (1911) 208 Mass. 287, 94 N. E. 386 (action for assault by special police officer), the court observed: "Having entered the subway station of the defendant, and paid his fare with the intention of becoming a passenger, the plaintiff was lawfully on the premises; and if, while passing through the turnstile to take a car, its servants unlawfully molested him by physical restraint, the defendant is responsible for the injury."

In *Philadelphia, B. & W. R. Co. v. Green* (1909) 110 Md. 32, 71 Atl. 986 (unlawful arrest), the court said: "By the undisputed evidence the plaintiff was a passenger of the defendant at the time the alleged trespasses were committed. He had entered a room provided by the defendant company for the accommodation of passengers to wait for a train to take him to his home. This, under all the authorities, establishes the relation of carrier and passenger. The rule is well settled that a person is a passenger who enters upon the depot grounds for the purpose of taking passage on the train of the carrier. The fare does not have to be

3. Continuity of the obligation.

The general rule is that the absolute obligation of a carrier with regard to the protection of his passengers continues to rest upon him and his servants as long as the contract of carriage is in process of performance.⁴⁹ In the case of a railway company which operates trains on its own land,

its obligation is not suspended where a passenger leaves his car temporarily, and still remains on its premises.⁵⁰ His rights also remain in force while he is going from one train to another in the course of the same journey.⁵¹ On the other hand, a person who relinquishes his original intention of traveling by the train for which he holds a ticket, and who, after having left the

paid, nor the train entered; but the person must merely enter within the control of the carrier at the depot through the usual channels of business, with the intention of becoming a passenger by either paying fare before or after entering the train."

In his concurring opinion in *Daniel v. Petersburg R. Co.* (1895) 117 N. C. 592, 4 L.R.A. (N.S.) 485, 23 S. E. 327, Avery, J., said: "The contract of carriage begins not later than the time when a person enters upon the premises of a carrier for the purpose of securing passage; but where carriages are furnished by it to transport passengers to a station, a person entering such vehicle or even halting one for the purpose of boarding it with the same object in view, and under the implied invitation of the carrier, is entitled to the same right of protection as after the purchase of a ticket."

In *Gasway v. Atlanta & W. P. R. Co.* (1877) 58 Ga. 216, the syllabus written by the court is as follows: "The liability [*i. e.* absolute liability] of the company extends to tortious acts of its servants done about its business, in checking the baggage of passengers at the several stations on its line of road, and to the platform or area along the cars necessary to be used or traversed by the passengers in attending to procuring seats and checking baggage, and other lawful and peaceful acts in connection with their travel."

In *Indianapolis Union R. Co. v. Cooper* (1892) 6 Ind. App. 202, 33 N. E. 219, where a gateman made an unprovoked assault upon a person who had purchased a ticket and was walking to his train, it was held that the company was liable whether it was committed at the time he was passing through the gate, or before, or after he got through.

For cases in which the action was held to be maintainable, although the intending passenger had not actually taken his ticket when the tort was committed, see *Texas & P. R. Co. v. Jones* (1897) —Tex. Civ. App. —, 39 S. W. 124 (woman insulted in waiting room by station agent's wife); *St. Louis Southwestern R. Co. v. Franklin* (1898) —Tex. Civ. App. —, 44 S. W. 701 (arrest in waiting room).

⁴⁹ "The relation, and the duties arising out of it, continues until the passenger is safely landed at his destination." *Alabama City, G. & A. R. Co. v. Sampley* (1910) 169 Ala. 372, 53 So. 142.

⁵⁰ *Parsons v. New York C. & H. R. R. Co.* (1889) 113 N. Y. 362, 3 L.R.A. 683, 10 Am. St. Rep. 450, 21 N. E. 145; 4 Elliott, Railroads, § 1592.
40 L.R.A. (N.S.)

⁵¹ In *Dwinelle v. New York C. & H. R. R. Co.* (1890) 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319, reversing (1887) 45 Hun, 139, the effect of the plaintiff's evidence was as follows: He took tickets for himself and wife for a continuous passage from G. to N. Y. in one of defendant's ordinary cars, and purchased from the porter, there being no other person acting as a conductor, tickets for a section in a sleeping car, which, upon plaintiff and his wife retiring, were taken up by said porter. The train was detained by a washout, and after waiting until nearly noon the next day the porter informed plaintiff he must take another train. The porter conducted plaintiff and his wife to a sleeping car in the other train, and, upon finding it filled, he conducted them into an ordinary car, where there were no vacant seats. On being requested to return the sleeping car tickets or procure for plaintiff something to show that he was entitled to a section in a sleeping car to N. Y., the porter refused to do so. As he turned to go away the plaintiff touched him lightly on the arm, saying to him he must not leave without some satisfaction; whereupon the porter struck plaintiff a violent blow in the face, knocking him down and injuring him. Held, that the question whether the porter was engaged in the performance of his duties as defendant's servant at the time of the assault had been improperly taken from the jury. The contention that the porter had performed all the duties which, as the servant of the defendant, he owed to the plaintiff, was thus discussed by the court: "The contract of carriage between the plaintiff and defendant was but partially performed and was in the actual process of performance. The plaintiff had been waiting through the forenoon to enable the defendant to make the necessary arrangements to complete his contract of carriage. The arrangement made by the defendant for that purpose was to start an independent train from Utica. This required the transfer of the plaintiff and his luggage to such other train. It was necessary that the plaintiff should be informed of this and that he, with his luggage, should be transferred to such other train. The porter was attending to this duty, and to that end had placed the plaintiff in an ordinary car to resume his journey. . . . If it is the duty of the passenger to make inquiry, it is the corresponding duty of the carrier to give the information sought. The porter had undertaken to furnish such information to the plaintiff, or to intro-

premises of the company, returns to the station to make some inquiries regarding his baggage, is not entitled to the full rights of passengers.⁵²

To a passenger on a street railway car the carrier, as a general rule, owes no contractual obligation after he has alighted from the car, even though he may not then have reached his destination.

4. Termination of the obligation.

In a standard treatise we find the following statement with regard to passengers

duce him to the conductor of the sleeping car for that purpose, and while so engaged had refused to complete the work, and struck plaintiff the blow complained of. . . . The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness, and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing, or had completed the performance of it, when the blow was struck. That blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract."

⁵² In *Georgia R. & Bkg. Co. v. Richmond* (1896) 98 Ga. 494, 25 S. E. 565, the plaintiff, having failed to get his baggage checked in time to be placed on the train by which he had expected to travel, went to a hotel, intending to take another train on the following day. Held (1) that although he was not a "passenger" when he returned to the station, he had the right to go to the station for the purpose stated, and, if he conducted himself properly, was entitled to respectful treatment from, and immunity from an unlawful assault by, the agent while engaged in transacting with him the business mentioned; and (2) that if his real purpose in returning was not to look after his baggage, or to attend to other legitimate business with the agent, but merely to upbraid him for a real or supposed breach of duty occurring at an earlier hour of the day, and a difficulty thereupon ensued, he could not hold the company responsible for an assault by the agent. It should be observed, however, that this decision, in so far as it predicates an absolute obligation on the part of railway servants to refrain from maltreating persons who come upon the railway premises for the transaction of business,

on ordinary railroad cars: "As a general rule it may be said that the relation of carrier and passenger . . . continues until the passenger has had a reasonable time and opportunity to safely alight from the train at the place provided by the carrier for the discharge of passengers, and to leave the carrier's premises in the customary manner."⁵³

In one case decided from this standpoint, it was held that a mail clerk engaged in the delivery of mail bags to the postoffice of a certain town was entitled to recover

ness, turns upon the unqualified phraseology of the provision of the Georgia Code regarding the liability of railway companies. See *Columbus & R. R. Co. v. Christian* (1894) 97 Ga. 56, 25 S. E. 411. Under common-law principles the fact that this was the object of the injured person's visit to the premises is not necessarily conclusive in respect of the company's liability. See, for example, *Bowen v. Illinois C. R. Co.* (1905) 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306.

⁵³ *Hutchinson, Carr.* § 1016. See also the note to *Glenn v. Lake Erie & W. R. Co.* 2 L.R.A. (N.S.) 873.

For cases in which the liability of the defendants for assaults was affirmed with reference to this doctrine, see *Peeples v. Brunswick & A. R. Co.* (1878) 60 Ga. 281 (complaint in action for assault made by a conductor upon a passenger after he had been delivered at his destination was held demurrable because it did not allege that the act was done within the scope of the conductor's duties); *Brunswick & W. R. Co. v. Moore* (1897) 101 Ga. 684, 28 S. E. 1000 (company liable where conductor shot plaintiff just after he had alighted from the train); *McDade v. Norfolk & W. R. Co.* (1910) 67 W. Va. 582, 68 S. E. 378.

In *Chicago, R. I. & P. R. Co. v. Barrett* (1884) 16 Ill. App. 17, it was laid down, on the one hand, that the severance of the relation of carrier and passenger is not necessarily dependent upon the fact that the passenger, upon reaching his destination, had actually left the car, and, on the other hand, that the mere fact that the passenger had had sufficient time and opportunity to leave the conveyance, and failed to do so, does not operate in every instance as a severance of the relation. If a passenger having time and opportunity safely to leave the train, remains in the car for the unlawful purpose of assaulting the servants of the carrier, he must be considered as having abandoned the protection afforded him by his contract. In this case, as the disputed fact, viz., whether the plaintiff, when assaulted by the conductor, still occupied the relation of a passenger, was made by the instruction of the trial judge to depend simply upon the question whether he had actually left the car or not, the verdict was set aside.

in respect of the misconduct of a porter deputed to carry the bags, by whom he had been several times assaulted and insulted, first on the defendant's premises, and afterwards on the street leading to the office.⁵⁴ But the authorities upon this subject are not harmonious. Some of the cases proceed upon the theory "that the contract of carriage is performed when the passenger, at the end of his journey, has reached a safe and proper place, where persons seeking to become passengers are regularly received and passengers are regularly discharged, and that the degree of care to which he is then entitled is less than during the continuance of his contract, as a carrier of goods is held to a liability less strict after they have reached their destination and

been put in a freight house than while they are in transit."⁵⁵

As passengers in street cars alight on public highways, there is, in the case of a carrier operating such cars, no room for any conflict of opinion with regard to the position which passengers in a train operated on land belonging to the carrier are to be regarded as occupying between the time when they leave the train and the time when they leave the carrier's premises. A street car company impliedly stipulates to protect a passenger from maltreatment by its employees until he has safely alighted.⁵⁶ But this is ordinarily the full extent of its undertaking.⁵⁷ His right of action is determinable with reference to this rule, although he may have alighted with the in-

In *Krantz v. Rio Grande Western R. Co.* (1895) 12 Utah, 104, 30 L.R.A. 297, 41 Pac. 717, the court was of opinion that when the plaintiff alighted from the train at the station in question, and made his way towards the section house for the purpose of engaging in his regular business, the relation of carrier and passenger as between him and the company had ceased; and consequently an assault committed upon him by a section foreman, not acting within the scope of his employment, could not be imputed to the company on the ground of a breach of its contractual obligations to protect him. The action was, however, held to be maintainable on the special ground that, having regard to the local conditions, the ticket agent was the representative of the company, and although he was present when the injury was inflicted, made no effort to prevent the assault.

⁵⁴ *Texas & P. R. Co. v. Cassidy* (1911) — Tex. Civ. App. —, 137 S. W. 389, the court said: "This relation [i. e., of carrier and passenger], it seems to us, was not severed by reason of the mail being taken from the train and placed upon the truck in charge of appellant's porter at Whitesboro, and the alighting of the appellee at the same place in the discharge of his duty. The duty of the appellant, under its contract, had not changed. It was still under obligation to care for and deliver the mail at the postoffice. The duty of the appellee to remain with the mail remained the same. The circumstances required, of necessity, that appellee and appellant's porter should be thrown together in the compliance of appellant's contract with regard to said mail being delivered at the postoffice; therefore we conclude that the relation of carrier and passenger existed between the appellant and appellee until so delivered; or, in other words, the appellant owed the appellee protection from the assault and abuse of its servants, and it is liable to appellee for the breach of such duty by its servant." Compare cases cited in note 62 *infra*.

⁵⁵ So stated by the court, *arguendo*, in 40 L.R.A. (N.S.)

Dodge v. Boston & B. S. Co. 1889) 143 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373.

For decisions rendered from the standpoint indicated in the concluding sentences of this passage, see *Berryman v. Pennsylvania R. Co.* (1910) 228 Pa. 621, 30 L.R.A. (N.S.) 1049, 77 Atl. 1011, where it was held that a verdict should have been directed for the defendant upon evidence given by the plaintiff to the effect that, after alighting from a train at a station, and while standing upon the station platform, he had been assaulted by a special policeman in the company's employ. The court said: "Here there was no evidence which could possibly support a finding that Bledsoe was in the line of duty under his employment when he committed the assault. The fact that it was committed at the defendant company's station is of no importance. Plaintiff had been a passenger, but that relationship ceased when he alighted at his destination and had so far proceeded on his way as to be out of danger from the movement of the train, or further necessity of relation with the servants of the company. The defendant company thereafter owed him no special duty, no contract relation existing between them."

⁵⁶ *Grayson v. St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730 (conductor pushed off a passenger who was descending from a street car, and at the same moment called on a policeman to arrest him; held, that the passenger had not ceased to be a passenger when the order to the policeman was given); *McQuerry v. Metropolitan Street R. Co.* (1906) 117 Mo. App. 255, 92 S. W. 912.

⁵⁷ In *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615, the facts involved and the conclusions of the court were stated as follows: "During the first part of the journey they [the plaintiff and one of defendant's conductors] engaged in a verbal quarrel which resulted in ill feeling between them; but there was no tes-

tention of continuing his journey upon the same or another car.⁵⁸ But the rule is subject to some qualifications. Thus, the

timony that during the last half of the journey the dispute was renewed, or that the plaintiff was told that if, upon request, he did not depart, he would be put off when the car stopped at the turnout, where the conductor was to set a switch and display a signal light. If, as the defendant contended and its witnesses testified, the jury were satisfied that the encounter took place after the conductor returned from the switch, they could find that the plaintiff, having passed from the car, had become a traveler, and the defendant would not be responsible for any injury then inflicted out of a spirit of vindictiveness for what had taken place on the car, or by anger aroused by the insult with which, as the conductor testified, the plaintiff then greeted him."

In *Palmer v. Winston-Salem R. & Electric Co.* (1902) 131 N. C. 250, 42 S. E. 604, a passenger on a street car got into an altercation with the motorman, and after alighting from the car and depositing certain bundles, which he carried, on the sidewalk, returned to the car. The motorman then left the car and assaulted plaintiff in the street. Held, that plaintiff was not entitled to recover. The court said: "If the plaintiff had been a passenger, or his passage had not been fully terminated, or if, when he left the car at his destination, the employee had immediately followed the passenger up and assaulted him, the defendant concedes that there would be no question as to the liability of the company. . . . But here the plaintiff was neither a passenger, nor was the employee acting within the scope of his employment. . . . The employee in this case had left the car, and was not engaged in any work or employment for the company at the time of the assault. He had, for the time being, abandoned his post, and was not doing service for the company."

See also *Hanson v. Urbana & C. Electric Street R. Co.* (1897) 75 Ill. App. 474 (company not liable for assault committed on a passenger after he had alighted); *Grayson v. St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730 (carrier not liable for wrongful arrest of passenger after he had left the car); *Reilly v. New York City R. Co.* (1904; App. Div.) 46 Misc. 72, 91 N. Y. Supp. 319 (carrier not liable for an assault made by a conductor on a passenger who, after having voluntarily alighted from a car, waited for him on his return trip, and spoke to him in an office of the street railway company).

In *Brown v. Interborough Rapid Transit Co.* (1907) 56 Misc. 637, 107 N. Y. Supp. 629, plaintiff boarded defendant's north-bound car, and, falling asleep, was carried several blocks beyond his destination. He then crossed the street to another station to catch defendant's south-bound car, which

liability of the carrier has been affirmed, where a passenger on a crowded car, having alighted from the front platform, walked

he persisted in getting on without paying his fare. The trainmen by force kept him off the train. Held, that defendant was not liable for the assault, having fully performed its contract when it carried plaintiff on its north-bound train to his destination. It was under no obligation to furnish him a return passage free of charge.

⁵⁸ In *Central R. Co. v. Peacock* (1888) 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709, a passenger to whom the driver had used insulting and abusive language threatened to report him when they should arrive at the defendant's office, which was at the stables at which the car stopped for a change of horse. Plaintiff alighted a block from the office, intending to report the driver while the horses were being changed, and then to resume his seat, but he did not communicate his purpose to the driver. The car went on, but was afterwards stopped before reaching the stables, and the driver went to the sidewalk where plaintiff was, and assaulted him. Held, that the defendant was not liable for the assault. The court said: "When he [the passenger] left the car, the carrier was certainly not liable for his conduct on the street, nor for the conduct of a stranger to him on the street. Why, then, should the appellant be answerable for the assault of its driver, who actually stomped his team, and left it in the street, with his passengers unguarded, in order that he might pursue his victim, and knock him down? In doing this, he cannot be regarded as acting within the sphere of his duty or scope of his authority. He left and stepped aside from both in order to gratify his spleen; and, upon the authorities already cited, we cannot doubt that it was error to hold the appellant responsible." The following statement in Cooley on Torts, p. 535, was quoted with approval: "If the conductor of a train of cars leaves his train to beat a personal enemy, or from mere wantonness to inflict any injury, the difference between his case and that in which the passenger is ejected from the cars is obvious. The one is a trespass he has stepped aside to commit; the other is committed in the course of his employment." Discussing the effect of the element introduced by the claimant's intention of resuming his journey, the court said: "After he had alighted and walked a square, could he resume his place in the car without paying another fare, without the assent of the conductor? Would the conductor be justified in omitting to charge another fare? We think not. Had he remained in the car until the stables were reached and the horses were being changed, the carrier would have understood his journey was not completed, and whilst the horses were being changed he would still have been regarded as a passenger, and would have been en-

to the rear platform to procure a transfer, and was there assaulted by the conductor.⁵⁹ Where a passenger who had twice asked for a transfer ticket while he was still on the car, and who had continued to demand it after he had, in obedience to the conductor's order to get off the car, alighted at

the transfer point, was assaulted during an altercation which then took place,⁶⁰ and where the assault complained of, although it was committed when the aggrieved party was on the highway, was merely the last of a continuous series of acts commenced while he was still on the car.⁶¹ The right

titled to protection as against the employees, if he then had gone into the office to execute his declared purpose to report."

In *Zeccardi v. Yonkers R. Co.* (1907) 190 N. Y. 389, 17 L.R.A. (N.S.) 770, 83 N. E. 31, reversing (1906) 113 App. Div. 649, 99 N. Y. Supp. 936, while the plaintiff and a friend were passengers on defendant's car, the conductor quarreled with the latter about the payment of fare, and ejected him from the car. Thereupon he and the conductor engaged in a fight upon the ground; the car being stopped at the time. Plaintiff did not know what the fight was about, but stepped out to separate the men. The motorman took hold of him and knocked him down and punched him. Subsequently the conductor charged plaintiff in a police court with having assaulted him, and plaintiff was acquitted. Held, that defendant was not liable for the motorman's assault on and the false charge against plaintiff. The court said: "It is . . . true that a passenger during his journey may alight from the car without losing his status as passenger. *Parsons v. New York C. & H. R. Co.* (1889) 113 N. Y. 362, 3 L.R.A. 683, 10 Am. St. Rep. 450, 21 N. E. 145. In this case, however, the wrongs for which the plaintiff seeks redress were suffered when the plaintiff entered upon an enterprise totally disconnected with the carriage. His intervention to end the quarrel which was taking place on the street between the conductor and the other passenger may have been, and doubtless was, on his statement, praiseworthy, but it occurred neither on the defendant's car nor on its property, and was a matter wholly foreign to and disconnected with the defendant's contract of carriage. The fact that one of the combatants was the defendant's conductor did not alter the relation the defendant would have borne to it had it been a contest entirely between strangers. Had the plaintiff been assaulted for trying to alight from the car or trying to again obtain entrance in it a very different question would be presented. His injuries were occasioned during his voluntary intervention in a quarrel, as to which the defendant owed him no duty."

In *McGilvray v. West End Street R. Co.* (1895) 164 Mass. 122, 41 N. E. 116, a passenger got off when the car was switched into the car house before reaching the point to which he had paid his fare, and, while standing in the street, with one foot resting on the step to the car house, engaged in an altercation with the conductor regarding the fact that the car did not run through, and that he was not informed that it would be switched. Held, that an assault

committed by the conductor upon him during the altercation was not imputable to the carrier. The court said: "The only reasonable inference to be drawn from the whole evidence is that, while waiting in the public street to take one of the defendant's cars, he saw fit to engage in an altercation with a person who was in fact one of defendant's servants, and received from him an assault which was not made for any purpose which the jury could find to be part of the defendant's business. The defendant had no control over the place where the plaintiff was, and no duty to protect the plaintiff there from any assaults, although it would be responsible to him for assaults committed upon him there, as elsewhere, by its servants in the scope of their employment. The suggestion that it could be found within the scope of that employment for a servant to punish him for asserting his rights against the defendant is, of course, untenable; nor is there in the suggestion that the assault was for the purpose of putting him out of the defendant's premises sufficient ground to warrant submitting the case to a jury."

⁵⁹ *Miller v. Brooklyn Heights R. Co.* (1908) 124 App. Div. 537, 108 N. Y. Supp. 960. It was held that he was still a passenger because he would have been entitled to continue his journey on the same ticket, if the conductor had refused to give him a transfer.

⁶⁰ In *Blomness v. Puget Sound Electric R. Co.* (1907) 47 Wash. 620, 17 L.R.A. (N.S.) 763, 92 Pac. 414, the court said: "It must be conceded that, under the contract made by the respondent, the appellant had not arrived at his destination when he alighted from the car in the city of Seattle, for he had paid for transportation to the city of Ballard. It was necessary for him to alight for the purpose of changing cars, and, to receive the benefit of his contract, it was necessary for him to travel outside of the car, between the car from which he alighted and the Ballard car. The trip was a continuous one, and the fact that he had to change cars would not in justice or fairness, affect his rights as a passenger."

⁶¹ In *Savannah Street R. Co. v. Bryan* (1890) 86 Ga. 312, 22 Am. St. Rep. 464, 12 S. E. 307, an action was held to be maintainable where a passenger on a street car, who had delayed a short time in paying his fare, was assaulted by the conductor, first on the car, and then at the company's office, where he had gone to make a complaint.

In *Wise v. Covington & C. Street R. Co.* (1891) 91 Ky. 537, 16 S. W. 351, where a

(4) Cases in which the defense relied upon by the carrier was that the tort in question had been committed after the contract of carriage had been completely performed.⁷⁵ The phrases, when used with reference to the validity of such a defense, are manifestly to be understood in their broadest sense.

(5) Cases in which the defense relied upon was that, at the time when the injury was inflicted, the tortfeasor was not engaged in performing the contract of carriage in respect of the injured person.⁷⁶

As used in such cases, the phrases may bear either the broader or the narrower sense.

(6) Cases in which the tortfeasor was employed in the dual capacity of a servant and of a public officer.⁸⁰ The phrases, when used in this connection, are obviously intended to apply to acts done by him in the former capacity.

The conclusion which seems to be strongly indicated by the foregoing summary is that these phrases should not be used at all in any case where the enforceability of a claim is determined with reference to the theory of an absolute liability on the car-

rier's part. Perspicuity, precision, and doctrinal consistency would unquestionably be subserved by the adoption of a terminology expressive merely of the essential fact that the tort complained of was or was not a breach of the contract of carriage.

4. Limits of the carrier's absolute obligation to protect passengers from wrongful arrest.

In jurisdictions where the right to maintain an action against a carrier for a wrongful arrest is treated as being determinable with reference to the theory of a duty on the carrier's part to afford protection to his passengers, that duty is deemed to be absolute only as regards arrests made by the carrier's servants on their own initiative. In respect of arrests made by officers of the law, a passenger cannot recover damages unless he can prove that the carrier's servants were guilty of some positive misconduct with relation to the tort. It has been laid down that such misconduct may be inferred where the servants had notice, actual or constructive, of the

duty, and apart and away from the scope of the employment, as that term is understood, in the class of cases . . . [where the plaintiff is a third person]. The carrier is liable in such cases because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment." *Birmingham R. & Electric Co. v. Baird* (1900) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456.

"It is not merely a question of negligence in such cases, nor is it a question strictly depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part, whether caused by the wilful act of an employee or not." *Haver v. Central R. Co.* (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916, adopting the language of *Elliot on Railroads*, vol. 4, § 1638.

It makes no difference . . . how foreign the act may have been to the master's business then in hand, of transporting the passenger, "if the act was in violation of the master's duty to the passenger." *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 588, 14 L.R.A. 798, 20 Am. St. Rep. 827, 14 S. E. 243.

See also *Pelot v. Atlantic Coast Line R. Co.* (1910) 60 Fla. 159, 53 So. 937 (carrier liable "regardless of whether the wrong is committed in the execution of the servant's employment"); *Citizens' Street R. Co. v. Clark* (1903) 33 Ind. App. 190, 104 Am. St. Rep. 249, 71 N. E. 53 (carrier liable irre-

spective of whether servant was "acting within the scope of his employment"); *Eads v. Metropolitan R. Co.* (1890) 43 Mo. App. 536 (carrier liable whether the act of the servant was done "in the line of his employment" or not); *White v. Norfolk & S. R. Co.* (1894) 115 N. C. 637, 44 Am. St. Rep. 489, 20 S. E. 191 (immaterial whether servant was "acting within the scope of his employment"); *Bess v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 49, 29 Am. St. Rep. 820, 14 S. E. 234 (carrier liable whether the act was "within the line of his employment or not," or "within the scope of his authority, or wanton"); *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103 (instruction to find for the defendant if the injurious act was not within the scope of the servant's duty, held to have been properly refused).

⁷⁵ See *Blomness v. Puget Sound Electric R. Co.* (1907) 47 Wash. 620, 17 L.R.A. (N.S.) 763, 92 Pac. 414, where it was laid down that the carrier would not be liable unless the servant's act was "within the scope of his employment."

⁷⁶ See *Goodwin v. Cincinnati Traction Co.* (1910) 99 C. C. A. 661, 175 Fed. 61, where the right of recovery was treated as depending upon whether one of the inspectors of a street railway company had assaulted a passenger before or after he had passed under the control of another inspector.

⁸⁰ *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103 ("acting within the scope of his employment"). It should be observed, however, that in another part of its opinion the court used a similar phrase in a different sense.

illegality of his arrest, and failed to take such measures as were requisite for his protection.⁸¹ But apparently no case has yet been decided in which the defendant's liability turned directly upon the nature and extent of the obligations which such notice imposed upon his servants. When the point is actually presented, the manifest difficulties involved in a doctrine which seems to offer to the carrier's servants the dilemma of an election between interference with the execution of criminal process and a cause of action which will render their employer liable for damages may lead to its definitive repudiation. Be this as it may, there can be no doubt that, in the absence of evidence of such notice, liability

cannot be imputed to the carrier on the mere ground that he did not inquire into the authority of the officers, nor resist them and prevent the arrest.⁸² It is also clear that, irrespective of the question of notice, he may be held liable if his servants actively participated in the arrest. But such participation is not established by testimony which merely shows that a servant in charge of a railway train or other vehicle of transportation pointed out the passenger as the person indicated by a telegram sent to the officer who made the arrest,⁸³ or facilitated the entrance of the officers into a place where the passenger had taken refuge,⁸⁴ or stopped the train while

⁸¹ Duggan v. Baltimore & O. R. Co. note 82, *infra*.

"If the conductor had knowledge that the arrest was unlawful, then it would be his duty to use extraordinary diligence to prevent it and protect the passenger; but even in that case the company would not be an insurer against such arrest. If the conductor had notice that the arrest was wrongful, it would be his duty to make inquiry into the matter." Brunswick & W. R. Co. v. Ponder (1903) 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430.

⁸² In Duggan v. Baltimore & O. R. Co. (1893) 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186, the court thus discussed the obligations of a conductor to whom a telegram addressed to the police, and ordering the arrest of a passenger, had been handed: "The conductor has general power and control over the train and all persons on it, with authority to compel observance of the regulations of the company, to preserve order, and to employ the whole force of the trainmen, and of passengers willing to assist, for these purposes. These extensive powers involve the correlative duty to protect passengers not only from injury by negligence or accident, but also from violence and illegal annoyance or interference by other parties. . . . He was not, however, required to enter into a contest with or put himself in opposition to the officers of the law, and if he merely stood by without taking part in the arrest by known policemen, he was not necessarily bound to inquire into their authority, or assert his own against it. How far the conductor in the present case assisted in the arrest is the subject of some conflict in the testimony, and what knowledge he had of the illegality of it is not clear. Although the telegram was addressed to him as the conductor of that train, he does not seem to have assumed the direction of the affair, but rather to have acquiesced in what the police whom he found there on his arrival should do, with the suggestion that they should not detain his train. The case must, therefore, go to the jury to determine what he did, and whether, in ac-

cordance with the principles of law, it was a proper performance of his duty."

"It would never do to allow a railroad conductor to interfere with officers of the law and prevent arrests by them merely because he did not know whether or not they were acting within their power and authority. . . . Where the arrest is by officers of the law and is apparently regular, and there is nothing to put the company on notice that the arrest is illegal, the company cannot be held liable for a failure to interfere with the officers and prevent the arrest." Brunswick & W. R. Co. v. Ponder, *supra*. The court said: "The duty defined did not, we think, obligate either the carrier or its servants to oppose active resistance to the officer of the law, or to inquire into the authority under which he was assuming to act. The law affords other remedies for its violation by its officers." Texas Midland R. Co. v. Dean (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135, reversing (1904) — Tex. Civ. App. —, 82 S. W. 524.

"The duty to protect the passenger from violence or assault from others does not demand that the conductor should place himself in opposition to the due administration of the law; and he cannot, therefore, be said to be guilty of misconduct or of negligence where he simply submits to and complies with the request or demands of those officers whose duty it is to enforce the criminal laws." Mayfield v. St. Louis, I. M. & S. R. Co. (1910) 97 Ark. 24, 32 L.R.A.(N.S.) 525, 133 S. W. 170. The court relied upon the Duggan case, *supra*, and quoted with approval the statement in Hutchinson, Carr. § 987.

See also Owens v. Wilmington & W. R. Co. and Bowden v. Atlantic Coast Line R. Co. notes 83, 84, *infra*.

⁸³ Owens v. Wilmington & W. R. Co. (1900) 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259.

⁸⁴ In Bowden v. Atlantic Coast Line R. Co. (1907) 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783, evidence that, on demand of police officers who were endeavoring to arrest plaintiff, defendant's conductor instructed the train porter to deliver to such

the arrest was being effected.⁸⁵ Nor is the carrier under any duty to see that the officers use only such force as is necessary to make the arrest.⁸⁶

j. Carrier's liability, how far affected by misconduct of passenger. Antecedent violence of passenger.

1. Assault made by servant in repelling an assault made upon him by the injured passenger.

The general rule is that damages in re-

officers the key to a water-closet wherein plaintiff had locked himself, without the conductor's knowledge, bolting the door on the inside, so that the key was of no avail, was held not to be evidence of "a purpose to actively aid and abet the officers."

⁸⁵ In *Brunswick & W. R. Co. v. Ponder* (1903) 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 42 S. E. 430, the court thus commented upon the contention of counsel in this regard: "The conductor was ordered to stop the train, and as he had a right to presume that the arrest was legal, his obeying the command of the officers was no breach of duty to the passenger. An officer may stop a train to make an arrest of a person thereon. *St. Johnsbury & L. C. R. Co. v. Hunt* (1888) 60 Vt. 588, 1 L.R.A. 189, 6 Am. St. Rep. 138, 15 Atl. 186. And certainly an officer may, after having made the arrest, stop the train to remove his prisoner. It would have been an interference with the officers to have carried them on out of their town while they were endeavoring to make an arrest within it. In this particular case it further appears that, at the time the train stopped upon the command of the officers, Ponder had ceased resisting and agreed to get off."

For another decision to the same effect, see *Bowden v. Atlantic Coast Line R. Co.* note 84, *supra*.

⁸⁶ In *Brunswick & W. R. Co. v. Ponder*, *supra*, the contention of counsel under this head was discussed by the court: "In the first place, the conductor seems to have done what he could to prevent this, and but little force was used after he arrived upon the scene, the violent assaults having occurred before he discovered what was going on or had time to take part. Nor is there any evidence of negligence on the part of the company's agents in not sooner discovering that the officers were on the train, endeavoring to arrest Ponder. Then, too, if our conclusions be correct, that the conductor could assume that the arrest was a lawful one, and was under no duty to prevent it, we think the company cannot be held liable for the excessive force used. Ponder became the prisoner of the officers as soon as they laid hold on him and before he was removed from the train. He was taken out from under the protection of the conductor as against the officers of the law. He was then in the custody of the law, and, whether or not the conductor or anyone else

spect of an assault committed by a carrier's servant for the purpose of defending himself against the violence of a passenger cannot be recovered in an action against the carrier.⁸⁷ This rule is a necessary deduction from the more general principle that "if an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility on him, no responsibility attaches to the employer

was authorized to prevent the use of unnecessary force in making the arrest, the railroad company was, in this regard, no longer under any duty to him as a passenger. See, in this connection, *Jardine v. Cornell* (1888) 50 N. J. L. 485, 14 Atl. 590."

⁸⁷ In *Baltimore & O. R. Co. v. Barger* (1894) 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560, the court observed *arguendo*: "There may be, and doubtless are, cases in which the conduct of a passenger towards the employee of a railroad company was such that the company would not be liable for the act of the employee. A conductor, for example, would be justified in the defense of his own person, or the property of the company in his charge, in using such force as would be necessary for their protection against a passenger or anyone else, without rendering the company liable. Because he occupies the position of a conductor, and his assailant that of a passenger, does not deprive the former of the right of defending himself or the property in his charge, so far as it becomes necessary."

In *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A.(N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615, the answer, after a denial of allegations to the effect that the plaintiff had been assaulted by the defendant's conductor, raised by further affirmation the issues that, if an assault was committed, the conductor at the time was not acting within the scope of his employment, or, if he was so acting, that the force used was not excessive, but was justifiable in self-defense, to repel an attack by the plaintiff. The court said: "There is no evidence to which this last averment is applicable. It appears that neither in the car, nor while passing from the car to the ground, did the plaintiff threaten him with bodily harm or lay hands upon the person of the conductor. If the defendant intended to rely upon the defense that the plaintiff was rightly ejected with the use of no more force than was necessary, it should have pleaded the avoidance. It was not available under the present answer."

In *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103, the court thus laid down the law: "A servant of a carrier, assaulted by a passenger, may use such force in resisting the same as is actually or apparently necessary to successfully repel it, but no more. The servant

therefor." ⁶⁸ Being founded upon that principle, it is subject to the obvious qualification that the carrier may be held liable

if the defensive action of the servant in question was accompanied with a degree of violence which, in view of the given circum-

may rightfully do what his principal could do if he were present and acting, and the measure of the right and duty of the former is, under these circumstances, the same as that of the latter. Self-defense, made within the limitations prescribed by law, is always permissible and never a violation of law. Hence, it justifies resistance sufficient to repel the assault wherever and upon whomever made. *New Orleans & N. E. R. Co. v. Jones* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109."

In *Murphy v. St. Louis Transit Co.* (1902) 96 Mo. App. 272, 70 S. W. 159, the defense was that whatever injuries plaintiff received were inflicted by the servants of the company in defending themselves against an assault by the plaintiff. An instruction was given by the court which told the jury that if plaintiff began the assault, he could not recover. Held, that the refusal of an instruction submitting the issue whether the plaintiff was a trespasser on the car or not was not error, that issue being immaterial, since he had no higher right to commit an assault if he was a passenger than he would have had if he had been a trespasser.

In *Hayes v. St. Louis R. Co.* (1884) 15 Mo. App. 583, where a passenger who has violently assaulted a conductor of a street car was pushed off by him while the car was in motion, it was held that the railway company would not be liable if he had good reason to believe that the act was necessary for his protection.

In *Neuer v. Metropolitan Street R. Co.* (1910) 143 Mo. App. 402, 127 S. W. 669, where the plaintiff struck the conductor of a street car and then dragged him from the car to the sidewalk, it was held that the carrier was not liable for what occurred on the sidewalk.

In *Russell v. New York C. & H. R. R. Co.* (1896) 12 App. Div. 160, 42 N. Y. Supp. 678, an action for an alleged assault committed by its conductor, a verdict for the passenger was set aside for the reason that evidence which was substantially uncontroverted tended to show that the plaintiff was disorderly, and that he struck the first blow, and that the conductor used no unnecessary force.

For other cases in which the doctrine stated in the text was recognized or applied, see *Culberson v. Empire Coal Co.* (1908) 156 Ala. 416, 47 So. 237; *Alabama City, G. & A. R. Co. v. Sampley* (1910) 169 Ala. 372, 53 So. 142; *Coleman v. Yazoo & M. Valley R. Co.* (1907) 90 Miss. 629, 43 So. 473; *O'Brien v. St. Louis Transit Co.* (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939; *O'Donnel v. St. Louis Transit Co.* (1904) 107 Mo. App. 34, 80 S. W. 315; *James v. Metropolitan Street R. Co.* (1903) 80 App. Div. 364, 80 N. Y. Supp. 710; *Reed v. New York & Q. C. R. Co.* (1907) 116 App. Div. 709, 102 N. Y. Supp. 19; *Williams v. 40 L.R.A. (N.S.)*

Gill (1898) 122 N. C. 967, 29 S. E. 879; *International & G. N. R. Co. v. Washington* (1909) 54 Tex. Civ. App. 166, 117 S. W. 992; *Houston Electric Co. v. Park* (1911) — Tex. Civ. App. —, 135 S. W. 229.

⁶⁹ *New Orleans & N. E. R. Co. v. Jones* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109. Referring to the case of *New Jersey S. B. Co. v. Brockett* (1886) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039, the court said: "It will be noticed that that which, according to this decision, the carrier engages absolutely against, is the misconduct or negligence of his employee. If this shooting was lawfully done, and in the just exercise of the right of self-defense, there was neither misconduct nor negligence. . . . If an employee may use force to protect other passengers, so he may to protect himself. He has not forfeited his right of self-defense by assuming service with a common carrier, nor does the common carrier engage against the exercise of that right by his employee. There is no misconduct when a conductor uses force and does injury in simple self-defense; and the rules which determine what is self-defense are of universal application, and are not affected by the character of the employment in which the party is engaged. Indeed, while the courts hold that the liability of a common carrier to his passengers for the assaults of his employees is of a most stringent character, far greater than that of ordinary employers for the actions of their employees, yet they all limit the liability to cases in which the assault and injury are wrongful." Here, as to the defense that the act of the conductor in shooting a passenger was lawful, the court said: "If the immediate actor is free from responsibility because his act was lawful, can his employer, one taking no direct part in the transaction, be held responsible? Suppose we eliminate the employee and assume a case in which the carrier has no servants, and himself does the work of carriage; should he assault and wound a passenger in the manner suggested by the instruction, it is undeniable that, if sued as an individual, he would be held free from responsibility, and the act adjudged lawful. Can it be that, if sued as a carrier for the same act, a different rule obtains, and he be held liable? Has he broken his contract of carriage by an act which is lawful in itself, and which, as an individual, he was justified in doing? The question carries its own answer."

In *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404, the court observed that the responsibility of the carrier "rests upon the assumption that the battery cannot be justified. If it can be, no responsibility attaches to anyone. If it cannot be, both the servant and the carrier are liable."

stances, appears to have been excessive and unreasonable.⁸⁹ "The servant is justified in using force upon a passenger only to pro-

tect himself from bodily harm; but even then he cannot lawfully go further than is reasonably necessary for his defense and

The consideration that no culpable act upon which an action could be founded had been committed by the servant was also especially relied upon as the *ratio decidendi* in *Monnier v. New York C. & H. R. R. Co.* (1903) 175 N. Y. 281, 62 L.R.A. 357, 98 Am. St. Rep. 619, 67 N. E. 569, reversing (1902) 70 App. Div. 405, 75 N. Y. Supp. 521, where a passenger had used force in resisting a conductor who attempted to enforce a regulation regarding the payment of fare.

⁹⁰ So laid down in *Haver v. Central R. Co.* (1900; Err. & App.) 64 N. J. L. 312, 45 Atl. 593, where a baggage master ejected from a train a passenger who had assaulted him. This was the second appeal of the case after the new trial which had been ordered on the ground that the plaintiff had been improperly nonsuited. See (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916.

In *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404, the court observed: "Nor is it true that an assault, or resistance to the performance of a duty, will justify the servant in pursuing and punishing the passenger, after the assault or the resistance is over. If he does, he makes the carrier, as well as himself, liable for the injury. If, therefore, it be true, as the defendants contend, that the plaintiff was the aggressor, that he first assaulted the brakeman and resisted him in the performance of a legitimate duty, it was still a question of fact for the jury to determine, whether the brakeman did not use greater violence than the exigencies of the case demanded; whether he did not pursue the plaintiff, and inflict the blows upon his head with the iron poker, after the latter had ceased his assault, had ceased his resistance, and was returning to his seat with his back to the brakeman. Under the instructions of the court the jury must have so found, or they could not have returned a verdict for the plaintiff; and in our judgment the evidence fully justified the finding."

In *Birmingham R. & Electric Co. v. Baird* (1900) 130 Ala. 354, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456, the court said, *arguendo*: "Of course, a conductor has the right of self-defense against the assault of a passenger; but the right is the same in this connection as in criminal law. He must be imperiled, and he must be without fault. To be sure, he need not retreat from his car. And he may assault a passenger when necessary to protect other passengers from assault, using no more than necessary force, and this may become a duty,—indeed, it is a duty whenever it is a right."

In *Neuer v. Metropolitan Street R. Co.* (1910) 143 Mo. App. 402, 127 S. W. 669, the court said: "With some exceptions, perhaps, the rule is well established that notwithstanding one person may instigate

a combat by insulting language or conduct, yet the law does not justify his adversary, on the plea of self-defense, in the use of unnecessary or unreasonable force. And this rule applies to the relationship of carrier and passenger. A carrier is liable for the act of its conductor while engaged in the performance of his duty as such precisely as the conductor himself would be in a case of assault on such passenger."

In *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103, the court said: "If the servant of a carrier, assuming to exercise this right [i. e., of self-defense] transcends the limits thereof in respect to an assault made upon him by a passenger by the use of unnecessary force or violence, his principal is just as clearly liable for the injury done as the servant himself would be for the exercise of such excessive force, when acting in his individual capacity, and not as a representative of the carrier. *O'Brien v. St. Louis Transit Co.* (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939; *Haman v. Omaha Horse R. Co.* (1892) 35 Neb. 74, 52 N. W. 830. To the extent of the excessive force and violence exerted, the conduct of the servant is necessarily wilful and without justification. Being unlawful, it imposes liability, and that liability falls upon the carrier, because of its duty to protect the passenger from injury by its servant."

In *Chicago, R. I. & P. R. Co. v. Barrett* (1884) 16 Ill. App. 17, where it was held that the jury had been correctly instructed that if the defendant's conductor used excessive and unreasonable force in repelling an attack upon him by appellee, the company would be responsible for injuries occasioned by such excessive force, the court remarked: "If the act of the servant in committing a naked assault upon, or other wilful or malicious wrong to, one intrusted to his care and protection, be the act of the carrier, how can it logically or legally be said that the latter's justification is more extensive than that of the servant?"

Other cases which recognize the rule that the plea of self-defense by the servant will not avail the carrier if excessive force was used are cited in note 87, supra, and notes 90, 91, infra.

In *St. Louis Southwestern R. Co. v. Berger* (1898) 64 Ark. 613, 29 L.R.A. 784, 44 S. W. 809, Bunn, Ch. J., delivered a lengthy dissenting opinion, the essence of his position being that an assault made by a servant in self-defense is not in the line of his employment, and that "continuing his defense to the extent of using more and greater force than is necessary to repel the assault and force his antagonist to desist" does not have "the effect of bringing him back into the line of his employment." The reasoning, however, is obviously of no force in any jurisdictions except those in which a carrier can escape liability by showing that

the proper management of the carrier's business."⁹⁰

The burden of justifying an assault rests upon the carrier.⁹¹ Whether the circumstances relied upon by the carrier were such as warranted the servant in resorting to the degree of force which he used in defending himself is a question to be determined by the jury, viewing the situation from the standpoint of the employee, though he must decide the matter in the first instance at the peril of himself and his master.⁹²

In determining whether the servant's conduct was wrongful on this point of view, it must be considered with reference to the standard of that high degree of care which, as the representative of the carrier, he is

the wilful tort of a servant which it is sought to impute to him was outside the scope of the servant's employment. By the majority of the court it was apparently taken for granted that Arkansas was not one of those jurisdictions at the date when the case was decided. It certainly is not now.

⁹⁰ Jackson v. Old Colony Street R. Co. (1910) 208 Mass. 486, 30 L.R.A.(N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615.

⁹¹ St. John v. Eastern R. Co. (1861) 1 Allen, 544; St. Louis Southwestern R. Co. v. Berger, supra.

In Birmingham R. Light & P. Co. v. Mullen (1903) 138 Ala. 614, 35 So. 701, an action for an assault by the defendant's conductor, charges which instructed the jury that the assault complained of was proper, if used in an honest and proper effort to eject plaintiff from the car, were held to be erroneous for the reason that the onus was upon the defendant to justify the assault, and that the conductor had no right to strike the plaintiff, in ejecting him from the car, unless it was necessary to defend himself from the assault as made upon him.

⁹² Teel v. Coal & Coke R. Co. (1909) 66 W. Va. 315, 66 S. E. 470. It was held that requested instructions which would have authorized the jury to find for the defendant if, in their opinion, the servant had used such force "as he believed" was necessary under the circumstances had been properly modified by inserting after the words, "as he believed" the words, "and had reasonable grounds to believe." The effect of the insertion was to narrow the proposition by making the extent of rightful exercise of force depend upon actual and apparent necessity, and not the brakeman's opinion in that regard.

⁹³ Dallas Consol. Electric Street R. Co. v. Pettit (1907) 47 Tex. Civ. App. 354, 105 S. W. 42; International & G. N. R. Co. v. Washington (1909) 54 Tex. Civ. App. 166, 117 S. W. 992.

⁹⁴ In Hanson v. European & N. A. R. Co. (1873) 62 Me. 84, 16 Am. Rep. 404, where a passenger and a brakeman had an alterca-

tion and a personal encounter over the removal of the passenger's dog from the car, and the brakeman afterwards assaulted the passenger with a poker, a verdict against the railway company was sustained. The court said: "If the servant is first assaulted, he may defend himself. If he is resisted in the performance of any duty, he may use force sufficient to overcome the resistance. But the assault being over, or the resistance ended, he cannot pursue and punish the wrongdoer. . . . Nor is it true that an assault, or resistance to the performance of a duty, will justify the servant in pursuing and punishing the passenger, after the assault or the resistance is over. If he does, he makes the carrier as well as himself liable for the injury. If, therefore, it be true, as the defendants contend, that the plaintiff was the aggressor, that he first assaulted the brakeman and resisted him in the performance of a legitimate duty, it was still a question of fact for the jury to determine, whether the brakeman did not use greater violence than the exigencies of the case demanded; whether he did not pursue the plaintiff, and inflict the blows upon his head with the iron poker, after the latter had ceased his assault, had ceased resistance, and was returning to his seat with his back to the brakeman."

bound to exercise in order to avoid inflicting injury upon passengers."⁹³

Another situation in which the defensive quality of the servant's act cannot be successfully pleaded is indicated by the cases in which the carriers have been held liable for assaults which were induced by previous attacks of passengers, but were committed after all danger from those attacks had ceased.⁹⁴

2. Assault made in repelling an assault made by a passenger other than the one injured.

In a case where the plaintiff, while alighting from a train, was wounded by a shot which a flagman had aimed at a disorderly

tion and a personal encounter over the removal of the passenger's dog from the car, and the brakeman afterwards assaulted the passenger with a poker, a verdict against the railway company was sustained. The court said: "If the servant is first assaulted, he may defend himself. If he is resisted in the performance of any duty, he may use force sufficient to overcome the resistance. But the assault being over, or the resistance ended, he cannot pursue and punish the wrongdoer. . . . Nor is it true that an assault, or resistance to the performance of a duty, will justify the servant in pursuing and punishing the passenger, after the assault or the resistance is over. If he does, he makes the carrier as well as himself liable for the injury. If, therefore, it be true, as the defendants contend, that the plaintiff was the aggressor, that he first assaulted the brakeman and resisted him in the performance of a legitimate duty, it was still a question of fact for the jury to determine, whether the brakeman did not use greater violence than the exigencies of the case demanded; whether he did not pursue the plaintiff, and inflict the blows upon his head with the iron poker, after the latter had ceased his assault, had ceased resistance, and was returning to his seat with his back to the brakeman."

In Galveston, H. & S. A. R. Co. v. La Prelle (1901) 27 Tex. Civ. App. 496, 65 S. W. 488, the plaintiff struck a conductor in the course of an altercation which had arisen between them. The conductor did not then resent the assault, but went into another car, procured a pistol, returned, and without further provocation, assaulted plaintiff. Held, that a verdict against the railway company was proper. The court said: "If the conductor committed the acts of violence complained of, then, in our opinion, the law of self-defense affords the true test of liability; and the plaintiff's entire cause of action could not be defeated by showing that he was guilty of provoking conduct which fell short of justifying the conductor in inflicting the injuries complained of."

passenger with whom he had had an altercation, it was held that the jury should have been instructed to find for the defendant, if, in their opinion, the flagman had fired the shot in the reasonable belief that this was necessary in order to protect himself or the other trainmen from death or great bodily harm at the hands of the disorderly passenger.⁹⁵

3. Assault made in dealing with a disorderly passenger.

The servants in charge of a train or other vehicle are justified in expelling a disorderly passenger from the vehicle, or removing him to some part of it where his misbehavior will not cause annoyance to the servants themselves or the other passengers. For such expulsion or removal the carrier cannot be held liable if it was effected without the use of unreasonable force.⁹⁶

⁹⁵ Illinois C. R. Co. v. Gunterman (1909) 135 Ky. 436, 122 S. W. 514.

⁹⁶ In New Orleans & N. E. R. Co. v. Jopes (1891) 142 U. S. 13, 35 L. ed. 919, 12 Sup. Ct. Rep. 109, the court observed: "It is not every assault by an employee that gives to the passenger a right of action against the carrier. Suppose a passenger is guilty of grossly indecent language and conduct in the presence of lady passengers, and the conductor forcibly removes him from their presence, there is no misconduct in such removal; and, if only necessary force is used, nothing which gives to the party any cause of action against the carrier. In such a case, the passenger, by his own misconduct, has broken the contract of carriage, and he has no cause of action for injuries which result to him in consequence thereof. He has voluntarily put himself in a position which casts upon the employee both the right and duty of using force."

In *Hanson v. European & N. A. R. Co.* supra, the court used the following language: "It is also the duty of passengers to observe the rules and regulations of the company and to conduct themselves generally so as not to invite uncivil treatment, nor provoke violence. But it is not true that disobedience to the rules of the company will operate as a license to the employees to maltreat a passenger. If a passenger persists in violating the reasonable rules of the company, after notice of the rules, and a request to him not to act contrary to them, the carrier will have a right to rescind the contract for his conveyance, and refuse to carry him further. But he will have no right to maltreat him while continuing to perform the contract for his conveyance."

See *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018, where the plaintiff 40 L.R.A. (N.S.)

4. Assault made by servant for purpose of protecting the carrier's property.

An action against a carrier in respect of an assault made by his servant upon a passenger cannot be maintained, if it appears that the servant merely used such force as was necessary to protect the carrier's property against the passenger.⁹⁷

k. —by antecedent provocative words or conduct on the passenger's part.

1. Assault induced by passenger's conduct or words.

The doctrine which prevailed in Georgia for several years was that no action in respect of an assault made upon a passenger by a servant of a carrier could be maintained against his employer, if the evidence showed that the assault had been provoked by offensive and irritating words or conduct on the part of the passenger.⁹⁸ In the

tiff was drunk and so disorderly as to justify his ejection.

⁹⁷ *Baltimore & O. R. Co. v. Barger* (1894) 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560.

⁹⁸ The doctrine was first applied in *Peavy v. Georgia R. & Bkg. Co.* (1888) 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70. The headnote written by the court is as follows: If a disorderly passenger defies a conductor, draws a pistol, and thereby induces the conductor to arm in order to expel him from the train; and if, after expulsion, he still uses grossly obscene and profane language, reeking with insult, on which a mutual combat with pistols ensues,—the railroad company is not liable for the consequences, though the expelled passenger be wounded in the conflict; even if the conductor, excited by danger and irritated by insult, be not fully excusable for the shooting. The grounds upon which the decision proceeded were thus stated in the opinion delivered by Bleckley, Ch. J.: "But for his fault, the conductor would not have been brought into a state of excitement from danger and insult which unfitted him for discharging his proper duties, either to the company or to the passenger. Whether the conductor was more or less in fault than the plaintiff was in the shooting, certainly the plaintiff was more in fault than the company; because the plaintiff was there upon the ground, stirring up excitement and bringing on danger both to the conductor and himself. He unfitted the conductor for exercising the care and prudence that were essential to guarding the interest of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff. The plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was

latest case in which the supreme court of that state has discussed the effect of such

evidence, the doctrine has been largely modified, if not virtually discarded.⁹⁹ But it

the plaintiff's fault that the conductor was out of tune; and though the conductor might not be altogether excusable for the shooting (according to his own evidence, however, he was excusable), the company was in no fault for it, and it would be unjust for the plaintiff to recover of the company, when he boarded its train, violating the law (as we can well infer) by carrying upon his person a concealed weapon, violating the law again by swearing and using obscene language, violating the law again by committing an assault upon the conductor with a pistol, drawing the pistol and presenting it at him, and violating the law by general disorder and misconduct throughout the transaction up to the moment he was shot."

In *Georgia R. & Bkg. Co. v. Richmond* (1896) 93 Ga. 495, 25 S. E. 565, where a baggage master assaulted a man who had gone to a station to attend to his baggage, the court, treating him as being entitled to the rights of a passenger, although not actually such at the time in question, laid it down that, "if the plaintiff, instead of treating the agent respectfully, used insulting or provoking language, which naturally resulted in a difficulty, the company should not be held responsible." It was held that the court trial judge erred in giving this charge without qualification: "Sneers, looks, or contemptuous gestures will not justify an assault by an agent of a railroad company upon one who had a ticket and has become entitled under the contract to courteous treatment, until the contract was fully carried out by the railroad company or its agents." This decision modified *pro tanto* *East Tennessee, V. & G. R. Co. v. Fleetwood* (1892) 90 Ga. 23, 15 S. E. 778, in which a similar instruction had been affirmed in an action for an assault by a conductor.

In *Georgia R. & Bkg. Co. v. Hopkins* (1899) 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965, a night watchman struck the plaintiff, who was abusing him because he had been ejected from a car for a sufficient cause. On the request of the defendant the trial judge charged: "If you believe that . . . and that as a result of the discovery of . . . [the plaintiff's] conduct words followed between . . . [him] and the watchman, and that the plaintiff used insulting and opprobrious language to the watchman which naturally enough resulted in a difficulty, the company should not be held responsible for alleged assault by the watchman." He also added: "I give you in charge in this connection, or with this added to it: that the assault by the watchman must not be disproportioned to the insult offered; it being still left a question of fact for you to determine whether the battery was disproportioned to the insult." It was held error to add this qualification to the requested charge.

In *Central of Georgia R. Co. v. Motes* (1903) 117 Ga. 933, 62 L.R.A. 507, 97 Am. 40 L.R.A. (N.S.)

St. Rep. 223, 43 S. E. 990, where the company's servant in charge of a waiting room pulled the plaintiff off a bench where he was lying down in violation of a rule, the court laid down the law thus: "A passenger who displays a persistent determination to disregard such a regulation, and by his wrongful conduct so exasperates a servant of the company as to unfit him for properly performing the duty he owes his master with respect to his treatment of its patrons, cannot justly complain that the company's servant lost his temper and resorted to unnecessary force in compelling an observance of the regulation on the part of the passenger." In the *Mason Case* (1910) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225, the court remarked that if this decision "meant that in an action for an assault or the use of unnecessary violence in the discharge of the duty of ejecting a person from a train or a station the company is relieved from liability if the plaintiff is somewhat aggravating, and merely failed to promptly regard the rules of the company, it made a long advance."

In *Macon R. & Light Co. v. Mason* (1905) 123 Ga. 773, 61 S. E. 569, it was observed *obiter*: The "court is committed to the doctrine that if a passenger is himself responsible for exciting the anger of an agent or employee of a railway company, whereby he is for the time being unfitted for performing the exacting duties he owes to his employer with respect to his treatment of passengers, the company cannot be held accountable for improper conduct on the part of its servant."

The *Peavy Case*, *supra*, was followed in *Harrison v. Fink* (1890) 42 Fed. 787 (a case originating in the Georgia district), where it was held that a passenger cannot claim damages on account of the conductor drawing a pistol on him, and speaking of him as a coward to the other passengers, if the conductor's conduct was provoked and caused by the acts of the passenger.

⁹⁹ In *Mason v. Nashville, C. & St. L. R. Co.* (1910) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225, the following statement of the doctrine is set out in the headnote written by the court: "Where a suit was brought against a railroad company for an assault and battery committed by its conductor upon a passenger, if the conduct of the passenger was such as to justify the act of the conductor, the company would not be liable. If the conductor's act was not justified, but mitigated by provocative words or conduct of the passenger at the time, such mitigation would inure to the benefit of the company. But if the conductor committed an assault and battery upon the passenger, and the words and conduct of the passenger were such as to arouse the anger of the conductor and to tend to provoke a difficulty, but not such as to justify the act of the conductor, this would not free the company from liability." The

has been applied, and, so far as appears, is still accepted in some other jurisdictions.¹⁰⁰ The various conceptions to which it has been referred are these:

court thus commented on the cases cited in the preceding note: "It will be perceived that from certain expressions used in the Peavy Case, carried by other cases into the domain of substantive propositions of law suitable to be given in charge, and aided by *obiter dicta*, has grown the present theory that if a passenger excites the anger of the servant of a railroad company, even of a conductor to whom is intrusted the company's duty of protecting him, whereby the conductor is, for the time being, unfitted for the performance of his duties, though the conductor unjustifiably assaults him, the company cannot be held liable. Of course, if the conduct of the servant of the railroad was justifiable, neither the servant nor the master would be liable. But a rule which would free the carrier from liability, although holding its servant to whom it intrusted the performance of its contract of carriage not justifiable, presents, we think, an untenable doctrine. . . . In some jurisdictions opprobrious words will not justify a battery. In this state, on the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words or abusive language used by the prosecutor, or person assaulted or beaten, and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which will be determined by the jury.' If the jury find that the opprobrious words of the passenger, or act by him, amounting to an assault, would justify the servant, his conduct, so justified, would not furnish a ground for recovery against the master. But the rule works both ways. If the servant represents the master in his act, and the master is responsible for his tort, aggravation of the servant which will not justify him will not free the master from liability."

The court referred to the following decisions as lending countenance to the doctrine that the carrier could be freed from liability if the assailant had been "put out of tune" by the abusive language of the plaintiff: *Gasway v. Atlanta & W. P. R. Co.* (1877) 58 Ga. 216; *Western & A. R. Co. v. Turner* (1884) 72 Ga. 292, 53 Am. Rep. 842; *Christian v. Columbus & R. R. Co.* (1888) 79 Ga. 460, 7 S. E. 216, n. c. (1895) 97 Ga. 56, 25 S. E. 411; *Thompson v. Wright* (1899) 109 Ga. 466, 34 S. E. 560; *Central of Georgia R. Co. v. Brown* (1901) 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989.

In *Georgia R. & Electric Co. v. Rich* (1911) 9 Ga. App. 497, 71 S. E. 759, it was laid down that, where a railway conductor, while in charge of a car, strikes one passenger and knocks him against another, injuring the latter, it is no defense to an action by the injured passenger that the other passenger had used opprobrious language to the conductor.

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(1) That under the circumstances supposed, the passenger himself is in fault, and cannot warrantably complain of the natural consequences of his misconduct.¹

¹⁰⁰ In *Wise v. South Covington & C. R. Co.* (1896) 17 Ky. L. Rep. 1359, 34 S. W. 894 (for first appeal, see 91 Ky. 537, 16 S. W. 351), it was held that a passenger on a street car could not recover for abusive language addressed to him by the conductor, or for the act of the latter in knocking him down after he had left the car, where the offensive language was used and the blow struck in response to abuse and assault by the passenger.

In *Rohrbach v. Pullman's Palace Car Co.* (1909) 166 Fed. 797 (district of Pennsylvania) plaintiff, after purchasing a seat in defendant's parlor car, ordered a meal, and later objected that he was not being served in his turn. The porter politely informed him that ladies' orders were served first, whereupon plaintiff started to the platform of the car to complain to the conductor. In doing so he called the porter a "black bastard," whereupon the porter assaulted him. Held that the plaintiff provoked the assault, and should therefore have been nonsuited. The court observed that "there is nothing in justice or reason why the carrier should be liable when the passenger has, by his own misconduct, provoked a respectful and courteous servant to commit the assault by the use of such irritating and insulting language as, in all human probability, would produce that result. The whole evidence of the plaintiff shows that the porter was not at fault at all, but was endeavoring to perform his duty by treating the passengers in the car, as well the plaintiff as the others, with equal attention; and simply because the plaintiff was not permitted to have his own way in regard to his order, as against what the porter conceived to be the rights of other passengers, of which he politely informed the plaintiff, the latter became angry and used the language stated. He was to blame entirely for the assault, and he cannot now hold the carrier liable."

In *Texas & N. O. R. Co. v. Taylor* (1903) 31 Tex. Civ. App. 617, 73 S. W. 1081, the court cites with approval the cases of *Peavy v. Georgia R. & Bkg. Co.* and *Harrison v. Fink*, note 98, supra.

In *Johnson v. Detroit, Y. & A. A. R. Co.* (1902) 130 Mich. 453, 90 N. W. 274, "an action against a railroad for an assault and battery inflicted by defendant's conductor upon a passenger, an instruction to the jury that plaintiff could not recover if he provoked the assault or was the aggressor was [held to be] sufficiently favorable to defendant."

See also the cases cited in notes 2, 3, 4, *infra*.

¹ The Georgia cases cited in note 98 *supra*, were apparently based upon this broad ground. But it is not easy to extract any precise legal principle from the somewhat rhetorical language used by the judges.

The position is clearly inconsistent with the fundamental juristic principle, *Injuria non excusat injuriam*.

(2) That "the duties of the carrier and the passenger are reciprocal. The carrier is bound to protect the passenger, and the passenger, in order to entitle himself to such protection, is bound to behave himself

in a decent and orderly manner."² This explanation is open to the objection that even if it is conceded that the passenger's offensive words or conduct constitute a breach of an implied contract on his side, a resort to violence is not a legitimate method of obtaining redress for that breach.³ By committing an assault he

² *Scott v. Central Park, N. & E. River R. Co.* (1889) 53 Hun, 414, 6 N. Y. Supp. 382. There the evidence adduced for the defendant tended to show that the plaintiff, after getting upon the front platform of one of defendant's street cars, commenced an altercation with the driver, using language which was very abusive, insulting, and calculated to bring about a personal encounter,—a result which presently ensued. Held that the trial judge had erroneously refused to charge the jury that, if they believe this evidence, the verdict must be for the defendant. The court said: "It is undoubtedly true that a common carrier of passengers undertakes to protect passengers from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owed to the passengers. But it has not as yet been held that, where a passenger, by his own misbehavior, while being transported, has provoked a personal encounter between himself and one of the employees of the carrier, that the carrier is liable for the results. It may be true that the use of abusive language to the driver did not justify the assault as far as the driver is concerned, in the eyes of the criminal law; but there is no reason for holding that where a passenger, by his own improper and insulting behavior, while a passenger upon the road of the railway company, brings upon himself an assault, the carrier should be responsible. Carriers are to be held to the strictest responsibility. They must treat their passengers respectfully and protect them so far as they reasonably can from injury or insult on the part of their employees. But there is also a responsibility on the part of the passenger. He is bound to conduct himself in an orderly and decent manner, and if he forgets his obligations, and, by his indecent behavior and by the use of language which is morally certain to end in a personal encounter, he succeeds in his efforts to bring about such a result, certainly the carrier cannot be bound to protect the passenger under such circumstances from the natural and probable results of his own act. It is clear that the act of the driver was not in the course of his employment, and the defendant can only be held under the rule that, as the passenger must submit himself to the custody of the employees of the carrier, the carrier must be responsible even for the wilful acts of the employees which result in a trespass against the passenger. But the reason of such a rule can have no application to a case where the trespass is brought about by the improper behavior of 40 L.R.A. (N.S.)

the passenger which caused the assault of which he complains." Daniels, J., however, dissented on the ground that a "law is settled that words alone will not excuse a resort to personal violence." His opinion has been adopted in the later decisions of the supreme court which are cited in note 8, *infra*.

In *Little Miami R. Co. v. Wetmore* (1869) 19 Ohio St. 110, 2 Am. Rep. 373, the court, referring to the contention that the obligation of a carrier to protect a passenger is absolute, remarked: "If any such rule of liability could be applied against the company, it would necessarily impose the reciprocal duty upon the plaintiff to so demean himself towards the servants as not, by misbehavior, to provoke a personal quarrel between them." This case, it will be observed, was of earlier date than the *Peavy Case*, note 98, *supra*.

³ In *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 40, the court said: "It is the duty of the conductor and other employees upon a train of cars, to treat the passengers with civility, and to abstain from all unnecessary violence toward them. It is also the duty of passengers to observe the rules and regulations of the company, and to conduct themselves generally so as not to invite uncivil treatment, nor provoke violence. But it is not true that disobedience to the rules of the company will operate as a license to the employees to maltreat a passenger. If a passenger persists in violating the reasonable rules of the company, after notice of the rules, and a request to him not to act contrary to them, the carrier will have a right to rescind the contract for his conveyance, and refuse to carry him further. But he will have no right to maltreat him while continuing to perform the contract for his conveyance."

In *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 618, 67 S. E. 1103, the court remarked that the passenger's "assault upon, or abuse of, the servant, may obviously excuse the carrier from performance of his contract. It may eject him from its train, but it is difficult to see how this option on its part can excuse the beating of the passenger or the infliction of other injury upon him by way of punishment."

See also the extracts from the opinions in *Baltimore & O. R. Co. v. Barger* (1894) 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560, and *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615, note 8, *infra*.

merely sets one wrong against another; and that is "retaliation, not remedy."⁴

An assault induced by personal resentment is not within the scope of a servant's employment.⁵ This consideration furnishes a satisfactory basis for the doctrine, so far as regards jurisdictions in which the carrier's obligation to protect passengers against wilful torts extends only to those which are committed by his servants in the course of their ordinary duties with respect to the actual work of transportation. But obviously it cannot be of any force whatever in the view of those courts by which the theory of the absolute quality of a carrier's obligations has been adopted. See preceding subtitle.

From the foregoing remarks, it is apparent that two of the rational bases which have been suggested for the doctrine stated at the commencement of this section are

clearly irreconcilable with general principles of jurisprudence, and that the third is of no validity when it is tested with relation to that theory of the carrier's liability which has already been adopted by a large number of the American courts, and which there is good reason to suppose will ultimately be accepted by all of them. A strong positive objection to that doctrine is indicated by the consideration that an assault induced by resentment at insulting words or irritating behavior is, in the eye of the law, a tortious act.⁶ In any jurisdiction in which the liability of a carrier is deemed to be absolute, it is submitted that this consideration must necessarily be treated as decisive in favor of the passenger's right of action against him.⁷ In several of the jurisdictions to which this description is applicable, that right has already been affirmed.⁸

⁴ Layne v. Chesapeake & O. R. Co. note 3, supra.

⁵ In Little Miami R. R. Co. v. Wetmore (1869) 19 Ohio St. 110, 2 Am. Rep. 373, the evidence of the defendant railway company tended strongly to prove that the plaintiff, by his importunate conduct and abusive language towards a baggage master, provoked a personal quarrel between them; that the assault was the result of this quarrel; and that the blow was inflicted by the servant as an act of personal resentment. The court took the position that "if these facts had been found by the jury, the wrongful act of the servant in striking the plaintiff could not be regarded as authorized by the master, nor as an act done by the servant in the execution of the service for which he was engaged by the master."

⁶ For the application of the rule in civil and criminal cases, see Cooley, Torts, 3d ed. 289 (192); Wharton, Crim. Law, § 619.

⁷ This objection, apart from the others already noticed, may fairly be regarded as sufficient to establish the unsoundness of the Georgia, Michigan, and New York cases cited in the preceding notes.

⁸ The effect of the most recent Georgia decisions is stated in note 99, supra.

In Baltimore & O. R. Co. v. Barger (1894) 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560, the court thus discussed the correctness of a requested instruction to the effect that, if the jury believed the plaintiff used foul and abusive language to the conductor which caused or provoked the assault complained of, and that in making said assault the conductor was not acting for the defendant and within the scope of his duties as conductor, but was carrying out a personal purpose and feeling, the defendant was not liable for such act of the conductor: "The theory of that prayer is that the plaintiff had by his conduct forfeited his right as a passenger, and the act of the conductor was merely a personal matter between him and the plaintiff, provoked 40 L.R.A. (N.S.)

by the latter, independent of and freed from the relation that had existed between the plaintiff and defendant as passenger and carrier. To such a doctrine we cannot subscribe, under the circumstances of this case. . . . The plaintiff was, at the time of the assault, a passenger on the train which was in charge of this conductor, who was the agent of the company to see, as far as reasonably could, that the plaintiff and other passengers were properly treated and carried to their respective points of destination. If the plaintiff persisted in misbehaving on the train, either by the use of foul and abusive language toward the conductor, or in any other way calculated to frighten or materially interfere with the comfort and safety of the other passengers, after being admonished by the conductor, the latter would have been justified in ejecting him from the train. The remedy in such case would be to eject the unruly passenger, not to assault him, and then let his employer escape all liability because he, the conductor, was carrying out a 'personal purpose and feeling,' as stated in the prayer. A conductor of a train doubtless has his patience and forbearance severely tested at times, but he must not settle his own personal difficulties with the passengers, whilst they are such, any more than he should permit others to do so when he could avoid it."

In Birmingham R. & Electric Co. v. Baird (1900) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456, the court laid down the law as follows: A conductor "cannot assault a passenger in retaliation for an assault committed upon himself or upon another passenger, and, *a fortiori*, he cannot assault a passenger for abusive words, or in revenge or punishment, under any circumstances. And if he does assault a passenger otherwise than under a necessity to defend himself or a passenger from battery, or in rightfully ejecting a passenger, who, by his conduct towards other

In one case the supreme court of New York laid it down, *arguendo*, that "of course the passenger could not recover, if he used

the provoking language with the intent of bringing on the assault which followed." This statement has recently been cited with

passengers, has forfeited his right of carriage, the carrier is liable. The fault of the passenger, short of producing a necessity to strike in self-defense, will neither justify the conductor in striking, nor relieve the carrier from liability for his act."

In *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615, the court said: "The use of opprobrious and hot-tempered language by the plaintiff, even though it was justly provocative of anger, and, with his partial intoxication, might have warranted his ejection as a passenger, did not justify the use of physical force upon his person by the conductor, whatever may have been the motive by which he was prompted; and the defendant's duty had not been discharged until the plaintiff had a reasonable opportunity to pass unmolested from the car and to depart. The substantial error of the trial arose from the presumption that under the circumstances verbal provocation was the legal equivalent of justification; and, the special findings of the jury not having determined the rights of the parties if the assault was committed as described by the plaintiff, the judge could not properly order a verdict for the defendant. *Hurley v. Boston* (1909) 202 Mass. 68, 88 N. E. 586." After some general remarks regarding the carrier's duty, the court expressed its disapproval of the defense relied upon, *viz.*: "That because the plaintiff, while a passenger, insulted the conductor by the use of abusive language, he contributed to his own harm, or invited the punishment inflicted upon him, and thereafter during transportation the defendant was discharged from any further duty to protect him from an assault by its servant. If the plaintiff's words absolved the defendant, then where a passenger purposely behaves in an insulting manner toward a servant, the passenger no longer can claim the protection of the carrier, but is put in jeopardy of a retaliatory assault at any time before transportation has ended, if such be the pleasure of the servant."

In *Weber v. Brooklyn, Q. C. & Suburban R. Co.* (1900) 47 App. Div. 306, 62 N. Y. Supp. 1, the supreme court of New York approved the dissenting opinion of Daniels, J., in *Scott v. Central Park, N. O. & C. R. Co.* (1889) 53 Hun, 414, 6 N. Y. Supp. 382, and laid down the law as follows: "The conductor cannot rightfully assault the passenger merely because the passenger has insulted him, or otherwise provoked him by mere words, and if he does assault the passenger by reason of such provocation only, unaccompanied by any threats or acts of personal violence, the railroad company will be liable for the consequences of the assault, under the well-established rule which protects passengers against the misconduct of a carrier's servants." This decision was fol-

lowed in *Baker v. Brooklyn Union Elev. R. Co.* (1911; App. Div.) 130 N. Y. Supp. 690.

In *Billingham v. Anthony* (1889) 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139, it was held that if a conductor committed an assault upon the plaintiff, any prior conduct on the part of the plaintiff which would not in law justify the assault and battery could not avail the defendant as a defense to the action. This decision was followed in *Galveston, H. & S. A. R. Co. v. La Puelle* (1901) 27 Tex. Civ. App. 496, 65 S. W. 488.

The headnote written by the court for *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103, is as follows: Provocation by a passenger, such as interference with employees in the exercise of their functions, abusive language, threats, and assaults upon them, although justifying expulsion from the train, does not bar recovery for injury by the exercise of more force than is actually or apparently necessary to repel the assault or prevent other injury.

In *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018, a disorderly passenger, after having been ejected from a railway car, moved his hand along his side to his hip pocket; held, that this gesture did not justify the trainman in assaulting him, where such movement was accompanied by the statement, "I'll see you later."

For other cases which recognize the doctrine that a carrier is liable for an assault induced by abusive words or irritating conduct, see *Birmingham R. Light & P. Co. v. Mullen* (1903) 138 Ala. 614, 35 So. 701; *Coggins v. Chicago & A. R. Co.* (1886) 18 Ill. App. 620; *Hanson v. Urbana & C. Electric Street R. Co.* (1897) 75 Ill. App. 474; *Baltimore & O. S. W. R. Co. v. Davis* (1909) 44 Ind. App. 375, 89 N. E. 403; *Philadelphia, W. & B. R. Co. v. Larkin* (1877) 47 Md. 155, 28 Am. Rep. 442; *Coleman v. Yazoo & M. Valley R. Co.* (1907) 90 Miss. 629, 43 So. 473; *Haman v. Omaha Horse R. Co.* (1892) 35 Neb. 74, 52 N. W. 830; *Williams v. Gill* (1898) 122 N. C. 967, 29 S. E. 879; *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018; *McDade v. Norfolk & W. R. Co.* (1910) 67 W. Va. 582, 68 S. E. 378.

A requested instruction that if the passenger in question brought on the altercation in which he was shot and killed by the conductor in charge of defendant's street car, no recovery could be had against the carrier, under Rev. Stat. 1899, § 2864, for the passenger's death, was held to have been properly refused in *O'Brien v. St. Louis Transit Co.* (1908) 212 Mo. 59, 110 S. W. 705, 15 Ann. Cas. 86.

⁹ *Weber v. Brooklyn, Q. C. & Suburban R. Co.* (1900) 47 App. Div. 306, 62 N. Y. Supp. 1.

approval in another case decided by the same court.¹⁰ But no specific authority was adduced on either occasion for the rule thus formulated, and the writer has not been able to find any such authority in the text-books. The soundness of the suggested qualification of the general rule which treats provocative words as being no excuse for an assault seems to be by no means as clear as the court assumed. As the "intent of bringing on an assault," or, at all events, a reckless disregard of consequences, —which may be regarded as the juristic equivalent of such intent,—is frequently, if not usually, predicable as a matter of fact in any case where one person deliberately provokes another by insulting language, it would seem that the admission of such a qualification would go far towards abrogating the rule itself. The doctrine relied upon in a Texas case, that provoking conduct of which the specific purpose is to bring on a difficulty is contributory negligence, is not likely to meet with much favor in other jurisdictions.¹¹

The rule adopted in most of the cases in which the point has been raised is that evidence as to provoking words or conduct on the passenger's part is admissible in mitigation of damages.¹² But the position that only punitive damages are subject to reduction on this ground has also been taken.¹³

2. Insolence of servant provoked by insolence of passenger.

In one case it was held that a passenger on a palace car had no right of action

against the palace-car company for rudeness of its porter toward him, which was induced by his own unreasonable and angry demands.¹⁴ On the other hand it has been laid down that "an uncivil word by a passenger at the beginning of his journey will not justify the carrier's servants in treating him with insolence to the end of it,"¹⁵ and that an immodest remark addressed by a female passenger to a servant does not justify him in making an insulting proposition to her.¹⁶

1. Pleading and practice.

1. Forms of action.

In jurisdictions where the liability of a carrier is treated as absolute, the remedy of a passenger "may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common-law duty in support of his action; in the other; upon a breach of his implied promise."¹⁷ The character of the action may be material with relation to any of the following matters:

(1) The party by whom the action should be brought when the injury results in the death of the passenger. In one case the court, treating the remedial right of the deceased passenger as being founded on contract, held that his administrator was entitled to maintain the action.¹⁸

(2) The question of damages. In one case we find this statement: "In actions of assumpsit, the damages are generally limited to compensation. In actions of

¹⁰ *Baker v. Brooklyn Union Elev. R. Co.* (1911; App. Div.) 130 N. Y. Supp. 690, where the question whether there was such intent was held to be for the jury.

¹¹ *Missouri, K. & T. R. Co. v. Gerren* (1909) 57 Tex. Civ. App. 34, 121 S. W. 905.

¹² *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615; *Mason v. Nashville, C. & St. L. R. Co.* (1910) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225; *Galveston, H. & S. A. R. Co. v. La Puelle* (1901) 27 Tex. Civ. App. 496, 65 S. W. 498; *Houston & S. C. R. Co. v. Batchler* (1903) 32 Tex. Civ. App. 14, 73 S. W. 981; *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018; *McDade v. Norfolk & W. R. Co.* (1910) 87 W. Va. 582, 68 S. E. 378; *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103.

It is error to charge that, if the conduct of a plaintiff was such as to exasperate a conductor into an assault, the jury were not entitled to take that conduct into consideration to mitigate compensatory damages; that such mitigation for such a reason could only be had where punitive damages were sought. *Freedman v. Metropolitan Street* 40 L.R.A. (N.S.)

R. Co. (1903) 89 App. Div. 486, 85 N. Y. Supp. 986.

¹³ *Mahoning Valley R. Co. v. DePascale* (1904) 70 Ohio St. 179, 65 L.R.A. 860, 71 N. E. 633, 1 Ann. Cas. 896.

¹⁴ *Pullman's Palace Car Co. v. Ehrman* (1888) 85 Miss. 383, 4 So. 113.

¹⁵ *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404.

¹⁶ *Strother v. Aberdeen & A. R. Co.* (1898) 123 N. C. 197, 31 S. E. 386.

¹⁷ *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39; *Bryant v. Rich* (1870) 106 Mass. 180, 8 Am. Rep. 311.

¹⁸ *Winnegar v. Central Pass. R. Co.* (1887) 85 Ky. 547, 4 S. W. 237. The recovery was allowed for the physical and mental suffering of the decedent up to the time of his death. The court said: The action "is not to recover for the death, nor is it an action of assault and battery, but an action in the nature of an action on the case for the injuries resulting from a breach of appellee's contract. The relation the parties occupy, the one to the other, is from the contract; and the failure to discharge the duty imposed by it may be a tort: but, nevertheless, it springs from the contract,

tort, the jury are allowed greater latitude, and, in proper cases, may give exemplary damages." 19

(3) The question whether the right of recovery shall be determined with reference to the law of the state where the injury was received, or to the law of the state where the action is brought. In one case the former law was treated as controlling on the ground that the action was *ex delicto*.²⁰

and the action survives to the administrator."

¹⁹ *Goddard v. Grand Trunk R. Co.* supra.

²⁰ *Pullman Palace Car Co. v. Lawrence* (1897) 74 Miss. 782, 22 So. 53, where the decision was rendered with reference to the rule supposed to have been established by the Illinois cases.

²¹ *Busch v. Interborough Rapid Transit Co.* (1907) 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460. The court said: "This action was brought to recover damages for defendant's failure to properly transport plaintiff over its road in the city of New York. The real, substantial element of damages is an alleged assault upon and maltreatment of plaintiff by one of defendant's employees after the former had passed through the gateway onto the platform of one of defendant's stations for the purpose of taking a train, and the sole question is whether the action is one of contract or of tort. This inquiry is of controlling importance, since the municipal court, where the cause originated, had jurisdiction of an action of the former character and did not have jurisdiction of one of the latter kind. Probably little or no doubt would have arisen as to the form of the complaint or the nature of the action if there had been alleged and proved some act constituting a familiar breach of contract; but the fact that this action was brought to recover damages largely caused by acts ordinarily treated as torts has cast a suspicion upon its character which, however natural, is not confirmed by legal analysis. It is no bar or answer to the claim of an action in contract that one in tort might have been, and ordinarily would be, brought for the acts really complained of. The dividing line between breaches of contract and torts is often dim and uncertain. There is no definition of either class of defaults which is universally accurate or acceptable. In a general way a tort is distinguished from a breach of contract in that the latter arises under an agreement of the parties, whereas the tort ordinarily is a violation of a duty fixed by law, independent of contract or the will of the parties, although it may sometimes have relation to obligations growing out of or coincident with a contract, and frequently the same facts will sustain either class of action. *Rich v. New York C. & H. R. R. Co.* (1882) 87 N. Y. 390. And so, while it may be conceded that, independent of any express promise or agreement, the defend-

(4) The question whether the action can be brought in a court of limited jurisdiction. It has been held that the municipal court of New York, in which no jurisdiction in respect of actions of tort is vested, has jurisdiction of an action of which the gravamen, as stated in the complaint, is that a railway passenger was, in violation of the contract of carriage, maltreated by the railway company through its agents and employees.²¹

ant would have been subject to duties and obligations in favor of plaintiff, the violation of which by the acts complained of in this case would have amounted to a tort, that is not at all decisive that this action was not and could not be brought in contract." It was held that as a judgment for plaintiff, entered upon the verdict of a jury, had been unanimously affirmed by the appellate division, it must be assumed that there was evidence to support the verdict, and that, in the absence of some objection thereto, it might also be presumed that such evidence was in accordance with, and in support of, the allegations of the complaint.

In *Hart v. Metropolitan Street R. Co.* (1901) 65 App. Div. 493, 72 N. Y. Supp. 797, first appeal (1901) 34 Misc. 521, 60 N. Y. Supp. 906, where the pleadings were oral, the evidence showed that the plaintiff, with intent to become a passenger upon one of defendant's street cars, boarded the front platform thereof while it was in motion, and was seized by the gripman and thrown from the moving car into the street. Upon these facts it was held that the action should not be treated as one of assault, but rather as one brought to recover damages for the neglect of the defendant to discharge its obligation as a carrier of passengers. The court said: "Under the well-established rule of liability, the defendant cannot maintain that the present action is for a private assault; it undertook to protect its passengers, and the plaintiff having become a passenger, he has a right to look to the defendant for any damages which he may have suffered; and the assault of the individual becomes merely a part of the negligence of the defendant in the discharge of its duty to the plaintiff."

In *Hines v. Dry Dock, E. B. & B. R. Co.* (1902) 75 App. Div. 391, 78 N. Y. Supp. 170, an action to recover damages resulting from the assault of an employee, the complaint was oral and was "for personal injuries." It was held that the action was not to be regarded as one for assault, but rather for breach of contract caused by the misconduct of the defendant's servant.

The above decisions of the supreme court were cited with approval in the *Busch Case*, supra.

In *Baumstein v. New York City R. Co.* (1907) 56 Misc. 498, 107 N. Y. Supp. 23, it was held that the municipal court had jurisdiction of an action brought by a pas-

the dwelling-house covenants, of the phrase, "with necessary or desirable outbuildings," and by its violation, in one or more instances, by the erection of a garage on the rear of a lot upon which a dwelling house was constructed in conformity with the dwelling-house restriction. We do not think, however, that this modification of this incidental feature is of such a nature as to destroy or impair the mutual benefit to the lot owners of the essential general dwelling-house scheme upon the protection of which they relied. So far as the modification of what may be called the incidental "no outhouse scheme" is concerned, of course, defendant's covenant is likewise modified, so that his burden will correspond with his benefit; but, as to the main essential purpose of the neighborhood dwelling-house scheme, we think defendant's lot continues to participate in its benefit, and consequently remains subject to its burden.

This being the case, the question arises: Does the construction of the defendant's garage, not on the rear of his lot, behind a dwelling house constructed thereon in conformity with the covenant, but, instead of that, constructed without any dwelling house on the lot at all, and in the very place fixed by the covenant for the dwelling house to go, fall within the modification of the incidental outhouse covenant, so as to be protected by such modification? We not only think that it does not, but, on the contrary, that it is a violation of the essential and beneficial purpose and effect of the neighborhood dwelling-house scheme. This scheme gave each lot owner, who paid a higher price for his lot with that in view, and constructed his dwelling house in accordance with the covenant, the right to expect that the improvement upon his neighbor's lot, in close proximity to his own dwelling house, and fronting upon a uniform building line, would be a similar dwelling, or one, at least, of the designated cost. The advantages to him of such an arrangement are too obvious to require discussion. Instead of this, he finds as the neighboring improvement a sheet-iron garage building of probably comparatively trifling expense as compared with the cost of the improvement which he had a right to expect, and doubtless of such displeasing appearance as to quite justify the taste of the owner in placing it beside someone else's dwelling house, instead of beside his own.

While we entirely agree, therefore, with the view of the vice chancellor, that there was in this instance a neighborhood scheme we think he erred in his conclusion that it had been abandoned in such essential features as to justify its violation in the manner in which defendant has violated it.

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The other principle invoked by the defendant to justify his violation of his covenant is that, by reason of other similar constructions (garages) in alleged similar locations with reference to complainant's remaining property, the violated covenant, in so far as it is violated, has ceased to have any beneficial value to complainant's property, and consequently can form no ground for equitable relief. This principle, if applicable, would also be decisive. The foundation for equitable relief in these cases is that, the first vendor having arranged by the covenant to accept a part of the consideration for his grant in a benefit to accrue to his remaining property by the performance of the covenant, it would be unconscionable to permit the covenantor-vendee's assignee, with notice, to cheat the vendor out of this portion of his consideration by depriving him of the benefit which he would receive by the performance of the covenant. If, however, there was no benefit, or the benefit has ceased to exist, there is no basis for equitable intervention. Thus, in *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679, 4 Mor. Min. Rep. 119, it was held that a covenant not to dig marl on one tract of land was not a benefit to the use of the adjoining tract (the probable purpose, to prevent competition, being unlawful, because in restraint of trade), and consequently would not be enforced in equity; and in *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365, followed in *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11, and in numerous other cases, it was held that "equity would refuse to enforce a covenant not to devote certain property to business purposes, where there had been such a change in the character of the neighborhood by the building of an elevated railroad and the increase of business houses as to defeat the object and purpose of the agreement and render it inequitable to deprive such owner of the privilege of using his property as its surroundings required." Pomeroy states this principle as follows: "Specific performance, not being an absolute right, the fact that enforcement would be of little or no benefit to the complainant, and a burden upon the defendant, is sufficient to constitute performance oppressive, and it will not be given." 6 Pom. Eq. Jur. 1316.

The facts in this case, however, fall very far short of bringing it within the operation of this doctrine. It is quite true that complainant, whose interest (aside from what should be her natural desire to protect the purchasers of her ground in a general scheme of improvements upon which she had induced them to rely) is in the value of the mansion house property directly op-

backward about making their claims large enough; and, when plaintiffs, represented by competent counsel, plainly indicate the extent of relief they desire, it is not the policy of the law to grant them more.

Construing the action, therefore, as one for compensatory damages only, the remaining and vital question is whether it can be maintained in the courts of this state. The Missouri supreme court has held that a statute creating a liability which did not exist at common law, and prescribing the person who shall have the right to enforce it, can be enforced only by the person so prescribed; and that the statute of Missouri, providing (§ 548, Rev. Stat. 1899) that, whenever a cause of action has accrued under the laws of another state, and the persons entitled to the benefit are not entitled by the laws of such state to prosecute the action in their own name, it may be brought in Missouri by a person appointed by the court for that purpose, was void, for the reason that no state has the power to create a liability for an act done beyond its territorial limits. *McGinnis v. Missouri Car & Foundry Co.* 174 Mo. 225, 233, 97 Am. St. Rep. 553, 73 S. W. 586, 588. It was there said: "Our statute attempts to enforce the liability created by the statute of Illinois, not through the person who alone is given the right under the Illinois law to enforce it, but through a person who would have no right to enforce the liability in that state. . . . As pointed out, it takes both paragraphs of the Illinois law to support the action in that state; and it is incongruous to say that a vital, component part can be segregated from the entity of which it is a necessary part, and be transplanted into the laws of another state, while the entity is incapable of being so transplanted or enforced. Nor can such a component part be transplanted, and be grafted onto or supplemented by a law of such other state, so as to make the two parts, dependent for their existence upon separate sovereign wills, a complete and valid law." 174 Mo. 234.

In *Newlin v. St. Louis & S. F. R. Co.* 222 Mo. 375, 392, 121 S. W. 125, 130, it was ruled that an action could not be maintained in Missouri for an injury arising in Kansas from the failure of a railroad company to block its switches; the Missouri statute requiring such blocking, but the Kansas statutes making no such requirement. In the opinion, the court said that comity, in a legal sense, must be courtesy in fact as well as in name; that, "in administering the substantive laws of a sister state, we administer them, not our own; and . . . we should not administer them either more or less blandly than do our sister's courts. 40 L.R.A. (N.S.)

This in order, on the one hand, to not refuse jurisdiction by a too sour or cold complexion, or to repel it by corroding our sister's law; or, on the other hand, to not toll, entice, and coax jurisdiction from our sister's courts, thereby (under a mask of courtesy) draining jurisdiction away from them by an enlarged and alluring interpretation in our own."

In *Dennick v. Central R. Co.* 103 U. S. 11, 17, 26 L. ed. 439, 441, it was decided that a right imposed by the statute of a state may, when transitory, be asserted and enforced in any circuit court of the United States having jurisdiction of the subject-matter and the parties. Mr. Justice Miller, in the opinion, said: "It is indeed a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory, and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." This decision was approved and followed in *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905, holding that "the rule thus stated is generally recognized and applied where the statute of the state in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced."

A leading case is *Higgins v. Central New England & W. R. Co.* 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534, deciding that an administrator appointed in Massachusetts could maintain an action for the wrongful death of his intestate in Connecticut, although the incidents of the recovery differed from those of an action brought in Connecticut. It was said that the principles of comity require that in cases, other than penal actions, the foreign law, if not contrary to public policy, abstract justice, or pure morals, or calculated to injure the state or its citizens, should be recognized and enforced. It was pointed out that the

benefit of a statute requiring crossing signals to be given by railroad companies, although the statute provides that failure to give the signal shall render the company liable for all damages which shall be sustained by any person by reason of such negligence.

(March 31, 1911.)

APPPEAL by defendant from a judgment of the Circuit Court for Ogemaw County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Messrs. Humphrey, Grant, & Baker, with Messrs. Cooley & Hewitt, for appellant:

No right of action by a section man or railroad employee can be based on the failure of defendant to sound the statutory whistles at a highway crossing.

Wright v. Southern R. Co. 80 Fed. 260; Norfolk & W. R. Co. v. Gesswine, 75 C. C. A. 214, 144 Fed. 56; Cleveland, A. & C. R. Co. v. Workman, 66 Ohio St. 509, 90 Am. St. Rep. 602, 64 N. E. 582; Harty v. Central R. Co. 42 N. Y. 468; Huff v. Chesapeake & O. R. Co. 48 W. Va. 45, 35 S. E. 866; Rohback v. Pacific R. Co. 43 Mo. 187; Galvin v. Old Colony R. Co. 162 Mass. 533, 39 N. E. 186; Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; O'Donnell v. Providence & W. R. Co. 6 R. I. 211; Texas & P. R. Co. v. Eason, 34 C. C. A. 530, 92 Fed. 553; Everett v. Great Northern R. Co. 100 Minn. 309, 9

L.R.A. (N.S.) 703, 111 N. W. 281, 10 Ann. Cas. 294; Sanborn v. Detroit, B. C. & A. Co. 91 Mich. 538, 16 L.R.A. 119, 52 N. W. 153; 2 Bailey, Mast. & S. § 2185; 1 Bailey, Mast. & S. §§ 1174-1275.

No negligence of defendant can be proved or considered by the jury that is not alleged specifically in the plaintiff's declaration.

Marquette, H. & O. R. Co. v. Marcott, 41 Mich. 433, 2 N. W. 795; Schindler v. Milwaukee, L. S. & W. R. Co. 77 Mich. 136, 43 N. W. 911; Flint & P. M. R. Co. v. Stark, 38 Mich. 714; Cowan v. Muskegon R. Co. 84 Mich. 583, 48 N. W. 166; Thompson v. Toledo, A. A. & N. M. R. Co. 91 Mich. 255, 51 N. W. 995; McNally v. Colwell, 91 Mich. 527, 30 Am. St. Rep. 494, 52 N. W. 70; Gardner v. Detroit Street R. Co. 99 Mich. 182, 58 N. W. 49; Batterson v. Chicago and G. T. R. Co. 49 Mich. 185, 13 N. W. 508; Henry v. Lake Shore & M. S. R. Co. 49 Mich. 495, 13 N. W. 832.

Mr. De Vere Hall for appellee.

Stone, J., delivered the opinion of the court:

This is an action on the case for negligence brought by the plaintiff as administratrix of the estate of her deceased husband, Richard Lepard, for damages claimed to have been sustained by the estate, and to have accrued against the defendant for causing the death of said Richard Lepard.

The declaration contained but one count. After alleging that defendant was a railroad corporation operating a line of railroad in this state, the appointment of plaintiff as administratrix; that the line of de-

On the other hand, it has been held that railroad employees are entitled to the same protection as other persons in crossing railroad tracks within the city limits in the performance of their duties, under a city ordinance requiring a bell on the engine to be rung continuously while a train is within the city limits. Illinois C. R. Co. v. Gilbert, 157 Ill. 354, 41 N. E. 724, affirming 51 Ill. App. 404; Gulf, C. & S. F. R. Co. v. Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246. To the same effect: Houston & T. C. R. Co. v. Burnett, 49 Tex. Civ. App. 244, 108 S. W. 404; Louisville & N. R. Co. v. Schroader, — Ky. —, 113 S. W. 874; Illinois C. R. Co. v. McIntosh, 118 Ky. 145, 80 S. W. 496, rehearing denied in 118 Ky. 156, 81 S. W. 270; International & G. N. R. Co. v. Tisdale, 39 Tex. Civ. App. 372, 87 S. W. 1063; Indiana, I. & I. R. Co. v. Otstat, 113 Ill. App. 37, affirmed in 212 Ill. 429, 72 N. E. 387.

A track repairer injured while working at a place where there were many tracks, by a train backing upon him without its bell ringing or having a man stationed on the car farthest from the engine, as re-

quired by a city ordinance, may recover for his injuries. Kelly v. Union R. & Transit Co. 95 Mo. 279, 8 S. W. 420.

The violation of an ordinance regulating speed and signals of trains is not a risk assumed by a railroad employee, but obedience to the ordinance is a duty owing by the railroad company to its employees. Pittsburgh, C. C. & St. L. R. Co. v. Moore. 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290.

In Dick v. Indianapolis, C. & L. R. Co. 38 Ohio St. 389, it was thought unnecessary to consider whether the act of 1872 (69 Ohio Laws, 49), by which railroad companies were made liable in damages for injuries occasioned by a failure of the engineer to sound the whistle and ring the bell at a public crossing on the same level with its tracks, was for the protection of travelers on the public way only, or extended to persons working upon the track; since, even in the absence of such a statute, it was the duty of the company to make and enforce reasonable rules and regulations to guard against danger at such crossings and in dangerous places.

W. M. G.

defendant's railroad crossed a highway at Ogemaw Springs, nearly at right angles, at grade called Ogemaw Springs crossing; that the injury was caused by a freight train, No. 220, propelled by locomotive engine No. 8,357; that the defendant company, in operating such train, was subject to the requirements and limitations of § 6292, Compiled Laws of 1897, regarding the blowing of a steam whistle at highway crossings; and that plaintiff's intestate was at the time employed as a section hand on a 5-mile section of said railroad, beginning about a mile south of said Ogemaw Springs crossing, and extending northerly a distance of 5 miles from the place of beginning,—the declaration averred that under the regulations and limitations of said section of the statute it was the duty of defendant:

(a) To place a steam whistle on the locomotive engine. (b) To place a steam whistle that could be sharply sounded on the engine. (c) To place, keep, and maintain a steam whistle that could be sharply sounded on said locomotive. (d) Not to operate such train with a locomotive having a defective, imperfectly constructed steam whistle that could not be sharply sounded at least 40 rods before reaching this crossing. (e) To keep and maintain the whistle in reasonable repair so that it could be sharply sounded. (f) To twice sharply sound the steam whistle on the engine at least 40 rods before reaching Ogemaw Springs crossing. The declaration alleged a violation of each of these duties. It also alleged that defendant owed other duties, as follows: (a) To equip the locomotive with a reasonably efficient steam whistle. (b) To keep the steam whistle in reasonable repair. (c) Not to operate the train with a locomotive on which the whistle was not maintained in reasonable repair. (d) To twice sharply sound the steam whistle 40 rods before reaching Ogemaw Springs crossing. It alleged a breach of each of these duties, and that the injury happened under the following circumstances: At about 5:30 o'clock A. M. on the 13th day of June, 1909, being Sunday, the section men started north over their section with a hand car. When near the crossing, without signal, notice, or warning, this train with the defective steam whistle suddenly approached the crossing, and ran into and collided with the hand car near the crossing, injuring and killing Lepard. The above statement is sufficient to show the issue raised by the declaration.

The plea was the general issue.

In the opening statement of plaintiff's counsel he used the following language, after referring to said § 6292: "It is the first contention of the plaintiff that this

whistle was not sounded as required by law; . . . that if it had been sounded when those men were at the crossing they would have heard it and known of the approaching train; and that, failing to do that, this right of action accrues to the person standing in the place of the plaintiff in this case. The second contention of the plaintiff in this case is that they did not have a whistle on their engine that could sound; that this whistle was a broken whistle, a defective whistle, a whistle that only corresponded to the escaping steam, that indicates a surplus of steam; that it was not an appliance that could be sounded sharply, as the law calls for; and that whatever may be the law about the first proposition about the failure to sound it, the rule as to the second is that the defendant was at fault in sending out an engine so improperly equipped that the whistle could not be sounded, as required by law. And that those two claims of the plaintiff are the ones on which we shall say that the defendant was negligent that morning."

It was conceded on the part of the defendant that the train in question in the case was No. 220, and that the number of the engine in question was 8,357, and that it was a regular time card or schedule train.

At the close of the plaintiff's evidence, which tended to show the circumstances under which the accident or injury occurred, the following colloquy took place between counsel:

Mr. Humphrey: I want to ask counsel for the plaintiff if they claim any other allegation of negligence against this defendant in the declaration, excepting the blowing of the whistle, or a defective whistle.

Mr. Hall: Yes, we make a claim at this time to the—well, you mean the right to invoke this statute in our behalf as to his failure to blow, or the question of defective whistle?

Mr. Humphrey: Yes.

Mr. Hall: No; that is all.

Mr. Humphrey: Your whole negligence is based on the question of the whistling and the whistle?

Mr. Hall: Well, yes, as I understand your inquiry.

Counsel for defendant then moved the court to direct a verdict in its behalf, among other things, on the ground that the plaintiff could not invoke the protection of the statutory signals at crossings as against the company in favor of Mr. Lepard, who was the company's employee, because the statute regarding whistling at crossings is not for the benefit of employees or section men, such as plaintiff's decedent. The court

did not rule immediately upon this question, and the defendant proceeded to put in its evidence. Later, and before the close of the evidence on the part of the defendant, the court made a ruling, holding that the statute did apply to employees on the road, and overruling defendant's motion to direct a verdict, to which the counsel for defendant excepted.

At the close of the evidence defendant's counsel submitted a number of requests to charge. Among others were the following: "(14) I charge you that, under the law and the undisputed evidence in this case, the plaintiff is not entitled to recover, and your verdict must be for the defendant. (15) I charge you that there is no evidence in this case that would authorize the jury to find that the whistle upon this engine was not such a whistle as required by the statute of this state, or the rule of the defendant company. (16) I charge you as a matter of law that, under the undisputed evidence in this case, this engine, No. 8,357, was at the time of this accident equipped with a whistle of the kind and character required by statute and the rules of the defendant company."

The court proceeded to charge the jury, and in its general charge it did not adhere to the ruling made upon the trial of the case, as to the applicability of § 6292, 2 Compiled Laws, but charged the jury that the statute was not applicable, and that the defendant was guilty of no negligence to the plaintiff's decedent, for the failure to ring the bell or blow the whistle at highway crossings, as provided by said section; that the statute was obviously passed by the legislature for the benefit of those using, or about to use, the highway in the vicinity of the railway crossing; that this statute does not impose any duty upon the defendant with respect to the section men working upon the road; and that the plaintiff could not found a right of recovery against the defendant for failure to give the signals provided in said section, as the undisputed evidence showed that the plaintiff's decedent was a section hand upon the railroad of the defendant company at the time of the accident to him.

The court also charged the jury that the plaintiff could not found any right of action based upon the negligence of the section foreman, for the reason that such foreman and plaintiff's decedent were fellow servants; also, that the engineer of the train causing the accident was a fellow servant of the men composing the section crew, including the deceased; the plaintiff could not found any right of action upon any neglect or failure of duty of said engineer in the ordinary operation of his train on the morn-

ing in question; that the plaintiff could not recover on account of the neglect of the engineer to blow the whistle at any time, unless the jury should find that his neglect to blow the whistle was occasioned by the fact of the whistle not being in a condition to be sounded. The case was submitted to the jury upon the following proposition: "The specific charge or claim that the plaintiff now makes, and now asks you to find against the defendant on, is the failure to equip the locomotive with a whistle and to sound the whistle at this curve, and in the condition in which these men were, as I have explained to you fully and read from the requests of counsel. I charge you that, under the undisputed evidence in this case, plaintiff's decedent, Richard Lepard, was a section foreman on defendant's road about one year, but a short time before the happening of this accident; and that, under the undisputed evidence in this case, he had full notice and knowledge of the rules and instructions governing employees of the track department of the defendant railroad company; and that, under said rules and instructions, the section hands upon said railroad would have no right to rely upon the statutory signals at highway crossings being given by the train men while said section hands were working at or near said highway crossings; and that, under the rules and instructions governing such section men, they were notified and required to look out for and protect themselves against accident from trains running upon the road. . . . I charge you that plaintiff cannot recover in this action on account of the violation of the defendant of any of its rules contributing to her decedent's injury, as plaintiff's decedent had assumed all risks for accidents so caused. . . . If you find that the engine was equipped with a suitable whistle, as defined by me, the plaintiff cannot recover. If you find that the death of said husband was occasioned by the negligence of said engineer in omitting to sound the whistle, and not in consequence solely of the defective and inefficient condition of the whistle, plaintiff cannot recover."

The plaintiff recovered a verdict and judgment, and the defendant has appealed, and has assigned many errors. We shall not have occasion to refer to them all. The assignments of error Nos. 30 to 35, inclusive, relate to the refusal of the court to charge the jury as requested by defendant's counsel.

Among other things, it is the contention of defendant's counsel that the declaration counts solely upon the statute, and this question is raised by an assignment of error. As we have already indicated, the declara-

tion contained but one count, and it was not demurred to. It sets forth clearly a statutory duty; and, in our opinion, it also sets forth a duty (independent of the statutory claim) to place, equip, and maintain a steam whistle upon the locomotive in reasonable repair.

This court has held that it is not necessary for a plaintiff to prove all of the acts of negligence charged; that, if any unlawful neglect of defendant is charged which resulted in the injury to the plaintiff complained of, he is entitled to recover, although the declaration may have charged other acts of defendant as negligence which were not proven. *Marquet v. La Duke*, 96 Mich. 596, 55 N. W. 1006; *Warren v. Porter*, 144 Mich. 699-704, 108 N. W. 435, citing *Smith v. Michigan C. R. Co.* 100 Mich. 153, 43 Am. St. Rep. 440, 58 N. W. 651; *Malkowski v. Olfs*, 161 Mich. 303, 126 N. W. 199.

We understand it to be claimed that this branch of the declaration counts upon the common-law duty to furnish the locomotive with a suitable whistle as a reasonable instrumentality in the efficient operation of the locomotive, and a breach thereof. We are of opinion that a cause of action is here stated, independent of the statute.

As we understand it, this case was submitted to the jury upon the sole proposition that this whistle was a broken or defective whistle, and that it was not an appliance that could be efficiently used, and that the defendant was only liable in case the jury found that it sent out an engine that was improperly equipped with a whistle, one that could not be used to perform the function that it was intended for.

We have read this record with great care to discover whether there was any evidence to sustain this claim. In the light of this record, we feel compelled to say that, instead of showing a broken or defective whistle, the uncontradicted testimony of all the witnesses in the case is that there was nothing the matter with the whistle. The plaintiff introduced as one of her witnesses the engineer in charge of the engine, who so positively testifies. It is true that there was some evidence tending to show that the whistle on this morning gave out a peculiar sound, described by one witness as a "squawking" sound. One of plaintiff's witnesses stated it sounded as though the pressure of the steam was low and condensed. Another testified that his idea was that there was something wrong about the steam; that it was either damp, moist steam, or that the operator didn't put on a full blast of steam to give a loud sound; that the tone was a "muffled tone." Another, that the condition of the atmosphere by reason of fog was the cause. Dif-

ferent theories were given by some of the plaintiff's witnesses as to the unusual sound of the whistle; one being that there may have been too much water in the boiler. The evidence being undisputed that the whistle on this engine was of the standard variety used on all the freight engines of the defendant, and that it was purchased from reputable whistle manufacturers, and the testimony as to the peculiar sound being just as consistent with the perfect condition of the whistle as with its imperfect condition, and it appearing that the person who operated the whistle was a fellow servant of plaintiff's decedent, and that no recovery could be had for his mismanagement of the whistle, or of the improper filling of the boiler, we do not think that the jury should have been left to speculate as to the cause of the peculiar sound testified to by some of the witnesses.

We are constrained to say that, in our opinion, there was no negligence of the defendant shown, nothing that would indicate that the whistle was a defective one; and that the case should have been taken from the jury because of the failure of the plaintiff to make a case under the evidence.

The evidence was undisputed that the engine had been in the shop for repairs in other parts, and it also appeared that it had been reported that the whistle valve did not open enough; that it was repaired, and left the shop in perfect condition as to the whistle, on June 8th, and again on June 12th.

The engineer, who had been called as a witness for the plaintiff, was recalled by the defendant for further direct examination. Upon his cross-examination he was asked whether he had not stated at the depot at West Branch, on the morning of the accident, and a short time after the accident, in the presence of divers persons, as follows: "I blew the whistle, and the damn thing wouldn't work, or didn't." He denied that he had made such statement. He was then asked if, on that occasion, he did not state: "I blew the whistle, and the damn thing was no good anyway." He denied this. Testimony was afterwards offered in rebuttal by plaintiff, tending to show that this witness had made such statement. This is complained of by defendant's counsel, and error is assigned upon it.

We are of opinion that, the defendant having made the engineer its own witness, it was competent upon cross-examination to ask the questions indicated, and that it was so far material as affecting his testimony that it was competent to prove the statements by other witnesses; it being in the nature of collateral impeachment. It could not be used for any other purpose, and was

no evidence of the negligence of the defendant.

We are so strongly impressed with the claim that there was no evidence of the negligence of the defendant that we think it was error to submit the case to the jury, and that for the error indicated the judgment below should be reversed, and a new trial granted. We find no other error that is likely to arise upon a new trial.

It may properly be said that, under the charge of the court, the question as to the statutory signals is not before us. But, as this case must go back for a new trial, it is only fair to the parties, and to the trial court, the question having been briefed by counsel, that we express our opinion whether section men or railroad employees can base a right of action on the failure of the railroad company to sound the statutory whistle at highway crossings, as is provided by § 6292, 2 Compiled Laws. That statute provides as follows: "A bell of at least 30 pounds weight, and a steam whistle, shall be placed on each locomotive engine, and said whistle shall be twice sharply sounded at least 40 rods before the crossing is reached, and after the sounding of the whistle the bell shall be rung continuously, until the crossing is passed, under a penalty of \$100 for every neglect; . . . and the company shall also be liable for all damages which shall be sustained by any person, by reason of such neglect."

This statute in its present form, so far as quoted, has been the law of this state for many years. It received a construction by this court in the case of *Sanborn v. Detroit, B. C. & A. R. Co.* 91 Mich. 538, 16 L.R.A. 119, 52 N. W. 153. This opinion was by a divided court. The vital question is whether this plaintiff is in a position to invoke this statute. It is a general rule that a civil action is maintainable where a person complaining is of a class entitled to take advantage of the law, is a sufferer from the disobedience, is not himself a partaker in the wrong of which he complains, or is not otherwise precluded by the principles of the common law from his proper standing in court. *Syneczewski v. Schmidt*, 153 Mich. 438, at page 441, 116 N. W. 1107.

It is a well-established principle that the violation of a statutory duty is the foundation of an action in favor of such persons only as belong to the class intended by the legislature to be protected by such statute.

In 33 Cyc., at page 784, the following language is used with reference to statutes of this character: "In the absence of a provision in the statute specifically designating persons to whom the duty of giving crossing signals or warnings is due, it is generally held that such warnings are due only 40 L.R.A. (N.S.)

to persons on the highway using, about to use, or who have just used, the crossing, and not to trespassers or licensees on the railroad tracks or right of way at places other than a crossing, nor to persons riding or driving along parallel to the railroad. In some jurisdictions, however, it is held that while the statutory signals are intended primarily as warnings to persons using, or intending to use, the crossings, and not for those walking along the track or right of way, yet, with regard to the latter as well as to the former, a failure to comply with the statute is evidence of negligence, to be considered by the jury, together with other facts tending to show want of reasonable care on the part of the railroad company; but, if the failure to give such signals is the only negligence imputable to the railroad company, it is not liable in such cases. Under some statutes, such signals or warnings are held to be due to all persons lawfully on or near the crossing who may be exposed to danger by the approaching engine or train whether on the highway or on the right of way,"—citing many cases.

A leading case upon this subject, in this country, is that of *Randall v. Baltimore & O. R. Co.* 109 U. S. 485, 27 L. ed. 1005, 3 Sup. Ct. Rep. 323. The opinion in that case was written by Justice Gray, and was concurred in by the entire court. In that case the statute of West Virginia was involved, which reads as follows: "'A bell or steam whistle shall be placed on each locomotive engine, which shall be rung or whistled by the engineer or fireman at the distance of at least 60 rods from the place where the railroad crosses any public street or highway, and be kept ringing or whistling until such street or highway is reached' under a penalty of not exceeding \$100 for each neglect; and that 'the corporation owning the railroad shall be liable to any person injured for all damages sustained by reason of such neglect.'" The action was brought by a brakeman in the employ of the defendant company for personal injuries received, while working a switch, by being struck by one of its locomotive engines in the yard of the defendant, where there was a network of tracks near the junction of a branch road with the main road, and about 10 rods from a highway crossing. After referring to the doctrine of fellow servants, and holding that the engineer and the plaintiff were fellow servants engaged in a common object, and in the employ of a common master, and holding that an action could not be maintained for the negligence of the engine man in not giving due notice of the approach of his engine, the court used the following language: "The statute of West Virginia, on which

the plaintiff relies, has no application to this case. There is no evidence that the engine which struck the plaintiff was about to cross a highway, and the main, if not the sole, object of the statute evidently was to protect travelers on the highway. *O'Donnell v. Providence & W. R. Co.* 6 R. I. 211; *Harty v. Central R. Co.* 42 N. Y. 468. It may perhaps include passengers on the trains, or strangers, not trespassers, on the line of the road. But it does not supersede the general rule of law which exempts the corporation from liability to its own servants for the fault of their fellow servants."

Our attention has been called to the case of *Everett v. Great Northern R. Co.* reported in 100 Minn. 309, 9 L.R.A.(N.S.) 703, 111 N. W. 281, 10 Ann. Cas. 294. That case reviews not only the text-books, but the reported cases at great length, and holds that a statute, similar to ours, did not impose upon the railroad company the duty to give the required signal for the benefit of a person who was driving a team along a street parallel to the railway track near a crossing, but who did not intend to use the crossing; and where, under such circumstances, an approach of the train frightened the horses of the plaintiff and caused them to run away, negligence could not be predicated upon the failure to give the crossing signals in order that the driver might have warning and an opportunity to care for his team; and it was held that the plaintiff was not within the class which the legislature intended to protect by the statute which required the giving of the designated signal. In that case the court, in its opinion, quotes from 3 Elliott on Railroads, §§ 1158, 1264, as follows: "There is conflict of authority as to who may claim the benefit of the statutory signals, and it may depend somewhat upon the language of the particular statute. Where the statute does not specifically designate the class to whom the duty is owing, the courts have usually construed it to be due only to those who are about to use, are using, or have lately used, the crossing, and have held that no others could recover for injuries resulting from failure to give the signals; but other courts have gone further, and hold that the duty is for the protection of all persons lawfully at or near the crossing, from any danger to be apprehended from the sudden approach of a train without warning.' Summarizing the cases, the author says: 'According to what we regard as the better rule, the company owes no duty to one who is not upon the highway or near the crossing, to give the statutory signals; and it is not, therefore, liable to one whose horse, while upon a parallel highway which does not cross the

track, or in a field, is frightened and runs away because the statutory signals were not given for the crossing of a neighboring highway, and the owner thus failed to hear and prepare for the approach of the train.'" Further quoting from 2 Thompson on Negligence, § 1560, as follows: "It has been well reasoned that this omission is negligence as matter of law only when injuries result therefrom to persons or animals endeavoring or intending to cross the track upon a street or highway crossing; and this, for the manifest reason that the object of the statute is to protect persons and animals in this situation, and not in other situations; the prevailing view being that such signals are intended only for the protection of persons or vehicles on the crossing, or about to use the crossing, and not (for example) for the protection of those driving along a highway parallel to the railroad.'" Again, quoting from 2 Shearman & Redfield on Negligence, § 470, the following language is used: "Statutes requiring signals at crossings are enacted only for the benefit of persons intending to cross the track at a lawful crossing, or proceeding on a highway parallel with the track. Persons walking along the track, or trespassing thereon, or occupied in work upon adjoining land, are not entitled to the benefits of such statutes, whatever may be their common-law rights.' See also *Patterson, Railway Acci. Law*, § 160; 2 *Rorer, Railways*, p. 1004."

The main case reviews the authorities generally in this country, and holds that the cases sustain the views above expressed. In many of the states the statutes contain the language that the corporation shall be liable for damages which shall be sustained by any person by reason of such neglect. This is notably so in *Randall v. Baltimore & O. R. Co.* supra, and in *St. Louis & S. F. R. Co. v. Payne*, 29 Kan. 166, where the opinion was written by Chief Justice Horton, and concurred in by Mr. Justice Brewer, then a member of that court. The same doctrine applies in *Missouri P. R. Co. v. Pierce*, 33 Kan. 61, 5 Pac. 378, where the court uses the following language: "The purpose of the legislature in requiring this warning to be given before reaching a highway is manifestly to afford protection to persons or property that may be upon or passing over such highway, and therefore the omission of the company to comply with the statutory requirement cannot be held to be negligence as to any injury done except at the crossing of the particular highway for which the whistle is required to be sounded."

In *East Tennessee, V. & G. R. Co. v. Feathers*, 10 Lea, 103, the statute was held

to have no application where a person was injured while traveling along a public road parallel to the railroad. The court said: "It seems clear that this language imposes a duty on the company in order to give warning to persons about to cross the road, or who may be in the act of crossing, possibly, or had just passed over the road; but it does not apply to parties who are not about to cross the road, but are simply traveling alongside, as in this case, and showing an evident purpose not to cross at all."

A similar doctrine is applied in *Louisville & M. R. Co. v. Hall*, 87 Ala. 708, 4 L.R.A. 710, 13 Am. St. Rep. 84, 6 So. 277. It appeared in that case that the plaintiff, a brakeman, was injured by being struck by an overhead bridge; and it was claimed that the defendant was liable because the whistle had not been blown at least $\frac{1}{4}$ of a mile before reaching the public crossing near by. In *Everett v. Great Northern R. Co.* supra, the court said: "In *Louisville & N. R. Co. v. Hall*, supra, said Chief Justice Stone: 'That statute has nothing to do with this case. Its design was to warn and protect persons who at a public crossing, pass across and directly on the track and who would be in danger of being struck and run over by an approaching train. . . .' To the same effect, see *Flint v. Norwich & W. R. Co.* 110 Mass. 222. In *Christy v. Chesapeake & O. R. Co.* 35 W. Va. 117, 12 S. E. 1111, the statute was held to be intended for the protection of those using the track at the crossing, and not for those using it elsewhere, and therefore no duty in this respect was owing to a section hand, an employee of the road, who was struck while standing on the track. The same rule had previously been applied in the case of a person using the railway tracks as a footpath."

We cannot undertake to review all of the authorities cited in this case. We refer to the following cases:

Rohback v. Pacific R. Co. 43 Mo. 187. In this case at the time of the injury the testimony showed that the plaintiff, with divers other servants of defendant, was at work on the main track and switches of defendant, digging and shoveling dirt upon a part of the track in the yard of defendant, between Jefferson and Madison streets, in Jefferson City, and where other servants of the defendant were about the same time and place making up a train, and in doing so had immediately before the accident passed up and down, once or twice, or perhaps oftener, upon the tracks where the plaintiff and others were at work; and that finally, in backing the train, plaintiff, failing to get out of the way, was

run over by it and received very serious injuries. The statute in Missouri made it incumbent upon the railroad companies to have a bell placed on each locomotive to be rung at a distance of at least 80 rods from where the railroad should cross a traveled or public street, and to be kept ringing until it should have crossed such road or street. And the last clause of the section declares: "And said corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect." The question raised was whether servants or employees of the company are to be included within the designation "any person," according to the true sense and meaning of the act. The court held that the section of the statute above referred to is a transcript of the New York statute, that the omission by a railroad company to give the signals required on the approach of a locomotive, within 80 rods of a highway crossing, was a breach of duty to the passengers, whose safety it imperiled and to the wayfarer, whom it exposes to mutilation and death; and reference is had to the case of *Ernst v. Hudson River R. Co.* 35 N. Y. 9, 90 Am. Dec. 761. The court in the Missouri case uses the following language: "After a somewhat careful examination I have been unable to find any case where it was sought to bring a servant within its provision. It is obvious that the enactment of the law was intended primarily for the protection of the traveling public and passengers. At a public crossing or street, frequented by travelers and persons engaged in business, the danger of collision and accident is constant and recurring, without a signal warning them of the approach of the train. Not only the danger to be apprehended to those who may happen to be on the track, but the lives of the passengers are also jeopardized. The law, in a previous part of the section, subjects the company to a penalty for omission of duty in ringing the bell; but, lest that might be deemed exclusive, it also makes it responsible in damages at the suit of any person injured. There is a strong and peculiar reason why this precaution of giving a signal should be observed, as regards passengers and the traveling public; but it is not apparent when it comes to be applied to the servants of the road. There is nothing to show that, from their business and occupation, they are in greater hazard at a public crossing than at a private crossing, or anywhere else on the track. That the draftsman of the law used the word 'person' in the sense that it should apply to the classes above referred to, and without any intention of changing

the common-law construction, can scarcely be questioned."

O'Donnell v. Providence & W. R. Co. 6 R. I. 211. The statute in that state provided as follows: "Every railroad company incorporated under the authority of this state shall cause a bell of at least 32 pounds in weight to be placed on each locomotive engine passing upon their road; and the said bell shall be rung at the distance of at least 80 rods from the place where said railroad crosses any turnpike, highway, or public way upon the same level with the railroad, and shall be kept ringing until the engine has crossed such turnpike or road." After providing a penalty for the violation of this statute, § 3 concludes in the following language: "And the said railroad company shall also be liable for all damages sustained by any person by reason of such neglect or refusal on the part of the company." In this case it appeared at the trial that the plaintiff was walking upon the tracks of the defendant's railroad, and was not at any place where the railroad crossed any turnpike, highway, or public way upon the same level with the railroad. The court held that the statute above referred to was exclusively designed for the benefit of persons crossing the turnpike, highway, or public way on a level with the railroad; and hence a person who was injured by the engine while walking along the tracks of the railroad, and not at any crossing, could not recover damages against the railroad company for such injury, upon the ground that the injury was caused by the company's neglect to ring the bell upon the locomotive, as required by statute.

Harty v. Central R. Co. 42 N. Y. 468. The statute of that state provided that every railroad company should keep a bell or steam whistle upon every engine, and cause the bell to be rung, or the steam whistle to be blown, at the distance of at least 300 yards from the place where any such railroad crossed a turnpike, road, or highway upon the same level with said railroad, and such bell should be kept ringing, or such steam whistle should be kept blowing, until the engine had crossed such turnpike or highway, or had stopped, and a penalty was imposed for not complying with the provisions. The plaintiff's intestate was struck by one of the defendant's engines and fatally injured at a point 200 feet east from the railroad crossing. The court held that the intestate was not within the protection of this law, and that the railroad owed him no duty under the law to ring the bell or sound the whistle. The court said: "If this company was bound to give these warnings to this man, then

every railroad company is bound to do so to every person who may be upon the railroad ahead of a train, although he is not on the track, and not in a place of danger. I think it would be unreasonable to carry the precautionary obligations of railroad companies to such an extent; and I therefore hold that this railroad company was guilty, as to the intestate, of no negligence in not ringing the bell or blowing the whistle, under the circumstances disclosed in this case."

In the case of *Norfolk & W. R. Co. v. Gesswine*, in the circuit court of appeals, sixth circuit, reported in 75 C. C. A. 214, 144 Fed. 56, Judge Lurton wrote the opinion. In that case the uncontradicted evidence was that a track man was injured, while engaged in working on the track, from a collision with a passing train. The statute of Ohio, where the case arose, provides for the giving of signals for railroad crossings. The court holds that such statutes are obviously for the benefit of those using, or about to use, the crossing, and do not impose any duty in respect to any other class of persons. This is the construction placed on the Ohio statute in *Cleveland, A. & C. R. Co. v. Workman*, 66 Ohio St. 509, 90 Am. St. Rep. 602, 64 N. E. 582. The court said [*Norfolk & W. R. Co. v. Gesswine*, supra]: "Gesswine was not a traveler using, or about to use, a crossing. He was not even at work upon the track at a crossing, though there were crossings on either side of him. . . . Failure to discharge some duty owed by the company to employees engaged in track repairing, under the circumstances of this case, is indispensable to a recovery by this plaintiff; and evidence to establish a custom to give signals for another purpose, and for the benefit of the general public using a crossing, was not competent or relevant to make out the breach of an actionable duty to Gesswine."

It is held that the lower court erred in permitting a witness to testify that he, and others of the gang of which the witness and deceased were members, relied upon the custom of the company to ring and whistle for such crossing, to warn them, when repairing in the vicinity, of the approach of such train. Section men whose duty requires them to work upon the track cannot predicate negligence upon disobedience of such a law.

In *Philadelphia & B. C. R. Co. v. Holden*, 93 Md. 417, 49 Atl. 625, the court deals with the question of failure to give signals at public crossings, and held that the rule did not apply to a person who was injured in crossing the railroad at a private crossing. The court, in speaking of

the case of *Sanborn v. Detroit*, B. C. & A. R. Co. 91 Mich. 538, 16 L.R.A. 119, 52 N. W. 153, says that this case is cited in 3 *Elliott on Railroads*, p. 1733, "for the proposition that, where a private crossing is located so near a public crossing that signals given thereat can be distinctly heard at the private crossing, the persons using the private crossing are entitled to the benefit of the signals required at the public crossing, and, that if the company fails to give such signals, it will be guilty of negligence; but the learned authors remark: 'This, however, seems to us questionable.' In 8 Am. & Eng. Enc. Law, 2d ed. 414, title 'Private Crossings,' a number of authorities are collected, showing considerable divergence of views in regard to the failure to give signals required by statute. But the question here presented, namely, whether the failure to blow whistle at public station, about 2,000 feet from the private crossing where the accident happened, is evidence of negligence of the defendant at the latter, as respects one crossing at the private or farm crossing, has not often arisen. It was directly presented in *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 347, 18 S. W. 2, where the question was answered in the affirmative. But in *Chicago, R. I. & P. R. Co. v. Eisinger*, 114 Ill. 79, 29 N. E. 196, it was held that flagmen are for the protection of those crossing at a public crossing. And so, also, it appears that the injury sued for in *Ransom v. Chicago, St. P. M. & O. R. Co.* 62 Wis. 178, 51 Am. Rep. 718, 22 N. W. 147, was inflicted at a point where a public highway crossed the railroad. To the same effect are *Norton v. Eastern R. Co.* 113 Mass. 366, and *Wakefield v. Connecticut & P. River R. Co.* 37 Vt. 330, 86 Am. Dec. 711. In *Harty v. Central R. Co.* 42 N. Y. 468, it appears that the railroad company was required by statute to ring bells, etc., at public crossings, and it was held that no duty was imposed as to persons not at public crossings, though lawfully on the track at another point. In *Vandewater v. New York & N. E. R. Co.* 135 N. Y. 588, 18 L.R.A. 771, 32 N. E. 636, this question was presented but not decided. *Peckham, J.*, said: 'It may be that evidence of the omission to give any signals for the highway would not be admissible as bearing upon the question of defendant's negligence in running its trains at the farm crossing 2,000 feet away.' It seems to us, however, that upon principle one who, like the plaintiff, was at a private crossing nearly half a mile distant from the place where the signal was required to be given for the public crossing, should not be allowed to complain, under the circumstances of

this case, of a failure to give the signal for the latter. Undoubtedly the regulation was made for those at the public crossing, and to extend it to private crossings would practically nullify the long line of decisions in this state, to the effect that no signals are required at the latter; for, if the contention of the plaintiff be sustained, if the defendant fails to give the signal at a public crossing, a double duty is violated, namely, a duty to those about to cross or crossing at a public crossing, and a duty to those in the same situation at a private crossing, where, as we have always held hitherto, that a railroad company owes no such duty to the latter. The result would be that the defendant would be held to the same degree of care, and the same liability would be imposed, when there is a duty to give the signal, as in cases where no such duty exists. A view leading to such a conclusion cannot be adopted."

In considering this question we have examined more than two score of cases, including all those cited by counsel upon both sides in their briefs. We have been unable to find a single case where it has been held that a section man, or other employee of a railroad company has been permitted to invoke this statute, or one similar to ours. We have found a number, including *Randall v. Baltimore & O. R. Co.* 109 U. S. 485, 27 L. ed. 1005, 3 Sup. Ct. Rep. 323, and kindred cases, which hold that an employee of a railroad company cannot invoke this rule; that he is not within the class intended to be protected by the statute. His work and duty is upon the track, and is as great a way from the crossing as at the crossing. The whole history of the legislation upon this subject shows that it has been for the benefit of the traveler upon the highway who is about to cross, is crossing, or has crossed the highway, and probably might be invoked by a passenger who was injured by reason of a collision caused through the neglect to give the signals required. To hold otherwise would be to do away entirely with the doctrine of fellow servants, for the statutory duty to use the signal is nondelegable. The fellow-servant doctrine, exempting corporations from liability to their own servants for the fault of their fellow servants, has become a part of the settled law of this country and of England, and it should not be frittered away indirectly by such construction as is here contended for.

For the error in submitting the case to the jury, as pointed out, the judgment below is reversed, and a new trial granted.

McAlvay and Brooke, JJ., concurred with Stone, J.

Blair, J.:

I concur in the result upon the ground that there was no evidence tending to prove the negligence relied on, *viz.*, that the locomotive was not equipped with a suitable whistle.

Ostrander, Ch. J., concurred with Blair, J.

Petition for rehearing denied, September 29, 1911.

NORTH CAROLINA SUPREME COURT.

W. L. FARRIS, Admr., etc., of Stanly Farris, Deceased,
v.

SOUTHERN RAILWAY COMPANY et al.,
Apts.

(151 N. C. 483, 66 S. E. 457.)

Custom — notice — master — duration.

1. A railroad company will be charged with notice of a custom of its employees which has continued for six months, to cross its yards to save time in going to and from their meals.

Master — flying switch — negligence — injury to employee.

2. It is negligence for a railroad company to make a flying switch without warning at a place where its employees are accustomed to cross its tracks in going to and from their meals, at a time when they may be expected to be so engaged.

Contributory negligence — defense — proof.

3. Contributory negligence must be alleged and proved.

Railroad — flying switch — injury to traveler — contributory negligence.

4. One rightfully attempting to cross railroad tracks is not negligent *per se* in grabbing for his hat, which is blown off by the commotion of a passing engine, and about to fall on a parallel track, without looking to see if cars are approaching on that track, so as to prevent holding the railroad company liable in case he is injured by

Note: — As to burden of proof as to contributory negligence, see exhaustive note to *Oklahoma City v. Reed*, 33 L.R.A. (N.S.) 1085.

As to negligence of railroad company in respect to flying switches or detached cars moved by their own momentum, see note to *Kentucky C. R. Co. v. Smith*, 18 L.R.A. 63.

As to applicability of the doctrine of last clear chance, where peril not actually discovered, see note to *Bogan v. Carolina C. R. Co.* 55 L.R.A. 418, and many notes in present series, indexed under title, "Negligence—Last Clear Chance."
40 L.R.A. (N.S.)

cars shunted onto that track by a flying switch, without warning of their approach.
Trial — last clear chance — submission of issue.

5. In case of injury to one on a railroad crossing, where the evidence is such that both the traveler and the railroad company may be found to have been negligent, the court should submit to the jury the question whether or not the railroad company could, after discovering the traveler's peril, have avoided injuring him.

Appeal — incompetent cumulative evidence — effect.

6. The admission of incompetent evidence is not reversible error, where the finding of the jury is amply supported by other evidence that was properly admitted.

(December 15, 1909.)

A PPEAL by defendants from a judgment of the Superior Court for Burke County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

Statement by Manning, J.:

His Honor submitted issues to the jury, presenting (1) the negligence of the defendants; (2) the contributory negligence of the plaintiff's intestate; (3) the last clear chance; (4) damages. The jury answered all the issues in favor of the plaintiff, and assessed damages in the sum of \$8,000. The case was heard entirely upon the evidence of witnesses offered by the plaintiff. The defendant offered no testimony, and moved for judgment of nonsuit at the close of the evidence, which motion was disallowed and defendant excepted. This exception, together with exception taken to the adverse rulings of his Honor in admitting certain evidence of the plaintiff, and exceptions to his Honor's charge, present the questions for consideration. The evidence offered shows the following facts: Stanly Farris was killed on May 29, 1907, at about 12 o'clock of the day, by being run over by four gondola cars moving on a track in the yard of the defendant Southern Railway Company at Asheville. The intestate was an employee of the defendant company, and had been in its service for about eight months prior to his death. The defendant company was doing on its yards at Asheville a large amount of work, rearranging its tracks, widening its yard, increasing the number of tracks, and building a stock pen. The intestate had been constantly and regularly at work for defendant company, engaged in doing different jobs, as a water boy, carrying water for the other employees, etc., and for a week prior to his death had been assisting in building the stock pens. The stock pens were on the

south side of the yards. The intestate lived on the north side of the yards. On the south side the embankment was about 3 or 3½ feet high, on the north side about 25 feet, except at a depression. The employees of the defendant company, numbering from 100 to 150, some of whom worked on the yards, others elsewhere, together with other laborers working for a tannery on the south of the defendant company's yards, crossed the yards to and from the depression in the embankment on the north side and to and from the south side from two to three times daily. A whistle, sounded at the roundhouse of the defendant company, gave the signal for its employees to stop at the noon hour for dinner. The place above described, where the large number of employees crossed the yards, was about three fourths of a mile to a street crossing on the east, and about 700 yards to a street crossing on the west, and from bank to bank was about 100 yards. This place contained 18 or 20 tracks. When Stanley Farris, the intestate, started to cross the yards, on May 29, 1907, at 12 o'clock of the day, there were many cars standing on the tracks to the east of him, about 30 to 35 yards. He crossed the first and second tracks in safety, and was walking down the space, from 6 to 8 feet wide, between these tracks. He was walking westward, and had gone a few steps when an engine, moving on the third track, from the south, at from 35 to 40 miles an hour, passed him, blowing off his hat, which fell on the second track, and, as he stooped to pick it up, he was struck, run over, and killed by the four gondola cars loaded with coal. The defendant company, through the codefendants, Smith, its conductor, and Mooneyham, its engineer, had made what was called "a flying switch," and four coal cars were sent westward on the second track and were moving at the rate of 8 or 10 miles an hour, and the engine took the third track. The switch at which the engine was separated from the coal cars was 25 or 30 yards east of the intestate. No bell was rung, whistle blown, or other signal given by the rapidly moving engine. The coal cars were moving noiselessly, with no watchman on any of the four cars, and no warning given to intestate of their approach. The intestate was about seventeen years of age, sober, hardworking, in good health, saving of his wages, and was at the time earning \$1.35 per day. From the judgment entered on the verdict, the defendants appealed to this court.

Mr. S. J. Ervin, for appellants:

It is the duty of one on or about to cross a railroad track to look and listen. 40 L.R.A. (N.S.)

Neal v. Carolina C. R. Co. 126 N. C. 639, 49 L.R.A. 684, 36 S. E. 117; Beach v. Southern R. Co. 148 N. C. 153, 61 S. E. 664; Cooper v. North Carolina R. Co. 140 N. C. 209, 3 L.R.A. (N.S.) 391, 52 S. E. 932, 6 Ann. Cas. 71; Lea v. Durham & N. R. Co. 129 N. C. 459, 40 S. E. 212; Syme v. Richmond & D. R. Co. 113 N. C. 558, 18 S. E. 114.

Defendant was under no duty to ring the bell and sound the whistle whenever the engine or cars approached any place where the public was likely to cross the track.

Williams v. Southern R. Co. 119 N. C. 746, 26 S. E. 32; Whitson v. Wrenn, 134 N. C. 86, 46 S. E. 17; Edwards v. Atlantic Coast Line R. Co. 132 N. C. 99, 43 S. E. 585.

As the intestate was walking in a place of safety, and came in contact with the cars when he suddenly left it and reached for his hat, the last-clear-chance doctrine does not apply.

Pharr v. Southern R. Co. 133 N. C. 610, 45 S. E. 1021; Matthews v. Atlantic & N. C. R. Co. 117 N. C. 640, 23 S. E. 177.

The act of the intestate in leaving a place of safety and putting himself in one of danger, without looking, was at least one of the concurrent, contributing causes which produced the injury.

Markham v. Raleigh & G. R. Co. 119 N. C. 715, 25 S. E. 786.

Messrs. Avery & Avery and Avery & Erwin, for appellee:

The making of the flying switch without warning, and at a time when defendants had reasonable grounds to believe that employees would be crossing the tracks, constituted negligence *per se*.

Vaden v. North Carolina R. Co. 150 N. C. 702, 64 S. E. 762; Kentucky C. R. Co. v. Smith, 93 Ky. 449, 18 L.R.A. 66, 20 S. W. 392; Bradley v. Ohio River & C. R. Co. 126 N. C. 735, 36 S. E. 181; Wilson v. Atlantic Coast Line R. Co. 142 N. C. 336, 55 S. E. 257; Allen v. Atlantic Coast Line R. Co. 145 N. C. 214, 58 S. E. 1081.

The omission to give warning was the proximate cause of the injury, which could have been prevented by the use of precaution.

Lloyd v. Albemarle & R. R. Co. 118 N. C. 1010, 54 Am. St. Rep. 764, 24 S. E. 805; Vaden v. North Carolina R. Co. 150 N. C. 702, 64 S. E. 762; Kentucky C. R. Co. v. Smith, 93 Ky. 449, 18 L.R.A. 66, 20 S. W. 392; Greenlee v. Southern R. Co. 122 N. C. 977, 41 L.R.A. 399, 65 Am. St. Rep. 734, 30 S. E. 115; Ray v. Aberdeen & R. F. R. Co. 141 N. C. 86, 53 S. E. 622; Ruffin v. Atlantic & N. C. R. Co. 142 N. C. 126, 55 S. E. 86; Gerring v. North Carolina R. Co. 146 N. C. 32, 59 S. E. 152; Edwards

v. Carolina & N. W. R. Co. 140 N. C. 50, 52 S. E. 234; Smith v. Atlanta & C. Air Line R. Co. 132 N. C. 824, 44 S. E. 663; Hinkle v. Richmond & D. R. Co. 109 N. C. 473, 26 Am. St. Rep. 581, 13 S. E. 884; Russell v. Carolina C. R. Co. 118 N. C. 1108, 24 S. E. 512.

Contributory negligence must be pleaded and proved.

Watson v. Farmer, 141 N. C. 453, 54 S. E. 419; Sherrill v. Southern R. Co. 140 N. C. 252, 52 S. E. 940; Ray v. Aberdeen & R. F. R. Co. 141 N. C. 86, 53 S. E. 622.

Where the death of intestate is shown to have been caused by cars constituting a part of a flying switch, the issue as to contributory negligence is for the jury, in view of surrounding circumstances.

Chicago Junction R. Co. v. McGrath, 203 Ill. 514, 68 N. E. 69.

Manning, J., delivered the opinion of the court:

The question first presented for our consideration is the negligence of the defendants. If the evidence does not prove, or tend to prove, a breach of duty by the defendants towards the plaintiff's intestate, and that such breach of duty resulted proximately in the injury complained of, then it must follow that the motion to nonsuit ought to have been allowed for failure of proof on the first issue. In *Wilson v. Atlantic Coast Line R. Co.* 142 N. C. 333, 55 S. E. 257, Mr. Justice Brown, speaking for this court, said: "The attempt to make a running switch across a much frequented street is not only a negligent, but a most dangerous and unwarranted, operation, and has been so held by a number of courts. *Bradley v. Ohio River & C. R. Co.* 126 N. C. 735, 36 S. E. 181; *Brown v. New York C. R. Co.* 132 N. Y. 697, 88 Am. Dec. 353; *Fulmer v. Illinois C. R. Co.* 68 Miss. 355, 8 So. 517; *Alabama v. V. R. Co. v. Summers*, 68 Miss. 586, 10 So. 63; *French v. Taunton Branch R. Co.* 116 Mass. 537; *Chicago & A. R. Co. v. Garvy*, 58 Ill. 83; *Illinois C. R. Co. v. Baches*, 55 Ill. 379. It matters not whether the purpose was to 'shunt' the car off on a switch, or to give it force enough to roll along on the same track. It is negligence to permit a car to be 'cut loose,' and roll on uncontrolled by anyone across a much used crossing." In *Allen v. Atlantic Coast Line R. Co.* 145 N. C. 214, 58 S. E. 1081, the same learned justice said: "The word 'kicking' seems to be used in railroad parlance, as synonymous with making a 'flying switch.' This court has never held such operations to be *per se* negligence in respect of the employees performing them. It is 'the attempt to make a running switch' when the detached car has no brakeman 40 L.R.A. (N.S.)

on it and is under no control that is declared to be negligence, because highly dangerous. *Wilson v. Atlantic Coast Line R. Co.* 142 N. C. 336, 55 S. E. 257, and cases there cited." *Vaden v. North Carolina R. Co.* 150 N. C. 700, 64 S. E. 762. In *Bradley v. Ohio River & C. R. Co.* supra, this court held: "A crossing which the public have been habitually permitted to use is treated as a public highway crossing. *Russell v. Carolina C. R. Co.* 118 N. C. 1098, 24 S. E. 512." In 3 *Elliott on Railroads*, 2d ed. § 1265g, this learned writer says: "The practice of making running or flying switches is inherently dangerous, and is so considered and condemned by the courts in numerous decisions. The courts have not hesitated to hold railroad companies liable for injuries to trespassers on the track, thus inflicted, on the ground of negligence. The case of this negligence seems specially plain where the cars are sent in swift motion, with no one at the brakes, upon switch tracks commonly used by persons for footpaths and crossings, without objection from the company, though not at a public crossing. It would seem a duty owed by the railroad company, even to trespassers, to station lookouts in such positions on the moving cars that they can watch the tracks ahead of them and warn persons thereon of their danger." *Conley v. Cincinnati N. O. & T. P. R. Co.* 89 Ky. 402, 12 S. W. 764; *St. Louis & T. R. Co. v. Crosnoe*, 72 Tex. 79, 10 S. W. 342. In *Vaden v. North Carolina R. Co.* 150 N. C. 700, 64 S. E. 762, Mr. Justice Brown, speaking for the court, in stating the facts of that case, said: "The evidence for plaintiff tends to prove that he was killed about 30 feet from where Tomlinson street crosses the tracks. The evidence for defendant locates him farther from the crossing. All the evidence shows that these switch tracks were situated in a populous part of the city and adjacent to and close by factories, where many people of all ages were employed. At the time the intestate was killed the factory had just closed for the day, and the employees were filling the streets and crossings. The court permitted evidence to the effect that there is much passing by school children, factory hands, and citizens generally along Tomlinson street and in the vicinity of the accident, to which defendant excepted. We see no objection to this evidence. It tended to establish conditions that should have put the defendant on notice as to the necessity for caution in moving its cars at that point. *Kentucky C. R. Co. v. Smith*, 93 Ky. 449, 18 L.R.A. 66, 20 S. W. 392"

In the present case, the intestate of plaintiff occupied, toward the defendant com-

pany, the relation of employee, and of this relationship the law certainly fixes the company with knowledge. He was not a trespasser in crossing its tracks. He, together with a large number of other employees of defendant company (among them others, not employees, were intermingled), some of whom worked on the yard, others on the stock pens, had been accustomed for about six months to cross the yards at or about the place where plaintiff's intestate was killed, and at least one of the hours during the day when they crossed the yard was indicated by a whistle from the roundhouse of defendant company. Crossing at this point enabled the employees to reach their homes and boarding places more quickly and to return to their work more promptly. A custom of its own employees continuing for six months, and observed by it without protest or objection from the defendant company, we must hold to have continued long enough to fix the defendant with knowledge of its existence. In addition, the defendants in their joint answer admit that the intestate of plaintiff was accustomed, in going in a direct course to and from his place of employment to his boarding house, to pass through the yards of the defendant company and cross its tracks. In *Bordeaux v. Atlantic Coast Line R. Co.* 150 N. C. 528, 64 S. E. 439, it was held "undoubtedly culpable negligence" to "kick" a car on a track in a shifting yard, resulting in injury to plaintiff, who was at work on a car on that track, but who failed to observe a rule of the company by placing a signal flag on the car, as notice to engineers operating the shifting engines; there being evidence that the rule was much violated on "short jobs," to the knowledge of the superintendent and engineers on the yard, and that the employees of the kicking engine saw repairers at work on the car. Under the authorities cited, we think the evidence clearly sufficient to sustain the finding of defendants' negligence by the jury in response to the first issue, and that the negligent act of the defendants continued up to the collision of the cars with plaintiff's intestate, and without which the accident would not have happened.

We proceed next to the consideration of the motion to nonsuit, as it applies to the second issue,—the contributory negligence of the plaintiff's intestate. Upon this issue, his Honor charged the jury: "It is the duty of persons going on the track of a railroad company to stop and look and listen for any train that may be moving or lying on the track of such company, and on its yards, where there are several tracks used for shifting cars, to be continually alert and on the lookout for a moving train

or cars, and if a person fails in this duty, and in consequence of such failure is injured by moving cars, the person would be guilty of contributory negligence." While the burden of this issue rested on the defendants, the burden of duty rested upon the intestate. The law does not presume contributory negligence. It must be alleged and proven. The defendant must show such facts—either omissions to observe such cautions or the doing of such acts—from which only one inference, to wit, the plaintiff's negligence, can be drawn by men of ordinary reason and intelligence. Of the conduct and acts of the intestate the evidence discloses these facts: When he entered upon the yard, he saw an engine and cars moving east of him. He crossed the first and second tracks, moving somewhat to the northwest. He had taken a few steps between the second and third tracks, and was about to cross the third track, when the engine sped by him at the rate of 30 to 40 miles per hour. The draught caused by the rapidly moving engine blew off his hat, blowing it on the second track, which he had just crossed in safety. As he stooped to catch his hat, he was struck by the coal cars and killed. The cars were moving at the rate of 8 or 10 miles an hour. The switch was 25 to 30 steps east of intestate. To make the flying or running switch with engine moving in front, it is, of course, necessary that the start must be made sufficiently beyond the switch to enable the engine to acquire such speed as to be uncoupled before reaching the switch, so far in advance of the cars as to permit the switch to be thrown and to send the detached cars a desired distance on the track. The engine had acquired the speed of 35 or 40 miles per hour, and must have been making the noise usual to engines moving at such speed. According to one of the eyewitnesses, the detached cars were moving noiselessly. It can easily be inferred that, in the close presence to the rapidly moving engine, the intestate could not have heard any noise from the moving cars. He had just crossed in safety the track upon which these cars were noiselessly moving, unguarded by any person stationed on them to warn him of their approach. His position and purpose were known to the defendants. The danger of a misstep, or of deviating from an exactly straight line, was obvious to the defendant engineer. The rapidly moving engine, passing intestate, was naturally calculated to make him draw away from it. The natural impulse was to grab at his hat and to stoop to pick it up. A watchful brakeman on the cars "keeping a continuous outlook" would assuredly, seeing his position of peril, have warned

by the use of a defective "exploder" in a stone quarry. The extract from the opinion in this case, found on page 18 of the company's brief, shows that "it appeared that the exploders were manufactured by one of the largest manufacturers in the country; that they were packed in boxes ready for use; that, in order to inspect them, it would be necessary to employ an expert at a great expense." Thus the effect of that opinion is really in support of the plaintiff's contention. In the case at bar an inspection could have been made at the time the peculiarity in the color and smell of the oil was observed, and before the same was sent down into the mine, without the employment of an expert, and without the waste of a minute of time, and by the expenditure of a match, and a handful of waste, or piece of wood.

In *Reynolds v. Merchants' Woolen Co.* 168 Mass. 501, 47 N. E. 406, another case cited by the company in support of this rule, it appears that an employee was injured by the flying apart of a cylinder, which had been recently purchased of a reputable manufacturer. An examination of this case shows that the court held that, before the employer would be absolved from liability, he must not only use care in purchasing the machinery from a reputable manufacturer, but, in addition, he must inspect the same before putting it in operation. On page 501 of 168 Mass. the court uses the following language: "Mill owners usually procure their machines of reputable makers. Such conduct meets the standard of ordinary care, and it is not negligence on the part of an employer to place in his mill, and, after proper inspection, to use, machinery so bought."

In *1 Labatt on Master & Servant*, p. 327, it is said: "There are at least two very weighty reasons why the theory that a master is entitled as a matter of law to rely on the quality of appliances obtained from a reputable manufacturer should be rejected. One of these is that such a theory is essentially inconsistent with the doctrine of nondelegable duties. . . . As between master and servant, this doctrine should, it is submitted, always be regarded as controlling, whenever it comes into conflict with that which declares that the employer of an independent contractor is not liable for his negligence. . . . The other reason is that, according to the rule adopted by most of the authorities, the servant has ordinarily no right of action against the manufacturer, and if he cannot recover from his master, he cannot recover at all. Assuming the defect which caused the injury to have been discoverable by the exercise of proper care, someone ought in fair-

ness to be held responsible for its existence, and it is a mere mockery of justice to absolve the master simply on the ground that he was justified in trusting to the skill and diligence of a person who, if that skill and diligence were, as a matter of fact, not exercised, is not liable to the servant, because there is no privity of contract between them. The question as to what extent the employer had a right to rely upon the skill of a manufacturer is, of course, immaterial where he was put upon inquiry as to the condition of the appliance which caused the injury."

In 26 Cyc. 1139, the author, in discussing this rule, uses the following language: "Reasonable care in the matter of inspection requires a master to make such an examination and test as a reasonably prudent man would deem necessary under the same circumstances for the discovery of possible defects, and he is not required, unless put upon notice as to the probable existence of defects, to employ unusual or extraordinary tests, nor to adopt the latest and most approved methods of testing machinery or appliances. The reasonableness and sufficiency of an inspection, when made, is a question of fact for the jury."

Counsel for the company cites § 153 of *1 Labatt on Master & Servant* as supporting their doctrine, and quotes therefrom as follows: "This right of the employer to rely upon the quality of articles so purchased involves the corollary that he is not under any obligation to subject the articles to tests as minute as can and ought to be applied by a manufacturer." But a close examination of the above extract shows that, under the circumstances of the case at bar, there was testimony sufficient to put a reasonably prudent and careful man upon inquiry; such facts and circumstances as the different and peculiar color, consistency, and smell of the oil, which would indicate, at least, that it was not the black lubricating oil that had formerly been used, and indicating, also, that the same was a dangerous explosive, and inflammable oil, on account of its peculiar smell, as noticed by the workmen at the time it was sent down into the mine. Further on, in § 161, of the same volume, is found the following extract: "The character of the inspection which the master is bound to make is described by various epithets and phrases, all of which, as will be seen from a subjoined note, are essentially the logical equivalent of the proposition that the examination must be such as a person of ordinary prudence would have made under the circumstances. The question whether the examination to which the instrumentality which caused the injury is actually sub-

jected before the accident was such as to satisfy the standard thus indicated is primarily one for the jury. This principle is not affected by the fact that the preponderance of the testimony, whether measured by the number of witnesses or the comparative credit which the court may think to be due to each, is in favor of one litigant. Whether or not the duty of a master with regard to proper inspection has been performed by the application of any given test is to be determined by considering whether that test will give indications as to the actual condition of the instrumentality in question. In the application of this principle, the courts have usually proceeded upon the theory that a merely visual or ocular inspection of external conditions does not satisfy the full measure of a master's obligations where the servant's safety depends upon the soundness of the material of which an instrumentality is composed." In this case, nothing but the reputation of the dealer is offered by the company as a full duty to its employees in one of the most hazardous employments men engage in.

In *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 37 L. ed. 728, 13 Sup. Ct. Rep. 837, which was an action for damages by reason of a defect in an iron casting, and where no reasonable examination or inspection would have disclosed the same, and where the court relieved the master from responsibility because of the almost undiscoverable defect in the appliance, it was nevertheless said: "With regard to the defect in the iron casting which seems to have been revealed by the explosion, it may be said that it is not necessarily the duty of a purchaser of machinery, whether simple or complicated, to tear it to pieces to see if there be not some latent defect. . . . We do not mean to say that it is never the duty of a purchaser to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested. It may be, and doubtless often is, his duty when placing the machine in actual use to subject it to ordinary tests for determining its strength and efficiency. Applying these rules, if the railroad company, after purchasing this engine, made such reasonable examination as was possible, without tearing the machinery to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests had disclosed no defect, it cannot in an action by one who is a stranger to the company be adjudged guilty of negligence because there was a latent defect, one which

subsequently caused the destruction of the engine and injury to such party."

In *Morton v. Detroit, B. C. & A. R. Co.* 81 Mich. 423, 46 N. W. 111, Mr. Justice Cahill, in discussing the duty of employers in this regard, says: "The managers of railroad companies are engaged in conducting for profit a business which, at the best, is hazardous to human life. In providing sound tools and safe appliances for the use of their employees, their plain duty, to say nothing of the dictates of humanity, requires great vigilance; they cannot be heard to excuse themselves from taking all reasonable care on the ground that care involves labor or expense. . . . They cannot be held responsible for hidden defects in tools or appliances if they have used reasonable care in procuring them, but they are not absolved from the duty of testing or inspection because they have bought in the open market of reputable dealers, or employed competent workmen to construct them. If any defect exists which a careful test or inspection would have discovered, the master must be held to have knowledge of such defect, and to be responsible for it." See, also, in support of this doctrine, *Hoes v. Ocean S. S. Co.* 56 App. Div. 259, 67 N. Y. Supp. 782; *San Antonio Edison Co. v. Dixon*, 17 Tex. Civ. App. 320, 42 S. W. 1009; *Anderson v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665, 99 N. W. 357.

In *Mather v. Rillston*, 156 U. S. 399, 39 L. ed. 470, 15 Sup. Ct. Rep. 464, the court, speaking of the degree of care required in the use of such dangerous instrumentalities as power and oil, from whatever source procured, said: "Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable, known to science, for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon." In 4 *Thompson on Negligence*, § 3784, is the following statement in respect to the necessity of inspection: "No other rule can be stated upon this subject than to say that it is the duty

of the master to resort to such tests as are practicable and are reasonable, having reference to the character of the machine or appliance, and to the nature and extent of the danger to be avoided. It has been reasoned that the master is not required to resort to tests which are impracticable, unreasonable, or oppressive, or which would be incompatible with the proper furtherance of his business, and which are only required to insure absolute safety, which is tantamount to saying that the master does not stand liable as an insurer, but is liable only for the exercise of reasonable or ordinary care, which is, as in other cases, a care in proportion to the danger to be avoided. But, on the other hand, where the result of a breaking of the machine or appliance would be a calamity to the servant, the law will not always excuse a mere visual inspection, but will leave it to the jury to say whether some sufficient test ought not to have been applied." And again in 4 Thompson on Negligence, § 3990, the identical claim, the excuse of the defendant, is discussed in the following language: "The 'reputable manufacturer' doctrine . . . is not that a master is exonerated from liability for dangerous defects in machinery, tools, and appliances which he purchases from a reputable manufacturer by reason of a manufacturer being reputable; but, fairly stated, it is that a master who buys machinery, tools, and appliances from a reputable maker, and who also uses reasonable care in inspecting and setting them up and in putting them into use or operation, is not liable to an employee for injury resulting from the negligence of the maker in using improper materials, or in doing the work in an improper manner. So stated, the doctrine is entirely consistent with the principle which assigns the duty of the master of exercising reasonable care in these particulars to that class of primary, absolute, and unassignable duties which the master cannot cast off. The fact that he purchases the machine, tool, or appliance from a reputable manufacturer does not excuse his own negligence in inspecting it, in testing it, and in setting it up, but is a circumstance entering into the general ingredient of evidence speaking on the question whether or not he has exercised reasonable care in the premises. The purchase of the machine, tool, or appliance from a reputable maker does not alone excuse him."

We are then led to the inevitable conclusion that while, as an abstract proposition, the rule contended for by the company correctly states the law, yet its full statement, with all its limitations and restrictions and modifications, will not, standing alone, an-

swer as an excuse for the company, or a defense to the charge of negligence as made by the plaintiff, unless the jury found from all the facts and circumstances of the whole case that the company, throughout the entire transaction, used such care and caution as was reasonable and prudent, having in view the nature and character of the instrumentality furnished, and the hazards of the employment. And we believe that no harm was done the company in refusing to give instruction No. 3, requested by the company, and refused by the court, for the reason that the subject-matter therein treated was fully, fairly, and correctly stated and covered by the court in its general charge to the jury, and that the instruction requested did not state the true rule fully and correctly. The general charge, and especially instructions numbered 7, 9, and 10, which we insert below, to our minds cover this phase of the case admirably, and protect alike, without undue emphasis on any point, the interests of the company and the plaintiff as well. In order that we may not be misunderstood, we quote literally the following instructions, given by the court in the general charge:

"Instruction No. 7. You are instructed that the operator of a coal mine is not an insurer of the lives of the men employed by him or it. The operator is required only to exercise ordinary care in providing the men working for him a safe place to work and with safe appliances with which to do the work, and by 'ordinary care' I mean such care as a reasonably prudent man would use in the conduct of his own business under like circumstances."

"Instruction No. 9. You are instructed that the defendant, in order to be relieved from liability for the injuries received by its employees from the use of defective materials, is not required to furnish the best materials known, or to subject such as he does supply to an analysis, to determine what hazard may be incurred in their use; but the defendant is only required to use ordinary care in the purchase of suitable materials for the purposes for which said materials are intended, and in the use of such materials to follow the ordinary usage of the business as conducted by prudent men. You are further instructed that if a coal company purchase a lot of oil from a reputable manufacturer under a warranty that it is a noninflammable lubricating oil, and after a large portion of said oil has been used without an accident or explosion from becoming ignited, and then one barrel of such oil becomes ignited, and is found to be inflammable, then the jury may take into consideration all of such facts and circumstances in determining whether or not the

defendant company was guilty of negligence in the use of said oil in its mine.

"Instruction No. 10. The jury is instructed that it is the duty of a master to use reasonable care to see that appliances and materials furnished for use by its servants are reasonably safe and suitable appliances and materials for the use and purposes for which they are intended, and this includes the necessity of using the same degree of care in the matter of observation and inspection to discover the character of the appliances and materials so furnished. And this reasonable care varies according to the danger to be avoided and according to the character of the appliance or material so furnished. So in the matter of furnishing oil for the use of its servants in lubricating the cars down in the mine, in this case, the defendant company was bound to use reasonable care to inspect and ascertain what sort of oil was furnished, and to use the same care to furnish a reasonably safe and suitable oil; and the jury are to determine what would be the reasonable care the company should exercise in respect to the inspection and use of this oil, and whether what was done by the company, if anything, in this respect, was the exercise of the reasonable care a reasonably prudent man would have exercised in such a case. You are also instructed, however, that, where a breach of this duty has occurred, protection or excuse cannot be had by showing only a contract or guaranty respecting the matter by some third person. A reliance upon such contract or guaranty does not necessarily show the exercise of the degree of care required; but it is for you to say whether, under the facts and circumstances, and considering the nature of the substance being furnished and the danger incident to its use, if unsafe, other and further inspection should have been made before sending the oil down into the mine." To our minds, the learned trial judge, with a fairness and exactness to be commended, covered the question of "reputable manufacturer," care, etc., in these instructions, in such a manner that the company has no reason to complain. The charge is not only comprehensive as to the issues involved, but is a correct and exceedingly fair statement of the law, and, in fact, is more favorable to the contention of the company than the facts warranted.

In this case it must be remembered that several negligent acts of the defendant company were complained of, and it is sufficient if the minds of the jurors are fairly directed to each of the actionable grounds in a general way, and if a proper instruction has been made in respect to the degree of care required of the master in his con-

duct, with respect to the working place and appliance furnished his servants, such as we have seen was given by the court in this case, it then remains for the jury to determine whether the master was exercising the degree of care as was required by law and as defined by the court in its instructions. The court in its closing instruction told the jury that it was for them to say whether, under all the facts and circumstances of the whole case, and considering the nature of the substance being furnished and the dangers incident to its use, if unsafe, other and further inspection should have been made before sending the oil down into the mine.

Instruction No. 11, requested by the defendant, which deals with the subject of proximate cause, was properly refused by the court, for the reason that there was no question of proximate cause in this case. And this appears not only from the evidence, or rather from the lack of evidence, but also by the conduct of the company throughout the trial, and by admissions in their brief. Yet the fact remains and cannot be successfully disputed that even this phase of the case was properly covered by the instructions of the court. Neither was it necessary for the court to specifically instruct that the knowledge of the master of this defect in the oil was necessary, for it is the established rule of law that, where knowledge is essential to charge the master, negligent ignorance is equivalent to knowledge. Besides, § 36 of article 9 of the Constitution of the state of Oklahoma provides that a master is made liable for the negligent acts of all its servants; and under this provision of the Constitution, if one employee of a master negligently makes use of a dangerous instrumentality to the injury of another servant, the latter may recover from the master.

The further consideration of alleged errors, in view of the foregoing conclusions, is rendered unnecessary. Their consideration could in no wise affect the determination of this case. The question of deceased's contributory negligence cannot be urged, for that phase of the case was wholly waived by the company at the trial, and the rule is well established that where there is no evidence tending to show contributory negligence, it is not error to refuse to give an instruction on the subject. It is also settled that it is not error to refuse to give instructions offered which in themselves correctly state a rule of law, if the court in its general charge has covered the points. In the case at bar we are unable, from a careful review of the entire record, to discover any error of such importance as would authorize or warrant an interference with

press Co. 26 Tex. Civ. App. 235, 62 S. W. 116; *People v. Chretien*, 137 Cal. 450, 70 Pac. 305.

No policy of secrecy should prevent defendant from establishing the invalidity of the indictment by the only witnesses to the facts.

State v. Campbell, 73 Kan. 688, 9 L.R.A. (N.S.) 533, 85 Pac. 784, 9 Ann. Cas. 1203; 1 Greenl. Ev. § 252; *Territory v. Hart*, 7 Mont. 42, 14 Pac. 768; *Atwell v. United States*, 17 L.R.A. (N.S.) 1049, 89 C. C. A. 97, 162 Fed. 97, 15 Ann. Cas. 253; 22 Cyc. 423; *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 276, 18 So. 182.

The plea shows but a single offense, and the former convictions are a bar to this indictment.

biting off the end of a person's nose or a joint from a finger was said not to be a wounding, as the statute was intended to apply to wounding produced by some instrument, and not by the hands or teeth.

And in *Rex v. Stevens*, 1 Moody, C. C. 409, it was held by a court divided seven to six that biting off a finger did not amount to maiming, as some instrument must be used to bring it within the statute.

However, in *Reg. v. Duffill*, 1 Cox, C. C. 49, where it was contended that to come within the statute, the wounding must have been done by some instrument, the court held that a kick with a boot was sufficient.

In *United States v. Askins*, 4 Cranch C. C. 98, Fed. Cas. No. 14,471, biting was said not to be equivalent to cutting as used in a mayhem statute.

A number of cases in this country, however, hold that the means used is immaterial.

Thus, in *United States v. Scroggins*, Hempst. 478, Fed. Cas. No. 16,243, a prosecution for mayhem, the court says: "The particular mode of doing it, as by stabbing, cutting, shooting, or striking, or the particular weapon or instrument used, is not material. The real inquiry is whether a limb or member has been disabled or disfigured purposely and maliciously, and with intent to maim or disfigure; and if so, the offense is complete."

In *Baker v. State*, 4 Ark. 56, under a statute declaring maiming to consist "in unlawfully disabling a human being by depriving him of the use of a limb or member, or rendering him lame or defective in bodily vigor," the court says it is immaterial by what means or with what instrument the injury described by the statute is inflicted.

In *State v. Mairs*, 1 N. J. L. 453, in which defendants were charged with mayhem in wilfully and deliberately cutting off the nose of the prosecuting witness, the court said that whether this was effected by one instrument or another was perfectly immaterial.

And in *State v. Cody*, 18 Or. 506, 23 Pac. 691, 24 Pac. 895, under a statute using 40 L.R.A. (N.S.)

Sadberry v. State, 39 Tex. Crim. Rep. 467, 46 S. W. 639; *Peck v. State*, 54 Tex. Crim. Rep. 81, 111 S. W. 1019, 16 Ann. Cas. 583; *Wright v. State*, 17 Tex. App. 152; *Hurst v. State*, 86 Ala. 604, 11 Am. St. Rep. 79, 6 So. 120; *Gunter v. State*, 111 Ala. 23, 56 Am. St. Rep. 17, 20 So. 632; *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369; *Sipple v. People*, 10 Ill. App. 144; *Paschal v. State*, 49 Tex. Crim. Rep. 111, 90 S. W. 878; *Cook v. State*, 43 Tex. Crim. Rep. 182, 96 Am. St. Rep. 854, 63 S. W. 872; *Pizano v. State*, 20 Tex. App. 139, 54 Am. Rep. 511; *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464; *State v. Eggesht*, 41 Iowa, 574, 20 Am. Rep. 612.

The second count in the indictment embraced the offense of attempt to disfigure,

the words "cut or slit or mutilate the nose or lip," the court said the employment of any direct means in the accomplishment of the results mentioned would be sufficient.

As to whether the means used must have been the direct cause of the injury, it was held in *Reg. v. Spooner*, 6 Cox, C. C. 392, that the wounding must be direct, and that an injury resulting from the injured person striking something in falling as the result of a blow does not amount to wounding with intent to maim, disfigure, or disable.

However, in *Rex v. Sheard*, 7 Car. & P. 846, where the prosecutor was injured by being struck by defendant on the hat with an air gun, it was apparently contended that the act did not come within the statute because the weapon used did not come in contact with prosecutor's head, but that the wound was caused by the violence with which the hat was struck; but the court held that the act was a wounding within the statute.

And in *Carpenter v. People*, 31 Colo. 284, 72 Pac. 1072, which was a prosecution for maiming by depriving prosecuting witness of an ear, the state alleged that defendant bit off the ear, while defendant said that he threw complainant to the ground and the ear was severed as a result of the fall; but the court said that the only question for determination was whether defendant unlawfully deprived the prosecuting witness of his ear.

In *Rex v. Owens*, 1 Moody, C. C. 205, defendant was held to have been guilty of maiming a mare, within the meaning of a statute, by destroying one of her eyes by pouring acid into it.

To sustain a charge of attempt to maim, the means used must be such as would naturally have that effect. Thus, in *Dahlberg v. People*, 225 Ill. 485, 80 N. E. 310, which was a prosecution for attempt to commit mayhem, under a statute defining mayhem as, among other things, putting out or destroying an eye with malicious intent to maim or disfigure, it was held that the charge was not sustained by showing that defendant attempted to throw red pepper into the eyes of the prosecuting witness, inasmuch as the

an aggravated assault and battery, and the verdict should have named the offense of which appellant was found guilty.

Evans v. State, 57 Tex. Crim. Rep. 174, 122 S. W. 392; *Moody v. State*, — Tex. Crim. Rep. —, 105 S. W. 1127; *Winzell v. State*, 47 Tex. Crim. Rep. 267, 83 S. W. 187; *Johnson v. State*, 30 Tex. App. 419, 28 Am. St. Rep. 930, 17 S. W. 1070.

Mr. C. E. Lane, Assistant Attorney General, for the State.

Davidson, P. J., delivered the opinion of the court:

The indictment contains two counts. Appellant was convicted under the second count, which charged him with unlawfully making an assault upon Stella Lee for the purpose of disfiguring her, and that he did wilfully and maliciously attempt to disfigure the said Stella Lee, and did wilfully and maliciously attempt to place a mark upon the face of the said Stella Lee by means of carbolic acid, by then and there wilfully and maliciously casting and throwing carbolic acid into and upon the face of the said Stella Lee, with the intent then and there on the part of the said Major Lee to wilfully and maliciously disfigure the said

Stella Lee as aforesaid, against the peace and dignity of the state.

Appellant moved to quash the indictment for several reasons. Putting this proposition to appellant in its essence, the contention is that, inasmuch as the statute uses the words, "by means of a knife or other instrument upon the face or other part of the person," in the definition of disfiguring, carbolic acid is not such an instrument as is meant by the statute. His contention is that by applying the rule of *ejusdem generis* that the expression, "or other instrument," carries with it the idea that it is such other instrument, and that such other instrument must be of the same character or kind as the knife. We cannot agree with counsel. In looking at this statute we must take the legislative intent in enacting it. The purpose of this statute was to prevent the person assaulted from being disfigured, and did not confine the manner or means of disfiguring simply to a knife or means of that peculiar class or kind. The word "instrument" there, under the legislative intent, has a broader significance and a wider meaning, and evidently means and was intended to mean any means by which the face or other part of the person should be

effect of red pepper was not to destroy or permanently injure an eye in which it should be placed.

In California the statute specifically mentions the throwing of vitriol or other corrosive chemical for the purpose of disfiguring. *People v. Stanton*, 106 Cal. 139, 39 Pac. 525.

The nature of the means used in inflicting an injury amounting to mayhem may be important as bearing upon the question of intent.

Thus, in *State v. MaFoo*, 110 Mo. 7, 33 Am. St. Rep. 414, 19 S. W. 222, where defendant was charged with throwing some corrosive liquid into the face of a child, destroying his eyes, the court said: "If she did this, the court correctly told the jury the law presumed she intended the natural consequence of her act, and from the intentional throwing of such a dangerous instrumentality into the eyes of a child, the jury might infer malice."

And in *State v. Nerzinger*, 220 Mo. 36, 119 S. W. 379, which was a prosecution for destroying the eyes of a person by throwing sulphuric acid into them, under a statute providing that "every person who shall, on purpose and of malice aforethought, . . . put out an eye . . . of any person, with intent to kill, maim, or disfigure such person, shall be adjudged guilty of mayhem." it was held that if the jury found that defendant knowingly and wilfully threw sulphuric acid into the face of prosecuting witness, the law would presume that it was done with malice aforethought, and with intent to destroy her eyes.
40 L.R.A.(N.S.)

In *O'Brien v. State*, 31 Ohio C. C. 33, a conviction of assault with intent to maim was sustained, under a statute which amounted to the common-law definition of maiming, upon it being shown that one of defendants struck the prosecuting witness over the head with a piece of gas pipe wrapped in paper, and that they were driven off by him when he drew a revolver and shot one of their number, it appearing that the assault grew out of a conflict as to whether a certain job should be done by union or nonunion labor.

In *Neblett v. State*, 47 Tex. Crim. Rep. 573, 85 S. W. 813, defendant was convicted of maiming by lighting a cannon cracker held by prosecuting witness, resulting in blowing off his hand; and it was held that it was not necessary, in order to show that the wilful and malicious act of defendant applied to the maiming, to describe the cracker as being a dangerous device, to defendant's knowledge, and that he set fire to it with the intention of destroying the hand.

In *Davis v. State*, 22 Tex. App. 45, 2 S. W. 630, the court says that if the means used were such as would, in the manner used, ordinarily result in maiming, the law presumes that the intention was to maim.

And in *People v. Wright*, 93 Cal. 564, 29 Pac. 240, which was a prosecution for mayhem in biting off a portion of the ear of one who attempted to separate defendant and another, who were fighting, the court said that the atrocity of the act itself created a presumption that it was intended.

R. L. S.

disfigured. The general definition of an instrument is "one who or that which is made a means or cause to serve a purpose." We understand this is the meaning to be given the word "instrument" in this statute. This definition has been upheld in various authorities, and we cite *Magnon v. United States* (C. C.) 66 Fed. 151, and *United States v. Magnon*, 18 C. C. A. 43, 35 U. S. App. 828, 71 Fed. 293. The case of *Ex parte Muckenfuss*, 52 Tex. Crim. Rep. 467, 107 S. W. 1131, recognizes very fully the doctrine here announced, and a careful review of that case and the cited authorities in our judgment justifies the conclusion that we reach in regard to the statute under which this indictment was framed. For authorities generally see 36 Cyc.

2. Appellant contends that the indictment should have been quashed because it was found by the grand jury without witnesses or testimony before them upon which to predicate such finding. This question has been settled adversely to appellant in quite a number of cases in Texas. *Kingsbury v. State*, 37 Tex. Crim. Rep. 259, 39 S. W. 365; *Terry v. State*, 15 Tex. App. 66; *Dockery v. State*, 35 Tex. Crim. Rep. 487, 34 S. W. 281. There are quite a number of other cases laying down the same doctrine.

3. Appellant contends that the judgment should have been set aside and appellant permitted to file a plea of former conviction. This comes too late after the trial had been had. If, as a matter of fact, appellant had been convicted previously for throwing the carbolic acid upon two other women who were with his wife at the time he threw it into her face, those facts were known to him. It would hardly be presumed that he could have been punished by incarceration in jail, or in any other manner punished by the jury, without his knowing that fact. A plea of jeopardy must be made before the trial of the case on its merit. It goes to the jury along with the other matters to be decided by them, upon a showing to the effect that the party filing the plea has been previously punished or acquitted, as the case may be. We do not believe the court was in error in not setting aside the judgment in order that the defendant might plead jeopardy.

4. It is contended that the court erred in not granting appellant's request to have the verdict as returned by the jury corrected, and that, as returned, it is not sufficient. The verdict found appellant guilty under the second count of the indictment specifically, and allotted him a term in the penitentiary of two years. The point of appellant's contention is that, inasmuch as

the court submitted aggravated assault, and the jury did not specify in the verdict whether they convicted of the disfiguring or the aggravated assault, and refused appellant's request to have it corrected, therefore the verdict is insufficient. Under the circumstances of this case, we are of opinion this proposition is not well taken. It is sometimes the case where the verdict must specify of which offense the conviction is had, and always this is the rule where the conviction was for murder, because the statute imperatively so demands. It may also be necessary in some cases for the jury to specify of what degree the conviction is, out that is usually where the verdict found might apply to either one of the offenses or punishments charged by the court to the jury. This is illustrated in convictions for assault where the fine is \$25, and the court has submitted to the jury aggravated and simple assault. It has been held it is necessary for the jury in such cases to specify what degree, because \$25 is the lowest fine for aggravated assault, and the highest punishment for simple assault, and the verdict is indefinite and uncertain, in that it fails to specify of which degree the conviction is had. In this case there can be no trouble, because appellant could not have been convicted of aggravated assault with the punishment assessed against him. The punishment imposed by the jury in their verdict applies alone to the charge of disfiguring. It could not possibly apply to aggravated assault. Had the jury found the defendant guilty and assessed a pecuniary fine only, the trouble would have been serious, because they could convict of aggravated assault with a fine not less than \$25 nor more than \$1,000, or in an assault to disfigure the jury could also impose a pecuniary fine not to exceed \$1,000, or they could convict with a penitentiary punishment. In this case, as shown by the verdict, appellant was allotted two years in the penitentiary. As before stated, this could not under any circumstances be imputed to aggravated assault as a punishment. It could only apply to the charge of disfiguring. We are therefore of opinion that the verdict is sufficiently plain and definite and unambiguous to show clearly the purpose and intent of the jury, and is not violative of the statute.

5. It is contended the evidence is not sufficient. To this we cannot agree. The state's case shows with sufficient cogency and accuracy that appellant and his wife were separated, and that he located her on this particular occasion, shortly before throwing the carbolic acid on her, met her on the street, and asked her if she was going to church. She evasively replied.

Later she and a couple of her friends started to gether *en route* to church. Appellant followed them, and approached his wife, and threw carbolic acid upon her face and right arm. This brought about a disfigurement, and kept her under the treatment of a doctor for quite a while. It is unnecessary to mention the extent of the wounds or disfigurement, and the details connected with it. These facts are not denied by appellant. In other words, the state has made out a *prima facie* case sufficient for the jury to find that the presumption of innocence and reasonable doubt have been met and overcome.

The judgment is affirmed.

Petition for rehearing denied June 28, 1912.

VERMONT SUPREME COURT.

GILBERT A. DAVIS, Admr., etc., of Sarah W. Story, Deceased,

v.

A. K. HALL.

(— Vt. —, 83 Atl. 653.)

Evidence — conversion by executor — credit of check on private account.

1. That an executor used funds of the estate to pay his individual debt may be found from the fact that the amount of the

check drawn by him as executor, calling for an amount of dollars and cents represented by numerous figures, was credited on his private debt.

Executor — decree transferring assets — effect.

2. A mere decree directing an executor to pay funds of the estate to himself as executor of a legatee does not, without more, work a transference of the funds, so as to relieve the sureties on his bond as executor of the former estate from liability for a *devastavit*.

(May 14, 1912.)

EXCEPTIONS by defendant to rulings of the County Court for Windsor County made during the trial of an action brought to hold defendant liable as surety on an executor's bond, which resulted in a verdict in plaintiff's favor. Affirmed.

The facts are stated in the opinion.

Messrs. William Batchelder and Bert E. Cole, for defendant:

Enright, as executor of Henry L. Story's will, after the decree ordering him to pay over to himself as executor of Sarah W. Story's will the sum found due from him on settlement of his account as executor of Henry L. Story, stood precisely as if the amount due from him as executor of Henry L. Story had been a debt due from him as a private person to Sarah W. Story.

Sigourney v. Wetherell, 6 Met. 553; 1

Note.—*Decree directing transfer of fund by executor, administrator, or guardian to himself in another fiduciary capacity, as affecting liability of his sureties.*

The general rule is that "where property has been received in one capacity, the change, in order to shift the responsibility of the sureties, must be evidenced by some overt act or express election to hold the property in the other capacity." 18 Cyc. 1258. From this it would seem that the mere issuing of a decree directing a transfer of a fund from a fiduciary in one capacity to himself in another capacity would not work a transfer, except possibly where the first fiduciary capacity terminated with such decree, and, as a matter of fact, the authorities so hold. The decision in *DAVIS v. HALL* affords a good illustration of the application of the rule that a mere decree directing such a transfer does not, without more, work a transfer which will relieve the sureties on his bond in the capacity from which the transfer was directed to be made, from liability for a *devastavit*. This rule also finds support in *Cranston v. Wilsey*, 71 Mich. 356, 39 N. W. 9, wherein, in holding that an order directing executors to distribute certain funds according to the terms of the will, under which they were to be invested and held in trust by such executors,

did not change the character of their position from that of executors to that of donees of a power in trust, where the order of distribution was not obeyed, but the executors converted the fund to their own use,—the court said: "An order of distribution alone cannot discharge executors until the estate is distributed. . . . The will required it to be invested by the executors. If the property had been invested in real estate securities as required, the question might have arisen whether this was not equivalent to such a compliance with the order of distribution as would have changed the nature of their holding. Upon this question we express no opinion. It is at least a doubtful proposition. But we think it is a dangerous and incorrect doctrine that executors can discharge themselves of their official responsibility without doing some act to change the character of their holding, and place the fund safely where it ought to be. As the finding is that they did no such thing, but made a wrongful conversion of the property to the use of one of them, we think this was a clear breach of duty, for which action would lie on the bond." And in *Gilmer v. Baker*, 24 W. Va. 72, it was in effect held that, in addition to a court order directing a transfer of assets from a fiduciary in one capacity to himself in another capacity, an election to hold in the latter capacity mani-

295. Previous to this decision, in the case of *Darston v. Orford*, the court of chancery, following *Joseph v. Mott*, *Prec. in Ch. 79*, had held that a voluntary preference of one creditor by an executor would not stand as against a creditor who had proceeded in chancery and procured an answer to his bill before the preference was made. But this moderate application of the principles of equity was not allowed to become the law, for Orford appealed to the House of Lords, where the decree of the court of chancery was reversed. *Darston v. Orford*, *Prec. in Ch. 188*, same case, *Colles*, 229.

However, the doctrine of retainer by operation of law never obtained in this state. For a long time it was thought that the executor or administrator who had a claim might elect to bring in his claim on his final accounting in the probate court or to present it to the commissioners. Note to *French v. Winsor*, 24 Vt. 402. And it at length became settled that, if an executor or administrator had a claim against the estate which he represented, the claim must be presented to the commissioners, or it was lost, and, if presented and allowed, it stood on a parity with other allowances of debts of the estate equal in degree. *Riley v. McInlear*, 61 Vt. 254, 17 Atl. 729, 19 Atl. 996. For a time we had a statute providing that if an executor or administrator has a claim against the estate which he represents, the probate court should appoint a special administrator to represent the estate in respect to that claim. Laws of 1888, No. 83; Vt. Stat. § 2439. And this statute as modified by an act of 1896, now in force, provides that in case of such claim by an executor or administrator, the probate court shall, upon request of a person interested, appoint a special administrator with reference to such claim. Laws of 1896, No. 43; P. S. 2827. But at common law it was recognized that a legacy is not a debt, and in the case of a legacy to an executor the doctrine of retainer by operation of law did not apply. *Paramour v. Yardley*, 2 Plowd. 539, 543; *Atty. Gen. v. Robins*, 2 P. Wms. 24, 25; *Fretwell v. Stacy*, 2 Vern. 434; *Heron v. Heron*, 2 Atk. 171; *Ashley v. Pocock*, 3 Atk. 208; *Cheney's Case*, Leon. pt. 1, p. 216. In such cases the question was whether the executor had in fact made an election.

The defendant relies much upon *Taylor v. Deblois*, 4 Mason, 131, Fed. Cas. No. 13,790, a case in the circuit court decided by Mr. Justice Story sitting as circuit judge. That was a case brought on the bond of an administratrix who was also guardian of children, and in that capacity entitled to distributive shares of the estate which she had administered. It appeared that she had

certified to the probate court that she held the distributive shares as guardian, and had obtained from that court a discharge as administratrix, a quietus as it was called. The certificate and quietus were held to show that the funds in question were in her hands as guardian, and that there was no liability on the administration bond. To this extent the opinion has since been regarded as sound law. But the justice was not content to rest the decision upon this ground alone, but invoked the doctrine of retainer by a creditor who is executor, citing the case against Lord Darcy and the case in *Hobart* to which we have already referred, and ignoring the distinction between creditors of a testator and legatees, and saying that there was a transfer from her as administratrix to her as guardian by mere operation of law by way of retainer. But the justice shortly had an opportunity to set himself right, and did so in the case of *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376. There the same person was both administrator of an estate and guardian of children entitled to shares in the estate. The administrator collected assets sufficient to pay those whom he represented in his character as guardian, and it was claimed that, upon a decree of distribution of the estate, the funds passed to him as guardian instantaneously by mere operation of law, without any election on his part. But it was held that this was not so. The case was against the sureties on the administration bond, and it was held that some act on the administrator's part constituting an election to hold the property as guardian, and not as administrator, might justly be insisted on before responsibility was shifted from sureties of one class to sureties of another. It was pointed out, among other things, that he had not charged himself in his guardian's account, and various circumstances were pointed out indicating that it was not his intention to pass the funds to the guardianship account; and it was said that, unless his intention was to do that, the court could not direct it to be done. And it was held that the sureties on the administration bond were liable. The remarks made in the course of the opinion are not altogether consistent; for, while the decision was entirely consistent with that rendered in *Taylor v. Deblois*, *supra*, there was some attempt to make the decision consistent with the *dictum* in that case, and that could not well be done. Some time before these decisions of Mr. Justice Story, Chief Justice Marshall, sitting in the circuit court, had had the same question under consideration. There one who united in himself the characters of executor and guardian of a legatee had pursued a course

which made it clear that he had elected to hold certain assets as guardian, and not as executor, and because of his obvious election the chief justice held that he was chargeable in his character of guardian. *Alston v. Munford*, 1 Brock. 266, 278, Fed. Cas. No. 267. This case had not been reported at the time of the decisions in *Mason's Reports* to which we have referred. When the case came to be reported, the learned editor made a note carefully amplifying the views which the chief justice had expressed or intimated. The note is this: "The principle seems to be well settled that where an executor or administrator having assets in his hands is also guardian of a legatee or distributee, he can elect to hold the share of that legatee or distributee in his character of guardian, and thus exonerate the sureties in the administration bond, and charge the sureties in the guardian's bond. But there must be some act from which the election to hold the property in a different character from that in which it was received may fairly be inferred before the responsibility can be shifted from one class of sureties to another." In support of this doctrine, acted upon by the chief justice, the editor cites *Taylor v. Deblois*, and *Pratt v. Northam*, *supra*, having regard to the decisions in those cases, and disregarding all remarks or intimations in the opinions therein, that in cases of that sort there could be an automatic transfer of assets by mere operation of law. This note expresses the law as it has generally come to be understood. *Re Scott*, 36 Vt. 297; *Re Gilbert* [1898] 1 Q. B. 285, 67 L. J. Q. B. N. S. 229, 77 L. T. N. S. 775, 4 Manson, 337, 14 Times L. R. 125, 46 Week. Rep. 351; *Re Rhoades* [1899] 2 Q. B. 352, 68 L. J. Q. B. N. S. 804, 47 Week. Rep. 561, 80 L. T. N. S. 742, 15 Times L. R. 407, 6 Manson, 277; *State ex rel. Lynch v. Whitehouse*, 75 Conn. 410, 53 Atl. 897; *Potter v. Ogden*, 136 N. Y. 384, 33 N. E. 228; *Newcomb v. Williams*, 9 Met. 525, 534; *Cranson v. Wilsey*, 71 Mich. 356, 39 N. W. 9; *Wilson v. Wilson*, 17 Ohio St. 150, 91 Am. Dec. 125; *Cluff v. Day*, 124 N. Y. 195, 26 N. E. 306; *Prior v. Talbot*, 10 Cush. 1; *State ex rel. Hospes v. Branch*, 134 Mo. 592, 56 Am. St. Rep. 533, 36 S. W. 226.

The mere decree of distribution did not change the character in which *Enright* held the assets in question. He filed no inventory of *Sarah W. Story's* estate, he filed no account, as her executor, and did no act manifesting his election to hold the funds in question as assets of her estate. He diverted such assets from their proper channel, and appropriated them to his own use. These facts rebut any presumption of a transfer from one estate to the other in accordance with the order of the court, and, 40 L.R.A. (N.S.)

together with the other facts in the case, fix liability upon the defendant on his bond to secure the discharge of the duties of *Enright* as executor of the estate of *Henry L. Story*. In *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376, Mr. Justice *Story*, in reaching the conclusion that the liability of the sureties on the administration bond had not been shifted to the sureties on the guardianship bond, said that he could not but have a strong suspicion that the intention of the administrator was to appropriate the assets to his own use. The equivalent of what was suspected there is here found, and more is found, for the findings show that the executor here did appropriate the funds to his own use, which is a finding both of intent and its accomplishment.

Other questions shown by the bill of exceptions are not here relied on by the defendant, and so are passed without notice. Judgment affirmed.

WASHINGTON SUPREME COURT. (Department 1.)

GEORGE F. HAMMOND, Appt.,
v.

OTTO MAU, Resp't.

(— Wash. —, 124 Pac. 377.)

Broker — time for sale — exclusive agency — right to commission.

An offer of a specified commission for the sale of real estate at a certain price, within a specified time, does not give the broker the exclusive agency for that period, but

Note. — Is broker's right to make sale of property exclusive of owner's right.

The earlier cases on this question have been collected in the note to *Bluthenthal v. Bridges*, 24 L.R.A. (N.S.) 279.

In *Parkhurst v. Tryon*, 134 App. Div. 843, 119 N. Y. Supp. 184, an owner who had listed real estate with a broker, agreeing in case of the sale of conveyance of the property at any time within one year from the date of the contract or thereafter until he notified the broker in writing, to pay a certain commission, was held not liable for commission on a sale made by his wife.

In *Burch v. Hester*, — Tex. Civ. App. —, 109 S. W. 399, where there was a dispute as to whether or not the owner had reserved the right of making a sale himself, the court holds the rule to be that unless the principal has expressly waived his right to sell, he is at perfect liberty to sell the property notwithstanding the employment of the broker, and in case of such sale, he will not be liable to the broker for commission if the broker's efforts were not in fact the procuring cause of the sale.

A real estate broker employed to secure a purchaser for a certain price is not entitled

the owner may effect a sale himself within that time without becoming liable for the commission, although before its expiration the broker produces a customer able and willing to comply with the terms of the sale.

(June 25, 1912.)

A PPEAL by plaintiff from a judgment of the Superior Court for Pacific County in defendant's favor in an action brought to recover the amount alleged to be due as commissions or compensation for the breach of a contract to sell real estate. Affirmed.

The facts are stated in the opinion.

to his commission upon a sale by the owner for a less price, where there is no showing that if the owner had not taken the property out of the market by selling it, that the broker would have succeeded in obtaining a purchaser at the stipulated price. *Ferguson v. Willard*, 196 Fed. 370.

In *Schusterman v. Kraus*, 148 App. Div. 727, 132 N. Y. Supp. 758, an owner who, in good faith, had sold the property to a purchaser produced by a second broker, was held not liable for commission to the broker with whom she had listed the property but whose employment was not exclusive. It does not appear that the second broker was employed by the owner, but merely that a purchaser was produced by him. The general question as to the right of the owner to employ another broker is not discussed in this note.

The court in *Gilbert v. McCullough*, 146 Iowa, 333, 125 N. W. 173, states the question in that case to be whether the broker found a purchaser within the terms of his employment. The real estate owner in that case had agreed to employ no other agent. In the course of the opinion the court states that, even though the defendant may have agreed to employ no other agent, he retained the right himself to dispose of the property.

An owner who sold land was held not liable to the broker for commissions in *English v. William George Realty Co.*, 55 Tex. Civ. App. 137, 117 S. W. 996, but this was placed on the ground that the broker was not the procuring cause of the sale, the only ground on which the broker was seeking to recover.

Where the agency is for a definite time, or is an exclusive agency, the courts are not agreed upon the construction to be placed upon such contracts.

The court in *Smith v. Preiss*, 117 Minn. 392, 136 N. W. 7, makes a distinction between an "exclusive agency" to sell property and the "exclusive right to sell," and holds that the owner of certain stock of a corporation who gave an exclusive agency to sell the same for a specified time is not precluded from selling the same himself, and, having done so in good faith, is not liable to the broker for commission.

In *Moore v. May*, 10 Ga. App. 198, 73 S. E. 29, under a Code provision that the 40 L.R.A. (N.S.)

Messrs. Welsh & Welsh, and F. D. Couden, for appellant:

A broker employed to procure a purchaser of real estate may ordinarily be dismissed by his principal at any time before a customer is found. But if the employment is for a definite period of time, a dismissal without cause before the expiration of the time specified, renders the principal answerable as for a breach of the agreement.

Hunter v. Wenatchee Land Co. 50 Wash. 438, 97 Pac. 494; *Glover v. Henderson*, 120 Mo. 367, 41 Am. St. Rep. 695, 25 S. W. 175; *Blumenthal v. Bridges*, 91 Ark. 212,

placing of property in the hands of a broker to sell does not prevent the owner from selling unless otherwise agreed, it is held that an irrevocable agency for a definite time does not prevent the owner himself from selling. The contention that the word "irrevocable" was equivalent to the word "exclusive" was disapproved by the court, and a recovery of commission by an agent who had procured a purchaser within the stated time was denied.

Other courts treat the sale by the owner as in effect a revocation of the agency, which, being for a definite time, cannot thus be revoked without liability to the agent, provided such agent performs his contract within the time stated. Thus in *Hardwick v. Marsh*, 96 Ark. 23, 130 S. W. 524, following *Blumenthal v. Bridges*, the agency was not in terms an exclusive agency, but for a definite time; and it is held that the agent who, in that case, had procured a purchaser within the stated time, was entitled to his commission although the owner had previously sold the property.

In *Norman v. Vandenberg*, 157 Mo. App. 488, 138 S. W. 47, an owner who had given to some real estate brokers an exclusive agency for a definite time, and who had himself sold the property within such time, was held liable to the brokers, although such agents had not themselves effected a sale of the property. On the amount of recovery it is held that the agreed commission cannot be recovered as of absolute right, but the amount of such commission is prima facie the amount of damages suffered by the brokers, and the burden of reducing this amount by showing that, in all reasonable probability the brokers would not have performed the contract within the time yet unexpired, rests upon the owners of the property.

In *Carle v. Parent*, Montreal L. Rep. 5 Q. B. 451, an owner who had listed property with a broker for a definite time, and had sold same before expiration of that time, was held liable to the broker for the commission, although it did not appear that broker had effected a sale.

See note to *Cloe v. Rogers*, 38 L.R.A. (N.S.) 366, on liability of owner upon revoking authority of real estate broker employed for a definite period. W. A. E.

24 L.R.A. (N.S.) 279, 120 S. W. 974; Green v. Cole, 127 Mo. 587, 30 S. W. 135; Rowan v. Hull, 55 W. Va. 335, 104 Am. St. Rep. 998, 47 S. E. 92, 2 Ann. Cas. 884; Attix v. Pelan, 5 Iowa, 336; Waterman v. Bolt-inghouse, 82 Cal. 659, 23 Pac. 195; String-fellow v. Powers, 4 Tex. Civ. App. 199, 23 S. W. 313; Lane v. Albright, 49 Ind. 275; Johnson v. Buchanan, 54 Tex. Civ. App. 328, 116 S. D. 875.

Mr. Edward H. Wright, for respondent:

To entitle a broker to commissions he must find a purchaser ready, able and willing to buy upon the authorized price and terms, and either get him in communication with the principal so that the negotiations may proceed to a completed deal, or he must procure from the contemplated responsible purchaser a binding and enforceable contract.

Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 326; McDonald v. Smith, 99 Minn. 42, 108 N. W. 291; McCray v. Pfost, 118 Mo. App. 672, 94 S. W. 998; Sullivan v. Milliken, 51 O. C. A. 79, 113 Fed. 93; Neely v. Lewis, 38 Wash. 20, 80 Pac. 175; Arthur D. Jones & Co. v. Eilenfeldt, 28 Wash. 687, 69 Pac. 368; Carstens v. McReavy, 1 Wash. 359, 25 Pac. 471; Barnes v. German Sav. & L. Soc. 21 Wash. 448, 58 Pac. 569.

Chadwick, J., delivered the opinion of the court:

This action was begun by plaintiff to recover the sum of \$1,500 alleged to be due as commissions or compensation for the breach of a contract to sell real estate. On August 1, 1910, defendant wrote the plaintiff as follows: "George F. Hammond, Portland, Oregon—Dear Sir:—I have about 550 lots 50x100, situated at the north end of Long Beach, Washington, about $\frac{1}{4}$ mile north of Ocean park, and about $\frac{1}{4}$ mile south of the I. R. N. R. R. depot at Nahcotta, Wn. If you will sell these lots within the next ninety days at \$10 a lot or \$5,000 spot cash for the 550 lots, I hereby agree to pay you as a commission \$1,500. No commission to be paid until deed is signed and money paid in full for above property." The complaint sets out the contract, and it is further alleged that by the terms of the contract plaintiff was given an exclusive right to conduct negotiations for the sale of the real property described for a period of ninety days. He further alleges that within the time limited he found a purchaser who was ready, able, and willing to comply with

all the conditions of the purchase; that thereupon plaintiff informed defendant that he had found a purchaser for the property, and requested defendant to prepare and tender a deed; that defendant failed and refused to comply with or carry out the terms of the contract. Plaintiff further alleges that defendant did wrongfully, and without the knowledge or consent of the plaintiff and in violation of his agreement, sell on his own account a part of the lots described in the writing, and has since repeatedly violated the terms of his contract. When the case was called for trial, objection was made to the introduction of any evidence, for the reason that the complaint did not state facts sufficient to constitute a cause of action. This objection was sustained, and, plaintiff having refused to take leave to amend, a judgment of dismissal was entered. The grounds upon which the court sustained the motion seem to have been that the communication above set forth was in the nature of an offer merely; that the complaint did not sufficiently set forth an acceptance; and that the contract, if treated as such, was not sufficiently definite as to the description of the property to satisfy the statute of frauds. Section 5289, Rem. & Bal. Code. The case is brought here upon plaintiff's appeal, and is argued upon the same lines as in the court below.

We have grave doubt as to the correctness of the grounds upon which the rulings of the trial judge were made to rest, but it does not follow that a reversal should be ordered. It has been the rule of this court that we will not look to the reasons for the judgment in cases of this character, but will consider the question an open one on appeal, and, if the judgment can be put upon any sound foundation, it will be sustained. Kane v. Dawson, 52 Wash. 411, 100 Pac. 837. Waiving, then, the reasons assigned below, we are satisfied that the complaint does not state facts sufficient to constitute a cause of action. Treating the letter as a contract and assuming that the complaint alleges acceptance, it is not exclusive, nor is there any statement contained therein that will warrant the inference that it is so. The governing rule is "the fact that a person has employed a broker to negotiate a sale does not, in the absence of a special contract, deprive him of the right himself to negotiate, and, if he procures a sale without any agency of the broker, he is not liable to the latter for a commission."

4 Am. & Eng. Enc. Law, 2d ed. p. 979.

We think the complaint in this case does not stand this test. If a contract is silent as to the character of the agency, the owner is entitled to sell without making himself liable for the payment of commissions, and many cases go so far as to hold that, if the contract provide that the broker shall have an exclusive right to sell, but does not in terms inhibit the principal from selling, the contract is not violated if the principal sell to one who is not a customer of the broker. It is only where an exclusive agency is granted upon sufficient consideration, or it is plainly the intent of the parties that the agency shall be exclusive, that the principal is liable when he makes the sale on his own account. *Hunter v. Wenatchee Land Co.* 50 Wash. 438, 97 Pac. 494. Text and sustaining authority may be found in *Walker, Real Estate Agency*, § 13; *Gross, Real Estate Brokers*, pp. 100, 101, 251, 252; 5 Cyc. 1517.

Appellant makes the point that, because a time was fixed in the contract, this makes the contract exclusive. This fact does not alter or qualify the rule, and obviously so, for, if no time had been fixed, the law would imply a reasonable time, and such contracts would be exclusive for a greater or less time, with or without the time limit. We have read the authorities offered to sustain this contention, and find that most of them fall within some recognized exception to the rule. The contract provided that it was exclusive, or the authority was coupled with an interest, or the principal had acted in bad faith. In *Blumenthal v. Bridges*, 91 Ark. 212, 24 L.R.A.(N.S.) 279, 120 S. W. 974, one of the authorities relied on, it is said that, where a time limit is fixed, "the contract implies an exclusive right to sell within the time named." The authorities cited to sustain this proposition do not bear out the conclusion of the judge writing the opinion. On the contrary, they affirm our position, for in each of them the contract was by its terms "exclusive" or "sole" or coupled with an interest. Here the only interest is the commission, and it is uniformly held that this is not an interest rendering the power irrevocable. 1 Am. & Eng. Enc. Law, 1217; *Mechem, Agency*, § 207.

The complaint did not state a cause of action, and the judgment of the lower court was properly entered. Affirmed.

Gose, Parker, and Crow, JJ., concur.

Petition for rehearing denied.
40 L.R.A.(N.S.)

WEST VIRGINIA SUPREME COURT OF APPEALS

JOHN SHRADE

v.

WILLIAM P. GARDNER

(— W. Va. —, 74)

Injunction — sale of land — damages.

A demand for unliquidated damages for breach of covenant of warranty is not ground to enjoin a sale under a deed of trust.

(April 23, 1912)

APPEAL by plaintiff from the Circuit Court for Hancock county, defendants' favor in an action to enjoin a sale of land for damages. The facts are stated in the opinion of Mr. O. S. Marshall for the appellant, Mr. E. A. Hart for appellee.

Brannon, P., delivered the court:

William P. Gardner made a deed conveying to James E. McDonald land in Hancock county. In this deed a clause reading as follows: "I, the undersigned, do hereby lease to the Ohio Valley Gas Company and Railroad Company, which said second part assume to pay all benefits and rentals derived from said land." At the time of the execution of this deed McDonald made a deed of the same land to William P. Gardner for the payment of \$7,500 purchase money which McDonald agreed to pay Gardner for the land. McDonald conveyed the same land to the Ohio Valley Gas Company. The covenant of warranty in the deed of McDonald said deed of trust, which was held the land expressly subject to the deed of trust. Later the trustees of the trust gave notice of sale of the land and the payment to Gardner of the purchase money due him from McDonald. Gardner filed a bill of injunction to enjoin the sale. The injunction was granted and Gardner obtained the appointment of a receiver. The bill of injunction asked for an order that various payments due Gardner debt had been made and other payments by him, and that Gardner had received money from the Ohio Valley Gas Company, and that the payments and rentals had been paid to him.

Headnote by BRANNON, P.

Note.—As to right to enjoin a sale under power of sale for the purpose of intercepting the proceeds, see note to *Ekeberg v. Ma* (N.S.) 912.

the debts. The bill made this general charge, without any specification of amounts or dates of payments. The bill is bad for this, I would say. Gardner filed an answer flatly denying that the debt had been paid, but admitting numerous payments, giving amounts and dates, and averring that a large sum specified yet remained unpaid on his debt, and denying that he had ever received a dollar for rentals from the gas company. This answer was verified by affidavit. No replication to this answer. For that reason, and for the reason that the answer denies all the material allegations of the bill on which the injunction rests, and there is no proof of them, other than the affidavit to the bill, under law the dissolution was proper.

But there is another reason justifying such dissolution. Shrader claims in his bill that Gardner received rental from the gas company. As just stated, the answer denies this, and the allegation is fruitless because, first, the answer is not replied to; second, if it had been, there is no proof of it. But when we examine the instrument relating to the pipe-line lease from Gardner to the Ohio Valley Gas Company, we find that it stipulates for no money rental to Gardner. In consideration of 30 cents per lineal rod, Gardner granted to the gas company an easement to lay a pipe line through this land to convey gas. This was ten years before the conveyance by Gardner to McDonald, and of course that 30 cents per rod had been paid, and the clause in the deed from Gardner to McDonald, quoted above, saying that the conveyance was subject to the pipe-line lease, had no reference to that money. Further, it is not rental. The pipe-line lease provided for no money payments for rentals or for any cause, except the 30 cents per rod. The fact must be taken to have been known by McDonald, as well as Shrader, because they were put upon inquiry and given notice by that clause in the deed from Gardner. It appeared in their chain of title. The instrument constituting the pipe-line lease provided that Gardner should have right to sufficient gas of the pipe line for use in one house. Gardner transferred this right to Rigby years before the land was conveyed to McDonald. McDonald did not convey this right to Shrader in words.

Then the question comes: Has Shrader any right to it? Does the warranty extend to it? Is there a covenant that he shall have the benefit as appurtenant to it, or as a covenant running with the land? I scarcely think so. It is not mentioned in Shrader's deed. It cannot be an appurtenance. That is a thing belonging to and going with the transfer of a principal 40 L.R.A.(N.S.)

thing; used with, dependent upon that thing. 3 Cyc. 565. Essential to it, used with it. *Com. v. Sanders*, 5 Leigh, 751. A thing will not pass as appurtenant, unless essential to the main thing. 2 Am. & Eng. Enc. Law, 522, note; 1 Words & Phrases, 478. For a covenant to run with land it must be a grant of it or an interest in it. *Hurxthal v. St. Lawrence Boom & Lumber Co.* 53 W. Va. 87, 97 Am. St. Rep. 954, 44 S. E. 520. We must note that the contract between Gardner and the gas company does not grant or covenant for right to use gas in a residence situate on the land, as gas leases generally do. It is not a right limited to the land. It is not a lease to take gas from the land. It gives no such right. It simply grants right to pass gas from other lands by pipe through this land. Gardner could use the gas on any land. It is a personal right to him. As before stated, Shrader's deed does not mention this gas right. It is a right not issuing out of land. But we need not, and do not, decide the question whether his deed gives any right to the gas; for if we say that the right is guaranteed by the covenant, or belonged to the land, then I say that McDonald conveyed that right by the deed of trust along with the land to secure Gardner's debt, and I cannot see how he can come in and claim against that deed of trust when he yet owed the debt. It would be a subject conveyed by that deed of trust. But aside from that, if Shrader or McDonald would be entitled to that gas right, what would be the character of that right? If anything, it would be an action of damages for breach of warranty, a collateral matter, a claim for unliquidated damages, which could not be set off against a deed of trust by way of injunction. Must the trustee wait until unliquidated damages shall be liquidated? A mortgagor cannot discharge the mortgage debt by setting off against it a personal demand for unliquidated damages. 27 Cyc. 1392. They cannot be set off against a deed of trust. *Cleaver v. Matthews*, 83 Va. 801, 3 S. E. 439; *Robertson v. Hogshead*, 3 Leigh, 667. This principle is approved in the opinion in *Koger v. Kane*, 5 Leigh, 606. I find such to be the general law. High on Injunctions, § 444, says: "And the fact that the mortgagor has unliquidated demands against the mortgagee which he desires to set off against the indebtedness secured by the mortgage will not warrant an injunction against a sale under a power contained in the mortgage, since the rule is regarded as well settled that unliquidated damages cannot be pleaded by way of set-off to proceedings in equity."

We affirm the decree.

NEW YORK COURT OF APPEALS.

WILLIAM SCOTT, Resp't.,
v.
GROVE T. CURTIS et al., Appts.

(195 N. Y. 424, 88 N. E. 794.)

Indemnity — injury by defective coal hole — liability of coal dealer.

1. A property owner who is compelled to pay damages for injuries to a pedestrian because of the unsafe manner in which a cover was placed upon a coal hole in the sidewalk, by a coal dealer delivering coal through it, may, in case he himself was not actively negligent in the matter, recover indemnity from the dealer for the loss so caused.

Note. — Right of one constructively liable for a tort, to contribution or indemnity from one actually responsible for its commission.

- I. Scope, 1147.
- II. Statement of the rule, 1148.
- III. Persons or corporations within rule.
 - a. Generally, 1148.
 - b. Owner or occupant of premises.
 1. Generally, 1148.
 2. Lessor or lessee, 1148.
 3. Proprietor of railroad, highway, canal, or lighting plant, 1149.
 4. Abutter, 1149.
 - c. Carrier, 1150.
 - d. Miscellaneous, 1151.

I. Scope.

The question of the conclusiveness and effect of a judgment against one constructively liable for a tort, as against the actual wrongdoer when sued for contribution or indemnity is discussed in note to *Baltimore & O. R. Co. v. Howard County*, post, 1172.

Of course, it is essential, in order that the present question may arise, that the former verdict or judgment against the plaintiff in the present suit for contribution or indemnity shall have been predicated solely of his constructive liability. So, the cases in the present note are not to be confused with those which hold that the rule against recourse between joint wrongdoers will prevent a recovery over by one who has been held liable, upon the ground that he was actually negligent in failing to perform a duty which devolved jointly upon the plaintiff and defendant. As an illustration of the numerous cases of this kind which, in respect of matters of fact, resemble those included herein, reference may be had to *Union Stock Yards Co. v. Chicago, B. & Q. R. Co.* 196 U. S. 217, 49 L. ed. 453, 25 Sup. Ct. Rep. 226, 2 Ann. Cas. 525, holding that a terminal company whose negligence toward one of its employees in failing, by a proper inspection, to discover a defective brake on a car delivered to it 40 L.R.A.(N.S.)

Judgment — against property owner — personal injury — effect on alleged indemnitor.

2. A property owner who has confessed liability in an action to hold him liable for injury to a pedestrian falling through a coal hole in the sidewalk cannot recover over against the coal dealer who was using the hole for the delivery of coal, on the judgment roll, without showing that the accident was due to his negligence.

(June 8, 1909.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term, Part X., for New York County, in plaintiff's favor, and

by a railroad company, has been established by a competent tribunal, cannot enforce contribution or recover indemnity from the railroad company because of the latter's neglect of duty. See also *Central of Georgia R. Co. v. Macon R. & Light Co.* 9 Ga. App. 628, 71 S. E. 1076, reaching a similar result, where an employee was injured by coming in contact with a defectively insulated electric light wire, the master and the electric lighting company being held equally bound to make inspections and observe necessary precautions.

Another distinctive question is whether, when both parties are guilty of actual fault, the rule against recourse between joint wrongdoers will apply when it is found that the negligence of the person against whom indemnity is sought was the proximate cause of the accident. For a discussion of this matter, see the note in 36 L.R.A.(N.S.) 583.

As to right of action of one legally responsible for another's death, against a third person whose negligence caused the death, see the note in 36 L.R.A.(N.S.) 60. The present discussion is not concerned with cases involving the question whether the rule against recourse between joint tortfeasors applies to a suit by an agent or servant or one occupying some similar relation, to recover indemnity or contribution when he has been held liable for a tort committed at the behest of the master or principal, and without knowledge on his own part that he was doing a wrongful act. It will be also observed that cases in which a right of action over is expressly given by statute are not herein discussed. As an illustration of cases of this kind, see *Littleton v. Richardson*, 32 N. H. 59, holding that under a statute making any person who shall encumber a highway liable to the town for all damages and costs which it shall be compelled to pay to any person on account of the obstruction, the town is entitled to recover where the highway is so encumbered, where, although defects and want of repairs in the highway for which the town was responsible may have contributed to the accident, they were not its

from an order denying a motion for new trial, in an action brought to recover an amount alleged to be due plaintiff, recovered against him in a former action brought to recover damages for personal injuries to a pedestrian, for which defendants were alleged to be responsible. Reversed.

The facts are stated in the opinion.

Mr. Frank Verner Johnson, for appellants:

The duty of maintaining the coal hole in question in a safe condition, and of protecting and guarding the public from accident when uncovered or defectively covered, rested upon the plaintiff, the owner of the premises.

Downey v. Low, 22 App. Div. 460, 48

proximate cause. Subsequent appeal in this case in 34 N. H. 179, 66 Am. Dec. 759.

And the note does not include cases in which the right to indemnity is based upon a bond taken or exacted by the present plaintiff from the defendant.

For references to other analogous notes, see *infra*, III.

II. Statement of the rule.

The general principle is well settled that one of several wrongdoers cannot recover against another wrongdoer, although the former may have been compelled to pay all the damages for the wrong. "The rule exists," says a commentator, "not because contribution in such a case is inequitable, but because the law will not raise an implied promise to contribute between wrongdoers, for the implied promise rests upon equitable grounds, and no equities arise from a wrong to aid a participant in a wrong. The court will leave a person who asks its assistance in such a case in the position where it finds him." 9 Cyc. 805. The foregoing, it will be observed, concerned the matter of "contribution." With respect to "indemnity," the rule is the same. However, this universal accepted rule against recourse, whether by way of contribution or of indemnity, between joint wrongdoers, is considerably circumscribed in its operation, with the result that, in the circumstances suggested by the title of this note, it is almost universally agreed that the ultimate liability for a tort may be visited upon an actual wrongdoer for whose delinquency the plaintiff has been held legally liable, where the latter was guilty of no actual wrong.

The ground of the action is that the defendant has, by his own unauthorized act, exposed the plaintiff to a liability, and it is immaterial whether such liability is imposed by force of a statute or by the rule of the common law, for in either case the plaintiff is held liable by inference of law, and not by reason of his active participation in the act which was the occasion of the injury. *Baltimore & O. R. Co. v. How-* 40 L.R.A. (N.S.)

N. Y. Supp. 207; *Campion v. Rollwagen*, 43 App. Div. 117, 59 N. Y. Supp. 308; *Matthews v. DeGross*, 13 App. Div. 356, 43 N. Y. Supp. 237; *Anderson v. Caulfield*, 60 App. Div. 560, 69 N. Y. Supp. 1027.

The burden was upon the plaintiff to show that the judgment in the former action was awarded against him for some reason other than his own negligence, and the evidence is entirely insufficient to establish that fact.

Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360.

Even if there was some neglect on the part of the defendants' employees contributing thereto, the plaintiff herein was jointly responsible for the existence of any

ard County, 113 Md. 404, 77 Atl. 930; *Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324.

III. Persons or corporations within rule.

a. Generally.

As to the right of an employer who has been held liable for a tort of or upon a servant, to recover over from the actual wrongdoer, see the note to *Grand Forks v. Paulsness*, post, 1158.

As to the right of a municipality to recover over from the actual wrongdoer, see the note to *Robertson v. Paducah*, post, 1153.

b. Owner or occupant of premises.

1. Generally.

One who creates a dangerous condition upon the premises of another, without the latter's consent, is bound to indemnify the owner for all resulting damage which he is compelled to pay, where there is no active fault on the owner's part. Thus, a company which, without the owner's consent, places a wire on his premises so as to render a chimney unsafe, must indemnify the latter for damages which he has been compelled to pay one who was injured by a fall of the chimney. *Gray v. Boston Gaslight Co.* supra.

2. Lessor or lessee.

The lessor of premises who is held liable for injuries occasioned by failure to keep them in repair may recover indemnity from the lessee, whose primary duty it was to make the repairs. *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 987.

And on the other hand, where a provision in the lease charges the landlord with the duty of making repairs, his lessee, who has been held liable in respect thereof under a similar provision in a sublease, may have

unsafe condition of the coal hole at the time the accident happened.

Deming v. Terminal R. Co. 49 App. Div. 493, 63 N. Y. Supp. 615, affirmed in 169 N. Y. 1, 88 Am. St. Rep. 521, 61 N. E. 983; *Johnston v. Phoenix Bridge Co.* 44 App. Div. 581, 60 N. Y. Supp. 947, affirmed in 169 N. Y. 581, 62 N. E. 1096; *Campion v. Rollwagen*, 43 App. Div. 117, 59 N. Y. Supp. 308; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459, 15 N. E. 424; *Ray v. Jones & A. Co.* 92 Minn. 101, 99 N. W. 782; *Churchill v. Holt*, 131 Mass. 67, 41 Am. Rep. 191.

Messrs. Arrowsmith & Dunn, for respondent:

A person guilty of negligence is charged with the responsibility for his wrongful

indemnity from the landlord. *Prescott v. Le Conte*, 83 App. Div. 482, 82 N. Y. Supp. 411, affirmed without opinion in 178 N. Y. 585, 70 N. E. 1108.

3. *Proprietor of railroad, highway, canal, or lighting plant.*

Notwithstanding the failure of a railroad company to place cattle guards at the point at which its road enters a pasture, the railroad company, when it is held liable for stock which passed through an opening in the fence between the right of way and the pasture, and escaped, may recover indemnity from a telephone company which, in working upon its line, made the opening in the fence. *Southwestern Teleg. & Teleph. Co. v. Krause*, — Tex. Civ. App. —, 92 S. W. 431.

In *Chicago & N. W. R. Co. v. Dunn*, 59 Iowa, 619, 13 N. W. 722, the court said: "That the plaintiff's negligence did not constitute the omission of any duty which the plaintiff owed the defendant is apparent from the fact that, if the defendant's horse had escaped through the gate upon the track of the railway, and been injured, the defendant would have been without remedy. The case falls fully within the principle of those cases in which it has been held that a municipal corporation which has been compelled to pay damages to a party injured, because of an obstruction upon or excavation in a street, may recover from the party causing the excavation or obstruction."

And it has been intimated at least, that where the negligence of one of two railroad companies causes a collision of their trains, the one at fault must indemnify the other for damages it has been compelled to pay for loss or injuries thereby occasioned. *Houston & T. C. R. Co. v. Williams*, — Tex. Civ. App. —, 31 S. W. 556.

So, a turnpike company which has been held liable for injuries occasioned by an unguarded excavation in its road is entitled to be indemnified by the person who, without leave or license, made the excavation. *Westfield Gas & Mill. Co. v. Noblesville & 40 I.R.A. (N.S.)*

act, not only directly injured, but indirectly to legally liable therefor, as held responsible by judgment damages which ought to be by the wrongdoer.

Phoenix Bridge Co. v. Div. 354, 92 N. Y. Supp. 185 N. Y. 580; 78 N. E. Uvalde Asphalt Paving Co. 67 N. E. 439; *Chicago v. I* 429, 17 L. ed. 304; *Oces Co. v. Compania Transatl* 134 N. Y. 467, 30 Am. f N. E. 987.

The evidence submitted ment roll in the case of Fo ly established the appell

E. Gravel Road Co. 13 In Am. St. Rep. 244, 41 N. E.

And a gas company wh to pay damages for persons by the leakage of gas fi pipe may recover from a company whose negligent e street caused the pipe to l phia Co. v. Central Tract 456, 30 Atl. 934.

An electric lighting com been held liable to one inju tric current which passed through the wires of a tel may recover indemnity f where, in stringing its wire ligently failed to take pr against the sagging of wir vent contact with those Fulton County Gas & Elect River Teleph. Co. 130 Ap N. Y. Supp. 642.

So, the owner of a can held liable for injuries fr of a bridge crossing the indemnity from his grante to which the bridge was ap the latter negligently fai the bridge in a safe cor apolis Mill. Co. v. Wheeler 16 N. W. 698.

And a railroad company ing a bridge across a mill same to overflow, must ind er of the race for damages pelled to pay for property overflow. Northern Ohio Canal & Hydraulic Co. 28 affirmed without opinion in 80 N. E. 1130.

4. *Abutter*

Where persons in the pro business negligently unco in a sidewalk, and allow guarded, without the know er or occupant of the a who is thereby made lia injured, by reason of his building, the rule as to j

and that it was through their wrongful acts that Mrs. Fort was injured.

New York v. Brady, 151 N. Y. 616, 45 N. E. 1122; Rochester v. Montgomery, 72 N. Y. 65; Morette v. Bostwick, 127 App. Div. 701, 111 N. Y. Supp. 1021; Reynolds v. Alderman, 64 Misc. 73, 103 N. Y. Supp. 863.

The parties to this action are not *in pari delicto*.

Phoenix Bridge Co. v. Creem, 102 App. Div. 354, 92 N. Y. Supp. 855, affirmed in 185 N. Y. 580; Rochester v. Montgomery, 9 Hun, 394, affirmed in 72 N. Y. 65; Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola, 134 N. Y. 466, 30 Am. St. Rep. 685, 31 N. E. 987; Dunn v. Uvalde Asphalt Paving Co. 175 N. Y. 214, 67 N. E. 439;

does not apply, and the owner or occupant may have indemnity. Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355. On a subsequent appeal in this case in 131 Mass. 67, 41 Am. Rep. 191, a judgment for the defendant was upheld upon the principle that if the plaintiff negligently left the hatchway in a dangerous condition, and the acts of the defendant merely made it more dangerous, it was impossible for the jury to find that the fault of the plaintiff did not contribute to the injury; and that in such circumstances the parties were *in pari delicto*, within the rule against recourse between joint wrongdoers.

So, as has been seen, an abutter who, without negligence on his own part, is held liable for injuries resulting from an open coal hole in front of his premises, may have indemnity from the person who negligently left it open. SCOTT V. CURTIS.

c. Carrier.

Where mail carriers unnecessarily obstruct the platform of a railroad station, the company's failure, as between it and its passengers, to keep the platform safe, does not render it a joint wrongdoer in such a sense as will prevent a recovery by the company, from the mail carriers of the amount it has been compelled to pay one thereby injured. Colony R. Co. v. Slavens, 148 Mass. 363, 12 Am. St. Rep. 558, 19 N. E. 372.

A railroad company may recover indemnity from a sleeping car company where it has been compelled to pay damages to a passenger in the latter's car, whose servant negligently caused her to alight at the wrong station, it appearing that the railroad company had nothing to do with the discharge of passengers riding in sleeping cars. Pullman Co. v. Hoyle, 52 Tex. Civ. App. 534, 115 S. W. 315.

So, a Pullman company, whose exclusive duty it is to notify passengers in its cars upon arrival at their destination, must indemnify a railroad company when it has been held liable for injuries occasioned by the former company's failure to do so. MIS-40 L.R.A. (N.S.)

Lowell v. Boston & L. R. Corp. 23 Pick. 31, 34 Am. Dec. 33; Churchill v. Holt, 131 Mass. 67, 41 Am. Rep. 191; Brooklyn v. Brooklyn City R. Co. 47 N. Y. 475, 7 Am. Rep. 469.

The fact that Scott allowed or acquiesced in the use of the coal chute to deliver the coal by the appellants, while it made him a passive wrongdoer as to a pedestrian, did not relieve the active wrongdoer, the appellants, from their acts.

New York v. Brady, 81 Hun, 443; Rochester v. Montgomery, 72 N. Y. 67; Port Jervis v. First Nat. Bank, 96 N. Y. 556.

Chase, J., delivered the opinion of the court:

The plaintiff is the owner of certain real

souri, K. & T. R. Co. v. Maxwell, — Tex. Civ. App. —, 130 S. W. 722, affirmed on other grounds in — Tex. —, 143 S. W. 1147.

And a sleeping car company which negligently fails to comply with its contract with the railroad company to maintain sleeping cars in good order and condition at its own expense must indemnify the railroad company when the latter is compelled to pay damages to a passenger injured by such negligence. Pullman Co. v. Norton, — Tex. Civ. App. —, 91 S. W. 841.

And a connecting carrier which has been held liable for goods lost beyond its own line may recover indemnity from the carrier whose actual negligence caused the loss, at least where the statute provides that an action may be brought against any one or all of such railroad corporations. International & G. N. R. Co. v. Jones, 26 Tex. Civ. App. 167, 62 S. W. 1075; Missouri P. R. Co. v. Twiss, 35 Neb. 267, 37 Am. St. Rep. 437, 53 N. W. 76.

The owners of a pier who negligently fail to keep it in a safe condition are liable to indemnify charterers of a vessel who, in their capacity as common carriers, are held liable for the loss of a cargo unloaded on the pier. Vogemann v. American Dock & Trust Co. 131 App. Div. 216, 115 N. Y. Supp. 741, affirmed without opinion in 198 N. Y. 586, 92 N. E. 1105.

So, a carrier which, without actual fault on its part, has been held liable for a fire communicated from one of its cars in which a fire was maintained, may recover over from the shipper, who was actually negligent in maintaining the fire, he having been given exclusive control of the interior of the car for the purpose. Boston & M. R. Co. v. Sargent, 70 N. H. 299, 47 Atl. 605. In this case the court applied the doctrine of last clear chance, holding that the plaintiff could recover if, and only if, it appeared that, by the exercise of proper care, it could not have prevented the injury. This, of course, is but one method of ascertaining whether the plaintiff was actually negligent so as to render him a joint tortfeasor with the shipper, in the sense in which that term is used in the rule against contribution

property in the city of New York, on which is a house, and under the sidewalk in front of the house are coal bins used in connection with said house, and through the sidewalk is an opening or coal hole and a chute leading into said coal bins. The plaintiff purchased of the defendants 15 tons of coal to be delivered in said bins. The defendants' employees came with a load of said coal, and the plaintiff showed them where to remove the fastenings to the cover over said coal hole, and saw them remove said cover, and the load of coal was delivered in the bins through said hole and chute leading therefrom. The plaintiff left his house, but returned before all of said coal had been delivered, and, as he passed over the sidewalk into

his house, noticed that the cover was on the coal hole. A few minutes afterwards, and before the defendants' employees had returned, he heard an outcry, and ascertained that a woman passing the house on the sidewalk had fallen into the hole. The woman who fell into the hole brought an action against this plaintiff for damages. In her complaint she alleged that "the defendant wrongfully and negligently permitted said coal hole to be and continue, and the same then and there was, so badly, insufficiently, and defectively covered and protected that by means thereof plaintiff . . . fell into said coal hole. . . ."

The plaintiff herein, as the defendant in said action, denied the allegations of negligence on his part. He thereupon gave no

or indemnity. For subsequent appeal in this case, see 72 N. H. 455, 57 Atl. 688. ✓

And no such negligence as will defeat the carrier's recovery in such circumstances is shown by the mere fact that the carrier relied upon the shipper's implied undertaking to use reasonable care in keeping the car heated, instead of inspecting the car to see whether or not he had used such care. *Boston & M. R. Co. v. Sargent*, 72 N. H. 455, 57 Atl. 688.

However, it was held in an early Ohio case that a road company was not bound to indemnify a stagecoach proprietor who had been held liable for injuries sustained by a passenger when the stage overturned on account of a defect in the company's road; and the apparent ground of the decision was that, since the proprietor of the stagecoach had been held liable to the passenger, this showed such negligence on his part as rendered him a tortfeasor jointly with the road company, and disentitled him to indemnity. *Talmadge v. Zanesville & M. Road Co.* 11 Ohio, 197. The following language indicates the reasons which governed the court in this case: "A carrier of passengers for hire is bound to exercise the highest possible degree of care; and if, by the slightest negligence on his part, an injury is sustained by a passenger, he can recover the amount of damage sustained. No damage, however, could be recovered against Talmadge unless there had been negligence or some wrongful act on his part, which occasioned the injury. This negligence was proven in the circuit court, and there was evidence to the same effect on the trial of this case. Talmadge now says to the road company, 'If you had not been negligent in not keeping your road in repair, my coach would not have been overturned, and no damage would have been recovered against me.' The road company may say, with equal truth, to Talmadge, 'Unless your coach had been negligently driven, it would not have overturned.' Both were mere wrongdoers. The passenger selected Talmadge, with whom he had contracted for his safe transportation, and recovered against him. Now, there is no 40 L.R.A. (N.S.)

principle of law upon which Talmadge can compel the road company to respond in damages for his wrongful act. The injury which Talmadge sustained directly, by the negligent act of the road company, may be recovered. This is the law. And if the court should permit carriers to recover the damages from the owners of bad roads, for injuries consequent upon the negligence of such carriers, there would be very little safety for passengers."

d. Miscellaneous.

One of two proprietors of a joint enterprise, who pays a joint judgment rendered against them for injuries caused by the personal negligence of the other, is entitled at the very least to contribution from such other. Thus, one of the joint proprietors of a stagecoach line, who pays a joint judgment recovered against them by a passenger who was injured through the personal negligence of another of the joint proprietors, who was driving the stage, is at least entitled to contribution from such other. *Bailey v. Bussing*, 28 Conn. 455. In this case the plaintiff sued only for contribution, but the court intimated that the situation was such as would have justified an action for full indemnity.

And while the principle that one constructively liable has recourse against the actual wrongdoer would seem to entitle one of two joint owners of a vicious animal to indemnity from the other for damages which the former was compelled to pay by reason of the latter's failure to restrain the animal when it was in his exclusive possession, the contrary has been held. *Spalding v. Oakes*, 42 Vt. 343, placing its decision upon the ground that the plaintiff knew that the defendant was not in the habit of restraining the animal, and was charged with the duty of restraint even when the defendant had it in his possession; and that this breach constituted him a joint wrongdoer.

A construction company may have indemnity from its employer, a street railway company, for damages which it has

tice in writing to the defendants in this action of the commencement of said action, and that the same was coming on for trial, and requested the defendants to come in and defend said action, and also notified them that they would be held liable by him for the verdict and judgment rendered in the action so brought against him; but the defendants did not intervene in said action. When said action came on for trial, the defendant conceded his liability. The court thereupon directed the jury to assess the amount of damage suffered by the plaintiff, and they found a verdict in favor of the plaintiff therein in the sum of \$2,500, and judgment was thereafter entered against the plaintiff in this action for the amount of such verdict and costs.

The plaintiff in this action subsequently paid the judgment. This action was then brought against the defendants, and the plaintiff alleges that while the defendants were in the control of said coal hole and chute, they "negligently and carelessly left the cover of the said hole or chute improperly, insufficiently, and defectively covered and unguarded and unprotected, and that, by reason of the said carelessness and negligence of the said defendants," the plaintiff in the action previously brought against him was injured, without any fault or negligence on his part, but that such injury "was wholly caused by the negligence and carelessness of the defendants." The complaint further alleges the bringing of said action against him, and the recovery and payment of said judgment. It demands judgment against the defendants for the amount paid by the plaintiff in satisfaction of said judgment, and for certain expenses incurred in defending said action. On the trial in this action the judgment roll in said action was received in evidence, and the plaintiff rested without showing in detail how the accident occurred, or the spe-

cific act or acts of the defendants upon which he bases their liability to him.

An owner of real property who maintains a coal hole in the sidewalk in front of his property is liable to a passer-by who is injured by falling into such hole when open and unguarded, or when negligently and carelessly covered, although the person or persons primarily negligent in omitting to cover the hole, or in negligently and carelessly covering it, are the employees of a coal dealer who were at the time engaged in delivering coal to the owner through said coal hole. *Downey v. Low*, 22 App. Div. 460, 48 N. Y. Supp. 207; *Campion v. Rollwagen*, 43 App. Div. 117, 59 N. Y. Supp. 308; *Anderson v. Caulfield*, 60 App. Div. 580, 69 N. Y. Supp. 1027; *Hart v. McKenna*, 106 App. Div. 219, 94 N. Y. Supp. 216. When the removal of a cover from a coal hole by the owner's permission creates danger to persons passing along a sidewalk, the owner is liable for any negligence in failing to see that proper safeguards or warnings are provided to reasonably protect the public from such danger. *Weber v. Buffalo R. Co.* 20 App. Div. 292, 47 N. Y. Supp. 7; *Mullins v. Siegel-Cooper Co.* 183 N. Y. 129, 75 N. E. 1112. The liability of the owner of real property for injury to a passer-by for negligence in covering or in failing to cover or guard such a hole in a sidewalk does not relieve the active or actual wrongdoers from the consequences of their acts. The liability to the passer-by is joint. As between themselves, the active wrongdoer stands in the relation of an indemnitor to the person who has been held legally liable therefor. *Phoenix Bridge Co. v. Creem*, 102 App. Div. 354, 92 N. Y. Supp. 855, affirmed in 185 N. Y. 580, 78 N. E. 1110.

Where the liability rests upon two or more persons who are, as against the person injured, jointly liable for the injury, the rule invoked by the defendants that the court should not interfere as between

been compelled to pay an abutter for injuries from a change of street grade in the manner directed by the employer's engineer, who was given the power of direction by the contract of employment. *Denison & P. S. R. Co. v. James*, 20 Tex. Civ. App. 358, 49 S. W. 660.

And it has been intimated that if a person frightens a team and causes it to run away, he must indemnify the owner for damages which the latter is compelled to pay to a person thereby injured. *Austin Electric R. Co. v. Faust*. — Tex. Civ. App. —, 133 S. W. 449. In this case it is clearly intimated that a street railroad company whose car, by reason of its negligent operation, collides with a wagon and causes the horse to run away, must indemnify 40 L.R.A. (N.S.)

the owner of the horses for damages which he has been compelled to pay persons thereby injured, if, of course, the owner was guilty of no actual fault.

An innkeeper who has been held liable as such for the loss of a horse may recover indemnity from one who wrongfully took it and caused its death. *Reynolds v. Alderman*, 54 Misc. 73, 103 N. Y. Supp. 863.

But where the owner of the horse recovered upon a complaint alleging both the relation of innkeeper and guest, and the negligence of the innkeeper, the latter cannot recover indemnity where there is nothing to indicate upon which theory the former judgment was based. *Reynolds v. Alderman*, 130 App. Div. 286, 114 N. Y. Supp. 463.

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joint tortfeasors is not applicable, where one of the two or more persons chargeable with negligence is primarily liable therefor, and the others are only liable by reason of their ownership of the property, and not by reason of any negligence occurring by their active interposition or with their affirmative knowledge and assent. When an employee or independent contractor assumes the duty of performing an act which is dependent upon his personal care and attention, and an injury arises by reason of lack of such care and attention, such person is liable to the owner of the property, if he is called upon to pay, and does pay, the damages arising from such negligence. *Phoenix Bridge Co. v. Creem*, supra; *Dunn v. Uvalde Asphalt Paving Co.* 175 N. Y. 214, 67 N. E. 439.

The plaintiff in this action cannot recover unless he shows that the active negligence and wrong which caused the injury to the person falling into the hole was the negligence and wrong of the defendants. As we have stated, it does not appear from the record how the accident occurred. If it occurred by the negligent and careless manner in which the defendants temporarily covered or guarded the coal hole, it may be assumed that this action will lie. If, however, the injuries occurred by reason of the cover of the hole breaking, without any negligence or carelessness on the part of the defendants, or by reason of some carelessness of the plaintiff in this action, or by reason of some defect in the construction of the cover to such coal hole wholly independent of the temporary use thereof, the defendants are not liable. It may be assumed for the purpose of this opinion that, notwithstanding the plaintiff's admission that he was liable in the action brought by the person who fell into the coal hole, nevertheless the judgment roll establishes, as against the defendants herein, that the plaintiff therein was injured by reason of negligence in connection with the covering of said hole, and that no negligence of hers contributed to such injury, and that it also establishes the amount of her damages, but it was also incumbent upon the plaintiff to give evidence in addition to the judgment roll in that action, to show that the accident occurred by negligence for which the defendants were primarily liable. This he wholly failed to do, and the judgment must therefore be reversed, with costs, and a new trial granted.

Gray, Vann, Werner, Willard Bartlett, and Hiscok, JJ., concur. Cullen, Ch. J., absent.
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KENTUCKY COURT OF APPEALS.

CHARLES L. ROBERTSON et al., Appts.,
v.
CITY OF PADUCAH.

(146 Ky. 188, 142 S. W. 370.)

Indemnity — joint tortfeasors — one primarily liable.

A municipal corporation which is compelled to pay damages for injuries to a pedestrian falling into a ditch across the sidewalk, dug under direction of its engineer, by an independent contractor, in connection with a street improvement, may secure indemnity from the contractor if the accident was caused by his negligence in failing to provide a sufficient protection for the ditch to render the way safe for pedestrians; and it is immaterial that the engineer mistakenly located the ditch at the wrong place, which mistake required it to remain open overnight.

(January 12, 1912.)

Note. — Right of employer who has been held liable for tort of or upon servant or contractor, to recover over from the actual wrongdoer.

For other phases of the general question as to the right of one constructively liable for a tort to recover contribution or indemnity from one actually responsible for its commission, see the note to *Scott v. Curtis*, ante, 1147, and the other notes to which it refers, especially in subdivision III. a.

Questions relating to a joint action against master and servant have already been discussed in notes in this series. Generally as to joint liability of master and servant for the tort of the servant, see the notes in 12 L.R.A. (N.S.) 669, and 25 L.R.A. (N.S.) 356. As to the joint liability of master and servant for a trespass committed by the servant under the positive orders of the master, see the note in 50 L.R.A. 644. As to the effect of a verdict in favor of the servant in a joint action against the master and servant for the negligence of the latter, see the note in 9 L.R.A. (N.S.) 880.

There are cases holding that an agent or other person holding a similar relation is entitled to indemnity from the master when he has been held liable for a tort committed at the behest of the principal, without knowing it to be wrongful. But this question is distinctive, and not pertinent to the present inquiry. And the question whether a pilot whose negligence has caused damage must indemnify one who has been compelled to pay that damage, being a matter of admiralty law, is not herein discussed.

Right against negligent servant.

The general principle set out in the note to *Scott v. Curtis*, ante, 1147, that one con-

APPPEAL by defendants from a judgment of the Circuit Court for McCracken County in plaintiff's favor in an action brought to recover the amount paid by plaintiff to satisfy a judgment against it for injuries to a pedestrian. Affirmed.

The facts are stated in the opinion.

Messrs. Hendrick & Crice and D. G. Park for appellants.

Mr. James Campbell, Jr., for appellee:

Plaintiff, by way of indemnity, could recover from defendants the amount it was compelled to pay as damages for injuries to a pedestrian.

Blocker v. Owensboro, 129 Ky. 75, 110 S. W. 369; *Georgetown v. Groff*, 136 Ky. 662, 124 S. W. 888; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Washington*

structively liable for a tort may have recourse against the actual wrongdoer, operates to allow a master to recover indemnity from his servant, where the former has been compelled to respond in damages for injuries to the person or property, inflicted by the negligence of the servant, in which the master had no actual participation. *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647; *Georgia S. & F. R. Co. v. Jossey*, 105 Ga. 271, 31 S. E. 179; *Costa v. Yochim*, 104 La. 170, 28 So. 992; *Grand Trunk R. Co. v. Latham*, 63 Me. 177.

In other words, where a master, without any actual fault of his own, has been held liable upon the doctrine of *respondet superior*, he may recover indemnity from the servant for whose negligence he has responded. *Gaffner v. Johnson*, 39 Wash. 437, 81 Pac. 859. See also *Glover v. Richardson & E. Co.* 64 Wash. 403, 116 Pac. 861, stating that a servant engaged in teaming with his own horse and wagon must indemnify the master for damages which the latter is compelled to pay to a third person who was injured as a result of the servant's negligent overloading of his wagon.

In the case of a carrier, for instance, the servant is liable for his actual negligence, and the carrier for the nonperformance of its undertaking. *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647.

The actual wrong, so far as it is one in morals, is on the part of the servant alone; and the master is held only through his obligation to be accountable for the actions of those to whom he intrusts his business. *Bradley v. Rosenthal*, 154 Cal. 420, 129 Am. St. Rep. 171, 97 Pac. 875, holding in effect that therefore, where a joint recovery against a master and servant is sought upon the act or omission of the servant which the principal did not direct and in which he did not participate, and his responsibility, therefore, is simply a responsibility cast upon him by law by reason of his relationship to his servant, the effect of a judgment in favor of and exonerating the agent is *ex proprio vigore* to relieve the master of responsibility; and that a judgment in favor of the servant and against

Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564; *Compagnie de Navigation Française v. Burley*, 183 Fed. 166.

Settle, J., delivered the opinion of the court:

In 1906, Miriam Lander brought suit in the McCracken circuit court against the appellee, city of Paducah, the Southern Bitulithic Company, and the appellants Charles L. Robertson and George A. Gardner, to recover damages for personal injuries she received by falling into a ditch across the sidewalk on Kentucky avenue, between Fifth and Sixth streets, in the city of Paducah. In 1905, the city of Paducah, pursuant to an ordinance duly passed by

the master is unsupportable. To the same effect is *Doremus v. Root*, 23 Wash. 710, 54 L.R.A. 649, 63 Pac. 572.

This liability of the servant to indemnify the master has been referred to *arguendo* in reaching the conclusion that where the lessee of a slave employed him in business to which he was accustomed, and the slave caused an injury by his negligence, which was not induced by any want of care on the part of the lessee, the latter might recover against the owner of the slave indemnity for such damages as he was obliged to pay for the injury. *Fitzgerald v. Ferguson*, 11 La. Ann. 396.

But the common-law rule which makes the agent or servant liable over to his employer or master for damages sustained by him in consequence of the servant's neglect does not apply to a public surveyor of highways, so as to render him liable to indemnify the town for damages which it is compelled to pay by reason of a defect negligently allowed to exist without repair by the surveyor. *White v. Phillipston*, 10 Met. 108. It was further held in this case that the surveyor was not rendered a mere servant, responsible to the municipality for any neglect of duty, by the statute giving him jurisdiction of the highways in his district, and providing that he might be prosecuted by indictment for any deficiency in a road, occasioned by his fault or neglect, and also that if the town should be sentenced to pay a fine for any such deficiency, the surveyor should be liable to the town for the amount of such fine, to be recovered by the town in an action on the case.

Right against negligent contractor.

So, an employer who, without any fault upon his own part, has been compelled to respond in damages by reason of the negligent failure of his contractor to perform his legal duty, may recover indemnity from the latter. *Maxwell v. Louisville & N. R. Co.* 1 Tenn. Ch. 8; *Pfau v. Williamson*, 63 Ill. 16.

And the employer's right to indemnity is not affected by the fact that he reserved

its council, entered into a written contract with the Southern Bitulithic Company, whereby the latter undertook, according to certain plans and specifications, the reconstruction of Kentucky avenue from the last curb line of First street, to the west property line of Ninth street. The work included the construction of underground storm water sewers along the curb line of the street, with laterals extending from the main sewer across the sidewalk to the property line, thereby providing connection between the abutting property and the main sewer. According to the contract, the entire work of reconstruction was to be performed under the supervision and control of the city engineer of Paducah, or his assistant. After entering into the contract, the South-

ern Bitulithic Company sublet the work of street and sewerage construction in question to the appellants, Charles L. Robertson and George A. Gardner, who agreed to carry out the contract of the Southern Bitulithic Company with the city of Paducah according to its terms and specifications. In constructing the sewers it became necessary to cut ditches across the sidewalk to put in the laterals extending from the property line to the main sewer; it being the duty of the city engineer or his assistant, under the ordinance and contract, to locate the place for cutting the ditches across the sidewalk, and direct the work. Chappell, the assistant city engineer, by an error in the measurement of the "Y" branch of the main sewer, directed the cutting of a

the right to go on the premises to see that the contractor was performing the work according to plans and specifications. *Pfau v. Williamson*, supra.

One who undertakes to repair a sidewalk for a property owner without supervision or direction from him is liable to him for any sum he is required to pay because of injury to a pedestrian, due to failure to place proper signals or barriers to protect the public from injury, irrespective of whether he is an independent contractor or a mere employee. *Kampmann v. Rothwell*, 101 Tex. 535, 17 L.R.A. (N.S.) 758, 109 S. W. 1089.

That this is the proper rule has been recognized in other cases, which, however, deny a right of recovery over, upon the ground that the contractor was not charged with the specific duty the breach of which caused the damage. Thus, in *Silvers v. Nerdlinger*, 30 Ind. 53, denying the right of an abutting owner, who had been held liable to one injured by an insufficiently guarded excavation in front of his premises, to recover over against the contractor, and basing its decision upon the ground that the contract imposed no obligation upon the contractor, as between him and the employer, to guard the excavation,—the court said that if the employer had required him to stipulate that he would keep the excavation properly guarded during the progress of the work, and he had failed to do so, he would unquestionably have been liable to him on his contract; but that since no such stipulation was made, no implied obligation to that effect arose as between the parties, whatever liability the contractor might have incurred toward others by leaving the excavation unguarded.

And a contractor for work in a street, who is held liable for injuries resulting from an obstruction placed upon the sidewalk, may recover indemnity from his subcontractors, who failed to perform their duty to light and guard the obstruction. *Phoenix Bridge Co. v. Creem*, 102 App. Div. 354, 92 N. Y. Supp. 855, affirmed without opinion in 185 N. Y. 580, 78 N. E. 1110. In this case, involving the right of a con-

tractor to indemnity from a subcontractor, the court said: "The liability which results from the mere omission of a legal duty is to be distinguished for the purposes of this case from that which results from personal participation in an affirmative act of negligence, or from a physical connection with an act of omission by knowledge of, or acquiescence in, it on the part of the original contractor, or by his failure to perform some duty in connection with it which he may have undertaken by virtue of his agreement. In other words, while both the plaintiff and the defendants were equally culpable and equally liable to the traveling public for the omission of duty which resulted in the injury, yet, as between themselves, the plaintiff was entitled to rely upon the defendants to discharge the duty because of their contractual relations, and the former could only be deprived of the right of indemnity by proof that it did in fact participate in some manner in the omission beyond its mere failure to perform the duty imposed on both by the law."

A city, by employing a contractor to construct a building upon a lot owned by it, does not impliedly authorize him to obstruct the street by building material; and where the contractor nevertheless obstructs the street without compliance with ordinances with respect thereto, and the city is held responsible for a resulting injury, it may recover indemnity from the contractor. *Rochester v. Montgomery*, 72 N. Y. 65, distinguishing *Buffalo v. Holloway*, infra.

Of course, the present note is not concerned with cases in which a contractor for a municipality has been exonerated from liability to the municipality for damages which it had been compelled to pay to one who was injured by an excavation, upon the ground that, in the absence of a provision to the contrary in the contract, the duty of guarding an excavation is upon the municipality, and not upon the contractor. And it is also to be observed that no light is thrown upon the present discussion by cases in which the right of action was based upon an express provision of the contract or

ditch across the sidewalk of Kentucky avenue, between Fifth and Sixth streets, at the wrong place. Appellants cut the ditch at the place indicated by Chappell, but after doing so they and Chappell discovered it was at the wrong place, as it did not strike the "Y" at the place of connection with the main sewer. When this was discovered, appellants ordered their servants to refill the ditch, but before it was refilled the assistant engineer, Chappell, directed them not to close the ditch that night, but to throw the dirt back from the fence and make a plank walkway across the ditch for the use of pedestrians during the night. This was done by the servants of appellants; a signal light being left on a dump near the fence to warn passers-by of the presence of the ditch. The ditch was 2 feet in width and 6 feet in depth. There had been rain during the day, and the rain, together with the digging of the ditch, made the sidewalk near the ditch and plank walk across it muddy and slippery. Shortly after nightfall, Miss Lander, in traveling the sidewalk to her residence, slipped from the plankway into the ditch and was in-

jured. Although a recovery was resisted by all the defendants, the trial of the case resulted in a verdict and judgment in her favor against the appellee, city of Paducah, and the appellants, Robertson and Gardner, for \$750. Thereafter Miss Lander sold and assigned the judgment to one George W. Robertson, and the latter, by a subsequent action and mandamus against the appellee, city of Paducah, compelled it to pay the amount of the judgment with interest and costs, following which the city of Paducah brought this action in equity against appellants for indemnity; that is, to recover of them the amount it paid the assignee of Miss Lander in satisfaction of the judgment in her favor. The recovery against appellants was sought by appellee upon the ground, as alleged in the petition, that though appellee was responsible to Miss Lander for the damages resulting from her injuries, because as to her appellants were its agents in the matter of providing the ditch with the plankway from which she fell in crossing it, yet in fact their negligence in failing to make the plank crossing over the ditch reasonably safe for the use

upon a contractor's bond. For an illustration, see *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550.

Master's right of indemnity against third person in case of injury to servant.

The liability of an employer for injury to an employee by the explosion of a boiler, on the ground of negligence in failing to discover the defect in the boiler by inspection, will not preclude the employer from recovering against the maker of the boiler, where the employer's negligence was induced by the warranty or representations of the maker. *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 51 L.R.A. 781, 86 Am. St. Rep. 478, 59 N. E. 657.

A railroad company which has been held liable to a servant for injuries resulting from the unsafe condition of a private switch may recover indemnity from the owner of the switch, if it, the company, was guilty of no actual negligence contributing to the accident. *Boston & M. R. Co. v. Brackett*, 71 N. H. 494, 53 Atl. 304.

And where the servant's injury is due to the fact that an electric company negligently allowed an excessive current to enter the master's premises upon wires which ordinarily carried a comparatively harmless current, the master, upon being held liable for resulting injury, has a right of action over against the electric company. *Galveston, H. & S. A. R. Co. v. Pigott*, 54 Tex. Civ. App. 387, 116 S. W. 841; *Consolidated Hand-Method Lasting Mach. Co. v. Bradley*, 171 Mass. 127, 68 Am. St. Rep. 409, 50 N. E. 464.

Where, however, the injury to the servant was the result of a defectively insulated

wire, the master was denied the right to indemnity from the lighting company, upon the ground that the master and the company were equally bound to make inspections and observe necessary precautions; and that its liability was founded upon its actual fault, which rendered it a wrongdoer jointly with the lighting company, within the meaning of the rule forbidding contribution or indemnity. *Central of Georgia R. Co. v. Macon R. & Light Co.* 9 Ga. App. 628, 71 S. E. 1076. Likewise, where a terminal company's servant was injured by a defective car delivered to it by a railroad company, it was held that the former's failure to make proper inspection precluded it from seeking indemnity from the latter. *Union Stock Yards Co. v. Chicago, B. & Q. R. Co.* 196 U. S. 217, 49 L. ed. 453, 25 Sup. Ct. Rep. 226, 2 Ann. Cas. 525. As has been well said, in such circumstances the liability of a railroad company to its servant for injuries which he received by reason of a defective car is necessarily predicated upon the company's negligent failure to inspect or negligent inspection of the car; and this is sufficient to render it a joint tortfeasor with the company from which it received the car. *Galveston, H. & S. A. R. Co. v. Nass*, 94 Tex. 256, 59 S. W. 870. These cases, of course, do not come strictly within the scope of this note, for it is essential in order that the present question may arise, that the former verdict or judgment was founded upon the present plaintiff's constructive liability. These cases are but two of many holding the rule against recourse between joint wrongdoers applicable where the plaintiff was guilty of active or actual negligence.

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of pedestrians was the sole and proximate cause of her injuries. Appellants' answer, as amended, traversed the averments of the petition, and alleged, in substance, that they made the ditch and left it open by order of appellee's assistant engineer, Chappell, and in the manner specifically directed by him placed the plank walk across the ditch; that by his further direction they put the signal light at the place ordered by him; and that if the means thus employed were not sufficient to make the crossing of the ditch reasonably safe for the use of persons traveling the sidewalk, and by reason thereof Miss Lander was injured, it was because of the negligence of appellee's assistant engineer, which was the proximate cause of Miss Lander's injuries. The case was submitted upon an agreed statement of facts, the entire record in the case of *Lander v. Paducah*, etc., and the depositions of the assistant engineer, Chappell, and the appellant Gardner, and the circuit court rendered judgment in favor of appellee for the full amount claimed in the petition. From that judgment this appeal is prosecuted.

The judgment was based on the ground that, as between appellee and appellants, the latter were, in respect to the injuries sustained by Miss Lander, the wrongdoers, and that, as appellee was compelled to compensate her to the extent of the damages recovered therefor, it was in turn entitled to recover of appellants the amount so paid.

On the subject entitled, "Contribution and Indemnity as Between Wrongdoers," Judge Cooley, in his admirable work on the Law of Torts (vol. 1, p. 254), has this to say: "As under the rules already laid down, the party wronged may, at his election, compel any one of the parties chargeable with the act, or any number less than the whole, to compensate him for the injury, it becomes a consideration of the highest importance to the person or persons thus singled out and compelled to bear the loss, whether the others, who were equally liable, may be compelled to contribute for his relief. On this subject there is a general rule, and there are also some very important exceptions. The general rule may be found expressed in the maxim that no man can make his own misconduct the ground for an action in his own favor. If he suffers because of his own wrongdoing, the law will not relieve him. The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it. But there are some exceptions to the general rule which rest upon reasons at least as forcible as those which support the rule itself. They are of 40 L.R.A. (N.S.)

cases where, although the law holds all the parties liable as wrongdoers to the injured party, yet, as between themselves, some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete. There are many such cases where the wrongs are unintentional, or where the party, by reason of some relation, is made chargeable with the conduct of others."

In 22 Cyc. 99, it is said: "It is a well-established rule of law that there can be no indemnity among tort feorsors. But this rule does not apply to a person seeking indemnity who did not join in the unlawful act, although he may thereby be exposed to liability, or to one who did not know, and was not presumed to know, that his act was unlawful; it must appear that the parties are *in pari delicto* as to each other before plaintiff's recovery will be barred."

An excellent statement of the same doctrine may be found in *Geneva v. Brush Electric Co.* 50 Hun, 581, 3 N. Y. Supp. 595, wherein it is said: "The cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured are exceptions to the general rule, and are based upon principles of equity. Such exceptions obtain in two classes of cases: (1st) Where the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an innocent master was held to respond for the tort of his servant, acting within the scope of his employment; or (2d) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury."

We have repeatedly approved the correctness of the doctrine announced by the foregoing authorities, and recently applied it in the cases of *Blocker v. Owensboro*, 129 Ky. 75, 110 S. W. 369, and *Georgetown v. Groff*, 136 Ky. 662, 124 S. W. 888.

It now remains to be seen whether its application to the facts of the case at bar will authorize the affirmance of the judgment of the circuit court. It is manifest from the evidence that the digging of the ditch and leaving it open overnight were not unlawful or negligent acts; for the work of digging a ditch through the sidewalk was necessary in making the street improvements required by the contract under which appellants were employed, and the contract, as well as the ordinance authorizing and approving it, permitted the use of the sidewalk for making the ditch. It is not material that Chappell, the assistant engineer, made a mistake in locating

the ditch where it was made, or that the mistake made it necessary to leave the ditch open until the following day. But in leaving it open overnight it was necessary to provide, for the use of persons traveling the sidewalk, some way of crossing the ditch that would be reasonably safe for the purpose; and also to place at or near the ditch a light sufficient to warn them of the danger to be encountered in approaching and crossing the ditch, and enable them to see how to cross it.

It is apparent from the evidence that this duty was not properly performed by appellants, although they were required by the terms of the contract to so perform it, for neither the plankway laid by them, nor the light they provided, made the crossing reasonably safe for use. Indeed, according to the evidence, it was unsafe, with little chance of its dangerous condition being discovered by persons attempting to cross the ditch. It is patent, therefore, that in thus failing to provide sufficient light and a reasonably safe way of crossing the ditch, appellants were guilty of negligence.

It seems to be conceded by appellants that the work of providing the ditch crossing was negligently performed by them; but they insist that it was done in the manner ordered by appellee's assistant engineer, who was charged with the duty of supervising and directing such work, and that his negligence in requiring the crossing to be made as it was constructed was the proximate cause of Miss Lander's injuries, and relieved them of any liability to appellee for the indemnity claimed.

In determining whether this contention should prevail, we must be governed by the evidence, the whole of which on this point is contained in the deposition of the appellant Gardner, and that of Chappell, appellee's assistant engineer. Without commenting in detail upon the testimony of these two witnesses, it is sufficient to say that from it as a whole, the circuit court seems to have found: (1st) That the ditch was made by appellants at the place and in the manner directed by the assistant engineer. (2nd) That although it was left open overnight by appellants by order of appellee's assistant engineer, and with the direction from him to provide a plankway crossing over the ditch and signal light to give warning of the presence of the ditch, the assistant engineer did not direct the manner of appellants' doing the work of constructing the crossing, but left its performance to their judgment, and was not present when the work was done. In this view of the matter, the conclusion would seem to follow that the unsafe condition of the crossing was due to appellants' negli-

gence, and that such negligence was, as between appellants and appellee, the proximate cause of Miss Lander's injuries. Under the authorities, this conclusion, if authorized by the proof, entitled appellee to the indemnity asserted.

This conclusion is not free from doubt, but on the record as a whole we are unable to say that the judgment of the circuit court is flagrantly against the evidence.

This being true, the judgment should be, and is, affirmed.

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NORTH DAKOTA SUPREME COURT.

CITY OF GRAND FORKS, Reapt.,

v.

B. O. PAULSNESS, Appt.

(19 N. D. 293, 123 N. W. 878.)

Municipal corporation — license to obstruct street — liability of licensee.

1. A party who, for his own benefit or convenience, or under license from a city of this state, places upon a public thoroughfare a structure which, from its nature, or from a failure to properly guard it or keep it in repair, is or may become dangerous, is under an implied contract with the city that while such structure is maintained upon the street he will exercise ordinary care to protect the public from danger and the city from loss; and in case of injury to one using the street by reason of such structure or the manner in which it is kept, the party who thus rendered the street unsafe will be regarded as the real wrongdoer, and if the city sustains loss through payment of damages to the person injured, he will be held to be an indemnitor of the city.

Judgment — against wrongdoer — effect on indemnitor.

2. In a case where a city, having paid a judgment obtained by a person injured upon its streets in an action predicated upon an alleged failure of the city to keep its streets in safe condition, brings suit against the party who, under license, express or implied, from the city, placed on the street the structure or obstruction by which the injury was caused, the defendant, if he has been given reasonable notice and opportunity to defend upon the trial of the original action, is concluded as to all matters of fact necessary to establish a liability from the city to the person injured, and as to any matter which might have been urged as a defense by the city against such liability. Unless, however, it appears that evidence showing the liability of the alleged indemnitor was necessarily involved in the determination of the original action,

Headnotes by ELLSWORTH, J.

Note. — See note post, 1165

and passed upon by the trial court in rendering judgment, the defendant is not concluded upon the point that, notwithstanding the liability of the city, he was not at fault and has not failed in any duty which he owed to the city or the person injured, and may plead and show such facts as a defense upon the trial.

Highway — obstruction — duty to guard.

3. A person placing a structure upon a street for his own benefit or convenience, under his implied contract with the city to protect the public from danger and the city from loss, is required to maintain such structure in safe condition, and to supervise the same for the purpose of keeping it in repair and free from any changes or additions which he, in the exercise of reasonable care, has cause to anticipate will be made or placed there. Such supervision does not, however, extend to changes or additions which the original structure, from its nature or the manner of its construction, does not invite or induce, or which were not within the reasonable contemplation of the party at the time he placed it there.

Trial — proximate cause — question for court.

4. In an action in negligence the question whether the alleged fault of the defendant, or failure on his part to perform a legal duty, was the proximate cause of the injury, is one of law for the court, to be determined upon the material facts presented, with such inferences as may be properly drawn therefrom.

Highway — obstruction — alteration by stranger — liability.

5. In the state of fact assumed to exist, a party, under license from a city, placed upon a principal street a 1-inch water pipe, and fastened down to the pavement on either side of it a 2-inch plank for the purpose of protecting the pipe from injury and from being shifted from its place upon the street. Afterward, without his knowledge, by some unknown agency, and for a purpose that is not shown, manure was placed upon the pipe and upon the planks placed to guard it, and a third plank was placed on top of the manure. This third plank was not attached either to the pavement of the street or to the planks placed to guard the water pipe, but was loose and movable. It was so placed upon the manure that pedestrians stepping on one end at times caused the other end to be raised a distance of from 5 to 10 inches from the street. While in this position a person using the street, in stepping over the loose plank, caught his foot upon it and was thrown violently upon the pavement, sustaining injuries for which he brought an action in damages against the city, and recovered a judgment which the city paid. The city then proceeded against the party placing the water pipe and the planks guarding it on the street, as an indemnitor, alleging that the accident resulted from a
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failure on his part to keep the same so placed by him.

Held, that the party placing the pipe and the two planks was not to be said, in the exercise of reasonable care, to have in contemplation of law that a person would change and remove the manure placed and maintained upon the pipe, and that the defendant was not liable for the injury resulting from the failure to perform any duty imposed upon him thereby to keep the same so placed by him.

(December 2, 1909.)

APPEAL by defendant from the judgment of the District Court of the County of Grand Forks in plaintiff's favor, brought to recover the amount of damages upon a judgment recovered in an action for damages for injury to a horse due to a defective condition of a street. Reversed.

The facts are stated in the opinion of the court.

Mr. George A. Bangs, for plaintiff.

In an action brought by a person for injury to a horse, brought to recover over and above the amount of damages recovered in a prior action, if proper notice is given, the judgment in the prior action is conclusive only as to the defect in the street, the amount of damages recovered in the prior action, and the amount of damage.

2 Dill. Mun. Corp. 4th ed. 100; 4 Wall. Neg. § 6362; Roberts v. City of New York, 4 Wall. 657, 18 L. ed. 427; City of New York v. City of New York, 10 Gray, 496, 71 Faith v. Atlanta, 78 Ga. 403, 89 N. W. 54; Rochester v. City of Rochester, 72 N. Y. 65.

There was no right of recovery over in favor of the city.

1 Cooley, Torts, p. 254; City of New York v. City of New York, 7 N. Y. 493, 57 Am. Rep. 100; City of New York v. Nerdlinger, 30 Ind. 100, 101; City of New York v. Tucker, 3 Hun, 529; Rochester v. City of Rochester, 123 N. Y. 405, 25 N. E. 93; City of New York v. City of New York, 20 Am. St. Rep. 760; McQuinn v. City of New York, 93 N. Y. 12.

There was a complete, sufficient intervening cause between the negligence on the part of the city and the damages resulting to the plaintiff.

1 Cooley, Torts, 3d ed. 91; City of New York v. Nichols, 11 Allen, 514; City of New York v. City of New York, 70 N. E. 199.

The proximate cause of

the negligent act of the one who rested the plank upon the manure.

Sherman & Redf. Neg. 5th ed. § 25; Leeds v. New York Teleph. Co. 178 N. Y. 118, 70 N. E. 219; Re Michigan S. S. Co. 133 Fed. 577; Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325; Andrews v. Kinsel, 114 Ga. 390, 88 Am. St. Rep. 25, 40 S. E. 300; Morris v. Brown, 111 N. Y. 318, 7 Am. St. Rep. 751, 18 N. E. 722; Malloy v. New York Real Estate Asso. 156 N. Y. 205, 4 L.R.A. 487, 60 N. E. 853; Fowles v. Briggs, 116 Mich. 425, 40 L.R.A. 528, 72 Am. St. Rep. 537, 74 N. W. 1046; Carter v. Towne, 103 Mass. 507; Bellino v. Columbus Constr. Co. 188 Mass. 430, 74 N. E. 684; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; Claypool v. Wigmore, 34 Ind. App. 35, 71 N. E. 509; Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117; Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; Marsh v. Giles, 211 Pa. 17, 60 Atl. 315; Chattanooga Light & P. Co. v. Hodges, 109 Tenn. 331, 60 L.R.A. 459, 97 Am. St. Rep. 844, 70 S. W. 616; Hunt Bros. v. Missouri, K. & T. R. Co. — Tex. Civ. App. —, 74 S. W. 69; Winfree v. Jones, 104 Va. 39, 1 L.R.A.(N.S.) 201, 51 S. E. 153; Land v. Southern R. Co. 67 S. C. 290, 45 S. E. 203; Saxton v. Missouri P. R. Co. 98 Mo. App. 494, 72 S. W. 717; Daniels v. New York, N. H. & H. R. Co. 183 Mass. 393, 62 L.R.A. 751, 67 N. E. 424; McGahan v. Indianapolis Natural Gas Co. 140 Ind. 335, 29 L.R.A. 355, 49 Am. St. Rep. 199, 37 N. E. 601; Georgetown Teleph. Co. v. McCullough, 118 Ky. 182, 111 Am. St. Rep. 294, 80 S. W. 782; Texas & P. R. Co. v. Kelly, — Tex. Civ. App. —, 78 S. W. 372; Watters v. Waterloo, 126 Iowa, 199, 101 N. W. 871.

Mr. Frank B. Feetham for respondent.

Ellsworth, J., delivered the opinion of the court:

The state of fact out of which the cause of action involved in this appeal arises may be stated as follows: In the months of November and December, 1904, the city of Grand Forks owned and operated a public waterworks plant, and one of the mains thereof extended along De Mers avenue, one of the principal streets of the city, to a point 30 feet or more from the west end of a bridge crossing the Red River of the North to the city of East Grand Forks, located on the eastern bank. At this point there was connected with the water main a 2-inch pipe intended to provide water service to consumers in East Grand Forks, which pipe, from its junction with the main, extended underground below the western approach to the bridge, and thence to the eastern bank beneath the bed of the river. That

part of the west bank of the river under which this service pipe extended was composed of soil, a peculiar quality of which caused it to be constantly sliding or moving toward the bed of the river, and as a result there were frequent breaks in that portion of the pipe which passed beneath it. Such a break occurred during the month of November, 1904, and was the cause of a considerable wastage of water passing through the pipe. The defendant, Paulsness, who was a plumber, holding a license from the city of Grand Forks for that purpose, was notified of this break in the pipe, and authorized to take steps for its repair. In order that he might do this, it was necessary to either entirely shut off the water beyond the end of the main in De Mers avenue, near the west end of the bridge, or to provide other means of conveying it from that point to a point beyond the break in the service pipe to East Grand Forks. This connection was finally made by inserting into the main under the western approach to the bridge a 1-inch pipe, leading this pipe up through a manhole in De Mers avenue above the end of the main, and thence over the surface of the street to the side, where it passed down the river bank and connected with the service pipe at a point east of where the break had occurred. Employees of Paulsness, under the direction of the superintendent of the waterworks of the city of Grand Forks, placed this pipe upon the surface of the street in the manner described, and in order to protect it from injury and from being shifted from side to side by the passing of loaded wagons, placed on either side of it a 2-inch plank, which planks were securely spiked down to the cedar block pavement of the street. After that time, at a date which is not shown by the record, some person or persons whose identity and purpose are not disclosed placed some manure over the planks and the pipe, filling the crevice between the space at the side, and covering partially the top of the planks. There was also placed above the water pipe upon the manure, at a date that the record shows obscurely, except that it was probably four or five days prior to December 17, 1904, a plank which was not attached either to the other planks already there or to the cedar block pavement of the street. Neither the manure nor the loose plank was a part of the original pipe guard placed there by the defendant, Paulsness. He did not know of the presence of the loose or "fugitive" plank, and it seems to be conceded that there was no useful purpose in connection with the pipe guard that was or could be served by this plank. The footway upon the bridge from Grand Forks to East Grand Forks

negligence during the period the street was so obstructed by him, which judgment was appealed to the United States circuit court of appeals at an expense of the further sum of \$400, and by said court affirmed; that defendant was duly notified of the bringing of said action, and that he might appear and defend the same; and that the city would look to him for reimbursement in the event of a recovery by Allman; that the city had paid the judgment recovered by Allman, and by reason of the premises alleged now looks to the defendant, Paulsness, for reimbursement, and asks that said defendant be held liable to the plaintiff for the sum of money so expended.

This action, being the one in which this appeal is taken, came on for trial before the district court of the first judicial district of North Dakota on March 5, 1908, and, at the conclusion of the evidence introduced by both parties, showing facts substantially as hereinbefore narrated, the plaintiff moved the court to instruct the jury to return a verdict in its favor upon the ground that "the case conclusively establishes the legal liability of the defendant." The defendant also moved that the jury be directed to return a verdict in his favor upon the ground (1) that the evidence failed to show that a demand was made upon the defendant to defend the suit brought by Allman, and a reasonable time allowed him by such notice to prepare for and make such defense; and (2) that it did not appear that, under the facts shown, the structure placed by defendant Paulsness upon the street was dangerous or out of repair, or that there was any duty on the part of Paulsness to remove the obstruction which caused the injury. The court denied the motion of defendant and granted the motion of plaintiff, and under its direction a verdict in plaintiff's favor was rendered by the jury.

Thereafter, in denying a motion for a new trial made by defendant upon the ground, among others, of the insufficiency of the evidence to justify the verdict, and that the verdict is against the law, the learned trial court filed a memoranda of its reasons, in which it stated: "At the trial of the present action I followed the ruling of the Supreme Court of the United States in *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564, in directing a verdict for the plaintiff. It seems to me that the principles announced in the case just cited control the case at bar. . . . The very gist of the original cause of action was the structure or pipe guard which the defendant admits he constructed, but which was subsequently changed by some unknown per-

son by adding the loose plank. It follows, therefore, that the judgment against the plaintiff obtained in the original action 'conclusively established a fact from which, as the duty' to keep the pipe guard in the street safe rested on Paulsness, his 'negligence results.' I cannot see that there is any difference in principle between the case at bar, where the original construction was safe and was rendered unsafe by adding something to it, to wit, a loose plank, and the *Washington Gaslight Co. Case*, where the original construction, which was safe, was rendered unsafe by removing something from it, to wit, the cover of the gas box. If, instead of removing the cover and leaving the gas box open, in the case cited, a cap 6 or 10 inches high had been attached to the box, and Mrs. Parker had been injured by tripping over the cap, and recovered judgment against the District of Columbia for the injury, would the gas company have been any the less liable? Clearly not."

Appellant in this court urges as a ground for reversal of the judgment of the district court, that it was error to grant plaintiff's motion and to refuse to grant defendant's motion for a directed verdict, and that if a verdict should not have been directed for the defendant, then the disputed questions of fact with reference to his liability should have been submitted to the jury. A proper determination of the points presented by this appeal requires that we should consider whether or not, upon the evidence introduced, the plaintiff has shown the necessary elements of a cause of action against Paulsness; and, if so, whether or not, upon such showing, as a matter of law, the plaintiff is entitled to recover. The substance of all assignments upon this appeal may be said to be included in these points. It is well settled that a municipal corporation which, under a liability resulting from a failure to keep safe its streets for the passage of persons and property, and to abate therefrom all nuisances and remove all obstructions that might prove dangerous, is required to pay damages to a person injured on the streets, has, unless it is also a wrongdoer, a remedy over against the party that is in fault and has so used the streets to produce an injury. *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564; *Rochester v. Montgomery*, 72 N. Y. 65; *Wabasha v. Southworth*, 54 Minn. 79, 55 N. W. 818, and *Chicago v. Robbins*, 2 Black, 418-429, 17 L. ed. 298-304. Such right of action proceeds upon the principle that in the case of joint tortfeasors, in which the parties are not equally culpable, the principal may be held responsible to his codefendant.

quent for damages incurred by their joint offense. A party who, for his own benefit or convenience, or under license from a city, is permitted to place upon a public street a structure which, from its nature or from a failure to guard it, or keep it in repair, is or may become dangerous, is held to be under an implied contract with the city that in so doing he will exercise ordinary care to protect the public from danger and the city from loss; so that, in case of injury to one using the street, and consequent loss to the city, resulting from such structure or the manner in which it is kept, the city may be regarded as in nominal fault only, while the party who rendered the street unsafe will be held to be the real wrongdoer and an indemnitor of the city against loss. *Chicago v. Robbins*, supra; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

The defendant, Paulsness, vigorously contends that the 1-inch pipe was laid from the manhole to the side of the street, and the two planks placed on either side of it, not by him or under his direction, but by the city, whose superintendent of water-works interfered at a time when his workmen were about to proceed to repair the pipe by another method which would not have caused any obstruction whatever of the street; and that he was not responsible for any obstruction to or unsafe condition of the street, caused thereby. In our view of the case, however, this point has no materiality. If it appeared that the injury to Allman and the consequent liability of the city had resulted directly from the laying of the pipe or the placing of the two planks beside it as a guard, this question would be one of controlling importance, and on its determination would depend the liability of Paulsness. It appears, however, that the cause of the injury was neither the pipe nor the planks placed beside it as a guard, but a third plank which drifted there through some agency not accounted for, and remained for several days without permanent attachment either to the pavement or the structure guarding the water pipe. In this state of fact, we believe that the point decisive of the case will be reached more speedily and determined more clearly by assuming in accordance with the contention of the plaintiff, that whether or not the pipe was placed on the surface of the street and the two planks placed beside it as a guard by Paulsness or under his direction, he had, by his acquiescence and subsequent conduct, adopted both this method of conveying water beyond the break and the structure necessary to protect it, and was liable for any damages which resulted from a failure to use ordinary care to keep such struc-

ture reasonably safe. We will also assume, without deciding, that the notice served by the city upon the defendant prior to the trial of the action brought by Allman was sufficient in substance and in time of service to enable him to prepare a defense to and to defend the action had he desired to do so.

On a state of facts such as is here assumed, the plaintiff contends, and the trial court seems to have held, that the judgment in favor of Allman conclusively established as a fact that it was the duty of Paulsness to keep safe the water pipe with the two planks guarding it upon the street, and that his failure to do so resulted in the injury to Allman and consequent loss to the city. So far as the duty of Paulsness is concerned, this contention will be regarded as correct, and if it can be truly said that the evidence taken in this case conclusively shows, or that the rendition of the judgment in Allman's favor necessarily included, a finding that the injury was caused by a failure to keep safe the water pipe laid in the street, or the structure guarding it, there is little question but that Paulsness is liable as an indemnitor to the city. It appears, however, from the evidence taken and from an express finding of the jury, on whose verdict the judgment was rendered, and in fact seems to be conceded on all hands, that the injury to Allman did not proceed from any danger inherent in the pipe or the planks guarding it, or from any failure of Paulsness to properly maintain the structure or keep it in repair, but, as before stated, from a loose plank, not a part of the original structure, subsequently placed on the street without his knowledge or authority.

Appellant, if liable as an indemnitor of the city, and if given notice of an opportunity to defend against the judgment obtained by Allman, is concluded as to all matters necessary to establish a liability from the city to Allman, and as to any matter which might have been urged as a defense by the city against such liability. *Rochester v. Montgomery*, 72 N. Y. 65. It cannot be said, however, that the liability of Paulsness is coextensive with that of the city. The city was liable for a failure to use ordinary care to keep its streets safe, whether the obstruction which rendered it dangerous was placed there by the city itself, by Paulsness, or by some other party. Paulsness was liable only in case the injury was produced by an obstruction which he had placed upon the street, and failed to use reasonable care to keep in safe condition. Notwithstanding the payment by the city of a judgment resulting from the injury to Allman, and all legal conclusions

arising out of the trial of the action brought by him, Paulsness was not "estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault that the accident happened." *Chicago v. Robbins*, supra.

Any liability of Paulsness in this action, therefore, "is predicated upon the negligent character of the act which caused the injury, and the general principle of law which makes a party responsible for the consequences of his own wrongful conduct." *Port Jervis v. First Nat. Bank*, 96 N. Y. 550. His relation to the city, and his conduct with reference to the obstruction of the street which caused the injury, will be measured by the rules of the law of negligence. Whether or not the proximate cause of the injury to Allman was a failure of defendant to perform a legal duty, or arose through his fault, in this as in other cases charging negligence, is a question of law for the court, to be determined upon the material facts, with such inferences as may be properly drawn therefrom. *Glassey v. Worcester Consol. Street R. Co.* 185 Mass. 315, 70 N. E. 199.

Assuming, therefore, that Paulsness was responsible for placing the water pipe across the street, and the two planks, one on either side, for the purpose of guarding it, did the placing of such obstruction or the failure on the part of Paulsness to exercise ordinary care to protect the public from damage result directly and proximately in the injury to Allman? The trial court held that a liability of Paulsness follows when the fact is established that he constructed the original pipe guard, upon the principle, evidently, that having created an obstruction in the street, it was his duty to prevent or remove any additions thereto by persons known or unknown, which rendered it unsafe. It is true that defendant, having placed the original structure in the street, would be held to exercise a certain supervision over it for the purpose of keeping it in safe condition; and if, at the time he placed it there, he had cause to reasonably anticipate that, from the nature of the structure itself, or from the use for which it was intended, in the ordinary course of human events, additions would be placed thereon which might render it unsafe and dangerous, this supervision must extend to such additions. But unless the additions to or changes in the original structure are such as a prudent man, in the exercise of ordinary care, may be held to have had in anticipation, he is not liable for a failure to discover or remove them. *Glassey v. Worcester Consol. Street R. Co.* supra; *Kumba v. Gilham*, 103 Wis. 312, 79 N. W. 325; *Leeds v. New York Teleph. Co.* 178 40 L.R.A.(N.S.)

N. Y. 118, 70 N. E. 219; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17, 10 Am. Rep. 205.

In our view, the facts under which the plaintiff here claims to hold Paulsness liable are quite different, in legal effect, from those announced in the case of *Washington Gaslight Co. v. District of Columbia*, referred to in the memoranda of the district court. In that case the Gas Company, who, for its own benefit and convenience, placed an iron box in the sidewalk, would be held to know that such a construction, in the course of years, by ordinary usage, wear, and deterioration from the elements, would probably lose its cover, and through this or other substantial losses become dangerous. Knowing this, it was held liable for failure to anticipate and to repair such loss. On the other hand, however, the Gas Company could not be said to have in reasonable anticipation at the time it placed the box there that some unauthorized person would permanently attach to this cover an additional cap, 6 or 10 inches high, as conjectured by the trial court, unless the original cap itself was constructed in such a way as to induce or invite such addition, and to raise a reasonable expectation that it would be placed there.

The original structure placed by Paulsness was safe at all times before and after the injury to Allman. If one of the two planks guarding the pipe had, in the course of time, become loose, so that it tipped or moved about in such manner as to cause the injury, it is clear that such condition might have been reasonably anticipated by Paulsness, and that he would be liable. To hold, however, that in placing the original structure there he must have had reasonably in anticipation that it would be interfered with by some other person, who would place manure on top of the planks and the pipe, and a loose plank on top of the manure, in such position that pedestrians, by stepping on one end, would raise the other so as to render it dangerous to persons using the street at that point, requires, as we view it, an unreasonable assumption that the facts of the case will not sustain.

Paulsness insists that the sole purpose of placing on the street the two planks permanently attached to the pavement was to guard the pipe from injury or displacement; that the structure so made did not contemplate the use of manure or of a third plank for carrying out the purposes for which it was intended; that the manure placed on top of the pipe, and the loose plank placed on top of the manure, did not, in any manner, protect the pipe, and that the presence of these additions did not make the structure more safe, but, on the

contrary, presented in itself a dangerous obstruction for which he was in no way responsible. This contention, in the light of the entire evidence, seems well founded and reasonable. If the city placed the manure or loose plank there in carrying out some plan connected with its supervision of the streets, Paulsness would not be at liberty to remove it. If some third party placed it there, he, and not Paulsness, would be responsible for any injury caused by its making the street unsafe. If, for instance, an electric light company, in constructing or repairing its line along the street, had placed some of its apparatus upon this structure laid there by Paulsness, and a person using the street had been injured by coming in contact with the apparatus, it is apparent at a glance that the electric light company, and not Paulsness, would have been liable for the resulting damage. If a contractor engaged in the construction of a building near at hand had piled bricks or other building material on the structure, and Allman had fallen over this instead of the loose plank, it is equally clear that the contractor, and not Paulsness, would be liable. And yet, on what theory can it be said that the placing of the manure and the third plank on the original structure could have been more naturally or directly in the contemplation of Paulsness than the laying there of electric apparatus or building material?

Assuming to exist, therefore, all facts necessary to establish a liability of the city of Grand Forks to Allman, we are of the opinion that these facts, together with the additional showing made upon the trial of this case, are insufficient to establish a liability against Paulsness. Neither the facts nor any reasonable inferences that can be drawn from them show that it was the duty of Paulsness to remove from the street the obstruction which caused the injury, or that he failed to keep in safe condition the structure placed there by him. In other words, a cause of action in negligence is not shown against Paulsness, in that it does not appear that any breach of duty or lack of care on his part was the direct and proximate cause of the injury to Allman. Failing in this, the city fails to show that Paulsness was the real party in fault, and cannot hold him, as an indemnitor for the loss occasioned by payment of the judgment to Allman. The motion of defendant, made at the close of the entire testimony, that a verdict be directed in his favor, should have been granted.

The judgment of the District Court is reversed, and it is directed to dismiss the action.

All concur, except Morgan, Ch. J., who did not participate.

Note. — Right of municipality to recover indemnity or contribution from one for whose tort it has been held liable.

- I. The governing principle, 1165.
- II. Specific applications of the principle.
 - a. Discharge of sewage, 1165.
 - b. Condition of streets, 1165.
- III. General character of municipality's duty or fault.
 - a. Primary or secondary, 1168.
 - b. Failure to remedy condition, 1169.
 - c. Consent to or supervision of acts, 1170.

I. The governing principle.

The principle governing this question is set out in the note to *Scott v. Curtis*, ante, 1147, dealing with certain phases of the general question whether one constructively liable for a tort may recover contribution or indemnity from one actually responsible for its commission. That note, especially in subdivision III. a., refers to further notes dealing with other phases of the general question. Cases on the right of a municipality to recover indemnity from its negligent contractor fall within the scope of the note to *Robertson v. Paducah*, ante, 1153.

lilent contractor fall within the scope of the note to *Robertson v. Paducah*, ante, 1153.

II. Specific applications of the principle.

a. Discharge of sewage.

Under the principle that one constructively liable for a tort may recover indemnity from the person actually liable for its commission, a city which has been held liable for the pollution of a stream by sewage may recover indemnity from the tenants of its sewage farm, through whose active interference the pollution occurred.¹

b. Condition of streets.

This principle, that one who, without active fault on his own part, has been held legally liable for the wrongful act or neglect of another, may have indemnity from such other, has its principal illustration in those cases wherein municipalities have been held responsible for injuries suffered by persons lawfully using the streets in a city, because of defects in the streets or side-

¹ *San Antonio v. Smith*, 94 Tex. 266, 59 S. W. 1109, followed in *San Antonio v. Pizzini*, 95 Tex. 1, 61 S. W. 1102.

walks, caused by the negligence or active fault of abutters, licensees, or volunteers. In such cases, where the municipality has been called upon to respond in damages because of its legal duty to keep public highways open and free from nuisances, a re-

covery over has been permitted against the principal wrongdoer, whose negligence was the real cause of the injury.² This being so, the person whose negligence resulted in the dangerous condition cannot enforce against the city the judgment against it

² Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427; Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564; Hamden v. New Haven & N. Co. 27 Conn. 158; Norwich v. Breed, 30 Conn. 535; Waterbury v. Waterbury Traction Co. 74 Conn. 152, 50 Atl. 3; District of Columbia v. Baltimore & P. R. Co. 1 Mackey, 314; District of Columbia v. Washington Gaslight Co. 9 Mackey, 39; Western & A. R. Co. v. Atlanta, 74 Ga. 774; Faith v. Atlanta, 78 Ga. 779, 4 S. E. 3; Schneider v. Augusta, 118 Ga. 610, 45 S. E. 459; Byne v. Americus, 6 Ga. App. 48, 64 S. E. 285; Severin v. Eddy, 52 Ill. 189 (*dictum*); Gridley v. Bloomington, 68 Ill. 47; Todd v. Chicago, 18 Ill. App. 565; McDonald v. Lockport, 28 Ill. App. 157; Canton v. Torrance, 151 Ill. App. 129; Centerville v. Woods, 57 Ind. 192 (action to recover for expense of refilling excavation); Catterlin v. Frankfort, 79 Ind. 547, 41 Am. Rep. 627; McNaughton v. Elkhart, 85 Ind. 384; Elkhart v. Wickwire, 87 Ind. 77 (holding defendant not liable because he was guilty of no breach of duty); Wickwire v. Angola, 4 Ind. App. 253, 30 N. E. 917; Bloomington v. Chicago, I. & L. R. Co. — Ind. App. —, 98 N. E. 188; Independence v. Jekel, 38 Iowa, 427 (assumed); Ottumwa v. Parks, 43 Iowa, 119; Blocker v. Owensboro, 129 Ky. 75, 110 S. W. 369; Bowling Green v. Bowling Green Gaslight Co. — Ky. —, 112 S. W. 917 (*dictum*); Harrodsburg v. Vanarsdall, 148 Ky. 507, 147 S. W. 1; Veazie v. Penobscot R. Co. 40 Me. 119; Portland v. Richardson, 54 Me. 46, 89 Am. Dec. 720; Portland v. Atlantic & St. L. R. Co. 66 Me. 485; Chesapeake & O. Canal Co. v. Allegany County, 57 Md. 201, 40 Am. Rep. 430; Baltimore & O. R. Co. v. Howard County, 111 Md. 176, post, 1172, 73 Atl. 656, subsequent appeal 113 Md. 404, 77 Atl. 930; Lowell v. Boston & L. R. Corp. 23 Pick. 24, 34 Am. Dec. 33; Lowell v. Short, 4 Cush. 275; Lowell v. Spaulding, 4 Cush. 277, 50 Am. Dec. 775; Boston v. Worthington, 10 Gray, 496, 71 Am. Dec. 678; Swansey v. Chace, 16 Gray, 303; Woburn v. Henshaw, 101 Mass. 193, 3 Am. Rep. 333; Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735; Stoughton v. Porter, 13 Allen, 191; Woburn v. Boston & L. R. Corp. 109 Mass. 283; Westfield v. Mayo, 122 Mass. 100, 23 Am. Rep. 202; Lowell v. Glidden, 159 Mass. 317, 34 N. E. 459 (conceded); Boston v. Coon, 175 Mass. 283, 56 N. E. 287; Detroit v. Chaffee, 70 Mich. 80, 37 N. W. 882 (action authorized by charter); Wabasha v. Southworth, 54 Minn. 79, 55 N. W. 818; Kilroy v. St. Louis. — Mo. —, 145 S. W. 769; Memphis v. Miller, 78 Mo. App. 67; Independence v. Missouri P. R. Co. 86 Mo. App. 585; Omaha

v. Philadelphia Mortgage & T. Co. 88 Neb. 519, 129 N. W. 996; Durant v. Palmer, 29 N. J. L. 544; Brooklyn v. Brooklyn City R. Co. 47 N. Y. 475, 7 Am. Rep. 469; Rochester v. Montgomery, 72 N. Y. 65; Port Jervis v. First Nat. Bank, 96 N. Y. 550; Seneca Falls v. Zalinski, 8 Hun, 571; New York v. Dimick, 49 Hun, 241, 2 N. Y. Supp. 46; Canandaigua v. Foster, 81 Hun, 147, 30 N. Y. Supp. 686, affirmed in 156 N. Y. 354, 41 L.R.A. 554, 66 Am. St. Rep. 575, 50 N. E. 971; New York v. Corn, 133 App. Div. 1, 117 N. Y. Sppp. 514; New York v. Hearst, 142 App. Div. 343, 126 N. Y. Supp. 917; New York v. Lloyd, 148 App. Div. 146, 133 N. Y. Supp. 118; Brown v. Louisburg, 126 N. C. 701, 78 Am. St. Rep. 677, 36 S. E. 166; Raleigh v. North Carolina R. Co. 129 N. C. 265, 40 S. E. 2; Gregg v. Wilmington, 155 N. C. 18, 70 S. E. 1070; Brookville v. Arthurs, 130 Pa. 501, 18 Atl. 1076; Reading v. Reiner, 167 Pa. 41, 31 Atl. 357; Ashley v. Lehigh & W. Coal Co. 232 Pac. 425, 81 Atl. 442; Chester v. First Nat. Bank, 9 Pa. Super. Ct. 517; Fowler v. Jersey Shore, 17 Pa. Super. Ct. 366; Aston Twp. v. Chester Creek R. Co. 2 Del. Co. Rep. 9; Pawtucket v. Bray, 20 R. I. 17, 78 Am. St. Rep. 837, 37 Atl. 1; San Antonio v. Talerico, 98 Tex. 151, 81 S. W. 518; Ft. Worth v. Allen, 10 Tex. Civ. App. 488, 31 S. W. 235, subsequent appeal — Tex. Civ. App. —, 39 S. W. 125; Corsicana v. Tobin, 23 Tex. Civ. App. 497, 57 S. W. 319; Newbury v. Connecticut & P. River R. Co. 25 Vt. 377; Roxbury v. Central Vermont R. Co. 60 Vt. 121, 14 Atl. 92; Richmond v. Sitterding, 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562 (assumed); Seattle v. Puget Sound Improv. Co. 47 Wash. 22, 12 L.R.A. (N.S.) 949, 125 Am. St. Rep. 884, 91 Pac. 255, 14 Ann. Cas. 1045. In Hamden v. New Haven & N. Co. supra, in which the railroad company which created the dangerous condition in the road was bound by its charter to restore all highways so as not to impair their usefulness, the court said: "It is true, as we have said, that there must be a wrong in the town in order to subject it to damages caused by a defective road. But in cases where the defect is in consequence of the neglect of a railroad to restore a highway to its former state, the wrong is rather technical than real, as respects the town. It consists rather in imputing to the town, as between it and third persons who have received injuries arising from such defects, the neglect of the railroad corporation, which, by its charter and the general laws of the state in relation to the subject-matter, was bound to restore the highway to its former state of usefulness, and thus to repair or remedy the defect which it

which he had purchased from the person injured;³ and it also follows that when the person injured receives a sum of money from the wrongdoer and releases him from liability, the municipality is likewise released;⁴ and that where an action is brought jointly against the city and the wrongdoer, a nonsuit against the wrongdoer alone is improper, and will be set aside at the instance of the city.⁵ In other words, a judgment against the city, and in favor of the creator of the dangerous condition, cannot be upheld.⁶

It has been said that one who constructs, for instance, an area in a sidewalk, does so upon the implied condition that he will maintain it in a proper and safe condition.⁷ The municipality and the actual wrongdoer are not joint tortfeasors, at least, within the meaning of the rule forbidding recourse between such persons.⁸ Indeed, it is held that if the defendant's negligent creation of a dangerous condition was the proximate cause of an accident, he cannot escape liability for indemnity to the city, although the injury resulting from the accident was perhaps augmented by an attendant condition for whose existence the municipality was solely responsible.⁹ And where, because of want of permission of the city, or for other reasons, operations conducted in the street are unlawful, the condition created is deemed to be a nuisance, rendering the author liable for any damage which the municipality is compelled to pay, ir-

alone had caused for its own interest and convenience. The town is prevented from interfering with the building of the railroad by the authority of the legislature, until the company has completed its works; yet, while in this condition, it is held liable for neglect which it has no power to prevent. It is equitable, therefore, that the party whose absolute duty it is to restore the road to its former state of usefulness should indemnify it from the consequences of such a liability; and it appears to us that it would be unjust to apply to the town, under these circumstances, the principle that there shall be no contribution between joint wrongdoers."

³ *Blocker v. Owensboro*, 129 Ky. 75, 110 S. W. 369.

⁴ *Brown v. Louisburg*, 126 N. C. 701, 78 Am. St. Rep. 677, 36 S. E. 166.

⁵ *Kilroy v. St. Louis*, — Mo. —, 145 S. W. 769.

⁶ *San Antonio v. Talerico*, 98 Tex. 151, 81 S. W. 518.

⁷ *Omaha v. Philadelphia Mortg. & T. Co.* 88 Neb. 619, 129 N. W. 996.

⁸ *Schneider v. Augusta*, 118 Ga. 610, 45 S. E. 459.

⁹ Thus, if a defective gas box in the street is the proximate cause of the fall of a pedestrian, the gas company cannot escape
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respectively of the question of negligence in creating or guarding the condition.¹⁰

The remedy of the person injured against the municipality is cumulative, and therefore it is no answer for the actual wrongdoer, who is sued for indemnity, to say that the injured person might have recovered directly in an action against him.¹¹ And the fact that the municipality has recovered indemnity from the person obstructing the street does not preclude it from maintaining a subsequent action for indemnity when it is again held liable upon another cause of action arising from the same accident.¹² The city's right to indemnity from one who placed building materials in the street is not affected by the fact that the defendant was engaged under a contract with the city, in constructing a building upon a lot belonging to it.¹³

In a Canadian case decided in 1876, the right of a municipality to recover over was denied upon the ground that its breach of duty to keep its streets in a safe condition rendered it a wrongdoer jointly with the person who placed the obstruction in the street.¹⁴ But this rule has since been changed by statute.¹⁵

In Wisconsin the question is governed by a statute which expressly makes one who creates a dangerous condition in the street primarily liable, and provides that the city may be sued in the same action with the one so primarily liable, but that the court shall suspend execution against the city

liability for indemnity to the municipality, upon the ground that the pedestrian's injury was the more serious because she fell into a depression in the pavement for which the city was, and the gas company was not, responsible. *District of Columbia v. Washington Gaslight Co.* 9 Mackey, 39.

¹⁰ *McNaughton v. Elkhart*, 85 Ind. 384.

¹¹ *Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 201, 40 Am. Rep. 430.

¹² *Newbury v. Connecticut & P. River R. Co.* 25 Vt. 377.

¹³ For it is held that in such circumstances the city's contract for the erection of the building is not an implied license to pile building materials in the street without compliance with ordinances in respect thereto. *Rochester v. Montgomery*, 72 N. Y. 65.

¹⁴ *Vespra v. Cook*, 26 U. C. C. P. 182.

¹⁵ *Atkinson v. Chatham*, 26 Ont. App. Rep. 521. And this statute probably accounts for other decisions which apparently assume that the municipality may recover indemnity in a proper case, and which are more concerned with the question whether the particular facts of the case warrant such relief. *Toronto R. Co. v. Toronto*, 24 Can. S. C. 589; *Rice v. Whitby*, 28 Ont. Rep. 598; *Mitchell v. Hamilton*, 2 Ont. L. Rep. 58.

until execution against the person primarily liable shall have been returned unsatisfied, in whole or in part.¹⁶

In this connection it is to be noted that in some cases municipalities have been denied the right to recover over against persons alleged to have been responsible for dangerous conditions in its streets, upon the ground that there was no duty on the part of such person to keep the streets in a safe condition. For instance, there are some cases which hold that, in the absence of a statutory declaration to the contrary, there is no duty on the part of an abutting owner to keep the street or sidewalk in front of his premises free from defects or obstructions. Such cases, of course, do not come within the scope of this note, for they essentially mean that the abutter was not negligent, because he owed no duty. A discussion from this point of view of the cases involving the right of a municipality which has been held liable for injuries from an unsafe condition of the streets, to recover over against the owner or occupant of abutting property, is to be found in an earlier volume in this series.¹⁷

III. General character of municipality's duty or fault.

a. Primary or secondary.

The right of the municipality to a recovery in the case of a defective sidewalk has been held to depend upon the question whether it was the primary duty of the defendant, as between himself and the municipality, to keep the sidewalk in front of his premises in repair, so as not to cause accident or injury; and that where such duty is primary, recovery over by the mu-

nicipality may be had.¹⁸ And the view is sometimes taken that where one, by his affirmative act, creates a dangerous condition in the highway, he is charged with the primary duty to keep it in a safe condition; and that in such circumstances, the parties are not *in pari delicto*.¹⁹ So, it is declared that, as between a private corporation occupying the street, and the municipality, the duty and liability of the former is primary, and that of the city secondary.²⁰ But it is probably more accurate to say, as has been said in the case of a street railroad upon which the duty has been imposed of keeping the street in repair, that, as between a pedestrian and itself, the city is primarily liable for injuries resulting from defects, but that, as between the city and the railway company, the latter is primarily liable, and may be compelled to indemnify the former for any damages it has been compelled to pay.²¹

But even where the municipality's duty is regarded as primary, it is held entitled to recovery over if there are no other circumstances which disentitle it to relief. Thus, it is held that although municipal corporations are primarily liable for injuries occasioned by obstructions or defects in their streets or sidewalks, yet if they are without fault themselves, they have a remedy over against the party who is at fault, and who has so used the streets or sidewalks as to produce the injury.²² For it is declared that the fact that the city is primarily liable for an injury occasioned by the insecurity of its streets affords no reason why the person who creates, permits, or continues a nuisance without the concurrence of the city, should not pay it for his wrongful act.²³ Indeed, it is this very fact, namely, that its liability is pred-

¹⁶ For cases involving this statute, see *Raymond v. Sheboygan*, 76 Wis. 335, 45 N. W. 125; *Cooper v. Waterloo*, 88 Wis. 433, 60 N. W. 714; *Fife v. Oshkosh*, 89 Wis. 540, 62 N. W. 541; *Somers v. Marshfield*, 90 Wis. 59, 62 N. W. 937.

¹⁷ See the note to *Seattle v. Puget Sound Improv. Co.* 12 L.R.A. (N.S.) 949.

¹⁸ *Detroit v. Chaffee*, 70 Mich. 80, 37 N. W. 882; *Ashley v. Lehigh & W. Coal Co.* 232 Pa. 425, 81 Atl. 442.

¹⁹ This position was taken in *Durant v. Palmer*, 29 N. J. L. 544, in reaching the conclusion that where the abutter is directly sued by the person injured through a dangerous condition in the sidewalk, the former cannot be heard to say that the action should have been brought against the municipality. One reason assigned was that the city was entitled to be indemnified by the author of the obstruction for the damages recovered, and that such author was primarily liable for the injury sustained. And it was held in *Wabasha v.* 40 L.R.A. (N.S.)

Southworth, 54 Minn. 79, 55 N. W. 818, that where a trapdoor is placed in a sidewalk for the convenience of abutting property, the duty, as between the property owner and the city, of maintaining it in a safe condition, devolves upon the former. See also on this point *Independence v. Missouri P. R. Co.* 86 Mo. App. 585; *Raleigh v. North Carolina R. Co.* 129 N. C. 265, 40 S. E. 2.

²⁰ *Mooney v. Edison Electric Illuminating Co.* 185 Mass. 547, 70 N. E. 933.

²¹ *Bloomington v. Chicago, I. & L. R. Co.* — Ind. App. —, 98 N. E. 188.

²² *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564.

²³ *Gridley v. Bloomington*, 68 Ill. 47; *Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 201, 40 Am. Rep. 430; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298. In the last case the court said: "The rule of law is, that one of two joint wrongdoers

icated on its constructive breach of this primary duty, rather than upon actual or active fault, that takes the situation out of the rule against recourse between persons *in pari delicto*, and allows it to obtain indemnity from the person whose actual fault caused the accident. Or, as has been said, while it is true, that the municipality is liable to the party injured, it is under no obligation to shield the actual wrongdoer from the consequence of his own neglect.²⁴

Where, however, the city's duty in respect of streets or sidewalks is not merely primary, but is exclusive, it cannot, of course, claim contribution or indemnity, since, as already noted in this discussion, there is no duty upon the part of the defendant of which liability may be predicated; the cases in which contribution or indemnity has been denied upon this ground are, of course, of no value in any aspect of the present discussion. Indeed, as already stated, a treatment from this point of view of a municipality's right of recovery over against an abutter has already been given in this series.²⁵

b. Failure to remedy condition.

Since, in the absence of actual participation in the specific act creating a dangerous condition in its highway, a municipality's liability to one who is thereby injured

is predicated of a constant, its general duty to maintain in a safe condition, the leaving which the defect or condition and the manner of notice constructive, of its existence, in an action by it for indemnity author of the danger, and so upon the theory that a danger, its failure to remedy would be remedied constituted would defeat a recovery against wrongdoer.²⁶ For the municipality to repair or conditions does not of itself *in pari delicto*.²⁷ Certain not say, as a matter of fact the fact that the municipality remedy the dangerous condition is guilty of such negligence equally guilty with the owner so as to warrant the application against recourse between wrongdoers.²⁸ To disentitle the municipality upon the ground that the dangerous condition of creation, it must appear that the defect or obstruction without guards or other precaution being sufficient that it was that the condition had been the failure of a city to remedy upon the owner's failure to

cannot have contribution from the other. It is difficult in this case to see how the city was to blame, and least of all how Robbins can impute blame to it. Robbins desired to erect a large storehouse, and to add to its convenience, wished to excavate the earth in the sidewalk in front of his lot. Without express permission from the city, but under an implied license, he makes the area. No license can be presumed from the city to leave the area open and unguarded even for a single night. The privilege extended to Robbins was for his benefit alone, and the city derived no advantage from it, except incidentally. Robbins impliedly agreed with the city that if he was permitted to dig the area, for his own benefit, that he would do it in such a manner as to save the public from danger and the city from harm. And he cannot now say that true it is you gave me permission to make the area, but you neglected your duty in not directing me how to make it, and in not protecting it when in a dangerous condition. If this should be the law, there would be an end to all liability over to municipal corporations, and their rights would have to be determined by a different rule of decision from the rights of private persons."

²⁴ *Woburn v. Boston & L. R. Corp.* 109 Mass. 283.

²⁵ See the note to *Seattle v. Puget Sound Improv. Co.* 12 L.R.A.(N.S.) 949, 40 L.R.A.(N.S.)

²⁶ *Hamden v. New Haven* Conn. 158; *Waterbury v. City of Waterbury* Conn. 74 Conn. 152, 50 Atl. 18, 70 S. E. 1070.

²⁷ *Waterbury v. Waterbury* 74 Conn. 152, 50 Atl. 18, 70 S. E. 1070; *Richardson*, 54 Me. 46, 89; *Baltimore & O. R. Co. v. Howard* Md. 176, post, 1172, 73 Atl. 6; county failed for a period to erect, or cause to be erected, upon the approach to the structure by the defendant and subsequent appeal, 113 L.R.A. 930; *Lowell v. Boston & Pick.* 24, 34 Am. Dec. 33; *Brook*, 9 Allen, 17, 85 Am. *Boylston v. Mason*, 102 Mass. 459; *Holyoke v. Hadley* 174 Mass. 424, 54 N. E. 459; *Coon*, 175 Mass. 283, 56 L.R.A. 459; *pendence v. Missouri P. R.* 585; *Seattle v. Puget Sound* 47 Wash. 22, 12 L.R.A. 949; *Am. St. Rep.* 884, 91 Pac. 1045.

²⁸ *Baltimore & O. R. Co. v. Howard* Md. 176, 73 Atl. 6, 1172, 73 Atl. 6.

²⁹ *Norwich v. Breed*, 30

tice does not affect its right to indemnity from the owner, although the ordinance imposing the duty to repair upon the owner provides that upon his failure to do so after notice, the municipal authorities may make the repairs, and charge the expense thereof to the owner.³⁰

A good reason for upholding the municipality's right to indemnity, although its failure to remedy, or cause to be remedied, the dangerous condition, may have contributed to the injury, is thus stated in a Massachusetts case: "Although the towns were required by law to keep their highways safe and convenient for travelers and all other persons lawfully passing thereon, and became liable for their negligence in this particular to the person who was injured by the obstruction which the defendant had placed in the way, they were under no obligation to him to shield him from the consequences of his own illegal act. If the person injured had preferred a claim for compensation and indemnity against him, he [would have] had no defense under which he could have successfully resisted it. He ought not to be in any more favorable condition merely because the claim in the first instance was made against a party whom he was bound to indemnify and save from loss."³¹ And since negligence cannot be imputed to a city from the manner of its exercise of a governmental function, the fact that its failure in the exercise of that function, to light a street, caused or contributed to an accident occurring on a defective portion of the street, does not affect its right to indemnity from the person upon whom, as between himself and the municipality, the primary duty of keeping the street in repair at that point devolved.³² Of course, it cannot be successfully contended that the plaintiff is not entitled to indemnity unless the defendant is solely responsible by its negligence for the accident, for such a rule would prevent a recovery in every indemnity case growing out of negligence, because, as to third parties, the negligence of the plaintiff is either admitted or established by judgment.³³

On the other hand, the city is not entitled to indemnity where its liability is predicated of the improper manner in which it constructed a sidewalk, although the negligence of a lighting company in failing to keep a lamp lighted may have contributed to the accident.³⁴

c. Consent to or supervision of acts.

Where the dangerous condition is created in a street without the permission, express or implied, of the municipality, the same is deemed to be a nuisance which renders the author liable for any damage which the municipality has been compelled to pay, irrespective of whether the author was actually negligent in creating or maintaining the condition without proper safeguards.³⁵ And the fact that the act or operation creating the dangerous condition was performed in pursuance of express authority or permission of the city does not affect its right to indemnity.³⁶ For municipal consent to create an excavation or other dangerous condition in the street is not consent that the work shall be carried on in an unlawful manner, or that the dangerous condition shall be let unguarded.³⁷ And a reservation of power on the part of the municipality to revoke the license in case of failure to comply with the terms does not affect the liability of the licensee.³⁸ And the fact that a permit to give an exhibition is made "subject to such restrictions and safeguards as the police department may determine is necessary" does not deprive the city of the right to indemnity in the case of one who is killed by an explosion of fireworks so maintained or handled as to constitute a nuisance.³⁹ So, the fact that a person conducting operations in the street adopts precautionary measures under the direction of the mayor does not relieve the former from the duty of adopting such additional measures as the safety of travelers require; and therefore he cannot urge his compliance with the directions of the mayor to defeat the city's right to be indemnified for damages which it has been compelled to pay to a person thereby injured.⁴⁰

³⁰ Ashley v. Lehigh & W. Coal Co. 232 Pa. 425, 81 Atl. 442.

³¹ Swansey v. Chace, 16 Gray, 303.

³² Bloomington v. Chicago, I. & L. R. Co. — Ind. App. —, 98 N. E. 188.

³³ Baltimore & O. R. Co. v. Howard County, 113 Md. 404, 77 Atl. 930.

³⁴ Denison v. Sanford, 2 Tex. Civ. App. 661, 21 S. W. 784.

³⁵ McNaughton v. Elkhart, 85 Ind. 384.

³⁶ Gridley v. Bloomington, 68 Ill. 47; Canton v. Torrance, 151 Ill. App. 129.

³⁷ Waterbury v. Waterbury Traction Co. 74 Conn. 152, 50 Atl. 3; Centerville v. Woods, 57 Ind. 192; New York v. Corn, 133

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App. Div. 1, 117 N. Y. Supp. 514; Brown v. Louisville, 126 N. C. 701, 78 Am. St. Rep. 677, 36 S. E. 166; Corsicana v. Tobin, 23 Tex. Civ. App. 492, 57 S. W. 319.

³⁸ Troy v. Troy & L. R. Co. 49 N. Y. 657.

³⁹ New York v. Hearst, 142 App. Div. 343, 126 N. Y. Supp. 917. And an abutting owner cannot escape liability to the city for damages which it has been compelled to pay for injuries inflicted by the fall of a defective awning, by showing that the municipality's chief of police inspected and accepted the awning. Byne v. Americus, 6 Ga. App. 48, 64 S. E. 285.

⁴⁰ Ottumwa v. Parks, 43 Iowa, 119.

ordinances as to guarding dangers, and that it may recover over from one failing to observe the required precautions.⁴⁵

Where the nuisance consists merely in the location, and not in the use, guarding, or proper maintenance of the obstruction to which the municipality has consented, the parties are deemed to be *in pari delicto* within the rule against recourse between joint wrongdoers.⁴⁶ This latter principle has been regarded, though erroneously, it is thought, as making consent a bar to a claim for indemnity, so as to disentitle a municipality which has consented, for instance, to the placing of a grating in the sidewalk, to recover over for damages caused by defects in the original construction.⁴⁷ But a complete answer to this is found in other decisions from the same jurisdiction, declaring that consent by a municipality to a person to do a lawful act merely permits it to be done in a careful, prudent, and lawful manner, and that when it is performed in any other manner, and injury to third persons ensues, the author of the injury is liable therefor.⁴⁸ The correct rule seems to be that if the municipality permits a thing to be done upon the highway which is in its very nature unlawful, and will necessarily result in a dangerous nuisance, and it is called upon to pay damages, it cannot recover over against its licensee, since both are *in pari delicto*; but that if the permit is to do a thing which may or may not result in a dangerous nuisance, according to the manner and the circumstances in which the licensee acts, and he acts in such a way as to create a dangerous obstruction or nuisance, the municipality may recover over from its licensee any damages which it has been obliged to pay, because in such a case the parties are not *in pari delicto*.⁴⁹

⁴⁵ *Corsicana v. Tobin*, 23 Tex. Civ. App. 492, 57 S. W. 319.

⁴⁶ Thus, where a company has contracted to light the city streets, and places a pole with the city's consent in such a position as to render it dangerous, the city is deemed to be *in pari delicto* with the company, and is not entitled to indemnity for damages which it has been compelled to pay by one thereby injured. *Geneva v. Brush Electric Co.* 50 Hun, 581, 3 N. Y. Supp. 595.

⁴⁷ Thus, the case of *Geneva v. Brush Electric Co.* supra, was said in *Canandaigua v. Foster*, 81 Hun, 147, 30 N. Y. Supp. 686, affirmed in 156 N. Y. 354, 41 L.R.A. 554, 66 Am. St. Rep. 575, 50 N. E. 971, to make recovery over out of the question in respect of defects in the original construction of the grating. This, however, is clearly a misapprehension of the *Geneva* case, for it places its decision expressly upon the ground that the nuisance consisted in the mere location, and not in the use, manner of placing, and 40 L.R.A. (N.S.)

the like. And it is to be observed that the *Canandaigua* case allows the municipality to recover over upon the ground that the defect which caused the injury was the result of a reconstruction of the grating without the municipality's consent, — a very thin distinction at the most.

⁴⁸ *Port Jervis v. First Nat. Bank*, 96 N. Y. 556; *New York v. Brady*, 81 Hun, 440, 30 N. Y. Supp. 1121, affirmed in 151 N. Y. 611, 45 N. E. 1122.

⁴⁹ This is the doctrine of *New York v. Hearst*, 142 App. Div. 343, 126 N. Y. Supp. 917, holding that a municipality did not place itself *in pari delicto* with one engaged in exploding fireworks, so as to disentitle it to indemnity in the case of one thereby killed, by the mere fact that it had during a political campaign, suspended an ordinance forbidding the explosion of fireworks, since such action on the city's part did not necessarily and as a matter of law permit the creation of a nuisance, it being said that such an exhibition might or might not be a nuisance, depending upon the place at which it was given and the surrounding circumstances; and that one who availed himself of such dispensation was bound not to do so in such an unlawful manner as to create a nuisance. L. A. W.

MARYLAND COURT OF APPEALS.

BALTIMORE & OHIO RAILROAD COMPANY, Appt.,
v.

HOWARD COUNTY COMMISSIONERS.

(111 Md. 176, 73 Atl. 656.)

Indemnity — joint tortfeasors — negligence of one constructively liable — effect.

1. Mere delay by public authorities for a period of three years, to place a barrier along a bridge approach rendered unsafe by a change in the grade by a railroad company, is not such delinquency as will prevent them from recovering over against the railroad company in case they are held liable for injuries due to the absence of the railing.

Note. — Conclusiveness of judgment against a constructive tortfeasor in a subsequent action for contribution or indemnity.

For a discussion of the various phases of the substantive question of the right of one constructively liable for a tort to recover indemnity or contribution from the person actually responsible for its commission, see the note to *Scott v. Curtis*, ante, 1147, and the other notes therein referred to. The limitations as to scope, enumerated in those notes, also apply to this.

From the note to *Scott v. Curtis*, ante, 1147, and the other notes to which it refers, it is clear that the rule which forbids con-

Judgment — against one constructively liable for tort — effect on indemnitor.

2. In case the one alleged to be ultimately liable for an injury due to a defect in a highway did not participate in an action to hold the public authorities liable for the injury, the judgment obtained against such authorities is not conclusive upon him as to the facts necessary to make a cause of action, although it is admissible in evidence to show that suit was brought and recovery had.

Evidence — condition and change in highway — action against indemnitor.

3. In an action by county commissioners to hold a railroad company liable for damages which they had been compelled to pay because of a defect in a highway due to a

change made by the company, it is admissible as to the condition of the highway before the changes were made, and the character of the changes.

Appeal — admission of evidence — nonprejudicial.

4. The admission in an action by county commissioners to hold a railroad company liable for personal injuries that the company had been compelled to pay, because of a defect in a highway alleged to be the act of the railroad, and an agreement made after the fact to relieve the railroad of further liability after making repairs in a highway, is not, although it is prejudicial error, because of its tendency to prejudice the defendant.

(June 30, 1909.)

tribution or indemnity between joint tortfeasors does not operate to prevent one who has been guilty of no actual wrong, but has nevertheless been held liable for the acts of another, to recover indemnity from such other. The present inquiry, of course, has to do with the question of how far the action for indemnity and the parties thereto are controlled and concluded by the former judgment.

Conclusiveness upon present plaintiff.

The plaintiff in the action for indemnity is concluded by a judgment in the former action rendered against him, and in favor of his codefendant, against whom he is now seeking indemnity. *Kansas City v. Mitchener*, 85 Mo. App. 36; *Seattle v. Northern P. R. Co.* 63 Wash. 129, 114 Pac. 1038.

Conclusiveness against present defendant—generally.

Having had notice of the former action, and having failed to come in and defend, the present defendant cannot object to the conclusiveness of the judgment upon the ground that the issues were erroneously referred, because, the action being in tort, it was triable by a jury. *Prescott v. LeConte*, 83 App. Div. 482, 82 N. Y. Supp. 411, affirmed without opinion in 178 N. Y. 585, 70 N. E. 1108.

—necessity of notice of prior suit.

It has been generally declared that the ultimate fact of the liability of the author of the act which occasioned the injury does not depend upon his having had notice, or its equivalent, of the former action against the person who is also liable for the damage occasioned by virtue of his constructive duty in the premises; but that the former's liability rests upon his original liability to all persons who may have suffered damages from his affirmative act of negligence. The only object of the notice in such a case is to enable the defendant in the former suit to avail himself of his right to impose the burden of the defense upon the party ultimately

liable, and to estop him from denying injury by the judgment in the former action. The question of whether or not a judgment again contesting the facts of the former judgment depends. *Port Jervis v. Nat. Bank*, 96 N. Y. 550. The absence of notice or its non-affecting the right of action, and although a minor point, it is held that in such circumstances a judgment is not admissible as a defense. (*Chester v. Schaffer*, 24 Pa. 101.) It is held in a number of cases that the effect of the omission to give notice is to impose upon the present defendant the burden of again litigating the facts, establishing the actionability of the former judgment is a defense for this purpose. *Baltimore Co. v. Howard County*, 113 Md. 930; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Oceanic Steam Navigation Co. v. Transatlantica Espanola*, 663, 39 N. E. 360.

The United States Supreme Court has held the view that the defendant in an action for indemnity need not have had actual notice of the prior action, but is bound by the judgment in the former action, knowledge that such suit was pending being sufficient. *Cargo v. Robbins*, 2 Black. 411; *Robbins v. Chicago*, 4 Wall. 427.

And especially where a party has been injured by the act of another, and that if a recovery is obtained by one else, and that if a recovery is obtained by one else, it will be because of his negligence, and that if a recovery is obtained by one else, it is sufficient that he had knowledge of the suit and could have so desired. *Missouri P. R. Co. v. Nebraska*, 35 Neb. 267, 37 Am. St. Rep. 76.

On the other hand, the view that mere knowledge of the pending action is insufficient to conclude the indemnitor, and that he must be given an opportunity to be heard, is also supported. (*Seattle v. Northern P. R. Co.* 63 Wash. 129, 114 Pac. 1038), or, at least, if the defendant has been notified that the defendant in the former action claimed a right of

(*Oskaloosa v. Pinkerton*, 51

A PPEAL by defendant from a judgment of the Circuit Court for Carroll County in plaintiff's favor in an action brought to hold defendant liable for damages which plaintiff had been compelled to pay because of defendant's alleged wrongful act and neglect. Reversed.

The facts are stated in the opinion.

Messrs. Francis Neal Parke and James A. C. Bond for appellant.

Messrs. John E. Dempster and Guy W. Steele for appellees.

Briscoe, J., delivered the opinion of the court:

The question in this case is one of indemnity, and arises in the following manner: On the 13th of September, 1907, Mrs.

W. 689); and that a notice to come in and assume the defense is insufficient where it does not state the cause or nature of action, or show in what way the person notified may be interested (*Lebanon v. Mead*, 64 N. H. 8, 4 Atl. 392).

And where the person injured brought a joint action against the constructive and the actual wrongdoer, and afterwards discontinued as to the latter, it was held that the latter was in the same position that he would have been if he had not been joined in the action in the first instance, and that since, after the discontinuance as to him, the city did not request him to enter and defend the suit, the judgment therein had no force or effect against him. *Boston v. Brooks*, 187 Mass. 286, 73 N. E. 206.

And it is held that the party originally sued cannot exclude the one from whom he proposes to seek indemnity if he is held liable, from defending the original suit, and then claim that the judgment is binding upon him; and therefore a notice is insufficient which informed the present defendant that the former suit was pending, and that he would be looked to for indemnity and expected to assist in the prosecution of that suit, where no offer was made to surrender the defense of that suit to him. *Consolidated Hand-Method Lasting Mach. Co. v. Bradley*, 171 Mass. 127, 68 Am. St. Rep. 409, 50 N. E. 464.

So, it is held that the defendant is not concluded by the prior judgment, where he was refused the right to aid in the defense of the former action (*Lewiston v. Isaman*, 19 Idaho, 653, 115 Pac. 404); as, for instance, where he offered a good defense to the former action and the defendant therein failed to plead it (*Seattle v. Northern P. R. Co.* 47 Wash. 552, 92 Pac. 411, subsequent appeal, 63 Wash. 129, 114 Pac. 1038).

—effect of notice or its equivalent.

Where the present defendant had notice of the former suit or its equivalent, the judgment therein is conclusive upon him, so far as it relates to matters necessarily included in the adjudication. *Washington* 40 L.R.A. (N.S.)

Agnes Hill, widow of Alexander S. Hill, late of Baltimore county, deceased, recovered a judgment for \$6,000 and costs for the death of her husband by reason of the alleged negligence of the county commissioners in permitting a public highway to be so maintained as to be unsafe for public travel. The judgment was paid by the county, and this suit is brought by the county against the appellant corporation as the alleged actual wrongdoer, to recover the amount it was compelled to pay. The public road where the accident happened was situate in Howard county, and was under the control and supervision of the county commissioners. The road led out of Howard county over the Patapsco river to the village of Ilchester, in Balti-

Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564; *Bloomington v. Roush*, 13 Ill. App. 341; *Harrodsburg v. Vanarsdall*, 148 Ky. 507, — L.R.A. (N.S.) —, 147 S. W. 1; *Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 201, 40 Am. Rep. 430; *Rochester v. Montgomery*, 72 N. Y. 65; *Reynolds v. Alderman*, 54 Misc. 73, 103 N. Y. Supp. 863; *Grand Forks v. Paulsness*, 19 N. D. 293, ante, 1158, 123 N. W. 878; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Todd v. Chicago*, 18 Ill. App. 565; *McNaughton v. Elkhart*, 85 Ind. 384; *Bloomington v. Chicago, I. & L. R. Co.* — Ind. App. —, 98 N. E. 188; *Campbell v. Somerville*, 114 Mass. 334; *Lebanon v. Mead*, 64 N. H. 8, 4 Atl. 392; *Boston & M. R. Co. v. Brackett*, 71 N. H. 494, 53 Atl. 304; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Seneca Falls v. Zalinski*, 8 Hun, 571; *Fowler v. Jersey Shore*, 17 Pa. Super. Ct. 366; *Pawtucket v. Bray*, 20 R. I. 17, 78 Am. St. Rep. 837, 37 Atl. 1).

In other words, the judgment is conclusive that the plaintiff in the first action was entitled to recover (*Port Jervis v. Erie R. Co.* 59 Misc. 623, 111 N. Y. Supp. 851) from the plaintiff in the present action. *Waterbury v. Waterbury Traction Co.* 74 Conn. 152, 50 Atl. 3; *McArthur v. Ogletree*, 4 Ga. App. 429, 61 S. E. 859; *Faith v. Atlanta*, 78 Ga. 779, 4 S. E. 3; *Catterlin v. Frankfort*, 79 Ind. 547, 41 Am. Rep. 627; *Bloomington v. Chicago, I. & L. R. Co.* — Ind. App. —, 98 N. E. 188; *Harrodsburg v. Vanarsdall*, 148 Ky. 507, — L.R.A. (N.S.) —, 147 S. W. 1; *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 30 Am. St. Rep. 633, 31 N. E. 987; *Lexington v. Aetna Indemnity Co.* 155 N. C. 219, 71 S. E. 214; *Grand Forks v. Paulsness*, 19 N. D. 293, ante, 1158, 123 N. W. 878; *Reading v. Reiner*, 167 Pa. 41, 31 Atl. 357.

Specifically, the judgment is conclusive, —that the injury occurred as the result of the negligent act, or the negligent creation or maintenance of the condition, alleged. *Todd v. Chicago*, 18 Ill. App. 565; *Waterbury v. Waterbury Traction Co.* 74

more county, over and across a bridge which was used by the citizens of those counties in passing and repassing to and from their respective counties. The bill of particulars filed in the case of Hill v. County Commissioners states that the death of Dr. Hill was caused, first, by the wrongful act, neglect, and default of the county commissioners of Howard county in suffering their public road in Howard county, near the village of Ilchester, at the time of the fall and the injuries so sustained therefrom, and for a long time previous thereto, to be so constructed, out of repair, or so maintained, as to be unsafe for travel, by reason of defendant having or leaving a steep or dangerous embankment or abutment of the bridge, to wit, the upstream

wing or retaining wall guards, railings, or safe sufficient guards, railing to provide against danger or which might reasonably and reasonable use a public highway at the place second, that the death caused by the wrongful default of the county of Howard county, in suffering the Howard county side of the fall and the injuries for a long time previous and remain with an unsafe approach or embankment, and dangerous retaining wall left or upstream edge of said

Conn. 153, 50 Atl. 3; District of Columbia v. Baltimore & P. R. Co. 1 Mackey, 314; McArthur v. Ogletree, 4 Ga. App. 429, 61 S. E. 859; Canton v. Torrance, 151 Ill. App. 129; Bloomington v. Roush, 13 Ill. App. 341; Todd v. Chicago, 18 Ill. App. 565; Catterlin v. Frankfort, 79 Ind. 547, 41 Am. Rep. 627; McNaughton v. Elkhart, 85 Ind. 384; Bloomington v. Chicago, I. & L. R. Co. — Ind. App. —, 98 N. E. 188; Costa v. Yochim, 104 La. 170, 28 So. 992; Veazie v. Penobscot R. Co. 49 Me. 119; Portland v. Richardson, 54 Me. 46, 89 Am. Dec. 720; Boston v. Worthington, 10 Gray, 496, 71 Am. Dec. 678; Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735; West Boylston v. Mason, 102 Mass. 341; Campbell v. Somerville, 114 Mass. 334; Lincoln v. First Nat. Bank, 67 Neb. 401, 60 L.R.A. 923, 108 Am. St. Rep. 690, 93 N. W. 698; Boston & M. R. Co. v. Sargent, 72 N. H. 455, 57 Atl. 688; Seneca Falls v. Zalinski, 8 Hun, 571; New York v. Brady, 81 Hun, 440, 30 N. Y. Supp. 1121, affirmed in 151 N. Y. 611, 45 N. E. 1122; New York v. Corn, 133 App. Div. 1, 117 N. Y. Supp. 514; New York v. Hearst, 142 App. Div. 343, 126 N. Y. Supp. 917; New York v. Lloyd, 148 App. Div. 146, 133 N. Y. Supp. 118; Reading v. Reiner, 167 Pa. 41, 31 Atl. 357; Fowler v. Jersey Shore, 17 Pa. Super. Ct. 366; Seattle v. Saulez, 47 Wash. 365, 92 Pac. 140; Seattle v. Regan, 52 Wash. 262, 132 Am. St. Rep. 963, 100 Pac. 731;

—and that it was not caused either by the intervening act of a stranger (Byne v. Americus, 6 Ga. App. 48, 64 S. E. 285), or the contributory negligence of the person injured. Waterbury v. Waterbury Traction Co. 74 Conn. 152, 50 Atl. 3; Todd v. Chicago, 18 Ill. App. 565; McNaughton v. Elkhart, 85 Ind. 384; Portland v. Richardson, 54 Me. 46, 89 Am. Dec. 720; Boston v. Worthington, 10 Gray, 496, 71 Am. Dec. 678; Boston & M. R. Co. v. Sargent, 72 N. H. 455, 57 Atl. 688 (joint judgment against plaintiff and defendant, which plaintiff paid); Oceanic Steam Nav. Co. v. Campana Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360; New York v. Brady, 81 Hun, 440, 30 N. Y. Supp. 1121, affirmed in 151 40 L.R.A. (N.S.)

N. Y. 611, 45 N. E. 1122; LeConte, 83 App. Div. 482 411, affirmed without opinion 585, 70 N. E. 1108; New York App. Div. 1, 117 N. Y. Supp. v. Hearst, 142 App. Div. Supp. 917; Fowler v. Jersey Shore, 17 Pa. Super. Ct. 366; Seattle v. 365, 92 Pac. 140;

—and that the damages amount of the former judgment v. Waterbury Traction Co. Atl. 3; McArthur v. Ogletree, 4 Ga. App. 429, 61 S. E. 859; Todd v. App. 565; Catterlin v. Frankfort, 79 Ind. 547, 41 Am. Rep. 627; McNaughton v. Elkhart, 85 Ind. 384; Costa v. 170, 28 So. 992; Veazie v. 49 Me. 119; Portland v. Richardson, 54 Me. 46, 89 Am. Dec. 720; Boston, 10 Gray, 496, 71 Am. Dec. 678; Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735; West Boylston v. Mason, 102 Mass. 341; Campbell v. Somerville, 114 Mass. 334; Lincoln v. First Nat. Bank, 67 Neb. 401, 60 L.R.A. 923, 108 Am. St. Rep. 690, 93 N. W. 698; Boston & M. R. Co. v. Twiss, 35 Neb. 267, 437, 53 N. W. 76; Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360; New York v. Brady, 81 Hun, 440, 30 N. Y. Supp. 1121, affirmed in 151 N. Y. 611, 45 N. E. 1122; Prescott v. App. Div. 482, 82 N. Y. Supp. without opinion in 178 N. Y. 1108; Vogemann v. Americus, 6 Ga. App. 48, 64 S. E. 285; Co. 131 App. Div. 216, 115 N. Y. Supp. 133; New York v. Corn, 133 App. Div. 1, 117 N. Y. Supp. 514; New York v. Lloyd, 148 App. Div. 146, 133 N. Y. Supp. 118; Lexington v. Co. 155 N. C. 219, 71 S. E. 270; Jersey Shore, 17 Pa. Super. Ct. 366; Seattle v. Saulez, 47 Wash. 365, 92 Pac. 140; Trunk R. Co. v. Latham, 17 Pa. Super. Ct. 366; it is held that the plaintiff is entitled to recover only single damages, where

ty approach or embankment of the bridge, without guards, railings, or safeguards, or without sufficient or adequate guards, railings, or safeguards to provide against dangers arising, or which might reasonably arise, from the ordinary and reasonable use of the bridge and the approach thereof as part of the public highway; and that whilst Dr. Hill was driving as aforesaid on and along the road to and upon the approach and abutment of the bridge, at the time and place in Howard county, and while using due and reasonable care and caution, unavoidably drove over the wing or retaining wall of the abutment so forming the edge or side of the approach or abutment of the bridge, and from the fall resulting he received mortal injuries from which death ensued.

The declaration in the present case alleges practically the same negligence against this defendant corporation; that is, that in or about the year 1902-1903, the Baltimore & Ohio Railroad Company in the relocation of its right of way and the roadbed and tracks of its railroad, under and by virtue of the authority of its charter granted by the state of Maryland, obstructed and changed the location of the highway as it then was, and also dumped or placed large quantities of earth and

stones therein, thereby raising the surface thereof as it approached the bridge above the level it had previously been, and by so doing rendered the road at the approach to the bridge unsafe and dangerous by reason of the fact that the wing walls of the abutments mentioned no longer extended above the bed of the road of sufficient height to guard the traveling public from going out of the road over the embankments thereof into the river below, a distance of about 18 feet; that it was the duty of the defendant to have raised the abutments or wing walls to their former height above the level of the bed of the highway, or to have provided and maintained suitable, safe, and proper guard rails at this point to protect those using the road from going over the embankment, so that all persons (together with their horses, vehicles, etc.) desiring to travel in and upon the road, and to cross and recross the bridge, might do so with safety by night or by day, while using due care and caution. It also charges that by reason of its failure to raise the abutments or wing walls along the embankments thereof in Howard county, to their former height above the level of the highway as they existed before the surface of the same was raised by the defendant, or by placing ade-

excess thereof in the former action was based on his own constructive negligence. *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33.

As to whether a judgment against one person is *prima facie* evidence of the amount of damages against another liable over, who had no notice of the original suit, see the note in 16 L.R.A. (N.S.) 911.

The only effect of the settling of the former suit without judgment is to leave open the questions which would have been conclusive upon the present defendant if a judgment had been rendered. *Wabasha v. Southworth*, 54 Minn. 79, 55 N. W. 818.

The judgment is, of course, not conclusive as to matters not litigated or material to the recovery in the former suit (*Boston & M. R. Co. v. Sargent*, 70 N. H. 299, 47 Atl. 605, for subsequent appeal, see 72 N. H. 455, 57 Atl. 688; *Boston & M. R. Co. v. Brackett*, 71 N. H. 494, 53 Atl. 304; *Fowler v. Jersey Shore*, 17 Pa. Super. Ct. 366), and even if notified of the former action, the present defendant is not estopped to show that he was under no duty in respect of the particular act or condition, and that, for that or other reasons, it was not through his fault that the accident happened. *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Byne v. Americus*, 6 Ga. App. 48, 84 S. E. 285; *McDonald v. Lockport*, 28 Ill. App. 157; *Catterlin v. Frankfort*, 79 Ind. 547, 41 Am. Rep. 627; *McNaughton v. Elkhart*, 85 Ind. 384; *Elkhart v. Wickwire*, 87 Ind. 77; *Boston v. Worthington*, 10 Gray, 496, 40 L.R.A. (N.S.)

71 Am. Dec. 678; *Bloomington v. Chicago, I. & L. R. Co.* — Ind. App. —, 93 N. E. 188; *Lansing v. Detroit, L. & N. R. Co.* 129 Mich. 403, 89 N. W. 54; *St. Joseph v. Union R. Co.* 116 Mo. 636, 38 Am. St. Rep. 626, 22 S. W. 794; *Lincoln v. First Nat. Bank*, 67 Neb. 401, 60 L.R.A. 923, 108 Am. St. Rep. 690, 93 N. W. 698; *Troy v. Troy & L. R. Co.* 3 Lans. 270; *New York v. Lloyd*, 148 App. Div. 146, 133 N. Y. Supp. 118; *Grand Forks v. Paulsness*, 19 N. D. 293, ante, 1158, 123 N. W. 878; *Reading v. Reiner*, 167 Pa. 41, 31 Atl. 357; *Fowler v. Jersey Shore*, 17 Pa. Super. Ct. 366; *Richmond v. Sitterding*, 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562; *Seattle v. Regan*, 52 Wash. 262, 132 Am. St. Rep. 963, 100 Pac. 731. Indeed, it is held that if the record does not show that the present defendant was the author of the act or condition, the plaintiff must establish such fact in order to render the judgment conclusive (*Coboes v. Morrison*, 42 Hun, 216); but the present defendant is estopped to deny that he was negligent where, because he had direct control of the premises or condition, the negligence which the former action established was necessarily his negligence (*Bloomington v. Roush*, 13 Ill. App. 339).

And a former judgment does not prevent the defendant from asserting that, although both he and the plaintiff were in the wrong, yet, as between themselves, there is no good reason why he should indemnify the plaintiff (*Westfield Gas & Mill. Co. v. Noblesville & E. Gravel Road Co.* 13 Ind. App. 481, 55

quate and sufficient guard rails thereon to provide against the danger ensuing or which might ensue from the use of the road and bridge as a public highway at this place, whereby the citizens of said county and the public generally were unable to pass and repass over the bridge with safety, while using due care as they had been accustomed to, and thereby the defendant by this neglect suffered and permitted the plaintiff to become liable to the citizens of the county and the public generally for all damages that might accrue to the property and person of the citizens of the county and the public generally, for injuries received in traveling over the highway, accruing by reason of the unsafe condition thereof caused by the changing of the roadbed and the surface thereof, made by the defendant without guarding and protecting the same. It further alleges that the death of Dr. Hill was caused and occurred by reason of the unprotected and unguarded approach to the bridge and the embankments thereof, caused by the action, omission, and work of the defendant corporation, and that the defendant is bound in law to reimburse and pay to the plaintiff the damages and losses it has been compelled to pay out, occasioned or accruing by the defendant's wrongful act

and neglect. The trial resulted in a verdict and judgment in favor of the plaintiff for the sum of \$6,506 with interest and costs, and from this judgment the defendant corporation has appealed.

There were thirty-two bills of exceptions reserved at the trial of the case. Thirty of them relate to the admission or rejection of testimony, one to the overruling of the defendant's special exception to the plaintiff's first, second, and fourth prayers, and the remaining exception to the granting of the plaintiff's prayers and to the defendant's rejected prayers. The duty imposed upon county commissioners in this state under §§ 1 and 2 of article 25 of the Code, and the legal liability on the part of the county for injuries from a neglect of duty to keep the roads in repair and in a safe condition, have been settled by repeated decisions of this court. *Baltimore County v. Wilson*, 97 Md. 209, 54 Atl. 71, 56 Atl. 596; *Adams v. Somerset County*, 106 Md. 197, 66 Atl. 695. In *Garrett County v. Blackburn*, 105 Md. 230, 66 Atl. 31, it was said the duty of maintaining in a safe condition the approach leading to the bridge in question, as well as all other parts of the public road, clearly rests on the county commissioners. But, while this is true, it is also well settled

Am. St. Rep. 244, 41 N. E. 955); and in such circumstances he may, for the purpose of defeating the action for indemnity, show that the plaintiff was guilty of actual negligence contributing to the injury (*Boston & M. R. Co. v. Brackett*, 71 N. H. 494, 53 Atl. 304; *Boston & M. R. Co. v. Sargent*, 72 N. H. 455, 57 Atl. 688); and the former judgment leaves open the question as to who is charged with the primary duty as between the plaintiff and the defendant in the action for indemnity (*Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 30 *Am. St. Rep.* 685, 31 N. E. 987; *New York v. Brady*, 77 Hun, 241).

If the plaintiff in the action for indemnity was held liable in the original action on the ground of some negligence of his own, and if the extent of his liability was determined within certain limits by the degree of his own culpability or of that of the present defendants, then it cannot be held that necessarily, and as a matter of law, the defendants in the action for indemnity are liable to reimburse the plaintiff therein to the extent of the judgment recovered in the original suit, even if the present defendants have been properly notified to come in and defend that suit. *Consolidated Hand-Method Lasting Mach. Co. v. Bradley*, 171 Mass. 127, 68 *Am. St. Rep.* 409, 50 N. E. 464, involving an action by a master who had been held liable for the death of his servant caused by coming in contact with a defective electric light, to recover indemnity from 40 L.R.A. (N.S.)

the electric lighting company upon the theory that the current furnished by it was excessive, and that the electric light was defective.

In *Boston & M. R. Co. v. Sargent*, 70 N. H. 299, 47 Atl. 605, holding that a railroad company which has been held liable for damages in some respects, at least, resulting from the act of a shipper, cannot have indemnity unless it shows that, by exercise of proper care, it could not have prevented the injury, it was further held that since such fact was not litigated in the former suit, it was incumbent upon the plaintiff to establish that it could not have prevented the injury by the exercise of such care. For subsequent appeal in this case, see 72 N. H. 455, 57 Atl. 688.

While not exactly pertinent to the present discussion, as already noted, it is interesting to observe in this connection, a case involving a statute expressly giving the municipality a right of action over against one who obstructs a highway, and holding that where a municipality has been held liable for such obstructions, it appearing also that the road was otherwise defective and that the municipality was responsible therefor, the former judgment is not conclusive unless it is shown on the face of the record that such recovery was had on account of the obstructions. *Littleton v. Richardson*, 34 N. H. 179, 66 *Am. Dec.* 759.

L. A. W.

by the decisions of the Supreme Court of the United States and by those of this court, that the corporation has a remedy over against the party that is in fault, and has so used the highway as to produce the injury, unless it was also a wrongdoer. *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 221, 40 Am. Rep. 430; *Eyler v. Allegany County*, 49 Md. 269, 33 Am. Rep. 249; *Rowe v. Baltimore & O. R. Co.* 82 Md. 504, 33 Atl. 761; *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 327, 40 L. ed. 718, 16 Sup. Ct. Rep. 564.

But it is earnestly contended upon the part of the appellant that, upon the facts of this case as set out in the record, the failure of the appellee to protect its highway from 1903 to 1906 was such a conscious and unlawful default upon its part as to relieve the original wrongdoer, assuming the appellant to have been the original tortfeasor, from all liability. In other words, the law will not enforce indemnity between conscious or actual joint tortfeasors. This rule is thus laid down by Mr. Pollock in his work on the Law of Torts, p. 199: "As between joint wrongdoers themselves, one who has been sued alone and compelled to pay the whole damages has no right to indemnity or contribution from the other, if the nature of the case is such that he 'must be presumed to have known that he was doing an unlawful act.'" And Mr. Beven in his work on Negligence in Law, p. 53, says: "The principle that, to fix liability for injuries brought about through a complicated state of facts, the last conscious agency must be sought, and the consideration that if, between the agency setting at work the mischief and the actual mischief done, there intervenes a conscious agency which might or should have averted mischief, the original wrongdoer ceases to be liable, afford the clues for the unraveling the cases. On that other hand, it must be borne in mind that, though there may intervene various stages in the development of the mischief, yet, if none of these is due to a conscious volition, the last conscious agent continues to be liable." Upon this question and in the class of cases like the one at bar, however, this court in *Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 221, 40 Am. Rep. 430, said: "We do not perceive from the nature and facts of this case any ground for defeating the appellee's suit, because of the principle of *pari delicto*." And in *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 327, 40 L. ed. 718, 16 Sup. Ct. Rep. 568, Mr. Justice White, in delivering the opinion of the court, said: 40 L.R.A. (N.S.)

The principle announced in *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298, "qualifies and restrains within just limits the rigor of the rule which forbids recourse between wrongdoers. In the leading case of *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 32, 34 Am. Dec. 33, the doctrine was thus stated: 'Our law, however, does not in every case disallow an action by one wrongdoer against another to recover damages incurred in consequence of their joint offense. The rule is: *In pari delicto potior est conditio defendentis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his codefendant for damages incurred by their joint offense. In respect to offenses in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them although both parties are wrongdoers.'" In *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 487, 7 Am. Rep. 469, the same rule was applied, the court saying: "Where the parties are not equally criminal, the principal delinquent may be held responsible to a codefendant for damage paid by reason of the offense in which both were concerned in different degrees as perpetrators."

This brings us, then, to the consideration of the questions arising upon the rulings of the court upon the prayers and the admissibility of the evidence. There was no error in the ruling of the court in granting the plaintiff's first and second prayers. The first prayer was practically approved by this court in the *Chesapeake & O. Canal Case*, supra, and the second submitted the law as applicable to the facts of the case.

The plaintiff's third prayer is clearly objectionable. It reads as follows: If the jury shall find the facts stated in the plaintiff's first prayer, then they are instructed that, under the pleadings and the evidence in this case, the judgment obtained against the now plaintiff, which was offered in evidence, is conclusive upon the defendant as to the damages suffered by the said Agnes Hill, widow of the said deceased, of the fact that due care was used by the said Alexander Scott Hill at the time of the accident mentioned in the evidence, and that the approach to said bridge at said place was unsafe and dangerous; there being no evidence in the case attacking the validity of said judgment, or its obtention and rendition, or to show

that it was obtained by collusion between the parties thereto. In the present case it is admitted that no notice of suit was given the appellant, nor did it participate in the suit between Mrs. Hill and the appellee, wherein the judgment was recovered. Under this state of facts the judgment was clearly not conclusive upon the defendant, but was admissible as part of the plaintiff's case. *Key v. Dent*, 14 Md. 98; *Grafflin v. State*, 103 Md. 171, 63 Atl. 373, 7 Ann. Cas. 1061; *Parr v. State*, 71 Md. 220, 17 Atl. 1020. In *Elliott on Roads and Streets*, § 870, it is said: "When a municipality has been compelled to pay damages for injuries sustained by reason of the wrongful acts of a third person which render its streets unsafe, it has a remedy over against him, unless as to such person the corporation is itself a wrongdoer. Where such a remedy over exists, it is customary and proper for the city to notify the original wrongdoer of the pendency of the action against it, and request him to come in and defend. The advantage to the city in so doing consists in the fact that he will then be concluded by the judgment as to the existence of the defect, the liability of the corporation for the injury, and the amount of damages occasioned by the defect. He will not, however, be estopped from showing that he was under no obligation to keep the street in a safe condition and was free from fault. The omission to give such notice does not affect the right of action, but simply imposes upon the city the burden of again litigating the matter and establishing the actionable facts."

For these reasons, there was error also in the granting of the plaintiff's fourth and sixth prayers. The defendant's rejected prayers were demurrers to the evidence, and for the reasons herein stated were properly rejected.

The thirty exceptions reserved by the defendant may be grouped and reduced to nine, and disposed of as follows: The first, second, third, eleventh, twelfth, thirteenth, fourteenth, fifteenth, eighteenth, nineteenth, twentieth, and twenty-second exceptions relate to certain alleged changes made by the appellant in the road as the road approached the bridge and the wing wall. The ninth, tenth, sixteenth, seventeenth, twenty-first, twenty-third, twenty-fourth, and twenty-fifth relate to the guarded condition of the public road as it approached the bridge before the change. These twenty exceptions present the same character of testimony and, as it tends to establish the plaintiff's case, the evidence was properly

admitted. The fourth exception presents the ruling of the court admitting as evidence the record of the prior case against the county. This evidence was admitted subject to exception, and no motion appears to have been subsequently made to strike it out. The defendant therefore lost the benefit of its objection. *Roberts v. Bonaparte*, 73 Md. 191, 10 L.R.A. 689, 20 Atl. 918. But, apart from this, the record in the first action was proof that the suit was brought and the recovery had. *Key v. Dent*, 14 Md. 98. There was no error in the rulings on the fifth, sixth, seventh, eighth, and thirtieth exceptions; the evidence set out therein being admissible. The twenty-sixth and twenty-seventh exceptions relate to the admission of an agreement between the parties entered into on the 29th of May, 1906, after the death of Dr. Hill. It was as follows: "Whereas, the Baltimore & Ohio Railroad Company, hereafter called the party of the first part, made certain changes in line of their track at Ilchester station, Maryland, which necessitated certain changes in the wagon roads at that point, and whereas, the necessary changes in the wagon roads at this point have not, up to this time, been properly completed to the satisfaction of the county commissioners of Howard county, it is hereby agreed that the party of the first part will widen the wagon road passing under its bridge at Ilchester station, to a width of 30 feet on top, from the north side of the bridge for a distance of 210 feet south. It is further agreed that the county commissioners will, when this work is completed, give to the party of the first part a formal acceptance, relieving the party of the first part from further expense, either in connection with the construction or maintenance of the county roads in that vicinity." While this agreement was subsequent to the alleged negligence of the appellant corporation, and did not reflect light upon the controversy between the parties, its admission did not injure or prejudice the defendant's case. Its admission was therefore harmless error. There was no such error in the rulings of the court upon the twenty-eight and twenty-ninth exceptions as could have injured the defendant. What has been said as to the rulings of the court upon the prayers and the evidence disposes of the demurrer to the plaintiff's declaration, and to the defendant's special exceptions to the prayers.

For the errors committed in granting the plaintiff's third, fourth, and fifth prayers, the judgment will be reversed and a new trial awarded

OKLAHOMA SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAIL-
ROAD COMPANY, Plff. in Err.,

v.

J. B. BAGWELL.

('— Okla. —, 124 Pac. 320.)

Master and servant — request for assistance — effect.

One who, at the request of a conductor in charge of a freight train, an emergency existing reasonably requiring such assistance, temporarily assists in the work of the carrier in the unloading of a safe from one of its cars, the regular crew not being reasonably able to unload same, is, for the

Headnote by WILLIAMS, J.

Note. — Liability of master for injury to an emergency assistant.

It is proposed to include in this note both the cases which involve the liability of the master for injuries to a third person who acts for the master in case of an emergency, and the cases which deal with servants already in the general employment of the master, but who step outside the scope of their regular employment in cases of emergency.

Upon the general subject of the liability of the master for injuries to a volunteer, see notes to *Evarts v. St. Paul, M. & M. R. Co.* 22 L.R.A. 663; *Grissom v. Atlanta & B. Air Line R. Co.* 13 L.R.A.(N.S.) 561; and *Maxson v. J. I. Case Threshing Mach. Co.* 16 L.R.A.(N.S.) 963.

As to the power of a conductor to hire a physician to treat a person injured by a train, see note to *Bonnette v. St. Louis, I. M. & S. R. Co.* 16 L.R.A.(N.S.) 1081.

It is a rule universally recognized that the relationship of master cannot be imposed upon a person without his consent, express or implied. But it is also a rule equally well recognized that a servant may engage an assistant in the case of an emergency, where he is unable to perform the work alone.

The general rule is well stated in *Aga v. Harbach*, 127 Iowa, 152, 109 Am. St. Rep. 377, 102 N. W. 833, 4 Ann. Cas. 441, which is quoted at length in *St. Louis & S. F. R. Co. v. BAGWELL*.

See also *Central Kentucky Traction Co. v. Miller*, post, 1184.

"An emergency employee, called on by another employee to assist him, for however short a time, becomes a fellow servant, and subject to the rules of law applicable to the injury of a servant by his fellow. But he must be so called on as of necessity in order to make him an employee, for a servant has no authority to call on another to help him in his master's business as of necessity unless the necessity exists. If he can do the work himself, there is no occasion of necessity to imply power in him to employ assistance." *Fiesel v. New* 40 L.R.A.(N.S.)

time being, the servant of the defendant and entitled to the same protection as any other servant.

(March 12, 1912.)

ERROR to the District Court for Hughes County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. W. F. Evans, R. A. Kleinschmidt, and Fred E. Suits, for plaintiff in error:

Plaintiff voluntarily assumed all risk of injury growing out of his attempt at assistance.

York Edison Co. 123 App. Div. 676, 108 N. Y. Supp. 130.

The vital question in cases of this character is, Does an emergency actually exist? It is to be noted that in case an emergency of this character has been found to exist, the emergency assistant, while he is entitled to all the rights and privileges of a servant, is also subject to the obligations of a servant, being in particular subject to the operation of the fellow-servant rule.

In a few cases the courts have found the conditions such as to justify a servant in employing an assistant to help him.

Thus, a conductor has implied authority to hire a man to take the place of a brakeman who has fallen ill while the train is on the road. *Georgia P. R. Co. v. Propst*, 83 Ala. 518, 3 So. 764. The court said: "The conductor testified that he had no authority from the superintendent or from the defendant to engage or utilize the services of the plaintiff in the capacity of brakeman. Express authority for this purpose was not necessary. The circumstances themselves, about which there is no conflict of testimony, gave him the authority. In such an emergency, there must be discretion and authority somewhere to supply the place of disabled or missing servants; and no one could exercise this power so well or so prudently as the conductor in charge of the train."

So, where two brakemen are necessary for the safe operation of a train, the conductor has authority to hire a substitute for one who is laid off for a week's rest. *Sloan v. Central Iowa R. Co.* 62 Iowa, 728, 16 N. W. 331.

And a conductor of a train who has only two brakemen to assist him has implied authority to hire a substitute, where one of them leaves his work temporarily while the train is making its regular round trip, and it is necessary for the safety of the passengers to have two brakemen. *Fox v. Chicago, St. P. & K. C. R. Co.* 86 Iowa, 368, 17 L.R.A. 289, 53 N. W. 259. In this case it was held that the mere fact that the train may have been safely operated for some distance with a single brakeman, thus

Cooper v. Lake Erie & W. R. Co. 136 Ind. 366, 36 N. E. 272; Everhart v. Terre Haute & I. R. Co. 78 Ind. 292, 41 Am. Rep. 567.

Plaintiff was a volunteer, and defendant owed him none of the obligations of a master toward a servant.

3 Elliott, Railroads, § 1305; Thomp. Neg. § 3756; Eaton v. Delaware, L. & W. R. Co. 57 N. Y. 382, 15 Am. Rep. 513; Vassor v. Atlantic Coast Line R. Co. 142 N. C. 68, 7 L.R.A.(N.S.) 950, 54 S. E. 849, 9 Ann. Cas. 535; New Orleans, J. & G. N. R. Co. v. Harrison, 48 Miss. 112, 12 Am. Rep. 356; Barstow v. Old Colony R. Co. 143 Mass. 535, 10 N. E. 255; Kiernan v. New Jersey Ice Co. 74 N. J. L. 175, 63 Atl. 998; Foster-Herbert Cut Stone Co. v. Pugh,

115 Tenn. 688, 4 L.R.A.(N.S.) 804, 112 Am. St. Rep. 891, 91 S. W. 199; Sparks v. East Tennessee, V. & G. R. Co. 82 Ga. 156, 8 S. E. 424; Blair v. Grand Rapids & I. R. Co. 60 Mich. 124, 26 N. W. 855; Flower v. Pennsylvania R. Co. 69 Pa. 210, 8 Am. Rep. 251; Rhodes v. Georgia R. & Bkg. Co. 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922; Eason v. Sabine & E. T. R. Co. 65 Tex. 577, 57 Am. Rep. 606; Motey v. Pickle Marble & Granite Co. 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 155; Fairbanks, M. & Co. v. Walker, 88 C. C. A. 78, 160 Fed. 896; Gowen v. Harley, 6 C. A. 190, 12 U. S. App. 574, 56 Fed. 973; Atchison, T. & S. F. R. Co. v. Lindley, 42 Kan. 714, 6 L.R.A. 646, 16 Am. St. Rep. 515, 22 Pac. 703; Miles v. Columbia River

showing that it is physically possible to operate it without the second brakeman, will not justify overruling the finding of a jury that the substitute was required for its proper operation.

A boy taken by the driver of a delivery wagon to show him the way becomes an emergency servant, but the employer is not liable for the driver's negligence whereby the boy is injured, since they are fellow servants. Gunderson v. Eastern Brewing Co. 71 Misc. 519, 130 N. Y. Supp. 785.

A bystander called upon by a station agent to assist in pushing cars away from a fire is not a volunteer, but will be deemed a fellow servant of a section hand engaged in the same work, and by whose negligence he is injured. Jackson v. Southern R. Co. 73 S. C. 557, 54 S. E. 231.

A driver of a horse car which inadvertently meets another upon the space between two switches has the right to employ a boy to drive the horse after it has been attached to the rear end of the car, so as to draw it back to the switch, while the driver stands at the front end and manipulates the brake. Marks v. Rochester R. Co. 146 N. Y. 181, 40 N. E. 782. See also McIntire Street R. Co. v. Bolton, 43 Ohio St. 224, 54 Am. Rep. 803, 1 N. E. 333, where, under similar conditions, a passenger was injured while aiding the driver to push back the car.

In connection with the foregoing cases, see ST. LOUIS & S. F. R. CO. v. BAGWELL.

See also Louisville & N. R. Co. v. Ginley, 100 Tenn. 472, 45 S. W. 348, which is sufficiently set out in Central Kentucky Traction Co. v. Miller, post, 1184.

A passer-by who complied with the request of the defendant's manager to assist his servants in moving a heavy weight was held not to be a volunteer, in Little v. Neilson, 17 Sc. Sess. Cas. 2d Series, 310.

It is within the scope of the authority of the agent of a railroad in charge of a wrecking crew, to employ other help if the exigencies of the situation call for it. Goff v. Toledo, St. L. & K. C. R. Co. 28 Ill. App. 529.

If an agent is given sole charge of the 40 L.R.A.(N.S.)

preparation and exhibition of cumbersome and complicated machinery, and calls to his assistance in that occupation one who in good faith enters upon such work, the person thus employed is not a volunteer or trespasser, but, for the time being, assumes the relation of servant to the master. Maxson v. J. I. Case Threshing Mach. Co. 81 Neb. 546, 16 L.R.A.(N.S.) 963, 116 N. W. 281.

In many cases the fact that no emergency and no actual necessity for extra help exists is alluded to as one of the factors taken into consideration by the court in deciding that the person was not in the position of a servant.

See St. Louis, I. M. & S. R. Co. v. Jones, 96 Ark. 558, 37 L.R.A.(N.S.) 418, 132 S. W. 636; Yazoo v. M. Valley R. Co. v. Kern, 99 Ark. 534, 138 S. W. 988; Central R. Co. v. McWhorter, 115 Ga. 476, 42 S. E. 82; Whitton v. South Carolina & G. R. Co. 106 Ga. 796, 32 S. E. 857; Central R. & Bkg. Co. v. Chapman, 96 Ga. 769, 22 S. E. 273; Sears v. Central R. & Bkg. Co. 53 Ga. 630; Atchison, T. & S. F. R. Co. v. Lindley, 42 Kan. 714, 6 L.R.A. 646, 16 Am. St. Rep. 515, 22 Pac. 703; Hendrickson v. Louisville & N. R. Co. 137 Ky. 562, 30 L.R.A.(N.S.) 311, 126 S. W. 117; Yazoo & M. Valley R. Co. v. Stansberry, 97 Miss. 831, 53 So. 389; Mickelson v. New East Tintic R. Co. 23 Utah, 42, 64 Pac. 463.

A bystander who attempts to assist in the switching of cars of a construction train, at the request of the head brakeman, left in charge of the switching while the conductor is temporarily absent attending to his usual duties at the station, is a mere volunteer, and assumes all the risks incident to the situation. The head brakeman of such a train has no implied authority to employ additional men, even though the existing force of hands is insufficient for the work. Church v. Chicago, M. & St. P. R. Co. 50 Minn. 218, 16 L.R.A. 861, 52 N. W. 647 (injury caused by defective car).

The same principles govern where a servant steps outside the scope of his employment in an emergency.

Packers' Asso. 41 Or. 617, 69 Pac. 827; Walker v. Green, 60 Kan. 289, 56 Pac. 477; St. Louis, I. M. & S. R. Co. v. Bennett, 53 Ark. 208, 22 Am. St. Rep. 187, 13 S. W. 742; Church v. Chicago, M. & St. P. R. Co. 50 Minn. 218, 16 L.R.A. 861, 52 N. W. 647; Powers v. Boston & M. R. Co. 153 Mass. 188, 26 N. E. 446; Everts v. St. Paul, M. & M. R. Co. 56 Minn. 141, 22 L.R.A. 663, 45 Am. St. Rep. 460, 57 N. W. 459; St. Louis & S. F. R. Co. v. Daugherty, 72 Kan. 678, 83 Pac. 821; Hot Springs R. Co. v. Dial, 58 Ark. 318, 24 S. W. 500; Cincinnati, N. O. & T. P. R. Co. v. Finnell, 108 Ky. 135, 57 L.R.A. 266, 55 S. W. 902; Driscoll v. Scanlon, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100; Morris v. Brown, 111 N. Y. 318, 7 Am. St. Rep. 751, 18 N. E. 722; Hoar v. Maine C. R. Co. 70 Me. 65, 35 Am. Rep. 299; Finley v. Hudson Electric R. Co. 64 Hun, 373, 19 N. Y. Supp.

621; Keating v. Michigan C. R. Co. 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346; Smith v. Louisville, E. & St. L. R. Co. 124 Ind. 394, 24 N. E. 753; Gulf, C. & S. F. R. Co. v. Dawkins, 77 Tex. 228, 13 S. W. 982; St. Louis & S. F. R. Co. v. Gosnell, 23 Okla. 588, 22 L.R.A. (N.S.) 892, 101 Pac. 1126; Chaney v. Louisiana & M. River R. Co. 176 Mo. 598, 75 S. W. 595; Mickelson v. New East Tintic R. Co. 23 Utah, 42, 64 Pac. 463; Wagen v. Minneapolis & St. L. R. Co. 80 Minn. 92, 82 N. W. 1107.

Messrs. Langston, Hicks, & O'Neill for defendant in error.

Williams, J., delivered the opinion of the court:

It is claimed by counsel for plaintiff in error that the petition does not state a cause of action because it shows that the

Thus, an employee in a mill who has at previous times assisted in repairing machinery, injured while replacing a chain on a wheel in response, in good faith, to the call of the operator of the machine, and to prevent the suspension of the work of forty men, in the absence of the persons whose regular duty it is to replace the chain, is acting within the scope of his employment, and not as a mere volunteer. Mullin v. Northern Mill Co. 53 Minn. 29, 55 N. W. 1115.

And a telegraph operator in the employ of a railroad company does not, by going upon the railroad track to stop a train which has failed to obey his signal, in order to avoid a collision, become a trespasser, so as to lose his right to have the company exercise the utmost care for his safety. Illinois C. R. Co. v. Mahan, 17 Ky. L. Rep. 1200, 34 S. W. 16.

Where a conductor on a freight train, who had been such for seven years, and who was a brakeman a number of years before that, attempted to make a coupling of a car when his train was several minutes late, and the brakeman had made three unsuccessful attempts to make the coupling, and was run over and killed while so engaged, the railroad company is not relieved from liability on the ground that he was not authorized to couple cars. Seley v. Southern P. Co. 6 Utah, 319, 23 Pac. 751. In the Supreme Court of the United States (152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530) recovery was denied on the grounds of assumption of obvious risk and contributory negligence in coupling where there was a defective frog. The above point was not noticed.

The chief of a fire company composed wholly of railroad employees, and which has been voluntarily organized for the protection of the railroad property, but which is not under the control of the railroad company, although the latter furnishes the apparatus and allows the firemen to drill dur-

ing work hours without deducting any time, and also allows the chief an hour once a week without deduction to inspect its premises, owes the duty to the company to aid in extinguishing a fire, and in doing so acts as its employee, and not as a mere volunteer, who must assume all the risks of such action. Collins v. Cincinnati, N. O. & T. P. R. Co. 13 Ky. L. Rep. 670, 18 S. W. 11.

The conductor of a freight train, who takes the engine and goes forward a mile or two from a station by order of the road superintendent, to see whether certain culverts are safe, or whether they have been injured by a recent heavy storm, is within the scope of his employment while riding on the engine between two of such culverts, over a trestle which breaks down, causing his death. Terre Haute & I. R. Co. v. Fowler, 154 Ind. 682, 48 L.R.A. 531, 56 N. E. 228.

But a conductor coupling cars is a volunteer except in cases of great emergency. Sears v. Central R. & Bkg. Co. 53 Ga. 630.

Whether or not an emergency exists is a question for the jury. Ibid.

See also Central Kentucky Traction Co. v. Miller, post, 1184.

It may not be out of place at this time to call attention to another exception to the rule that one who voluntarily does work for another is not to be considered as a servant, namely, where the person doing the work has a personal interest therein and is forwarding his own interests.

This exception is fully explained in the notes cited above, and is well illustrated by the recent case of McConnell v. Pennsylvania R. Co. 223 Pa. 442, 72 Atl. 849, where it was held that a stone mason was not a volunteer in going onto a car to assist in unloading stone, where his work was being delayed by the fact that there was no stone for him to use, and he, by acting as he did, would materially hasten his work.

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plaintiff was a mere volunteer for the work in which he was engaged at the time he received his injury.

Under the allegations of the petition the plaintiff was engaged in defendant's work at the request of the conductor in charge of the train, and, although it may be said that his employment was for mere temporary purposes, still, being in the defendant's employ at the request of its servant or the conductor who was in charge of the train, an emergency existing reasonably requiring such assistance in the work of the carrier in the unloading of a safe from one of its cars, the regular crew not being reasonably able to unload same, he was not a trespasser, but, for the time being, the servant of the defendant.

In *Aga v. Harbach*, 127 Iowa, at page 145, 109 Am. St. Rep. 377, 102 N. W. 833, 4 Ann. Cas. 441, it is said: "It may be conceded that, generally speaking, a servant who is engaged to perform a given labor is not authorized to bind his master by the employment of a substitute or assistant. The relation of the master to a servant is one involving both responsibility and risk, and is not to be imposed by the act of another without authority or consent, express or implied. But in most lines of business the master cannot always remain, in person or by vice principal, in immediate supervision of the servant, and it not infrequently happens that some unforeseen contingency arises rendering it necessary, in the master's interest, that the servant have temporary assistance. In many such cases it has been held that the servant has implied authority to engage such temporary service, and that the substitute or assistant, if not in the law the employee of the master, is at least entitled to the same measure of protection as is the servant or agent upon whose request he rendered the assistance."

In *Marks v. Rochester R. Co.* 146 N. Y. 181, 40 N. E. 782, in the opinion by Andrews, Ch. J., it is said: "The complaint alleges that the plaintiff was engaged in assisting in the management of the car under the direction of the driver, and was placed on the rear platform to drive the horse, and while so engaged was crowded from the platform by persons who were leaving the car, and was thrown under the wheels and injured, and that the injury was caused by the negligence of the defendant. The only specification of negligence contained in the complaint is that the platform on which the plaintiff was stationed for the purpose of driving the horse was an unsafe and unfit place upon which to put a boy of his age to perform the duty imposed upon him. The trial judge sub-

mitted to the jury two questions, first, whether there existed such an emergency at the time as to authorize the driver of the car to employ outside assistance to get the car back to the switch; and, second, if the jury found that such an emergency existed, whether he was negligent in placing a young boy under the circumstances upon the platform to drive the horse. . . . It is not claimed that the driver had any general authority to employ servants for the defendant. If he had authority to employ assistance under the circumstances of the case, it was an authority outside of the general scope of his employment. Clearly he had no authority, express or implied, to call upon bystanders to assist him in the discharge of any service which he himself could reasonably perform. If third persons undertook, upon his solicitation and for his convenience, to assist him in extricating the car from the blockade, when he could have accomplished the work himself, no authority to employ assistance could be implied. Such an implication could only arise when, in view of all the conditions, the driver could not himself without assistance, having a proper regard for the safety of passengers and the care of the car, have undertaken to take the car back to the switch. It is obvious that the driver could not at the same time have managed the brake and driven the horse. The driver of the other car had his own car and the horse to look after, and it does not appear that there was any other employee of the company in the vicinity to whom the driver of the car which was to be moved could have applied for assistance. While the evidence is not very direct or satisfactory as to the necessity for aid, we think that question was properly submitted to the jury. The defendant gave no evidence upon the point. The conduct of the driver indicates that in his opinion assistance was necessary, and the jury might reasonably have reached the conclusion upon the evidence before them, in the absence of any contradictory evidence, that there was an emergency which gave to the driver authority to call in outside aid on the occasion. The authority of a servant is not in all cases confined to the rendering of personal service. In every business and employment there are exigencies which are not anticipated, and which require a servant to act, in the absence of the principal, for the immediate protection of his interests; and he may do things in his interest when the emergency arises which transcend his usual authority, and they will be deemed to have been authorized. The jury having found that such an emergency existed in this case, the employment of the plaintiff to drive the

horse was the act of the principal, and if his employment in this service directly by the principal would have been an act of negligence, his employment by the driver, acting for the time being in place of the master, was a negligent act imputable to the defendant. The service which the plaintiff was called upon to render was unquestionably intended to be a gratuitous service. He went upon the car in compliance with the request of the driver. If the service required of the plaintiff was a dangerous one for a boy of his age, from which personal injury to him might reasonably have been anticipated, the defendant might justly be chargeable if injury happened which was the natural consequence of the employment. The plaintiff, by reason of his youth and inexperience, might not appreciate the risk, and he would not be held to the exercise of the same discretion and judgment in entering upon the service as would be required of an adult." See also to the same effect, *Sloan v. Central Iowa, R. Co.* 62 Iowa, at page 736, 16 N. W. 334; *Johnson v. Ashland Water Co.* 71 Wis. 553, 5 Am. St. Rep. 243, 37 N. W. 823.

In *McIntire Street R. Co. v. Bolton*, 43 Ohio St. 227, 54 Am. Rep. 803, 1 N. E. 335, it is said: "The plaintiff in the court of common pleas was not a mere volunteer within the meaning of the rule of law contended for by plaintiff in error, but, as a passenger on the north-bound car, was interested in having it driven to its destination. To this end it was necessary to pass the south-bound car. This could only be accomplished by pushing the north-bound car back upon the siding. In doing this, although it may not have been absolutely necessary for the passenger to assist the driver, it was a prudent and reasonable act justified by the circumstances of the case, not a wrongful interference and intermeddling with business in which he had no concern. It was not, in fact or in law, an assumption of risk from the carelessness of the defendant or any of its servants. The law in this case is well stated in *Wright v. London & N. W. R. Co.* L. R. 1 Q. B. Div. 252. That case was this: 'The plaintiff sent a heifer (which was put in a horse box) by defendants' railway to their P. station. On the arrival of the train at the station, there being only two porters available to shunt the horse box to the siding, from which alone the heifer could be delivered to the plaintiff, in order to save delay he assisted in shunting the horse box, and while he was so assisting he was run against and injured through a train being negligently allowed by the defendants' servants to come out of the siding. There 40 I.R.A. (N.S.)

was evidence that the station master knew that the plaintiff was assisting in the shunting and assented to his doing so. Held, affirming the decision of the Queen's bench, that the plaintiff was not a mere volunteer assisting the defendants' servants, but was on the defendants' premises with their consent for the purpose of expediting the delivery of his own goods, and the defendants were therefore liable to him for the negligence of their servants, according to the principle of *Holmes v. North Eastern R. Co.* L. R. 4 Exch. 254; L. R. 6 Exch. 123, 40 L. J. Exch. N. S. 121, 24 L. T. N. S. 69." See also *Haluptzok v. Great Northern R. Co.* 55 Minn. 446, 26 L.R.A. 739, 57 N. W. 144; *Barstow v. Old Colony R. Co.* 143 Mass. 535, 10 N. E. 255.

It follows that the petition stated a cause of action, and the demurrer to the evidence, as well as the motion of the defendant for a directed verdict in its favor, was properly overruled.

There is no merit in the other assignments of error under the record.

All the Justices concur.

Petition for rehearing denied June 18, 1912.

KENTUCKY COURT OF APPEALS.

CENTRAL KENTUCKY TRACTION COMPANY, Appt.,

v.

LISTON B. MILLER.

(147 Ky. 110, 143 S. W. 750.)

Master and servant — volunteer servant — injury — liability.

1. A street railway company is not liable for injury, through collision, to one of its conductors who, while returning home after being relieved from duty for the day, attempts to run the car to relieve the motor-man who appears to be ill, if the latter was not so ill that he could not have done the work himself and the injury would not have occurred except for the attempted act. Same — employees of other company — common superintendent — liability for negligence.

2. A street railway company which permits the cars of other companies, operated under direction of its superintendent and train despatcher, to use its track, is answerable to one of its employees in charge of the car which had been directed to pass over a certain track, for the negligence of employees of one of the other companies in permitting, under direction of the superintendent, cars to stand on such track with-

Note. — See note to *St. Louis & S. F. R. Co. v. Bagwell*, ante, 1180,

out any precautions to prevent collision with the car in charge of such employee.

(Nunn, J., dissents.)

(February 23, 1912.)

A PPEAL by defendant from a judgment of the Circuit Court for Fayette County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Stoll & Bush and John R. Allen, for appellant:

No emergency existed which created in Chilton the implied power or authority to employ Miller for his master and to place him in charge of the car.

Godshaw v. J. N. Struck & Bro. 109 Ky. 285, 51 L.R.A. 668, 58 S. W. 781; Church v. Chicago, M. & St. P. R. Co. 50 Minn. 218, 16 L.R.A. 861, 52 N. W. 649; McGill v. Maine & N. H. Granite Co. 70 N. H. 125, 85 Am. St. Rep. 618, 46 Atl. 684; Parent v. Nashua Mfg. Co. 70 N. H. 199, 47 Atl. 261; Kentucky C. R. Co. v. Gastineau, 83 Ky. 119; Marks v. Rochester R. Co. 146 N. Y. 181, 40 N. E. 782; W. B. Conkey Co. v. Bueherer, 84 Ill. App. 633; Elliott, Railroads, 2d ed. § 335; Louisville & N. R. Co. v. Ginley, 100 Tenn. 472, 45 S. W. 348.

No negligence is shown with which the Central Kentucky Traction Company is chargeable.

Brady v. Chicago & G. W. R. Co. 57 L.R.A. 712, 52 C. C. A. 48, 114 Fed. 100; Atwood v. Chicago, R. I. & P. R. Co. 72 Fed. 455; Hilsdorf v. St. Louis, 45 Mo. 98, 100 Am. Dec. 352; Pawlet v. Rutland & W. R. Co. 28 Vt. 297; Floody v. Chicago, St. P. M. & O. R. Co. 109 Minn. 228, 134 Am. St. Rep. 771, 123 N. W. 815, 18 Ann. Cas. 274.

Messrs. Allen & Duncan also for appellant.

Messrs. Scott & Hamilton and Hunt, Bullock, & Hunt for appellee.

Hobson, Ch. J., delivered the opinion of the court:

Liston B. Miller was a conductor in the service of the Central Kentucky Traction Company, and on August 30, 1908, was injured in a collision between the car he was on and some other cars which had been left standing on the track. He brought this suit to recover for his injuries.

The proof for him on the trial showed these facts: He left Lexington for Versailles at 11 P. M., and was ordered by the despatcher to return from Versailles to Lexington that night, so as to be able to take out a car early next morning. His car

was a regular car, but an extra followed it. When he reached Versailles, he got on the extra car, which had orders to return to Lexington that night. They left Versailles for Lexington at 12:05. When they were about a mile out of Versailles, the motorman became sick, was pale, and looked weak. He asked Miller to operate the car for him, as he was sick. Miller then took the motor bar and began operating the car. The motorman went to the side of the car and vomited. When they reached Anglin avenue, in Lexington, the motorman said to Miller that he felt better, and Miller turned the car over to him at his request. When they reached Broadway, the motorman again called to Miller, saying that he was too sick to run the car, and asked him to take charge of it. He ran it to Union and Broadway, where, at the request of the motorman, he again turned the handle bar over to him. The motorman then ran the car to Main and Limestone streets, where he again said to Miller that he was too sick; that he could not go to the barn with the car, and Miller would have to take the car in for him. Miller took charge of the car again, and when he reached Fourth street, where the motorman lived, by an agreement between them, the motorman got off; Miller slowing down the car for that purpose, but not coming to a full stop. Miller ran the car on toward the barn. Between three and four squares beyond where the motorman got off, but before they had reached the car barn, the collision occurred, and Miller was badly hurt. The track at that point was owned by the Lexington Railway Company, but the Bluegrass Traction Company and the Central Traction Company, under an arrangement with the owner, ran their cars over it. Each of the three companies were under the same management; each had the same despatcher and the same superintendent. They all used the same barn. The cars into which Miller ran had been placed upon the track by the servants of the Bluegrass Traction Company, acting under the orders of the same superintendent who had ordered the car Miller was on to return from Versailles to the car barn that night. The headlight of the car Miller was on was burning badly. An automobile passed just before he reached these cars which threw up considerable dust, so that Miller, although on the lookout, could not see the cars in front of him until he was right on them. Miller, while by employment a conductor, had previously run cars from the Central station to the barn, and understood how to manage them. The train despatcher left his office at 12 o'clock at night, and there was no way to communicate with any

officer of the defendant after the motorman became sick and unable to operate the car.

On the other hand, the proof for the company was to the effect that the motorman simply felt badly, but was able to operate his car; that he did not request Miller to operate it for him, but that Miller requested him to let him run it, and the motorman sat by him on the stool while he was running it until they reached Fourth street, where the motorman asked Miller to take the car into the barn for him, as Miller lived near the barn, so as to save the motorman the walk back home from the barn. The conductor, who was in the car, testified that the motorman was not sick, so far as he knew; that he had heard nothing of his being sick; and that he did not know that Miller was operating the car until they reached Fourth street, where he heard the motorman, from the ground, call to Miller and ask him to take care of his toolbox for him. The defendant's proof was to the effect that Miller was not ordered to return to Lexington that night, but came back of his own accord, to avoid the expense of staying at Varsailles. The proof for the defendant also showed that the headlight was good; and that there was an express rule of the company forbidding a motorman, under any circumstances, to turn over his handle bar to another, and requiring him, if for any reason he had to leave the car, to take his handlebar with him, so that no one could operate the car while he was off it. On the other hand, there was proof by the plaintiff to the effect that it was customary for the conductors to operate the cars when the motorman was eating his lunch, or for any reason he was temporarily disabled, and this usage was known and acquiesced in by the officers of the defendant.

On this proof, the court instructed the jury in substance: (1) That if Miller was rightfully operating the car as motorman, and while he was so operating it and exercising ordinary care it collided with the freight cars negligently left on the track by the defendant, they should find for the plaintiff; (2) that, unless they so believed, they should find for the defendant; (3) that if the motorman on the car became so ill that he could not, in safety to himself and in safety to the car and its passengers or crew, operate it; or if the plaintiff believed and had reasonable grounds to believe this, and that it was necessary that the car should be moved, and it was impracticable to obtain orders from the officers of defendant what steps to take toward supplying the place of the motorman, then the plaintiff, so long as these conditions existed, and no longer, was rightfully the motorman upon the car; (4) the

plaintiff could not recover if he failed to exercise ordinary care in operating the car; (5) if the cars with which the collision occurred had been negligently left on the track by the servants of the Bluegrass Traction Company, such servants, for the purposes of this action, were the servants of the defendant. The jury found for the plaintiff, fixing the damages at \$12,000. The court entered judgment on the verdict and refused a new trial. The defendant appeals.

The defendant asked the court to instruct the jury that they could not find for the plaintiff, unless they believed from the evidence that at the time the motorman left the car at Fourth and Limestone streets he was, by reason of sickness, unable to run the car, and it was for this reason necessary to get Miller to run the car to the barn. The court refused to so instruct the jury, and by the instruction which he gave allowed Miller to recover, although no emergency in fact existed, if Miller believed and had reasonable grounds to believe that the emergency existed.

In determining the rights of the parties, we must carefully bear in mind the relation in which they stood. While Miller was in the service of the company as conductor, he was not the conductor of the car on which he was riding; he had no duty to the company to perform on that car; under his own evidence, he was simply ordered to return to Lexington on that car. In so far as he took any part in running the car, he was simply a volunteer, unless an emergency arose, requiring him to run the car. The rule is that a person who is not authorized to perform as a servant the work in which he is injured cannot recover of the master, if he is injured, damages for his injury, because the master, not having authorized him to act, owes him no duty. There is an exception to this rule, where the injured person is an emergency assistant, acting at the request of an employee who has, under such circumstances, authority to request his assistance, although ordinarily he is not invested with such power. 2 Labatt, Mast. & S. § 631. Thus, in *Sloan v. Central Iowa R. Co.* 62 Iowa, 728, 16 N. W. 331, a conductor whose crew was short requested a third person to act as brakeman on his train, the regular brakeman being absent. It was held that the conductor, though not ordinarily authorized to hire brakemen, had authority to supply the place of the absent brakeman for the time being. The same principle was applied in *Aga v. Harbach*, 127 Iowa, 144, 109 Am. St. Rep. 377, 102 N. W. 833, 4 Ann. Cas. 441, where an engineer requested another to help him adjust an electric light in the en-

gine room. In *Georgia P. R. Co. v. Propst*, 83 Ala. 518, 3 So. 764, one of the brakemen on a train became violently sick, and the conductor requested a third person to act as brakeman in his place. It was held that the person so acting in the emergency could recover for an injury received. In *Louisville & N. R. Co. v. Ginley*, 100 Tenn. 472, 45 S. W. 348, the conductor, in an emergency, requested a third person to help him, when his brakeman was otherwise employed, and could not make a coupling. A recovery by the person who was thus injured was sustained. There are also numerous cases holding that a person is not a volunteer, if he assists the servants of the defendant, at their request, in doing work in which he is interested, and while so acting is injured by the negligence of the defendant. This has been applied in cases in loading freight and in favor of passengers on cars, where an accident had occurred, or, by reason of some other emergency, it was necessary that the passengers should assist the servants of the railroad company. *Eason v. Sabine & E. T. R. Co.* 65 Tex. 577, 57 Am. Rep. 606, and authorities cited.

But we have not been referred to any case in which a recovery has been allowed by one who assisted a servant, at his request, when no emergency in fact existed, and the servant was without authority to employ assistance. We do not think that such a rule should be applied on the facts of this case. From the time the car left Versailles until about the time that the motorman got off at his house, the conductor, the motorman, and Miller were the only persons on the car. About the time the motorman got off, a trespasser got on to ride down to the barn, and he was the only other person on the car. The conductor and the motorman were in charge of the car. If the motorman became disabled, it was incumbent upon the conductor to take charge of it. Miller was under no responsibility for the car. The conductor was not consulted. Miller simply took charge of it at the request of the motorman, and should be regarded as a volunteer, unless the motorman was in fact so sick that he could not safely operate the car. It is true there is proof by Miller that the conductor had not long been on the road, and did not understand how to operate a car. Still he was in charge of it, and he knew nothing of any disability on the part of the motorman, or of his intention to leave the car, until he had left it. It is true that he then allowed Miller to operate the car down toward the barn; but, as the motorman had been left behind, in view of the short time that elapsed before the collision, Miller should be regarded as simply a volunteer, 40 L.R.A. (N.S.)

unless in fact the motorman, when he left the car at Fourth and Limestone, under the arrangement between him and Miller, was too sick to operate it safely to the barn. In other words, Miller cannot recover, unless he acted in an emergency; and it was for the jury, under all the facts, to say whether or not an emergency existed. The fault with instruction No. 3, given by the court, is that the court thereby left it to Miller to decide whether an emergency existed, when this question was for the jury, and not Miller. This instruction, with the words, "or if the plaintiff believed, and had reasonable grounds to believe, that such motorman had become and was so ill," omitted, expresses our idea of the law upon this point. The court should have instructed the jury on this point in substance as above indicated.

By another instruction, the court will tell the jury that if the motorman got off the car at Fourth and Limestone streets, and Miller then took charge of the car to operate it to the barn for the accommodation of the motorman, when the motorman was not in fact too sick to safely operate the car to the barn, they should find for the defendant.

Instruction 5 is also complained of; but we do not see that it was improper under the facts of the case. The defendant, by its despatcher, had ordered this car to return from Versailles to the barn. Having given this specific order, it was the duty of the defendant to exercise ordinary care to keep the place where the servant was to work reasonably safe. While this duty rested upon it, the superintendent, who had charge of this car, ordered the other cars taken out, and gave the men who were to take them out no warning of the coming of the other car, or direction to keep the track clear. No care was taken to keep this track clear for the car which had been ordered to run over it. The court therefore properly held that the defendant was liable for the obstruction of the track. The court did not err in refusing to instruct the jury *peremptorily* to find for the defendant.

There was sufficient evidence that the motorman was too sick to operate his car to take the case to the jury, and, in view of the short distance from Fourth and Limestone streets to the barn, and the usage prevailing in such cases, if the emergency really existed, the plaintiff was an emergency assistant. We have examined the cases of *Gamble v. Akron, B. & C. R. Co.* 63 Ohio St. 352, 59 N. E. 99, and *Louisville & N. R. Co. v. Hays*, — Ky. —, 128 S. W. 289. Neither of these cases are in any manner applicable to the question that we have considered; in neither of them was the ques-

tion of the right of a volunteer to determine whether or not an emergency existed presented or decided.

Judgment reversed and cause remanded for a new trial, and for further proceedings consistent herewith.

Nunn, J., dissenting:

The lower court instructed the jury, in substance, that if Miller was rightfully operating the car and exercising ordinary care when the collision occurred to find for him; and that if they believed from the evidence that the motorman on the car became so ill that he could not, in safety to himself, the passengers, the crew, and the car, operate it, *or if the plaintiff believed, and had reasonable grounds to believe, this*, and that it was necessary for the car to be moved, and it was impracticable to obtain orders from the officers of defendant with reference to what steps to take in supplying the motorman's place, then plaintiff, so long as these conditions existed, but no longer, was rightfully the motorman upon the car. The opinion of the court condemns the language above which is italicized, and only allows appellee to recover in case the motorman was actually sick and unable to run the car. The court says that it has been unable to find any authorities condemning this language in the instruction. I do not believe any court out of this state will ever condemn a proposition so just and reasonable. What does it mean? It simply means that if the jury believed from the evidence that Miller believed, and that he had reasonable grounds to believe, that the motorman was too ill to run the car, they should find for Miller, as an emergency then existed which authorized him to run the car. The opinion eliminates Miller's right to act upon what he believed and had reasonable grounds to believe the existing condition was, and holds that, unless Miller actually knew that the motorman was too sick to operate the car, he had no right to take charge of it; and he should not, therefore, be allowed to recover, unless he knew positively that the motorman was too sick to manage the car.

The accident happened after midnight, when those in charge of the car could not get in connection with the superintendent who sent them out, and by whose directions the cars collided with were negligently placed upon the track. Those in charge of the car had been directed to bring it back from Versailles to Lexington, and put it in the car barn. The testimony shows, without contradiction, that the regular motorman was sick. Miller testified that he was very pale; that he looked weak, and was hardly able to hold his head up; that he

vomited four or five times while going to Lexington; and that he asked him, on account of his condition, to run the car for him. The motorman testified that he was sick, but not so much so as he could not have run the car into the car barn. He said nothing about having vomited while going from Versailles. He also testified that he was familiar with the rules of the company, and that they did not authorize him to turn his motor bar over to another, unless he was sick, but said nothing about how sick he would have to be before he could do this, nor as to who was to determine that he was sick, and the extent of his sickness. While it does not expressly say so, the effect of the opinion is that, before Miller could be sure of his right to take charge of the car, he would have to send for a competent physician, and have him examine the motorman and determine whether or not he was too sick to operate the car, and then, if it should afterwards turn out that the motorman was not too ill to manage the car, Miller could not recover for an injury received, it matters not how honest his belief and how reasonable the grounds upon which it was founded, as the opinion requires positive knowledge upon his part.

To show the absurdity of this holding, we will suppose a case: While a train is passing through the country, a shot is fired from the woods, and the engineer falls instantly from his seat, and has all the appearances of having been shot. The fireman takes charge of the engine at once, and soon afterwards runs into some cars that have been negligently left upon the track, and is injured. Now, the court's opinion in this case is to the effect that the fireman could not recover, unless the engineer was actually shot and rendered unable to operate the train. They would not let him recover, no matter how honest his belief that the engineer was shot, nor how reasonable his grounds for believing. This court holds that before he is authorized to take hold of the throttle he must know positively that the engineer was shot, which, to my mind, is absurd. In the supposed case, if the fireman knew that the engineer was shamming, he could not recover, if injured while operating the train; nor should Miller be allowed to recover in this case, if he knew, or had reasonable ground to believe, that the regular motorman was shamming, or feigning; therefore it was necessary for the court to submit to the jury the question whether or not he had reasonable ground to and did believe that the regular motorman was sick.

In the case of Louisville & N. R. Co. v. Hays, — Ky. —, 128 S. W. 289, the company claimed that Hays was violating its

rules when he met his death, and appellee claimed that Hays believed he was doing his duty for the company. In commenting upon that idea, Chief Justice Hobson, in writing for the court, said: "In the case of the servant, the question would be simply, Were the circumstances such as to justify a man of ordinary prudence in regarding the thing as a part of his duty?" In that case the court did not require the servant to know what facts actually existed, before he was authorized to act for his master.

In the case of *Gamble v. Akron, B. & C. R. Co.* 63 Ohio St. 352, 59 N. E. 99, the conductor took the place of the motorman while he ate his dinner; but the motorman did not come out after he finished his dinner, so the conductor continued to operate the car. The despatcher ordered them out with the car, and also sent a snowplow out on the same line. While the conductor was operating the car, he came upon the snowplow on a sharp curve, collided with it, and was killed. The company contended that the motorman was a volunteer, and was violating the rules, which provided that the motorman should not turn his car over to any person, and the conductor should not be permitted to run it. The lower court decided against the conductor; but the supreme court of Ohio, after reviewing the facts of the case, said that the evidence would have justified the lower court in directing a verdict for him. The rules for running a car in that case were the same as those in the case at bar. They stated that if an emergency, such as sickness, etc., existed, the motorman had a right to turn his motor car over to another.

The court also said in that case that, "so far as appears here, there was no violation of either the letter or the spirit of these rules, construed together, when Walborn temporarily exchanged places with the motorman . . . that the company's property or the safety of passengers was in any way imperiled by this arrangement; and there was no occasion to apprehend an emergency which would call for them to be in their respective places. It would seem that in this instance the conductor exercised his judgment and authority, under the rules, reasonably and prudently. The case is not therefore akin to those cases in which a servant voluntarily and needlessly, and not in the performance of duty to the master, places himself in a position of great peril. But, if it be conceded that Walborn was in a prohibited position at the time he was fatally injured, it seems to us that the same result must be reached. The blunder of the train despatcher put everybody on the car in peril. His act was the sole and proximate cause of the collision. Not a

thing that Walborn did contributed to bring about a collision, and he heroically died at his post in trying to prevent it. Nothing is alleged against him, except that he was in the most dangerous position, where all were in common danger, without the fault of any. Under such circumstances, it is nothing short of absurdity to contend that, because he was killed, instead of another, or possibly all, the company should escape all liability for its wrong. But it is argued that he should have deserted his temporary post, and have gone back to his proper position; in other words, that he was negligent in remaining. But, if he had run away without attempting to reverse, and the people on the car had been killed or mangled, would any court acquit the company of negligence in that respect? If the contention of counsel is correct, it involves the contradiction that Walborn was negligent in remaining, and would have likewise been negligent if he ran away. Who, among us, is sufficient for the decision of such things in an emergency? We are not willing to accept it as the law that a motor engineer or locomotive engineer is guilty of contributory negligence, merely because he remains in his dangerous position and continues his efforts to avert calamity from the passengers behind him. *Beach, Contrib. Neg. § 42.* And Walborn was, for the time being, the motor engineer of that car, and as such responsible for the safety of the passengers being carried therein. We find no prejudicial error in the record. It was hardly necessary to have bothered with the elaborate charge and request to charge in this case."

It appears in that case that court recognized the right of the conductor to exercise his judgment as to the emergency, even when the regular motorman was sitting in the car, after finishing his dinner. In my opinion, appellee in the case at bar had a right to judge as to whether or not an emergency existed; and if he had reason to believe, and did believe, that such existed, he had a right to run the car to the barn, where it was ordered to be placed by the superintendent, especially as the regular motorman had left the car, and he was the only one on it who could operate it.

In the case of *Poillon v. Louisville R. Co.* 140 Ky. 707, 131 S. W. 996, the railway company claimed that Poillon received his injuries while violating a rule that prohibited him from going on the platform. In the case the court said: "But a conductor who has charge of a car may go on the outside, when called to do so in the discharge of his duty, or when he has reason to think it necessary in the discharge of his duty."

Applying the principles of the foregoing

cases to the case at bar, it is clear that Miller was acting rightfully and lawfully at the time of his injury. The cases referred to in the opinion by the court sustain this view. In the Tennessee case the conductor, in an emergency, requested a third person to help him, when his brakeman was otherwise engaged, and he could not make a coupling alone; and this third person was allowed to recover for an injury received, although the conductor had no right to employ him, except in a case of an emergency. Does anyone think the court would have refused to allow him to recover if it afterwards turned out that the regular brakeman was not in fact otherwise employed at the time? If this third person had reasonable grounds to believe, and did believe, that the conductor was telling him the truth, the Tennessee court would have sustained his recovery. There is a long line of decisions in this state authorizing persons to recover for injuries received while acting under the belief that an emergency exists, provided they have reasonable ground upon which to base such a belief, although it may develop afterwards that no emergency did actually exist, and they would not have been injured if they had not so acted.

Aside from this, the court erred, as, under the facts stated in the opinion, an emergency existed when the regular motorman left the car, and he did so without the knowledge of the conductor. Miller did not have charge of the motorman; he could not control him; and when he left Miller was the only person on the car who could run it. There were but two others,—the conductor and the trespasser mentioned in the opinion,—and it is in proof that the conductor could not operate the car. Under this state of facts, was it the duty of Miller to leave the car standing on the track in the street, where other cars might collide with it and cause injury to persons and property, or was it his duty to take it to the barn, the place for storing cars that are not in use? Miller was an employee of the company as conductor on other cars, it is true; but it certainly would have been expected of any employee, under the circumstances, to take the car to the barn where, according to orders, it was to go, and if Miller had not done so he would have doubtless lost his employment the next morning. There was an emergency which authorized Miller to take charge of the car, whether the regular motorman was too sick to handle it or not. He did leave it, and left Miller and the conductor in charge, and Miller was the only one who could run it. Grant that the motorman was not too sick to operate the car when Miller took charge, 40 L.R.A. (N.S.)

there is not a pretense that he was in the least negligent in handling it. There is admitted negligence, however, on the part of the company in placing the cars on the track with which he collided, as he could not see them on account of the poor light on his car and the dust stirred up by an automobile. In all probability, this accident would have occurred if the regular motorman had been on, and he would have been mangled, and the company would have to compensate him, instead of appellee.

In 20 Am. & Eng. Enc. Law, page 106, the rule is succinctly stated thus: "The mere fact that injuries sustained by an employee were inflicted while he was acting in disobedience of well-known rules will not relieve the master of liability. There must be a connection between the disobedience of the rule and the injury received. The contributory negligence of the injured party that will defeat a recovery must have contributed as the proximate cause of the injury." And there are authorities from many states cited to sustain it.

In the case of *Gamble v. Akron, B. & C. R. Co.* 63 Ohio St. 352, 59 N. E. 99, the court said on this point: "But, if it be conceded that Walborn was in a prohibited position at the time he was fatally injured, it seems to us that the same result must be reached. The blunder of the train despatcher put everybody on the car in peril. His act was the sole and proximate cause of the collision. Not a thing that Walborn did contributed to bring about the collision, and he heroically died at his post in trying to prevent it."

Miller, an employee of appellant, was doing the proper thing in a careful manner, without negligence on his part, when he collided with the cars which had admittedly been negligently left on the track. I am unable to see the connection of Miller's supposed violation of the rules with the negligence of appellant and the collision, so as to defeat his right to recover damages. In my opinion, this is one of the cases wherein, if Miller was acting in disobedience of a rule, it does not relieve the master from liability.

It is said in the opinion that "it is true there is proof by Miller that the conductor had not long been on the road, and did not understand how to operate a car. Still he was in charge of it, and he knew nothing of any disability on the part of the motorman, or of his intention to leave the car, until he had left it. It is true that he then allowed Miller to operate the car down toward the barn; but, as the motorman had been left behind, in view of the short time that elapsed before the collision, Miller should be regarded as simply a volunteer."

Sullivan, the conductor, agreed with Miller that he had only been in the service of the company a short time and did not know how to operate a car, and he also testified that he knew when the motorman left the car. The court indicates that the distance traveled after the motorman got off the car before the collision was very short, and that Sullivan, the conductor, therefore did not have time to prevent appellee from running or stopping the car. The proof shows, without contradiction, that they traveled a considerable distance, at least four blocks or more, from the place the motorman got off to the place of the collision, which was certainly a sufficient distance to allow the conductor to order Miller to stop running the car; but he made no effort to do so, although, as stated in the opinion, he was in charge of the car, and his conduct after the regular motorman left shows that he consented to Miller running the car.

For these reasons, I dissent from the opinion of the court.

ALABAMA SUPREME COURT.

T. J. SMITH, Appt.,

v.

E. W. WEBB.

(— Ala. —, 58 So. 913.)

Contract — not to engage in business — restraint of trade.

1. A contract by one selling a livery business, not to engage in that business in opposition to the vendee in the city where it is located, is not void as in restraint of trade, although not limited in time.

Note. — *Entering another's employment as breach of covenant not to engage in rival business.*

This note supplements that appended to *Siegel v. Marcus*, 20 L.R.A. (N.S.) 769.

It was held in an English case that acting as a salaried assistant to a surgeon who carried on the practice for his own benefit was carrying on the profession of surgeon within the meaning of a contract not to do so. *Palmer v. Mallet*, 57 L. J. Ch. N. S. 226, L. R. 36 Ch. Div. 411, 58 L. T. N. S. 64, 36 Week. Rep. 460, distinguishing *Allen v. Taylor*, 39 L. J. Ch. N. S. 627, L. R. 10 Eq. 52, 22 L. T. N. S. 512, affirmed in 19 Week. Rep. 35, subsequent proceedings below, 19 Week. Rep. 556, 24 L. T. N. S. 240, holding that a contract not to carry on the trade of a rag dealer was not broken by merely acting as manager of a rag business, the distinction being placed principally upon the ground of the difference between a trade and a profession. 40 L.R.A. (N.S.)

Same — breach — manager of rival business.

2. A contract by one selling a livery business, not to engage in that business in opposition to the vendee in the city where the business is located, is broken by his becoming manager of a branch established there by one owning a livery business a few miles distant from the city.

Evidence — failure of proof — incidental relief — effect on suit.

3. Failure of one suing to restrain another from breaking his contract not to engage in business in opposition to complainant, to establish an incidental feature of his bill asking for damages for failure to turn over property sold in connection with the business, does not defeat the right to injunctive relief.

(May 30, 1912.)

APPEAL by plaintiff from a judgment of the Chancery Court for St. Clair County in defendant's favor in an action brought to enjoin defendant from breaking his contract not to engage in the livery business in opposition to plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. M. M. Smith and Victor H. Smith, for appellant:

The contract set forth in the bill and sought to be specifically enforced by injunction is not a contract in restraint of trade, and hence not void as against public policy.

Robbins v. Webb, 68 Ala. 393; *Moore & H. Hardware Co. v. Towers Hardware Co.* 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41; *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806.

Defendant's contract not to engage in business was broken by his becoming manager of the branch establishment of another livery.

And it was held that taking orders for a firm or company was not carrying on the business "in the name or names or for the benefit of any person or persons," within the meaning of a covenant not to engage in a certain business or in anywise incident thereto. *Clark v. Watkins*, 9 Jur. N. S. 142.

And upon the theory that a contract not to engage in a specified business is in restraint of trade and must be strictly construed, it was held that engaging in business merely as the employee of another did not violate the contract. *Bowers v. Whittle*, 63 N. H. 147, 56 Am. Rep. 499 (dentistry).

And according to *Greenebaum v. Gage*, 61 Ill. 46, a joint interest is the test to determine whether association with another firm constitutes a breach of a contract not to "buy or sell goods in the line of" a specified business; the court saying that if the promisor was not buying or selling for himself or for a firm in which he had a joint interest, but was acting in the capacity of clerk or employee, then, although he

Abel v. State, 90 Ala. 631, 8 So. 760; Braeutigam v. Edwards, 38 N. J. Eq. 542; Lemons v. State, 50 Ala. 130; McPherson v. State, 54 Ala. 224; 9 Cyc. 587, 588; 6 Cyc. 269; 15 Cyc. 1047; Ewing v. Johnson, 34 How. Pr. 202; Nelson v. Johnson, 38 Minn. 255, 36 N. W. 868.

Messrs. N. B. Spears and James A. Embry for appellee.

McClellan, J., delivered the opinion of the court:

The purpose of the bill, exhibited by appellant against appellee, is to enforce the specific performance of the contract set out below, by means of the restraining effect of injunctive process. The contract made was in writing and is as follows:

Pell City, Alabama,
October 19, 1910.

This is to certify for a consideration of \$1,500 I have sold and delivered to T. J. Smith my livery outfit that consists of 8 horses, all buggies, surreys, hacks, wagons, harness of every description, in fact all that

belongs to the stable, including one billy goat, wheelbarrow and tools of every kind and description except three shoats in the barn lot. I also agree to turn over to T. J. Smith both stables now in my possession belonging to Sumter Cogswell. I further agree to turn over my contract with the Standard Oil Company on November 1, 1910, and I further agree to have transferred to the said T. J. Smith my insurance on said livery business. *I further agree for the above consideration not to engage in the livery business in opposition to said T. J. Smith in Pell City.*

[Signed] E. W. Webb.
(Italics supplied.)

It is contended that the vendor (Webb) had breached, before the bill was filed, and was then breaching, the contract in that feature (italicized above), whereby he obliged himself to refrain from engaging in the livery business, etc.

The contract is not void as in restraint of trade. 2 Beach, Contr. § 1575; Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala.

might have held himself out as a member of the firm, his acts would not constitute a breach of the contract.

But it is held that one's contract not to "engage, directly or indirectly, or concern himself, in carrying on or conducting the ice business, either as principal or agent," is violated by working for another dealer as deliveryman and solicitor. Babcock v. Clear, 63 Hun, 628, 43 N. Y. S. R. 426, 17 N. Y. Supp. 664.

So, there is a breach of a covenant not to carry on or be concerned in carrying on, either directly or indirectly with a certain business or trade, or to sell any goods in any way connected with that trade, where the covenantor acts as manager and sells goods connected with the trade mentioned. Jones v. Heavens, L. R. 4 Ch. Div. 636, 25 Week. Rep. 460.

And it was stated rather generally in Empson v. Bissinger, 9 Ohio L. J. 86, that one who contracted not to engage directly or indirectly in the business sold, could not, within the territory specified, act as employee in such a business; and that he could not engage outside such territory, as owner, manager, or employee in the manufacture of articles handled in the business, if such articles were designed to be sold within such territory. Although, as said, this statement was made in general terms, the additional fact that he engaged in business in the name of his wife, apparently as a subterfuge, was an additional reason for holding his employment a breach of the contract.

There is a breach of a covenant of the vendor of a route for the sale of tobacco, and its instrumentalities, that he will not in any manner interfere with the vendee in the prosecution of his said peddling business. 40 L.R.A. (N.S.)

ness in the district or over the route, at or about the places mentioned; and that he will not do or say anything to his old customers to discourage or hinder the vendee in the business,—where he covers such route as a salesman in the employ of another, and although he sells other kinds of tobacco than those covered by the sale. Ewing v. Johnson, 34 How. Pr. 202.

A contract not to engage in a rival business, made by a father and son upon the sale of the father's business, is broken by both parties when a new business is started by them through the subterfuge of placing the business in the name of a third person, and under the sole control and management of the son. Thompson v. Andrus, 73 Mich. 551, 41 N. W. 683.

So, a contract not to enter into a certain business is violated where the promisor connects himself nominally as manager with a business advertised as his own, and it does not appear that anyone else has an interest therein, the circumstances being such as to make the public think that in patronizing the new business they are benefiting the manager personally. Nelson v. Brassington, 64 Wash. 180, 116 Pac. 629.

Attention is also directed to Kramer v. Old, 119 N. C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 650, 25 S. E. 813, holding that the taking of stock, or helping to organize or manage a corporation formed to carry on a business, after one has agreed, on the sale of such a business, not to continue in it in that locality, is a breach of his contract. Numerous notes covering other aspects of contracts to restrict competition are referred to in the indexes to L.R.A. notes under the title, "Contracts — restraint of trade."

L. A. W.

binds appellant to pay all damages, costs, and disbursements which may be awarded against him, does not cover the loss which the prevailing party would suffer if he refrained from the use of the water awarded him pending appeal.

(January 23, 1912.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Lake County sustaining a demurrer to the complaint in an action brought to recover damages for alleged wrongful diversion of water from plaintiffs' lands. Modified.

Statement by McBride, J.:

The inception of this proceeding may be referred to the case of *Hough v. Porter*, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

On October 8, 1900, Annie C. Hough began a suit against A. D. Porter, plaintiff's ancestor, claiming the right as riparian owner to use 500 inches of the waters of Silver creek for the irrigation of her land, and alleging that Porter was unlawfully diverting the same. Porter answered, claiming his diversion as a prior appropriator, and after a reply had put the case at issue it was referred, and on October 23, 1901, the court, after considering the testimony reported, came into the conclusion that it could not finally adjudicate the disposition of the waters of Silver creek without bringing in other parties claiming water rights upon the same stream, and thereupon an amended complaint was filed, introducing several additional plaintiffs and a large number of defendants, aggregating in all about forty-five additional parties to the litigation. The present defendant, George H. Small, was one of those so brought in as a defendant, and he answered, claiming appropriation of 800 inches of the waters of Silver creek prior to those of the other defendants and plaintiffs.

After the case was again at issue, it was referred, and the testimony, which practically involved the investigation of a dozen or more conflicting claims to the water, was finally taken and submitted, and the court decreed, among other things, that Small was entitled to 650 inches of water and Porter to 100 inches. In the meantime, Porter died, and his heirs were substituted. An appeal was taken by them and others to this court, and an undertaking to "pay all costs, damages, or disbursements which may be awarded against them or either of them on said appeal or a dismissal thereof," was duly filed. On January 5, 1909, a decree was made by this court, reversing the award of 650 inches to Small, and re-

ducing his amount to 40 inches, and allowing the Porters 100 inches.

Plaintiffs bring this action, setting up the undertaking given by them on the appeal in *Hough v. Porter*, and alleging that during the years 1905, 1906, 1907, and 1909, respectively, there were 800 inches of water in Silver creek, of which plaintiffs were entitled to 100 inches, Small to 40 inches, Annie C. Hough and John C. Porter to 100 inches each, without priority between them, Lucinda Egli, 120 inches, and Marion Conley, 100 inches, aggregating in all 560 inches, which was the amount allowed by the decree of the supreme court.

The complaint further alleges that during the period above mentioned defendant, with full knowledge and notice of the rights of plaintiffs, maliciously, unlawfully, and wrongfully, and without probable cause, and for the purpose of injuring and defrauding the plaintiffs by drying up their land and destroying the grasses growing thereon, suitable for hay, and to cause them to lose their hay crops on the land, and to compel them to obtain water for their stock from other sources, at additional expense, diverted the water from plaintiffs' lands, to their damage, etc. The complaint, which is of great length, contains six causes of action, of which the foregoing is the merest outline, but it serves to indicate its general scope. To this complaint, defendant interposed a general demurrer, which was sustained, and plaintiffs appeal.

Messrs. W. J. Moore and Thomas S. Farrell, with Mr. E. B. Watson, for appellants.

Messrs. W. Lair Thompson and John A. Carson, for respondent:

The decree of the lower court was binding in all things until reversed.

Day v. Holland, 15 Or. 464, 15 Pac. 855; *Shirley v. Birch*, 16 Or. 1, 18 Pac. 344; *State ex rel. Chrisman v. Small*, 49 Or. 595, 90 Pac. 1110.

In all cases where the jurisdiction of the appellate court is revisory only, a supersedeas does not suspend the operation of the judgment of the nisi prius court pending the appeal.

Day v. Holland, 15 Or. 464, 15 Pac. 855; *Shirley v. Birch*, 16 Or. 1, 18 Pac. 344; *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *Nill v. Comparet*, 16 Ind. 107, 79 Am. Dec. 411; *Graves v. Maguire*, 6 Paige, 379; *State ex rel. Matthews v. Chase*, 41 Ind. 356; *Bacon v. Green*, 36 Fla. 322, 18 So. 866; *Randles v. Randles*, 67 Ind. 434; *Willis v. Willis*, 165 Ind. 332, 2 L.R.A.(N.S.) 244, 75 N. E. 655, 6 Ann. Cas. 772.

Upon a reversal of a judgment or decree

regularly entered, the successful party upon the appeal is entitled only to a restitution of the property of which he was deprived by such judgment or decree.

Black, Judgm. 2d ed. 170, 355; 2 Freeman, Judgm. 4th ed. §§ 482, 1048; Simpson v. Hornbeck, 3 Lans. 53.

And this does not mean damage for use of the thing pending reversal.

Bridges v. McAlister, 106 Ky. 791, 45 L.R.A. 800, 90 Am. St. Rep. 267, 51 S. W. 603; Mark v. Hyatt, 135 N. Y. 306, 18 L.R.A. 275, 31 N. E. 1099; Gay v. Smith, 38 N. H. 176.

McBride, J., delivered the opinion of the court:

The foregoing is not a full statement of the issues presented by the complaint, but is sufficient to indicate the points involved in the decision of the demurrer. Briefly stated, the controversy is this: The circuit court, by the decree in Hough v. Porter, adjudged defendant, Small, to be entitled to 650 inches of the waters of Silver creek. Acting in pursuance of such decree, Small took about that amount, or so much of it as he wanted, to the detriment of plaintiffs' lands and crops, until the modification of the original decree, which gave him only 40 inches. If the modification of the decree by this court restores all parties to their original status, and attaches to all acts done in pursuance of it the same wrongful character which they would have possessed had no such decree been rendered, then defendant is a trespasser *ab initio*, and the demurrer was not well taken. If, on the other hand, the decree of the circuit court was valid until reversed, and the defendant had a legal right to rely upon the correctness of it, his act in pursuance of it, if then lawful, will not become a tort by reason of a modification of the decree by an appellate court. The question is one of great difficulty, not heretofore passed upon by this court, and one upon which there is an astonishing scarcity of precedent in the decisions of other jurisdictions. The text writers seem to be as much at sea upon the proposition as the courts. Thus, Freeman on Judgments, 3d ed. § 481, states the general rule as follows: "The reversal of a judgment by any competent authority restores the parties litigant to the same condition in which they were prior to its rendition. The judgment reversed becomes mere waste paper; and the parties to it are allowed to proceed in the court below to obtain a 'final determination of their rights' in the same manner and to the same extent as if their cause had never been heard or decided by any court." Taken by itself, this would seem to settle the whole matter 40 L.R.A. (N.S.)

in favor of plaintiffs' contention, but in the succeeding section the following language is used: "Upon the reversal of the judgment against him, the appellant is entitled to the restitution, from the respondent, of all the advantages acquired by the latter by virtue of the erroneous judgment. The successful appellant is entitled to a restitution of everything still in possession of his adversary, *in specie*; not the value, but the thing. If money has been collected by the plaintiff in the judgment, under execution an action lies against him to recover it back. . . . But a subsisting judgment, though afterwards reversed, is a sufficient justification for all acts done by plaintiff in enforcing it prior to the reversal. Thus, if the defendant be taken in execution, the subsequent reversal of the judgment will not render the plaintiff liable to an action for false imprisonment. For the act of imprisonment, where directed by the plaintiff, was sanctioned by a then valid judgment. But the plaintiff on the reversal is liable to an action to recover the damages occasioned by a sale of the defendant's property made under the judgment prior to its reversal. Where the plaintiff has purchased the property, and still has it in his possession, the defendant may, at his election, affirm the sale and have his action for damages."

In Williams v. Simmons, 22 Ala. 425, which was an action in assumpsit to recover money collected from an administrator's surety, by execution upon a decree which was afterwards reversed, the court say: "A judgment reversed is regarded as if it had never existed, and the parties are restored to their rights as they were before it was rendered. . . . After the reversal of the first decree, then, the defendant in error held the position of a party who had possessed himself of the property of another, without even the color of right to retain it. True he had the right when he acquired the possession, but he has since lost it, and his possession has become tortious. . . . He was bound to see, and doubtless, as he supposed, did see, that his proceedings were legal. In the collection of the money, he stood strictly upon his legal rights, and he cannot complain that the plaintiff in error, after the judgment is reversed, stands upon his; nor can he be said to hold the position of one paying out money without notice that there was an adverse claim to it in his hands. The fact that he collected the money forcibly by law, and alone upon the ground of legal right in himself, must always affect him with notice, so far as respects the rights of the plaintiff in error."

In Hay v. Bennett, 153 Ill. 271, 38 N. E.

645, an administrator was directed by a decree of the court to pay out of funds in his hands \$3,500 to one of the parties to the suit in which the decree was rendered. He paid the money while the decree was in force and according to its terms. Afterwards the decree was reversed, and subsequently a suit was brought against him to recover the money. He justified payment by reason of the decree, but the court held that he, having been a party to the original suit, was bound by such reversal, although he had paid the money, relying upon the validity of the decree. This case is cited with approval in *Miller v. Doran*, 245 Ill. 200, 91 N. E. 1039.

In *Stanbrough v. Cook*, 86 Iowa, 740, 53 N. W. 131, which was an action for crops taken by defendant under a judgment which was afterwards reversed, the court say: "To our minds, the appellant discovers and solves the problem thus presented for us when he says in argument: 'There is now, however, a practical difficulty in the way of our relying on the former judgment, namely, that it has been reversed.' That is the true solution, and renders further comment unnecessary. An erroneous judgment, not final, would not protect the defendant in taking the property of the plaintiff. But it is said the former judgment for the defendant 'takes him out of the category of trespassers, and puts him in as good a position as a defendant in an ordinary action for the recovery of real property.' This is urged on the theory of his good faith. But a wrong done in good faith does not make it, in a legal sense, right. . . . While good faith may sometimes affect the extent of liability for trespass, it does not excuse it. We are led intuitively to the thought suggested by the appellant, that the judgment was reversed. It was not final, but erroneous, and gave no rights." To like effect is the decision in *Reynolds v. Hosmer*, 45 Cal. 616, 4 Mor. Min. Rep. 657.

In *Bank of United States v. Bank of Washington*, 6 Pet. 8, 8 L. ed. 299, which was an action in assumpsit for money collected upon an execution or a judgment which was afterwards reversed, the court say: "On the reversal of the judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost, and the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a scire facias, when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases, a scire facias

may be necessary to ascertain what is to be restored. . . . And, no doubt, circumstances may exist where an action may be sustained to recover back the money."

The case of *McCallister v. Bridges*, 19 Ky. L. Rep. 107, 40 S. W. 70, is a case apparently in point for the contention of plaintiffs in the case at bar, but in a subsequent hearing of the same case (*Bridges v. McAlister*, 106 Ky. 791, 45 L.R.A. 800, 90 Am. St. Rep. 267, 51 S. W. 603), the opposite view is taken by the court in a strong and convincing opinion. The expressions in the original case seem to be to a great extent *dictum*, and are ignored by the court in its final opinion. In fact, the official reports of the state do not contain the original opinion, which is indorsed "not to be reported," and is printed only in an unofficial publication.

We have thus given the principal decisions tending to support the contention of plaintiffs, preferring, in most instances, to give the language of the courts, rather than our construction of it.

We will now advert to some of the principal decisions tending to support defendant's contention, which, briefly stated, is that, being brought involuntarily into court, and having there obtained a decree that he has a right to 650 inches of water, he was justified in assuming that the court was right and had correctly construed the law, and in acting on that assumption until the decree was reversed; that until the final decree in the supreme court the decree of the lower court was valid and subsisting, and that, as he could not be a trespasser while acting under a valid and subsisting decree, the same acts did not become torts when that decree was reversed.

The principal case relied upon by defendant, and one in many respects similar to the case at bar, is *Bridges v. McAlister*, *supra*. *Bridges* and *McAlister* owned adjoining lands. A ditch had been dug from the land of *McAlister*, in order to drain certain swamp ground thereon; down to and upon the land of *Bridges*. In the course of years, it had become partially filled up, and *McAlister* and others reopened it, so as to more completely effectuate its original purpose of draining their lands. *Bridges* brought a suit, and obtained a decree prohibiting *McAlister* from using the ditch for the purpose of drainage, and directing that it should be filled up entirely. Pursuant to this agreement, the ditch was filled entirely, so that the water, which had been accustomed to flow through it in its partially obstructed condition, was thrown back upon the lands of *McAlister*, to the serious injury of his crops. Upon appeal the decree was so modified that the ditch

was permitted to be maintained in its partially obstructed condition; but that part of the decree which required it to be filled entirely was reversed. Thereupon McAlister brought an action in tort against Bridges for damages occasioned by the complete filling up of the ditch. Bridges answered, setting up the decree under which he acted as justification. The court struck out this portion of his answer, and he appealed. The reasoning of this case seems so cogent that we quote it in its entirety:

"The main question arising on this appeal is as to the effect of the reversed judgment on acts done under it and in obedience to it before its reversal when it was not superseded. In *Freeman on Judgments*, § 482 it is said: 'But a subsisting judgment, though afterwards reversed, is a sufficient justification for all acts done by plaintiff in enforcing it prior to the reversal. Thus, if the defendant be taken in execution, the subsequent reversal of the judgment will not render the plaintiff liable to an action for false imprisonment; for the act of imprisonment, when directed by the plaintiff, was sanctioned by a then valid judgment.' And in section 104b the same author says: 'The case of a judgment set aside for irregularity differs materially from that of one reversed upon appeal. In the latter case, the error for which the judgment is ultimately avoided is imputed to the court, and the parties are not left without protection for the acts which they have done, based upon the judgment, and upon their confidence in the correctness of the decisions of the court.' The same principles are laid down in *Black on Judgments*, §§ 170, 355. In *Kaye v. Kean*, 18 B. Mon. 847, Kean obtained a mandamus against Kaye, which he refused to obey, and, being imprisoned for disobedience, brought suit against Kean, upon a reversal of the judgment awarding the mandamus, for damages for his imprisonment. His petition was dismissed. The court said: 'The judgment of the circuit court was not void, but merely erroneous. . . . So long, therefore, as the judgment remained in force, unsuspended and unreversed, it was the duty of the appellant to have rendered obedience to it. His contumacy subjected him to be proceeded against for a contempt, and as, therefore, there was sufficient cause for his imprisonment, he cannot maintain an action therefor against the appellee.'

"In *Clark v. Rodes*, 12 Bush, 16, again this court said: 'A judgment is a final and conclusive determination of the rights of the parties to the litigation, and until it shall be reversed, vacated, or modified in some one of the modes provided by law the parties cannot refuse to obey it; nor

can they, by subsequent l
nify themselves against
quences.'

"In *Fraser v. Page*, 82 K who had paid out a fund i which was not superseded reversed, was held protect done in obedience to it wh same ruling was made in 5 Ky. L. Rep. 224; *Shu Ky. L. Rep. 662*; *Showwa 5 Ky. L. Rep. 423*; *Dudley L. Rep. 773*.

"These cases proceed up that what was lawful wh become unlawful by rea acts. The chancellor, in e ment in the case referred as the agent of either of judgment was the act of t party could control the co was responsible for his a constituted a tribunal t rights of the parties. The proceeding from a power in no sense their act. A court does not procure entered, in any such sense responsible for the consequent or its reversal by th Supreme Court. We hav to no case, and can find action for damages has been the reversal of a judgmer pursuant to it, as for a that there are no precede covery seems at this day it has not been recognize by either the bench or th judgment is reversed, rest made of all that has been r but no further liability sh be imposed. The case of *Ha Ky. 375*, 3 S. W. 431, 11 not supported by the weig and cannot, in our judgmen on principle, so far as i greater liability. The quote *Freeman on Judgments* is omitted altogether in the la opinion is supported only b Illinois and California, and the rule followed by the Supreme Court and all t courts, so far as we have s in conflict with the well-s the court, in ordering o judicial sale, and the commi ing it, do not act as the age tiff. *Bank of United Sta Washington*, 6 Pet. 9, 8 L. Judicial Sales, §§ 1-12; *For 3 Dana*, 621.

"Appeals may be taken i

ordinarily within two years, but sometimes within five or twenty years, and it would often produce intolerable hardship to hold a litigant responsible for the consequences of an erroneous judgment under such circumstances. The object in having trust estates, including those of decedents, or those assigned for the payment of debts, settled in equity, under the direction of the chancellor, is to protect the parties in the payment of the money, as well as to secure to every one his rights. A creditor with a small claim, who moved for a distribution of the fund, would, under the rule referred to, be responsible for the entire fund upon the reversal of the judgment, although he had received only a few dollars of it. Such a rule would destroy all confidence in judgments of courts, and make them the prolific parent, in many cases, of ruinous litigation.

"Our system of courts and the principles governing them are derived from the common law. But in England the tribunal was called the *curia* or court, because it was held by the King himself originally. The judgments of the court read as the judgments of the King, and when he ceased to hold the court in person, and delegated this function to one of his officers, the character of the judgment was the same. Manifestly there the subject was not responsible for damages for the act of the King. In this country the power vested in the King vests in the body of the people, and the courts sit as their representative. The law, from principle and policy, requires that full confidence should be given to their judgments while in force. It tends to prevent the troubles incident to the settlement of disputes by the act of the parties, often bringing about breaches of the peace or bloodshed. It is the duty of every good citizen to obey the mandates of the law, and no one should incur any responsibility by doing that which it was his duty to do. It is also the duty of every citizen to uphold the authority of the courts and maintain respect for their judgments; and when in doing this he obeys a judgment of the court, it is a sound and safe rule that no liability for damages should arise therefrom."

In a valuable note to this case, in 45 L.R.A. 800, the editor says: "The prevailing doctrine is that the reversal of a judgment which is merely erroneous, as distinguished from one that is irregular, void, or voidable, merely creates a right *ex æquo et bono* to have restored what has been lost, and that it does not relate back, so as to render wrongful acts done under the judgment which were justified at the time."

Mark v. Hyatt, 135 N. Y. 306, 18 L.R.A. 275, 31 N. E. 1099, was a case where the 40 L.R.A. (N.S.)

plaintiff sued to restrain infringement upon certain patents, and after hearing obtained an injunction. Upon appeal to the general term of the supreme court, the case was reversed. Plaintiffs sued for damages. The court said: "The patentee lawfully and fairly submitted her rights to the decision of the court. While the judgment rendered was in one respect erroneous, neither the party nor the court were therefore trespassers. Some injury or inconvenience quite often flows from the operation of an erroneous judgment, pending the appeal, which ends in a reversal; but there is no trespass and no trespasser. To some extent, the evil is prevented by provisions which stay the execution of the judgment and authorize a summary restitution; but no action of trespass will lie to recover the damages, unless the prosecution is alleged and proved to have been malicious and without probable cause. We have held that doctrine quite firmly and clearly in cases of injunctions, declaring, in substance, that, although the restraining order ought not to have been granted, and was set aside for that reason, yet the damages incurred, where the proceedings have been regular, cannot be recovered, in the absence of an undertaking, except upon the basis of a malicious prosecution. *Lawton v. Green*, 64 N. Y. 326. *Palmer v. Foley*, 71 N. Y. 106."

We have tried fairly to present the principal authorities bearing either way upon the matter in controversy in the case at bar, for the reason that the precise point involved here has not been previously decided by this court, and because the question is of such nicety and difficulty that counsel in the case and the bar generally are entitled to all the data upon which this court bases its conclusion upon a question which no candid lawyer can say is beyond controversy.

We are of the opinion that in a case like the present one, where, as we shall presently show, the decree is self-executing, and no stay of proceedings is asked or taken on the appeal, that the successful party in the court below has a right to assume that the decree of the court is lawful and proper, and that he will not subject himself to an action for tort in acting upon that assumption.

This is not like a case where an execution or order of the court is necessary to enable the party to reap the fruits of his decree. It acts *proprio vigore* upon the res—the right to use the water. *Day v. Holland*, 15 Or. 464, 15 Pac. 856. The appeal and the undertaking given did not stay the operation of the decree. It only stayed the issuance of an execution for costs and disbursements. *Ibid.*; *Willis v. Willis*, 165

Ind. 332, 2 L.R.A.(N.S.) 244, 75 N. E. 655, 6 Ann. Cas. 772, and cases there cited.

The undertaking on appeal given in the suit of Hough v. Porter would have afforded this defendant no remedy, had he treated it as suspending his right to use the water during the pendency of the suit. It is conditional that "defendants will pay all damages, costs, and disbursements which may be awarded against them or either of them on said appeal, or a dismissal thereof." Now suppose that Small had refrained from using the water until the final disposition of that case in this court, and finally prevailed, what redress could this court have given him upon this undertaking, for being deprived of the use of the water? Manifestly none. Its functions are purely revisory. It could only have given him costs and disbursements. Water used for the purposes of irrigation is for many purposes treated as real estate; it is appurtenant to the land. L. O. L. §§ 6545, 6668. Being so appurtenant to the land, we are of the opinion that an undertaking, to be effectual as a stay in cases of this character, should conform to the requirements of subd. 2 of § 551, L. O. L. Under this section, the appellant could have had the value of the use of the water fixed beforehand by the circuit judge, and the prevailing party would have had a definite right to restitution, which, while not affording in all cases complete compensation, would have as nearly approximated to it as is possible in such cases. Plaintiffs also had another remedy by applying to this court for an injunction, as was done in *Livesley v. Krebs* Hop Co. 57 Or. 352, 97 Pac. 718, 107 Pac. 460, 112 Pac. 1. In such a case, the court could have required an undertaking sufficient to indemnify Small in case he should prevail in this court, and, upon this being given, could have expressly enjoined him from diverting water during the pendency of the appeal.

Plaintiffs did not seem to have such confidence in the merits of their appeal as to be willing to take any chance of paying damages in case it should be adjudged groundless, and they should not now be permitted to mulct Small in damages because he was not wiser than the circuit court, and did not know the law which this court consumed 125 pages of the Oregon reports in explaining.

It is often said that there is no wrong without a remedy, and, while this is generally true, a remedy may be lost by inaction or want of diligence; and if we concede that it was wrong for defendant to assume that the circuit court had properly adjudged the law, we have already indicated that plaintiffs had it in their power to

minimize the effects of that wrong by giving a proper undertaking, or by applying to this court for an injunction. But we are not prepared to say that defendant, under the circumstances, was guilty of an actionable wrong. As was said by the court in *State ex rel. Chrisman v. Small*, 49 Or. 603, 90 Pac. 1110, which was a proceeding to punish this defendant for contempt for committing the very act upon which this action is predicated, "until the appeal in such suit is heard and determined in this court, and until such decision is rendered, it must be presumed that the decree of the lower court is correct in every particular." The defendant had the right to indulge in this presumption, and if his act was not a tort when performed it cannot become a tort by relation, upon reversal of the decree.

Judgment affirmed.

A petition for rehearing having been filed, McBride, J., on June 25, 1912, handed down the following additional opinion (— Or. —, 124 Pac. 649):

In their able brief on petition for rehearing, counsel for plaintiffs contend that the opinion of this court in *State ex rel. Chrisman v. Small*, 49 Or. 595, 90 Pac. 1110, is a conclusive determination in plaintiffs' favor that the undertaking given by appellants in *Hough v. Porter* operated as a supersedeas. The language used by the court in that opinion is as follows: "Though the ownership of ditches by the relators, and the legal assertion by them of the right to have the water of Silver creek flow in such trenches to their lands for the irrigation thereof, may constitute real property, . . . we shall assume, without deciding, that the decree rendered in the case of *Hough v. Porter* was not a suit for the recovery of the possession of land or for the partition thereof, so that an undertaking only for appeal stayed the proceedings as if the further undertaking therefor had been given." The court then goes on to discuss the evidence, and holds that Small is not shown to have been guilty of contempt. It will be seen from the language quoted that the court expressly declined to pass upon the question as to whether the undertaking operated as a supersedeas, but held in effect that, even if that were the case, the evidence was not sufficient to justify convicting Small of contempt. We cannot assent to the reasoning which holds that by some sort of legal legerdemain the court, as a matter of law, must have decided that which it expressly refused to decide.

This court has never intimated that plaintiffs might not have restitution by an appropriate action, probably in quasi contract,

for any profits, or perhaps for rentals of water appropriated by Small during the pendency of the appeal of the case of Hough v. Porter. We only hold that in this action, which is in tort pure and simple, he cannot recover, and we adhere to that view. It is, however, called to our attention that paragraph 5 of the complaint states a cause of action arising from a wrongful diversion of water during the irrigating season of 1909, and subsequent to the rendition of the decision in Hough v. Porter. This was not called to our attention on the original argument, and we are of the opinion that as to that cause of action the demurrer was improperly sustained. Our former opinion is therefore modified to the extent that the judgment of the lower court, sustaining the demurrer to the fifth cause of action, is reversed, and the cause remanded for proceedings not inconsistent with this opinion.

RHODE ISLAND SUPREME COURT.

TIMOTHY CARROLL

v.

ALFRED A. SANFORD et al.

(— R. I. —, 83 Atl. 855.)

Attachment — of curtesy initiate — validity.

Under the statutes preserving the property of married women free from liability for the contracts or torts of their husbands, but preserving curtesy, curtesy initiate is not liable to attachment for the husband's debts, and a sale by the husband of his curtesy interest, which becomes consummate after attempted attachment, takes priority over a subsequent execution sale of the interest levied on in the attachment proceeding.

(June 29, 1912.)

CERTIFICATION by the District Court for the Second Judicial District for the opinion of the Supreme Court, upon an agreed statement of facts, of questions arising in an action brought to recover possession of certain real estate. Decision for defendants.

The facts are stated in the opinion.

Note. — The general question as to whether an expectant or contingent interest in real property is subject to attachment or levy on execution is considered in the notes to *Young v. Young*, 23 L.R.A. 642, and *Walker v. Alverson*, 30 L.R.A.(N.S.) 115; and see specifically as to curtesy initiate, page 648 of the earlier note and page 118 of the later note.
40 L.R.A.(N.S.)

Messrs. Dexter B. Potter and Edward A. Stockwell, for plaintiff:

The curtesy initiate interest is attachable by a creditor of the husband in this state, under the laws now in force.

4 Cyc. 562; 12 Cyc. 1015; 8 Am. & Eng. Enc. Law, 2d ed. 516; Alderson, *Judicial Writs & Process*, p. 379; Washb. *Real Prop.* 6th ed. §§ 347, 351; 1 Tiffany, *Real Prop.* § 210; *Mattocks v. Stearns*, 9 Vt. 326; *Teacle's Estate*, 6 Pa. Co. Ct. 553; *Day v. Cochran*, 24 Miss. 261; *Roberts v. Whiting*, 16 Mass. 189; *Van Duzer v. Van Duzer*, 6 Paige, 366, 31 Am. Dec. 257; *Lang v. Hitchcock*, 99 Ill. 550; *McLellan v. Nelson*, 27 Me. 129; *Hitz v. National Metropolitan Bank*, 111 U. S. 722, 28 L. ed. 577, 4 Sup. Ct. Rep. 613; *Johnson v. Chapman*, 35 Conn. 550; *Franklin Sav. Bank v. Greene*, 14 R. I. 3, 51 Am. Rep. 336; *Briggs v. Titus*, 13 R. I. 136.

Messrs. Frederick O. Olney and Harvey A. Baker for defendants.

Johnson, J., delivered the opinion of the court:

This case has been certified to this court by the district court of the second judicial district, under Gen. Laws 1909, chap. 298, § 4, upon the following agreed statement of facts:

"This is an action of trespass and ejectment, brought by Timothy Carroll against Alfred A. Sanford and Nicholas Baker, to recover possession of the following premises, situate in the village of Wakefield, in the town of South Kingstown, and bounded and described as follows: 'Northerly on Mechanic street, a highway, so called, one hundred and ten (110) feet; easterly on land now or formerly of the estate of John Caswell, deceased, one hundred and eight (108) feet, more or less, to land of the Narragansett Pier Railroad Company; southerly on land of said railroad company, one hundred and ten (110) feet; and westerly on land now or formerly of the estate of John R. Clark, deceased, one hundred and eight (108) feet, more or less, in the line of the aforesaid street or highway;—which said premises the said plaintiff, Carroll, alleges he is entitled to possession of for the life of Alfred A. Sanford. He further alleges that said defendants are tenants at sufferance of the aforescribed premises. In this case it is agreed by and between the parties thereto that the facts are as follows:

"(1) The plaintiff, Timothy Carroll, prior to the beginning of this action, to wit, on the 19th day of May, A. D. 1910, began suit against one of the defendants, to wit, Alfred A. Sanford, and attached on his original therein all the estate, right, title, interest, and property of the said Alfred A.

Sanford in the premises described in this declaration. On the 21st day of November, A. D. 1910, the said plaintiff, Carroll, obtained judgment against the said Alfred A. Sanford for \$4,122 and costs; on the 6th day of February, A. D. 1911, the said plaintiff, Carroll, levied on all the estate, right, title, interest, and property which said Alfred A. Sanford had at the time of the attachment on the original writ in the premises described in this declaration, by virtue of an execution issued in the case of Timothy Carroll v. Alfred A. Sanford, Washington, No. 202, which said execution was returnable May 28, 1911; and on the 15th day of May, A. D. 1911, the said plaintiff, Carroll, caused to be sold on execution sale on said judgment all the estate, right, title, interest, and property of the said Sanford in the premises described in this declaration, and at said sheriff's sale the said plaintiff, Carroll, became the purchaser thereof and took a sheriff's deed therefor, which said deed was recorded on June 13, 1911, in the records of land evidence for the town of South Kingstown, in Book 38, at page 18.

"(2) At the time of the attachment of the premises described in this declaration on the original writ in the case of Timothy Carroll v. Alfred A. Sanford, Washington, No. 202, said Alfred A. Sanford was not the owner in fee of said premises. They were purchased entirely with the money of Ethel B. Sanford, wife of said Alfred A. Sanford, in 1908, and stood of record in truth and in fact as her property. There were, however, issue born alive of the marriage between Alfred A. Sanford and Ethel B. Sanford, capable of inheriting the property in event of the death of said Ethel B. Sanford, which said children are now living. At the time of the aforesaid attachment Ethel B. Sanford was alive. She died on the 8th day of September, 1910, intestate. Subsequent to the aforesaid attachment, and to the said demise of the said Ethel B. Sanford, but before the levy on the premises described in this declaration by the said plaintiff, Carroll, under his execution, and before the execution sale aforesaid, to wit, on the 20th day of September, A. D. 1910, the said Alfred A. Sanford conveyed by deed all his right, title, and interest in the premises described in this declaration to the other of these defendants, Nicholas Baker, which deed was recorded the 20th day of September, A. D. 1910, in the records of land evidence of the town of South Kingstown, in Book 37, at page 521.

"(3) At the time this action of trespass and ejectment was begun, and for some time prior to that time, said Alfred A. Sanford was in possession of said premises, living

in the house on the tract in question, together with his said children. Due and legal notice to quit the said premises on or before July 1, 1911, was served on the said defendants by the said plaintiff, Timothy Carroll.

"Upon the aforesaid agreed statement of facts the parties pray the judgment of the court."

The question of law involved is: Did Timothy Carroll, by his attachment and subsequent purchase at execution sale of the interest of Alfred A. Sanford in the property of his wife in question, said interest at the time of said attachment being that of curtesy initiate, but before said sale becoming curtesy consummate, secure such title as will support this present action against the said Alfred A. Sanford and his grantee; said grant, however, having been made subsequent to the attachment and the death of his wife, but prior to the execution sale?

Section 1, chap. 246, Gen. Laws 1909, provides that "the real estate, chattels real, and personal estate, which are the property of any woman before marriage, or which may become the property of any woman after marriage, or which may be acquired by her own industry, including damages recovered in suits or proceedings for her benefit, and compensation for her property taken for public use, and the proceeds of all such property, shall be and remain her sole and separate property, free from control of her husband." Under said chapter 246, Gen. Laws 1909, is an estate by curtesy initiate attachable? Section 1 provides that the property enumerated "shall be and remain her sole and separate property, free from control of her husband." Section 8 provides: "The right of the husband in the real estate of the wife as tenant by the curtesy . . . shall not be impaired by the provisions of this chapter." Section 12 provides that "the wife or her property shall not be liable for the contracts or the torts of her husband."

The first married women's act in this state appears in Pub. Laws 1844, at page 270, entitled: "An Act Concerning the Property of Married Women." It is provided by the 1st section thereof as follows: "Section 1. The real estate, chattels real, household furniture, plate, jewels, stock or shares in the capital stock of any incorporated company of this state, or debts secured by mortgage on property within this state, which are the property of any woman before marriage, or which may become the property of any woman after marriage, shall be and are hereby so far secured to her sole and separate use, that the same, and the rents, profits, and income thereof,

shall not be liable to be attached, or in any way taken, for the debts of the husband, either before or after his death, and upon the death of the husband in the lifetime of the wife, shall be and remain her sole and separate property." The words "so far secured to her sole and separate use, that the same, and the rents, profits, and income thereof, shall not be liable to be attached, or in any way taken, for the debts of the husband, either before or after his death, and upon the death of the husband in the lifetime of the wife, shall be and remain her sole and separate property," were continued in the revision of 1857, in § 1 of chapter 136 of the Revised Statutes. This statute was considered in *Greenwich Nat. Bank v. Hall*, 11 R. I. 124. The court held that the husband's tenancy by the curtesy initiate is not subject to attachment for the husband's debts. At page 127 the court, Durfee, Ch. J., says: "The statute expressly says that the real estate which is the property of any woman before marriage, or which may become her property after marriage, shall be so far secured to her sole and separate use that the same, and the rents, profits, and income thereof, shall not be liable to be attached or in any way taken for the debts of the husband, either before or after his death. The protection extends to the real estate which is the property of a woman before marriage, to the real estate which may become her property after marriage, and to all the rents, profits, and income of her real estate of either description. Let us consider the question submitted to us, first, with reference to the real estate which is her property before marriage. Certainly an exemption which covers the real estate which is the property of a woman before marriage, together with all the rents, profits, and income thereof, leaves nothing to be attached; for any interest which the husband acquires therein as the result of the marriage must necessarily be some portion of the real estate, or of the rents, profits, or income thereof, all of which is exempt. Does the real estate which becomes her property after marriage stand upon any different footing? We think not. The two descriptions of property are coupled in the same sentence and in a manner which shows that they were both intended to have the same immunity. That which is protected is not the real estate which the wife has at the time of the attachment, but the real estate which was her property before or which becomes her property after marriage. And this construction, based on the letter of the statute, is in keeping with its spirit. The design was to secure the estate during the life of the wife from molestation by the credit-

ors of the husband, and this design is promoted by holding that during her life he, simply as husband, has no interest in her real estate which can be attached in any suit to which she is not a party."

The next change in the statute appears in the revision of 1872 (Gen. Stat. chap. 152, § 1): "The real estate, chattels real, and personal estate, which are the property of any woman before marriage, or which may become the property of any woman after marriage, or which may be acquired by her own industry, shall be absolutely secured to her sole and separate use; neither the same, nor the rents, profits, or income of the same, nor any part thereof, shall be liable to be attached, or in any way taken, for the debts of the husband, either before or after his death; and upon the death of the husband in the lifetime of the wife shall be and remain her sole and separate property." This section was considered in *Re Voting Laws*, 12 R. I. 586. The opinion stated that the law of 1844 did not in any way affect the right of the husband to vote under article 2, § 1, of the Constitution, upon the property of his wife, so long as she left him in the enjoyment of it. Then at page 592: "The law of 1844 remained without material change until the General Statutes went into effect, December 2, 1872. The General Statutes introduced an important modification by enacting that the real property of a married woman 'shall be absolutely secured to her sole and separate use,' instead of 'so far secured to her sole and separate use that the same, and the rents, profits, and income thereof, shall not be liable to be attached or in any way taken for the debts of the husband.' It is true the old provision, that the husband may receive the rents and profits until the persons who are held for them are notified in writing by the wife not to pay them to him remains unaltered. But this does not authorize us to conclude that the modification is of no effect. It is easy to construe that provision as being simply in the nature of a license or permission from his wife, which may be presumed until it is expressly repudiated or revoked. But there can be no estate by marital right in property which is absolutely secured to the sole and separate use of the wife. The estate is utterly incompatible with so exclusive an appropriation. See *Martin v. Pepall*, 6 R. I. 92, 94. Nothing remains for the husband which he can really call his own. We think, therefore, that no husband who has married since December 2, 1872, or whose wife has acquired the property on which he claims the right to vote since December 2, 1872, can be entitled to vote under article 2, § 1, simply as tenant by marital right."

The opinion held that the new statute did not retroact, so as to destroy an estate by marital right previously acquired, and thus disfranchise the tenant, and that therefore any person who had acquired a right to vote previous to December 2, 1872, as tenant by marital right, and *a fortiori*, as tenant by the curtesy initiate, was not affected in his right by the new statute which then went into effect. The opinion then proceeds: "One other question remains to be considered, namely: Can a husband who has married since December 2, 1872, or whose wife has acquired the property on which he claims the right to vote since December 2, 1872, be entitled to vote under article 2, § 1, if he has had issue by her capable of inheriting it? The new statute (Gen. Stat. [R. I.] chap. 152, § 14) provides that the right of the husband in the real estate of the wife as tenant by curtesy shall not be impaired. But this cannot mean that this right as tenant by the curtesy initiate shall not be impaired; for the absolute appropriation to the use of the wife necessarily excludes that right, as well as the mere marital title. It means, doubtless, that tenancy by the curtesy in its stricter sense, as consummate by the death of the wife, shall not be impaired." The opinion then considers the question whether the right to vote is lost.

The statute remained unchanged in the Public Statutes of 1882, but appeared in its present form in Gen. Laws 1896. Under the provisions of the present statute (Gen. Laws 1909, chap. 246, § 1), it is provided that the property of the wife, enumerated, "shall be and remain her sole and separate property, free from the control of her husband." We think this secures the property to her separate use as effectively as the words of chapter 152, § 1, Gen. Statutes 1872, viz.: "Shall be absolutely secured to her sole and separate use." The express provision that the property "shall not be liable to be attached, or in any way taken, for the debts of the husband," is not in the present statute. Section 12 of said chapter, however, provides that "the wife or her property shall not be liable for the contracts or the torts of her husband." The provision of § 8, that "the right of the husband in the real estate of the wife as tenant by the curtesy . . . shall not be impaired by the provision of this chapter," does not enlarge the right of tenancy by the curtesy beyond what it was under the statute under consideration in *Re Voting Laws*, *supra*, where at page 593, the opinion says: "The new statute (Gen. Stat. [R. I.] chap. 152, § 14), provides that the right of the husband in the real estate of the wife as tenant by curtesy shall not be impaired. 40 L.R.A. (N.S.)

But this cannot mean that this right as tenancy by the curtesy initiate shall not be impaired; for the absolute appropriation to the use of the wife necessarily excludes that right, as well as the mere marital title. It means, doubtless, that tenancy by the curtesy in its stricter sense, as consummate by the death of the wife, shall not be impaired."

We are of the opinion that under chapter 246, Gen. Laws 1909, an estate of tenancy by the curtesy initiate is not attachable. As the defendant Alfred A. Sanford at the time of the attachment merely had an estate by the curtesy initiate, the plaintiff took nothing by his purchase at the execution sale of the right, title, interest, and property which said Alfred A. Sanford had at the time of the attachment in the premises described in the declaration, and therefore acquired no title to said premises which will support this action of trespass and ejectment.

Decision for the defendants for costs. The papers in the case will be sent back to the District Court of the Second Judicial District, with the decision of this court certified thereon, for further proceedings.

WASHINGTON SUPREME COURT. (In Banc.)

A. D. McKNIGHT

v.

ROBERT T. HODGE, Sheriff.

(55 Wash. 289, 104 Pac. 504.)

Peddlers — license — discrimination.

1. No unconstitutional impairment of the privileges and immunities of peddlers in general occurs by compelling them to pay a license fee from which peddlers of farm products, books, periodicals, and newspapers are exempted, since the classification upon which the difference depends is not wholly without reason.

Same — local discrimination.

2. An exemption from the general law requiring peddlers to pay a license fee, of those operating in towns whose ordinances regulate such licenses, does not effect an unconstitutional impairment of the privileges and immunities of those operating elsewhere.

Note. — Right to discriminate between harmless articles in legislation regulating peddlers.

The early cases upon the question of the right to discriminate between harmless articles in legislation regulating peddlers are gathered in the note to *State v. Wright*, 21 L.R.A. (N.S.) 349, and the present note is merely supplemental to that. It will be noticed that these notes are limited to

Same — unequal fees — validity.

3. The difference between the minimum of \$100 and the maximum of \$300 in fees charged peddlers, according to whether they travel on foot or by different classes of conveyances, is not so unequal as to render the statute imposing them void.

Statute — repugnant provisions — validity.

4. A proviso in a statute requiring the issuance of peddler's licenses for one year, to the effect that they shall terminate on the second Monday of January succeeding the year in which they are issued, is void for repugnancy.

Peddlers — license — excess.

5. A peddler's license fee of from \$100 to \$300 is not excessive, where the intent is to exercise the taxing as well as the police power.

(October 16, 1909.)

APPPLICATION for a writ of habeas corpus to secure petitioner's release from the custody of the sheriff of King County, to which he had been committed for peddling without a license, in violation of law. Writ denied.

The facts are stated in the opinion.

Mr. Charles D. Fullen, for petitioner:

The law under which petitioner was arrested is unconstitutional.

cases where the claim of discrimination is based upon the nature of the articles to be peddled.

In *Ex parte Crowder*, 171 Fed. 250, a statute requiring peddlers to secure licenses, but exempting peddlers of agricultural or farm products, books, periodicals, or newspapers, and those within the limits of cities or towns having ordinances regulating the sale of goods by peddlers, was held not to deprive persons of the equal protection of the law. The court said: "The exemptions are manifestly designed to avoid unreasonable interference with business of a class of peddlers who are the least objectionable, or with peddling in cities, where local regulations obviate the necessity for legislation by the state. Otherwise the statute is general in its application, it bears evenly upon all peddlers, without discriminating against persons, whether residents or nonresidents of the state, nor against commodities, whether produced within the state or imported from other states or countries. Therefore it is not a statute which will deprive any person or class of persons of equal protection of the laws, nor create an invidious burden upon interstate or foreign commerce."

In *State v. Whitcom*, 122 Wis. 110, 99 N. W. 468, a statute which exempted, among others, dealers in agricultural implements maintaining permanent places of business, keepers of retail meat markets, fish dealers, and sellers of fruit or vegetables in cities of certain classes, was held to deny a ped-

Kansas City v. Overton, 68 Kan. 560, 75 Pac. 549; *Moore v. St. Paul*, 48 Minn. 331, 51 N. W. 219; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Re Aubrey*, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 Ann. Cas. 927; *State ex rel. Richey v. Smith*, 42 Wash. 237, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 84 Pac. 851, 7 Ann. Cas. 577; *State Railroad Tax Cases*, 92 U. S. 575, 612, 23 L. ed. 669, 673; *Re Camp*, 38 Wash. 393, 80 Pac. 547; *State ex rel. Luria v. Wagner*, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; *Rosenbloom v. State*, 64 Neb. 342, 57 L.R.A. 922, 89 N. W. 1053; *State v. Whitcom*, 122 Wis. 110, 99 N. W. 468; *State v. Garbroski*, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; *State v. Shedroi*, 75 Vt. 277, 63 L.R.A. 179, 98 Am. St. Rep. 825, 54 Atl. 1081, 15 Am. Crim. Rep. 129; *Laurens v. Anderson*, 75 S. C. 62, 117 Am. St. Rep. 885, 55 S. E. 136, 9 Ann. Cas. 1003; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 166, 15 Am. Crim. Rep. 117; *State ex rel. Board of Education v. Brown*, 97 Minn. 402, 5 L.R.A.(N.S.) 327, 106 N. W. 477; *State v. Wright*, 53 Or. 344, 21 L.R.A.(N.S.) 349, 100 Pac. 296; *State v. Bayer*, 34 Utah, 257, 19 L.R.A.(N.S.) 297, 97 Pac. 129;

dlers of teas and coffees the equal protection to which the Federal and state Constitutions entitled him, whether the purpose of such act was taxation or a regulation of conduct. The court said: "Other glaring false classification is presented by the exemption of dealers in agricultural implements maintaining permanent places of business, or keepers of retail meat markets, or fish dealers, and sellers of fruits or vegetables in cities of the first class, selling their respective wares. What consideration of public welfare could exclude a retail grocer from peddling his wares, while permitting the keeper of an adjoining meat market to peddle perhaps the same articles, or exempt the dealer in plows from the restriction placed on the dealer in paints, fence wire, or any other merchandise, we confess our inability to discover. Under this act the agent of this appellant's employer and an agent of the keeper of a nearby meat market may start together on the same vehicle, each with his samples,—tea, coffee, sugar in one satchel, ham, bacon, cured meats, and lard in the other; may visit the same farmer, in the same vehicle, one take an order for coffee and sugar, the other for lard and bacon. The first is a criminal, the other not. . . . The illustration leaves nothing to be said. It is discrimination between individuals of the same class, not between legitimate classes."

And a statute authorizing the mayor and certain other officers to issue a license "to such persons as they find proper persons to

Ex parte Snyder, 10 Idaho, 682, 68 L.R.A. 708, 79 Pac. 819; State v. Conlon, 65 Conn. 478, 31 L.R.A. 55, 48 Am. St. Rep. 227, 33 Atl. 519; Re Yot Sang, 75 Fed. 983; Hood River Lumbering Co. v. Wasco County, 35 Or. 498, 57 Pac. 1017; Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Asher v. Texas, 128 U. S. 120, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 165, 41 L. ed. 666, 671, 17 Sup. Ct. Rep. 255; State v. Gardner, 58 Ohio St. 599, 41 L.R.A. 689, 65 Am. St. Rep. 785, 61 N. E. 136; Even-son v. Spaulding, 9 L.R.A. (N.S.) 904, 82 C. C. A. 263, 150 Fed. 517; Re Grice, 79 Fed. 627.

Messrs. George F. Vandevceer and Merritt, Oswald, & Merritt, for defendant:

The law requiring a peddler's license does not discriminate against any class.

Bacon v. Locke, 42 Wash. 215, 83 Pac. 721, 7 Ann. Cas. 589; Emert v. Missouri,

156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Singer Mfg. Co. v. Wright, 97 Ga. 114, 35 L.R.A. 497, 25 S. E. 249; Ex parte Haskell, 112 Cal. 412, 32 L.R.A. 527, 44 Pac. 725; Warren v. Geer, 117 Pa. 207, 11 Atl. 415; Banta v. Chicago, 172 Ill. 204, 40 L.R.A. 611, 50 N. E. 233; People v. Smith, 147 Mich. 391, 110 N. W. 1102; State v. Montgomery, 92 Me. 433, 43 Atl. 13; Stull v. DeMattos, 23 Wash. 71, 51 L.R.A. 892, 62 Pac. 451; Fleetwood v. Read, 21 Wash. 547, 47 L.R.A. 205, 58 Pac. 665; Re Garfinkle, 37 Wash. 650, 80 Pac. 188; Re Yot Sang, 75 Fed. 983; Re Camp, 38 Wash. 393, 80 Pac. 547; Ex parte Crowder, 171 Fed. 251; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 683, 25 Sup. Ct. Rep. 403; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232.

Parker, J., delivered the opinion of the court:

This is an application for a writ of habeas corpus. The questions involved have been presented to the court by oral argument and briefs of counsel, upon an order to show cause why the writ should not issue. The petitioner is held in custody by the sheriff of King county, upon a charge of peddling without having a license there-

engage in a temporary or transient business," for a fee not less than \$1 nor more than \$100, as the authority issuing such license may direct, and making such business when unlicensed a misdemeanor, except in the sale of products of a farm or the sea, is, so far as it applies to ordinary and lawful business, a violation of the Bill of Rights, declaring that all men "are equal in rights, and that no man or set of men is entitled to exclusive public emoluments or privileges from the community." State v. Conlon, 65 Conn. 478, 31 L.R.A. 55, 48 Am. St. Rep. 227, 33 Atl. 519.

In State v. Miller, 54 Or. 381, 103 Pac. 519, where a statute was involved which required itinerant vendors or hawkers of any drug, nostrum, ointment, or application of any kind for the treatment of any disease or injury to procure a license, the court reviewed the decision in State v. Wright, 53 Or. 344, 21 L.R.A. (N.S.) 349, 100 Pac. 296, where it was held that an act requiring one engaged in peddling any of two or three harmless articles to pay a large fee for a license, while it permitted peddlers of other articles, whether harmless or not, to peddle without limitation, was void as class legislation, and said: "Mr. Justice Bean, who delivered the opinion, was careful to state at the very threshold of the discussion of the question that it was important to note that the case he was considering did not involve the right of the state to regulate the sale of articles which are, or may be, injurious to the public health or morals. It was ex-

pressly conceded that the legislature may in such laws divide peddlers into different classes; but it was held that the classification must be on some reasonable basis, and the law when enacted must apply alike to all engaged in the business or occupation. Reasonable regulation by law of the sale of drugs, medicines, and poisons by retailers has been uniformly upheld as a valid exercise of police power. 14 Cyc. 1079. The object of such laws is the protection of public health (Com. v. Zacharias, 181 Pa. 126, 37 Atl. 185); and statutes requiring itinerant vendors of drugs, who publicly profess to cure diseases thereby, to pay a license fee, have been upheld upon the same grounds (14 Cyc. 1083; State use of Iowa Commission v. Gouss, 85 Iowa, 21, 51 N. W. 1147). There is certainly a reasonable distinction to be made between the sale of stoves, ranges, wagons, carriages, fanning mills, on the one hand, and drugs, nostrums, ointments, and applications for the treatment of diseases and injuries. The former are harmless and have no hidden power liable to injure public health, while the composition of the latter is generally secret, and frequently contains deleterious elements unknown to the purchasers. The distinction arises from the inherent quality of the articles vended, and not from the character of the persons vending them."

As to discrimination against nonresidents by statute or municipal ordinance imposing license or occupation tax, see note to State v. Williams, ante, 279. J. T. W.

ground of illegality urged against the detention of the petitioner is that the law under which he is charged is in violation of his rights under the state and Federal Constitutions. The provisions of the law, so far as involved by the questions presented, are as follows:

"Section 1. The term 'peddler,' for the purpose of this act, shall be construed to include all persons, both principals and agents, who go from place to place and house to house, carrying for sale, or offering for sale, or exposure for sale, goods, wares, or merchandise: Provided, that nothing in this act shall apply to peddlers in agricultural or farm products: And provided further, that nothing in this act shall apply to peddlers within the limits of any city or town which by city ordinance regulates the sale of goods, wares, or merchandise by peddlers: And provided further, that nothing in this act shall apply to vendors of books, periodicals, or newspapers."

"Sec. 3. Every peddler, whether principal or agent, shall, before commencing business in any county of the state, make application in writing and under oath to the county treasurer for the county in which he proposes to make sales, for a county license. Such application must state the names and residences of the owners or parties in whose interest said business is conducted, and shall state the number of horses and vehicles to be used by him, and at the same time shall file a true statement under oath of the quantity and value of the stock of goods, wares, and merchandise that is in the county for sale or to be kept or exposed for sale in said county, and shall at the same time make special deposit of \$500 with the county treasurer aforesaid, and shall pay the said treasurer the county license fee as follows: (1) Peddler on foot, \$100. (2) Peddler with one horse and a wagon, \$150. (3) Peddler with two horses and a wagon, \$250. (4) Peddler with any other conveyance, \$300. The county treasurer shall thereupon issue to said applicant a peddler's license, authorizing him to do business in the county aforesaid for the term of one year from the date thereof: Provided, that the license issued under and by virtue of this act shall expire by limitation on the second Monday of January succeeding the year of which said license was issued. Every county license shall contain a copy of the application therefor and shall not be transferable, and shall not authorize more than one person to sell goods as a

40 L.R.A.(N.S.)

Section 4 provides for records and files of licenses.

"Sec. 5. Upon the expiration and return of each county license, the county treasurer shall cancel the same, indorse thereon the cancellation thereof, and place the same on file. He shall then hold the special deposit of the licensee thereunder for a period of ninety days from the date of said cancellation, and after satisfying any and all claims made upon the same in the section next following, shall return said deposit or such portion of the same, if any, as may remain in his hands, to the licensee.

"Sec. 6. Each deposit made with the county treasurer of any county in this state shall be subject to all taxes legally chargeable to same, to attachment and execution on behalf of the creditors of the licensee whose claims arise in connection with the business done under his county license, and the treasurer may be held to answer as trustee in any civil action in contract or tort, brought against any licensee, and shall pay over, under order of the court or upon execution, such amount of money as the licensee may be chargeable with upon the final determination of the case. Such deposit shall also be subject to the payment of any and all fines and penalties incurred by the licensee through violations of the provisions of the preceding sections, and which shall be a lien upon same, and shall be collected in the manner provided by law."

Learned counsel for the petitioner contends that this law is repugnant to § 12, art. 1, of our state Constitution, which provides: "No law shall be passed granting to any citizen [or] class of citizens . . . privileges or immunities which, upon the same terms, shall not equally belong to all citizens;" and is also repugnant to the 14th Amendment of the Constitution of the United States, which in substance secures the same equal rights. It is argued that, since privileges and immunities are by the terms of this law granted to peddlers of agricultural products, books, periodicals, and newspapers, which are withheld from peddlers of other articles, by exacting a license fee from the latter, and not from the former, such privileges and immunities are therefore not accorded to all upon the same terms. This argument is based upon the assumption that all peddlers are necessarily in the same class, and that the legislature has no power to recognize subclasses within the general class, but must grant privileges or immunities to, or withhold them from, all peddlers alike. It may be conceded that

the discrimination between the classes must rest upon some reasonable ground of difference, and that such difference must have some relation to the business, and not be a mere difference in the persons placed in the respective classes or subclasses, which is entirely foreign to the business, such as a difference in citizenship (*Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721, 7 Ann. Cas. 589; *State v. Montgomery*, 94 Me. 193, 80 Am. St. Rep. 386, 47 Atl. 165, 15 Am. Crim. Rep. 117; *Simrall v. Covington*, 90 Ky. 444, 9 L.R.A. 556, 29 Am. St. Rep. 398, 14 S. W. 369), or a difference by reason of previous military service (*Laurens v. Anderson*, 75 S. C. 62, 117 Am. St. Rep. 885, 55 S. E. 136, 9 Ann. Cas. 1003; *State v. Garbroski*, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; *State v. Shedroi*, 75 Vt. 277, 63 L.R.A. 179, 98 Am. St. Rep. 825, 54 Atl. 1081, 15 Am. Crim. Rep. 129).

In all such cases it will be noticed the difference used as a basis for classification has no more relation to the business or proper purpose of the legislation than if it were a distinction based upon a difference in the color of hair or eyes of the persons sought to be put into the different classes. In the case of *Lasher v. People*, 183 Ill. 226, 47 L.R.A. 802, 75 Am. St. Rep. 103, 55 N. E. 663, 15 Am. Crim. Rep. 108, where commission merchants dealing in certain farm products were required to be licensed, while those dealing in certain other farm products were exempt from the law, the court said: "It is first argued that the statute is invalid as discriminating between commission merchants, because it excepts those who deal in grain, live stock, and dressed meats. The claim is that produce commission merchants constitute a class, and that the legislature must require a license from all or none. This objection to the law is not valid. The legislature have power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest upon some reasonable ground of difference, but the classification in this case is a natural one. The commission merchants dealing in the kinds of produce named in this act, which constitute the small products of the farm, are of a different class from those who transact business in the great markets for the sale of grain, live stock, and dressed meats."

In the case of *State v. Evans*, 130 Wis. 381, 110 N. W. 241, in answering the contention that a law requiring pharmacists to be licensed in towns of 500 population or more, and not elsewhere in the state, was unconstitutional as class legislation, touch-40 L.R.A. (N.S.)

ing the power of the legislature to define the class upon which the law should operate, the court said: "Doubtless this law, like all other police laws, presents classification, and we are confronted, as in the case of every such law, with the duty to consider the relationship of the distinctions between the classes to the subject of the legislation. Of course there must be such relationship. A mere arbitrary distinction, in nowise relevant to the subject of legislation, will not justify a departure from that equal protection of the laws commanded by the 14th Amendment to the Federal Constitution, nor that equality before the law commanded by § 1, art. 1, of the Wisconsin Constitution. It is unnecessary, and probably futile, to attempt again to state those rules as to classification in legislation which have been phrased so often to the utmost of the ability of the judges writing the opinions. The citation of a few illustrative cases will suffice: *Adams v. Beloit*, 105 Wis. 363, 47 L.R.A. 441, 81 N. W. 869; *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 436, 56 L.R.A. 252, 87 N. W. 561; *Black v. State*, 113 Wis. 205, 219, 90 Am. St. Rep. 853, 89 N. W. 522; *State ex rel. Risch v. Policemen's Pension Fund*, 121 Wis. 44, 54, 98 N. W. 954; *State v. Whitcom*, 122 Wis. 110, 119, 99 N. W. 468; *Bingham v. Milwaukee County*, 127 Wis. 344, 106 N. W. 1071. That there are distinctions between large and dense communities and small and sparser ones as separate classes is, of course, obvious. That such differences are germane and relevant to some purposes of legislation has been declared, almost without limit, by courts. *Smith v. Burlington*, 129 Wis. 336, 109 N. W. 79, and cases there cited. But, as remarked in that case, each new exercise of the power of police regulation presents anew to the courts the question of possible relationship between the distinguishing characteristics of the classes and the object and purposes of the regulation. As to the cogency or propriety of either the regulations made, or of the importance of the distinctions, as we have so often said, the courts have little concern. Those subjects rest with the legislature, and only when the court, in the exercise of the utmost deference toward that other branch of the government, is compelled to say that no one in the exercise of human reason and discretion could honestly reach a conclusion that distinctions exist having any relation to the purpose and policy of the legislation, can it deny its validity."

The legislature having exempted from the operation of this law peddlers of agricultural and farm products, and venders of books, periodicals, and newspapers, thus

placing them in a different class from other peddlers, we do not think it can be said that such a classification is wholly without reason, and foreign to all legitimate purpose of the legislation. Reasons quite satisfactory to some minds could be advanced for exempting peddlers of farm products from a license law, and the same can be said of venders of books, periodicals, and newspapers; while on the other hand, there may be room for argument to the contrary. We refer to reasons and arguments relating to some legitimate purpose of the law. The very fact that there is room for honest difference of opinion in this respect shows that it is a question of policy, and not of power in the legislature to pass the law. We are of the opinion that a license law such as this, whether its object be regulation or revenue, is not a grant of privileges or immunities to a class of citizens which, upon the same terms, do not equally belong to all, because it classifies peddlers with reference to the different kinds of goods they sell. *Stull v. De Mattos*, 23 Wash. 71, 81, 51 L.R.A. 892, 62 Pac. 451; *People v. Smith*, 147 Mich. 391, 110 N. W. 1102; *Ex parte Heylman*, 92 Cal. 492, 28 Pac. 675; *Howe Mach. Co. v. Cage*, 9 Baxt. 518; *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed 754; *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 35 L.R.A. 497, 25 S. E. 249; *Warren v. Geer*, 117 Pa. 207, 11 Atl. 415.

It is urged that the law discriminates arbitrarily and without reason between peddlers in cities and towns and elsewhere in the state, by exempting the former, when their licensing is regulated by ordinance of such cities and towns. Like the other classification we have noticed above, it seems to us this is a question of legislative policy. As a revenue measure the legislature certainly is authorized to delegate the power to cities and towns and suspend the operation of the law there, when such cities and towns act on the subject, and it is not necessary to the preservation of equal rights that the police power of the state should be exercised by uniform regulations all over the state. Classification of the people of different localities with reference to population, or with reference to cities and towns, is within legislative discretion. *State v. Evans*, 130 Wis. 381, 110 N. W. 241; *Gray*, *Limitations of Taxing Power*, § 1424.

The law is also assailed upon the ground of the unequal license fees exacted from peddlers by reason of their different modes of travel and conveyance of their goods, in reaching the public. That such a classification for the purpose of measuring the

license fee is not an unwarranted basis of discrimination is pointed out by the very pertinent language of the supreme court of Wisconsin, in *Servonitz v. State*, 133 Wis. 231, 126 Am. St. Rep. 955, 113 N. W. 277: "No reason which appeals very strongly to our judgment is advanced why peddlers should not be classified, as in the law in question, according to their facilities for going from place to place and carrying their wares. The perils to be guarded against in respect to the occupation, and the contributions that may reasonably be required to the public revenues, strongly suggest, if they do not demand, such classification. Certainly the legislature, within the boundaries of reason, may well have thought that a person traveling about the country, plying the vocation of a peddler, with an equipment consisting of a span of horses and a wagon, should, both as a matter of police regulation and taxation, pay a greater license fee than a person plying the same trade, but traveling about from place to place on foot. Not because the former would be more liable to be dishonest than the latter, but because of the greater opportunity and liability thereof in the one case than in the other, and the corresponding greater liability in the one case than in the other of the harm, if committed, being difficult of redress or going entirely without remedy; again, not because the person, as such, traveling with a team, should be taxed more than one traveling on foot, but, since the one in all reasonable probability would conduct a much greater business than the other, the tax exaction should bear some practical relation thereto."

It is contended that the proviso in the latter part of § 3 of the act renders it unconstitutional, in that it has the effect of making all licenses expire on the second Monday of January in each year, while the fee required is the same in amount where one licensee procures his license at the beginning and another at the end of the year, thus exacting from one a fee proportionately several times more than the other. In view of the fact that this law is evidently intended as a revenue measure, as well as for regulation under the police power, such contention would have some support if the proviso were given effect, and is not void by reason of its repugnancy to the body of the law. After providing for the payment of the license fee, the law reads: "The county treasurer shall thereupon issue to said applicant a peddler's license, authorizing him to do business in the county aforesaid for the term of one year from the date thereof: Provided, that the license

issued under and by virtue of this act shall expire by limitation on the second Monday of January succeeding the year of which said license was issued." Laws 1909, p. 737, § 3. It seems to us that this proviso is so clearly inconsistent with, and repugnant to, the body of the act fixing the annual fee, and declaring that the license shall be issued to the applicant, "authorizing him to do business . . . for the term of one year from the date thereof," as to render it wholly inoperative, even though there should be no constitutional objections to it. In the case of *Nathan v. Spokane County*, 35 Wash. 26, 38, 65 L.R.A. 336, 102 Am. St. Rep. 888, 76 Pac. 521, this court noticed the distinction made between the effect of a saving clause and a proviso, by some courts which hold that a saving clause repugnant to the enacting part of the law is void, while a proviso repugnant to the enacting portion will control. From the language of the opinion in that case the court apparently entertained the view, though the decision did not rest upon the exact point, that there was no sound reason for such distinction, but that both would be equally rejected when repugnant to the purview of the act, quoting from 1 Kent's Commentaries, 463, where such view is expressed. The following may also be cited in support of this view: *Cummings v. People*, 211 Ill. 392, 71 N. E. 1031; *Jackson v. Moye*, 33 Ga. 296; *Penick v. High Shoals Mfg. Co.* 113 Ga. 592, 38 S. E. 973; *Dugan v. Bridge Co.* 27 Pa. 309, 67 Am. Dec. 464; 26 Am. & Eng. Enc. Law, 2d ed. 681. We are of the opinion that, where a proviso is wholly repugnant to the purview of the law, as it is here, it is inoperative and void. This results in the license fee being uniform.

There would be some ground for contending that the fee charged for the license is excessive if the law be regarded only as a police regulation; but we see no reason for imputing to the legislature an intention other than to exercise both the police and taxing power in its passage. This view of the law was entertained by Judge Hanford of the Federal court of this district, in *Ex parte Crowder* (C. C.) 171 Fed. 250, where it was held the law did not violate the equal rights provisions of the state or national Constitution, either in its discrimination between the classes it recognizes, in the excessiveness of the license fee, or in the other conditions imposed.

We are of the opinion that the law does not violate any rights guaranteed by the state or national Constitution, and that 40 L.R.A. (N.S.)

petitioner's prayer for the writ should be denied. It is so ordered.

Dunbar, Crow, Fullerton, Gose, and Chadwick, JJ., concur.

Appeal dismissed by the Supreme Court of the United States, March, 5, 1912 (223 U. S. 748, 56 L. ed. 640, 32 Sup. Ct. Rep. 534).

WASHINGTON SUPREME COURT. (Department No. 2.)

STATE OF WASHINGTON, Resp.,

v.

H. G. HEROLD, Appt.

(68 Wash. 654, 123 Pac. 1076.)

Appeal — denial of change of venue — error.

1. Denial of a change of venue for prejudice is not a ground for reversal unless it clearly appears that the trial court abused its discretion, which does not appear when a satisfactory jury was obtained after the examination of twenty-eight men only eight of whom were excused for cause.

Criminal law — jeopardy — failure to swear a juror.

2. A prisoner is not in jeopardy while one juror has not taken the required oath, and is not therefore entitled to discharge because of former jeopardy, if, upon discovering the failure to take the oath, the jury are resworn and the trial begun *de novo*.

(June 5, 1912.)

APPEAL by defendant from a judgment of the Superior Court for Pierce County convicting him of attempted kidnapping. Affirmed.

The facts are stated in the opinion.

Messrs. James M. Harris and H. G. Rowland for appellant.

Messrs. J. L. McMurray and A. O. Burmeister, for the State:

The statute vests the matter of a change of venue in a criminal case entirely in the discretion of the trial court, and this court will not reverse a conviction unless the discretion has been most clearly abused.

Edwards v. State, 2 Wash. 291, 26 Pac.

Note. — Does jeopardy attach where trial is begun with unsworn jury.

While no other case has been found to present the precise question indicated, it is to be observed that the court in *STATE v. HEROLD* placed its decision upon the ground

258; *State v. Straub*, 16 Wash. 117, 47 Pac. 227; *State v. George*, 58 Wash. 686, 109 Pac. 114; *State v. Welty*, 65 Wash. 244, 118 Pac. 9.

Juror Jernberg was not disqualified, nor was he incompetent upon any showing.

McAllister v. Territory, 1 Wash. Terr. 360.

The plea of jeopardy cannot be sustained.

State v. Kinghorn, 56 Wash. 133, 27 L.R.A.(N.S.) 136, 105 Pac. 234; *State v. Morrow*, 63 Wash. 297, 115 Pac. 161; *Phillips v. State*, 28 Fla. 77, 9 So. 826; *State v. Davis*, 31 W. Va. 390, 7 S. E. 24; *Roberts v. State*, 72 Miss. 728, 18 So. 481.

Morris, J., delivered the opinion of the court:

Appeal from a judgment of conviction upon an information charging appellant with the crime of attempted kidnapping.

The first error assigned is the refusal of the court below to grant a motion for a change of venue. This motion was based upon affidavits and clippings from newspapers, which it is claimed so aroused public passion and prejudice as to prevent appellant from having a fair trial in Pierce county. The motion was resisted by counter affidavits on the part of the state. We have examined the showing upon this motion, and the ruling complained of must be sustained under the rule laid down in *State v. Welty*, 65 Wash. 244, 118 Pac. 9, that a reversal will not be granted upon this ground unless it clearly appears that the trial court, in making its ruling, abused the discretion vested in it by our statute to determine such applications. The record sustains the court's ruling in showing that the jury in the case was secured after an

examination of twenty eight jurors, only eight of whom were excused for cause either by the state or appellant. It is apparent there was no unusual difficulty in obtaining a jury satisfactory to appellant and to whom he was content to submit his cause.

The next error is directed against rulings of the trial court in refusing to discharge the jury and discharge the appellant when, in the course of the trial, it was discovered that a juror named Jernberg had not taken the oath either upon his *voir dire* or after such examination, when the jurors then in the box including Jernberg, were sworn as trial jurors in the case. Upon this point the record discloses that Jernberg was one of the twelve men originally called into the jury box and occupied one of the rear seats; that, the box being full, the twelve venire men were directed to arise and take the usual oath; that all arose and the oath was administered in the usual manner. The examination of these twelve venire men was then proceeded with as to their qualification as jurors, including Jernberg, who was one of the venire men remaining in the box after the state and appellant had made desired challenges, and announced their willingness to accept the twelve men then in the box as the jury in the case. Thereupon the twelve men were directed to arise and take the oath as jurors in the cause, and the usual oath was administered, to which all apparently made assent. The trial then proceeded; witnesses were sworn and examined. During a recess the court learned from Jernberg that, while he had stood up with the other venire men during the administration of both oaths, he had not held up his hand

that the plea of jeopardy cannot be sustained unless the defendant was placed on trial before a jury legally impaneled and sworn. This general declaration is to be found in other cases which do not involve the precise point discussed in the *HEROLD CASE*. For some of the cases which declare, in a general way, that jeopardy does not attach until the trial has legally commenced, and that the trial does not commence until the jury has been legally impaneled and sworn, reference may be had to the following: *United States v. Van Vliet*, 23 Fed. 35; *Lyman v. State*, 47 Ala. 686; *Scott v. State*, 110 Ala. 48, 20 So. 468, 113 Ala. 64, subsequent appeal 21 So. 425; *Allen v. State*, 52 Fla. 1, 120 Am. St. Rep. 188, 41 So. 593, 10 Ann. Cas. 1085; *Reynolds v. State*, 3 Ga. 53; *Reg. v. Poor*, 9 Haw. 297; *Haase v. State*, 8 Ind. App. 488, 36 N. E. 54; *Tye v. Com.* 3 Ky. L. Rep. 59 (abstract); *State v. Paterno*, 43 La. Ann. 514, 9 So. 442; *State v. Robinson*, 46 La. Ann. 769, 15 So. 40 L.R.A.(N.S.)

146; *Com. v. Tuck*, 20 Pick. 356; *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 539; *People v. Kuhn*, 67 Mich. 463, 35 N. W. 88; *Clarke v. State*, 23 Miss. 261; *Ex parte Donaldson*, 44 Mo. 149; *State v. Dover*, 46 N. H. 452; *Ferris v. People*, 43 Barb. 17, affirmed in 35 N. Y. 125; *Re McClaskey*, 2 Okla. 568, 37 Pac. 854; *McFadden v. Com.* 23 Pa. 12, 62 Am. Dec. 308; *Alexander v. Com.* 105 Pa. 1; *State v. M'Kee*, 1 Bail. L. 651, 21 Am. Dec. 499; *State v. Coleman*, 54 S. C. 282, 32 S. E. 406; *State v. Whipple*, 57 Vt. 637.

As to the effect of the discharge of a jury upon the discovery of prejudice, disqualification, or misconduct of one or more of their number, to sustain a plea of former jeopardy, see the note in 14 L.R.A.(N.S.) 551.

As to whether impaneling a jury and proceeding with the trial without arraigning the defendant places him in jeopardy, see the note in 27 L.R.A.(N.S.) 137. L. A. W.

nor taken the oaths, having conscientious scruples against taking oaths. Upon the opening of court this was called to the attention of counsel in the case, and the trial stopped. The court then directed Jernberg to affirm upon his *voir dire*, which was done, and he was examined by the state and the defense upon his *voir dire*, and challenged by the defense for cause upon the ground that, having heard part of the testimony in the case, he was not qualified to sit as a juror. The challenge was denied and Jernberg then affirmed as a juror, the other jurors again taking the usual oath, and the trial again commenced as in the first instance; the witnesses who had previously testified being resworn and re-examined upon the same matters previously testified to by them. When the first of these witnesses was recalled, counsel for appellant moved the court to discharge the defendant upon the ground that he had been previously placed in jeopardy. The motion was denied and an exception taken. We are now called upon to review these rulings.

The plea of jeopardy cannot be sustained. There could be no jeopardy until the defendant had been placed on trial before a jury legally impaneled and sworn. Under the circumstances shown by the record, there was no legally impaneled and sworn jury at the time Jernberg made his disclosure to the court that he had failed to take the oath. There could be no jury until twelve qualified jurors had been impaneled and sworn as a jury to try the issue between the state and the defendant. It was the duty of the court, upon learning that defendant was not being tried before a legal jury, to stop the trial of the cause and correct the mistrial by impaneling and submitting to the defendant such a jury as he was entitled to under the law, and, when the court tendered to the defendant the right to examine the juror Jernberg together with the other eleven jurors then sitting in the box, every right to which he was entitled under the law was fully preserved and guarded. *State v. Kinghorn*, 56 Wash. 131, 27 L.R.A.(N.S.) 136, 105 Pac. 234.

There was no error in any of the other rulings made by the court growing out of this situation, and which are in effect disposed of by what we have heretofore said.

The judgment is affirmed.

Dunbar, Ch. J., and Ellis, Mount, and Fullerton, JJ., concur.
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NEW YORK COURT OF APPEALS.

BREARLEY SCHOOL, Limited, Respt.,
v.
BEVERLEY WARD, Appt.

(201 N. Y. 358, 94 N. E. 1001.)

Spendthrift trust — subjecting to execution — constitutionality.

1. A statute subjecting a percentage of the income from an existing spendthrift trust to execution does not unconstitutionally deprive the beneficiary of his property without due process of law, as destroying a vested right.

Contract — impairment — spendthrift trust — subjecting to execution.

2. No contract right is destroyed by a statute subjecting existing spendthrift trusts to execution, although at the time of their creation all income necessary for the maintenance and education of the beneficiary was exempt, where the instrument creating the trust does not expressly declare that the income shall be exempt from the claims of creditors.

(Gray, Haight, and Chase, JJ., dissent.)

(March 28, 1911.)

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of the Appellate Term of the Supreme Court which affirmed an order of the City Court for the City of New York, denying plaintiff's motion for an order directing the issuance of an execution against the income of a trust fund due defendant. Affirmed.

The facts are stated in the opinion.

Messrs. William G. Chittick and Louis W. Dinkelspiel, for appellant:

The testator having given his property, the trustees, in accepting the trust, bound themselves by a contractual obligation to carry out the terms and purposes of the same.

15 Am. & Eng. Enc. Law, 1033; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; *People v. O'Brien*, 111 N. Y.

Note. — Constitutionality of statute subjecting spendthrift trust to debts.

As to application to existing judgments, of statute abolishing or diminishing exemptions, see note to *Laird v. Carton*, 25 L.R.A.(N.S.) 189.

Outside of New York, no other cases have been found on the point here presented. *BREARLEY SCHOOL v. WARD* puts at rest the conflict that existed in the foregoing jurisdiction on the subject.

In several cases (*King v. Irving*, 103 App. Div. 420, 92 N. Y. Supp. 1094; *Sloane v. Tiffany*, 103 App. Div. 540, 93 N. Y.

1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; McLaren v. Pennington, 1 Paige, 102.

The authorization of an execution under § 1391, instead of "adding to the means of enforcing existing obligations," would reopen and nullify a past and closed transaction without lawful and sufficient consent.

Metcalfe v. Union Trust Co. 181 N. Y. 39, 73 N. E. 498; Re Miller, 110 N. Y. 216, 18 N. E. 139; Cuthbert v. Chauvet, 136 N. Y. 326, 18 L.R.A. 745, 32 N. E. 1088.

The purpose of the statute permitting the creation of trust estates and interests was to make them indestructible, and if, by later legislation, the value of the interests can be diminished beyond the testator's intent, the obligation of a contract can be impaired, and the whole scheme of the trust can be destroyed, and the testator's intent thwarted.

Re Vanderbilt, 172 N. Y. 73, 64 N. E. 782; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; Re Seaman, 147 N. Y. 71, 41 N. E. 401; Brevoort v. Grace, 53 N. Y. 245; Douglas v. Cruger, 80 N. Y. 15.

The trustees were given no discretion by the testator; the title of the income until it was paid to the beneficiary was lodged in

Supp. 149; Demuth v. Kemp, 130 App. Div. 546, 115 N. Y. Supp. 28) the supreme court of the first department held that a judgment creditor could not obtain an execution and levy upon the income derived from a trust estate created prior to the time the statutory amendment subjecting spendthrift trusts to execution became a law, for the reason, as stated in some of the cases, supra, that the statute authorizing a levy did not have retroactive effect, and if it did it was unconstitutional. The same view was taken by the supreme court of the second department in Ringe v. Mortimer, 116 App. Div. 722, 101 N. Y. Supp. 1110. But the first department in BREARLEY SCHOOL v. WARD (138 App. Div. 833, 123 N. Y. Supp. 614) departed from the former decisions of the same court, and held that the funds of a trust created prior to the amendment in question were subject to execution, and that the amendment is not unconstitutional. And that view is now sustained by the court of appeals.

It is not perceived why the exemption rights of the beneficiary under a spendthrift trust should be greater than those of other debtors under exemption laws. And it has been held that the privileges extended to debtors under existing exemption laws are not, as to the particular property which comes within their protection, vested rights. Bull v. Conroe, 13 Wis. 234; Leak v. Gay, 107 N. C. 469, 12 S. E. 312.

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the trustees, and they held the principal and the income for a specific purpose.

Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; People ex rel. Roosevelt Hospital v. Raymond, 194 N. Y. 198, 87 N. E. 90; Metcalfe v. Union Trust Co. 87 App. Div. 144, 146, 84 N. Y. Supp. 183; Metcalfe v. Union Trust Co. 181 N. Y. 45, 73 N. E. 498.

Mr. Grenville Clark, for respondent:

The defendant's former privilege of keeping his income beyond the reach of creditors was a gratuitous exemption on which no "vested rights" can be predicated.

Bryan v. Knickerbacker, 1 Barb. Ch. 409; Fowler, Real Prop. Law, 3d ed. p. 497; Gray, Restraints on Alienation of Property, 1895 ed. § 280; Leggett v. Perkins, 2 N. Y. 297; Graff v. Bonnett, 31 N. Y. 9, 88 Am. Dec. 236; Stringer v. Young, 191 N. Y. 165, 83 N. E. 690.

A contract is impaired only when remedies existing at the time of the making of the contract are substantially reduced.

Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103, 15 Am. & Eng. Enc. Law, 2d ed. p. 1053.

There is no constitutional objection to

sale for the payment of debts being generally held to be but a privilege for the time being,—mere grace and favor, dependent on the will of the state, the decision in BREARLEY SCHOOL v. WARD seems well founded.

And in Leak v. Gay, supra (holding that a statute abolishing the exemption of homestead from the lien of judgments operates retrospectively so as to include prior judgments, and in so operating does not impair the obligation of contract or interfere with vested rights), Mr. Justice Avery says: "It is the creditor alone who has the right to insist that any law passed by the legislature of a state, which will, if enforced, . . . destroy his lien, is unconstitutional, because it impairs the obligation of the contract. Statutory privileges and exemptions, as distinguished from those conferred by the Constitution, are granted subject to the power of the general assembly to repeal or modify the act that gives them, and all private agreements are entered into, in contemplation of law, with full knowledge that such privileges or exemptions may be recalled, when not resting in contract. . . . A creditor has the constitutional right to demand that his lien shall not be destroyed, or his remedy in any other way impaired, but the debtor can claim no vested right of exemption. The privilege is granted to the latter subject to the right of the sovereign to recall it in the way prescribed in the organic law."

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modifying statutory exemptions not granted under express contract, and not paid for.

Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103; *People ex rel. Cunningham v. Roper*, 35 N. Y. 629; *Kittel v. Domeyer*, 70 App. Div. 134, 75 N. Y. Supp. 150, 175 N. Y. 205, 67 N. E. 433; *Bull v. Conroe*, 13 Wis. 233; *Leak v. Gay*, 107 N. C. 469, 12 S. E. 312; *Cusic v. Douglass*, 87 Am. Dec. 466, note; *Sparger v. Cumpston*, 54 Ga. 359; *Harris v. Glenn*, 56 Ga. 94; *Massey v. Womble*, 69 Miss. 350, 11 So. 188, 8 Cyc. 1008; *Waples, Homestead & Exemption*, p. 21; *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; *Hulbert v. Clark*, 128 N. Y. 298, 14 L.R.A. 59, 28 N. E. 638; *House v. Carr*, 185 N. Y. 453, 6 L.R.A.(N.S.) 510, 113 Am. St. Rep. 936, 78 N. E. 171, 7 Ann. Cas. 185; *Gatlin v. Walton*, 60 N. C. (1 Winst. L.) 335; *Com. v. Bird*, 12 Mass. 443; *Cooley*, Const. Lim. 1903 ed. p. 546.

Willard Bartlett, J., delivered the opinion of the court:

In this action, which was brought in the city court of New York, the plaintiff, on September 27, 1909, recovered judgment against the defendant for \$727.63, upon which an execution was duly issued and returned unsatisfied. Thereupon the plaintiff, on December 7, 1909, moved in the city court for leave to issue an execution against 10 per cent of the income derived by the judgment debtor from a testamentary trust established in his favor by the will of one Montagnie Ward, which was admitted to probate on the 6th day of December, 1879.

This application was based upon an amendment to § 1391 of the Code of Civil Procedure, which took effect on September 1, 1908. That section as then amended provides, among other things, that where a judgment has been recovered and an execution thereon has been returned unsatisfied, and where any wages, debts, earnings, salary, income from trust funds, or profits are due and owing to the judgment debtor to the amount of \$12 or more per week, the judgment creditor may apply to the court in which the judgment was recovered, and, upon satisfactory proof of such facts, the court must order an execution to issue against the wages, debt, earnings, salary, income from trust funds, or profits of the judgment debtor. On presentation of the execution to the person from whom the wages, debts, earnings, salary, or income from trust funds, or profits are due, such execution becomes a lien and remains a continuing levy to the amount specified therein, which shall not exceed 10 per cent thereof, until the execution and the expenses thereof are duly satisfied and paid. The ap-
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pellant concedes that § 1391, as thus amended, is applicable to the income from trusts which have come into being since the amendment, but contends that it cannot be applied to income from trusts previously created, because if so applied it would be unconstitutional as impairing the obligation of a contract and as depriving the beneficiary of the trust of a vested right.

It is pertinent to inquire in the first place to what extent the income from trust funds was subject to the claims of creditors of the beneficiary of the trust on September 1, 1908, when the amendment to § 1391 of the Code of Civil Procedure took effect. The rights of such creditors as against the trust income were then prescribed by a provision of the real property law and certain sections of the Code of Civil Procedure. The real property law provides as follows: "Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property which cannot be reached by execution." Real Property Law (chap. 547, Laws 1896), § 78, formerly 1 Rev. Stat. p. 729, § 57; Real Property Law (chap. 52, Laws 1909 [Consol. Laws 1909, chap. 50]), § 98. The Code of Civil Procedure, in chapter 15, title 4, art. 1, entitled "Judgment Creditor's Action," then provided and now provides for an action by a judgment creditor against a judgment debtor or other person to compel the discovery of any thing in action or other property belonging to the judgment debtor, and of any money, thing in action, or other property due to him or held in trust for him; but this provision was not and is not applicable to a case where the trust has been created by a person other than the judgment debtor. Code of Civil Procedure, §§ 1871, 1879. As the trust in the present case was created by a third party, it does not fall within the purview of § 1871 of the Code, so that when the amendment to § 1391 took effect, on September 1, 1908, the provision of the real property law which has been quoted was the only statutory regulation of the subject which has any application to the facts in the present litigation. In the statutory revision of 1909, the consolidators have appended a note to § 98 of the real property law, which is of some interest in this discussion. It is as follows: "The Code of Civil Procedure (§ 1391), as conceded, has put an end to a large 'spendthrift trust' in this state. . . . The effect of § 1391 of the Code is to permit certain creditors of beneficiaries

of trusts created under the third subdivision of § 76 (§ 96 of present law) of the former real property law, to have execution on their judgments. So important a reform in our domestic law of trusts deserves to be called to the attention of lawyers and laymen reading the statute on uses and trusts, and such a clause might be added to this section. It ought not to be left obscurely contained in a long section of the Code of Civil Procedure." Consol. Laws 1909 (Birdseye's Id.) chap. 52. In *Laird v. Carton*, 196 N. Y. 169, 25 L.R.A. (N.S.) 189, 89 N. E. 822, we held that the amendment of 1908 to § 1391 of the Code of Civil Procedure applied to judgments for wages which had been rendered prior to the time when it took effect, as well as to judgments subsequently obtained.

It seems equally clear that this amendment, so far as it relates to the income from trust funds, was intended to apply to then existing trusts as well as to trusts which should thereafter be established. The argument in behalf of the appellant is that, if this intent of the legislature is carried into effect, it will render the amendment unconstitutional for the reasons which have been stated. It is also argued in the dissenting opinion in the appellate division that, if the amendment in question be regarded as operative upon existing trusts, it is unconstitutional because it deprives one of his property without due process of law. This view is based on the proposition that, as soon as the trust estate was created, the beneficiary became entitled to the whole of the income derived therefrom, and the legislature could not take away from him any part thereof.

The mere fact that a statute is retrospective or retroactive is not a conclusive objection to its validity under the Federal Constitution. "It is not all retrospective laws, however," says Mr. Justice Miller, "that are forbidden by this clause [article 1, § 10] of the Constitution, but only such as impair the obligation of a contract. *Ex post facto* laws are also forbidden in the same clause, but . . . that term is only applied to criminal laws and procedure, and has no reference to contracts. There is a large class of retrospective legislation which is constitutional, not inconsistent with the principles above laid down, and some times necessary and proper, relating to rights not dependent upon contract, or affecting the individual by increasing his liability to a criminal prosecution." Miller, Const. 536; *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. ed. 458. The theory of the dissenting opinion below is that the beneficiary of a trust fund created by a third party, whose income therefrom is wholly exempt from execution at the time of the creation

of the trust, has a constitutional right which prohibits the legislature from making any part of such income applicable to the payment of his debts; in other words, that he has a constitutional right that the law thus exempting trust incomes from the claims of his creditors shall never be changed so as to affect him. This theory is only tenable upon the assumption that the state has entered into a contract with the *cestui que trust* to that effect. Certainly there is no such contract between the creator of the trust and the trustee or the beneficiary. The creator of the trust has simply appropriated a portion of his property to the use of the beneficiary. The trustee merely undertakes to pay over the income as directed, provided the law of the land permits him to do so. He enters into no engagement to withhold the trust income from the creditors of the beneficiary who may have a lawful claim against the same. If there is any contract in the case, therefore, protected by the constitutional provision, it must be an implied agreement by the state that the law shall not be changed in the respect indicated.

The provisions of law which afford protection to the beneficiaries of trusts are practically simply statutes of exemption. The Revised Statutes (now the real property law), by providing that the surplus income of real estate should be liable in equity for the claims of the creditors of the beneficiary, provided by necessary implication that all of the income which was necessary for the education and support of the person for whose benefit the trust was created should be exempt from liability for his debts. This rule of the Revised Statutes, implying a like exemption, was extended by judicial construction to trusts of personal as well as trusts of real estate. *Williams v. Thorn*, 70 N. Y. 270. The exemption, to the extent of 10 per cent of the trust income, has now been repealed by the Code amendment in question, in cases where such trust income equals or exceeds \$12 a week; or, perhaps, it is more accurate to say the exemption has been lessened to that extent.

The difference between a statute extending exemptions from execution and lessening exemptions from execution is fundamental. Some confusion has arisen from the failure to emphasize this distinction in discussions as to the constitutionality of exemption laws. Mr. Justice Miller in his treatise on the Constitution of the United States, speaking of state laws enlarging exemptions from execution so as to include homesteads, says: "So far as these laws or any of them have had the effect to operate upon contracts in existence when they were

passed, they have been uniformly held by the Supreme Court of the United States, as well as by nearly all the other courts before whom the question has come, to be forbidden by the clause of the Constitution we are now considering. To the extent that they impair the obligation of contracts or hinder the creditor from collecting his debt, they benefit the debtor and place him in a better position at the expense of the creditor, and so are repugnant to this clause of the Constitution. It matters not whether the sum involved be large or small, every law which has this effect in regard to past contracts or those in existence when the law took effect is void." Miller, Const. pp. 547, 548. This doctrine is unquestionable as applied to statutes enlarging exemptions; but the language quoted does not sustain the proposition that any change in an exemption law is unconstitutional as applied to past or existing contracts.

If the change be favorable to the creditor, as it must be when exemptions are thereby lessened, it does not impair the obligation of the contract, but, on the contrary, strengthens it. In this court the consideration of the effect of statutes enlarging exemptions from execution began with the case of Danks v. Quackenbush, 1 N. Y. 129. Chapter 157, § 1, of the Laws of 1842, provided that "in addition to the articles now exempt by law from distress for rent or levy and sale under execution, there shall be exempted from such distress and levy and sale necessary household furniture and working tools and team owned by any person being a householder or having a family for which he provides, to the value of not exceeding \$150." In an action upon a debt contracted before its passage, the supreme court had held that the enlarged exemption was not available to the judgment debtor, on the ground that the act of 1842 was unconstitutional so far as it applied to pre-existing contracts. The court of appeals was evenly divided upon the question, and the judgment of the supreme court was for that reason affirmed. This left the question open for further consideration in this court, however, and it came up again in *Morse v. Goold*, 11 N. Y. 281, 289, 62 Am. Dec. 103, where it was fully discussed by Denio, J., in whose opinion all the judges concurred, except one who was absent at the argument, and it was held that the act of 1842 was not unconstitutional as applied to prior contracts. "There is no universal principle of law," said Judge Denio, "that every part of the property of a debtor is liable to be seized for the payment of a judgment against him. . . . The ques-

tion is whether the law which prevailed when the contract was made has been so far changed that there does not remain a substantial and reasonable mode of enforcing it in the ordinary and regular course of justice. Taking the mass of contracts, and the situation and circumstances of debtors, as they are ordinarily found to exist, no one would probably say that exempting the team and household furniture of a householder to the amount of \$150, from levy on execution, would sensibly affect the efficiency of remedies for the collection of debts." (p. 289.)

A different view was taken by the Supreme Court of the United States in *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793, 798. The Constitution of North Carolina, which took effect on April 24, 1868, exempted from sale under execution "every homestead and the dwelling and buildings used therewith not exceeding in value \$1,000, to be selected by the owner thereof." The defendant's homestead, not exceeding \$1,000 in value, had been sold under execution upon judgments rendered against him on contracts which matured before the Constitution of 1868 took effect, and when the statutory exemptions from execution were materially less. The supreme court of North Carolina had held that his homestead was exempt; but the judgment to this effect was reversed by the Supreme Court of the United States. Mr. Justice Swayne, who wrote the opinion of the court, stated its conclusions thus: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void." (p. 607.) In a concurring opinion Mr. Justice Hunt expressed his acquiescence in the conclusion reached by Mr. Justice Swayne, speaking for the majority of the court, "not for the reason that any and every exemption made after entering into a contract is invalid, but that the amount here exempted is so large as seriously to impair the creditor's remedy for the collection of his debt." Page 610, 96 U. S. He referred to the New York case of *Morse v. Goold*, supra, as laying down the correct test, which was whether the increased exemption substantially lessened the creditor's remedy.

It does not follow, however, that, because a statute enlarging exemptions from execution may be unconstitutional as applied to executions issued on judgments on pre-existing contracts, a statute reducing such exemptions is objectionable on the same

ground. How can it be said that a statute of the latter class impairs the obligation of a contract as the subject-matter of litigation? To impair "is in some way to weaken or diminish the power which the courts had when the contract was made to enforce it, if enforceable specifically, or to give remedy by damages for failure to perform it." Miller, Const. p. 541. "All change is not impairment. Impair means to make worse, to diminish in quantity, value, excellence, or strength, to lessen in power, to weaken, to enfeeble, to deteriorate." Holland v. Dickerson, 41 Iowa, 367. A law which does away with an exemption where there was one before augments the power of the courts to enforce a contract sued upon, or to award damages for its breach. The constitutional provision against laws impairing the obligation of contracts therefore has no application to a statute diminishing exemptions from execution, on the theory that such an enactment lessens the enforceability of contracts when they come to be sued upon and reduced to judgment.

If that constitutional prohibition is invoked at all in the present case, it must be for the protection of some contract which is assumed to exist between the state and the creator of the trust or the beneficiary, and that I understand to be the position of the dissenting judges in the appellate division. They treat the trust created by the will of Mr. Montagnie Ward as a "contract, agreement, or understanding," and say: "When Mr. Montagnie Ward made his will, the state, in effect, said to him, speaking through the statutes: 'If you will give a portion of your property to A in trust, and he will agree to invest the same and pay the income derived therefrom to your son, the statutes under which you are permitted to thus give it will be sufficient to compel A to keep his agreement.' Mr. Montagnie Ward having given the property, and the trustees having accepted it, the legislature could not thereafter destroy the trust in whole or in part, because to do so would violate that provision of the Federal Constitution . . . which prohibits the state from impairing the validity of a contract. . . . While the arrangement under which the property was given by the testator and received by the trustees may not, in a strict or technical sense, have amounted to a contract, nevertheless it was so in spirit." [138 App. Div. 838, 123 N. Y. Supp. 614.] I am unable to see what foundation there is for this argument. There was no provision in the trust deed that the income of the beneficiary should be exempt from the claims of creditors. That was simply part of the law of the state as it 40 L.R.A. (N.S.)

stood at the time. In enacting such laws, the legislature does not enter into any contract with its citizens, nor does it offer to contract with them. The statute was enacted in the exercise of the plenary power of the state to regulate the tenure of real and personal property within its borders. It simply said *sic volo, sic jubeo*, and could not limit the power of succeeding legislatures to alter or repeal such legislation. Newton v. Mahoning County, 100 U. S. 548, 561, 25 L. ed. 710, 712. The law also provided that the interest of the beneficiaries should be unassignable. If the legislature cannot change the law, it would seem that both of these provisions, so far as their liability to repeal is concerned, must stand on the same basis. Yet over fifty years ago it was unanimously held by this court in Leggett v. Hunter, 19 N. Y. 445, that the legislature could authorize the beneficiary to assign it. Judge Allen, writing for the court, said: "It was certainly competent for the legislature to relieve the daughters from the prohibition contained in the 63d section of the statute (1 Rev. Stat. p. 730), that no person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest." (p. 460.)

But to what will the doctrine contended for lead? A not uncommon provision in wills grants to an equitable life tenant the power to dispose of the remainder by will. The right to make a will of real estate in this state occurs on the testator arriving at the age of twenty-one years. Is this provision immune from legislative change? Would the statute granting power to make a will on arriving at the age of eighteen years be inoperative as to property devised under a will prior to its enactment? The real estate of an infant cannot be sold or disposed of contrary to the provisions of a will which devised it, and under our law infancy continues until the age of twenty-one years. Would a statute changing the age at which infancy ceases to be inoperative as to land devised or given to the infant prior to the enactment of the statute? If not, why not in the cases suggested as well as the case before us? Where lies the distinction? The provision that the income of a trust fund may not be taken to satisfy the debts of the beneficiary is no inherent or necessary part of the trust. At common law the income of every trust, save that of a married woman, was assignable and could be subjected to the claims of creditors. As already shown, the exemption of the homestead of a debtor can be repealed. Why is not that right, especially if the homestead proceeded from

the gift of a third party, as sacred as any rights accruing under a trust? It is a mistake to suppose that this court, in affirming the decision in *People ex rel. Roosevelt Hospital v. Raymond*, 194 N. Y. 189, 87 N. E. 90, decided that the legislature could not repeal the provision granted in the act of incorporation exempting real estate of the corporation from taxation. On the other hand, there was no doubt of the existence of such power entertained by any member of the court. Before that it was expressly so decided in *Pratt Institute v. New York*, 183 N. Y. 151, 75 N. E. 1119, 5 Ann. Cas. 198, and in *People ex rel. Cooper Union v. Gass*, 190 N. Y. 323, 123 Am. St. Rep. 549, 83 N. E. 64, 13 Ann. Cas. 678. All that was decided in the *Roosevelt Hospital Case* was that the legislature did not intend to repeal the exemption as to property conveyed to the hospital at the time of incorporation.

But the question is really settled by authority. It was decided three quarters of a century ago by the court of errors in *Cochran v. Van Surlay*, 20 Wend. 365, 32 Am. Dec. 570, where it was held by the dissenting judges, as well as by the majority of the court, that a will absolute in terms and unconditional could not, by any stretch of terms within the limits of legal or ordinary language, be termed a contract. The authority of this case, as well as that of *Leggett v. Hunter*, supra, has never been impaired so far as I can find by subsequent decision. On the contrary, title to a great deal of property has been taken on the strength of these decisions. There is further curious result if the will of Montagnie Ward be treated as a contract. It never took effect until his death, and it is not very easy to see how there can be a contract with a dead man; but, assuming that there were some contract rights vested in Montagnie Ward during his life, on his death he certainly did not take them to the other world. They must have passed to the devisees, legatees, next of kin, or heirs at law. But these very contract rights, if he had any, passed under the residuary clause as part of the corpus of the trust of which his children were the equitable life tenants. Surely the remaindermen could not succeed to any right of the testator that the income should not be subjected to his debts, for they had no interest in the subject. Therefore, if there were any contract of the testator, those rights have become vested in the beneficiaries themselves. Any attempt to treat the will as a contract seems to me will involve us in a hopeless maze of incongruities from which it will be impossible to escape.

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But, though the will was not a contract, any person in whom, under its provisions, any property had vested, could not be deprived of his rights without due process of law, both under the provisions of our Constitution and those of the Federal Constitution. That a trustee has no property right in the trust will be seen by the opinion of Judge Gray in *Metcalf v. Union Trust Co.* 181 N. Y. 39, 73 N. E. 498. The property right in this case vested in the defendant, the life beneficiary, and the question is whether the exemption of his income from seizure by his creditors was of such a character that legislation subjecting that income to the obligation and satisfaction of such claims was a deprivation of property without due process of law. It is unquestionable that the legislature could not have directed a diversion of the income to a person who had no claim against the beneficiary.

Despite the constitutional provisions, it is settled that, by retroactive legislation, property may be taken from a person, which, were it not for such legislation, he could have held as his own, and that such legislation does not violate the constitutional provision. Our original statute on the subject of usury made every usurious security or instrument void. In the case of *Dry Dock Bank v. American L. Ins. & T. Co.* 3 N. Y. 344, bills of the bank amounting to £50,000 sterling were held void for usury. Apparently shocked by this result, the legislature passed a statute providing that no corporation should plead usury. The statute was construed as retroactive, and deprived the debtor of his defense to actions brought on loans made prior to its enactment. *Curtis v. Leavitt*, 15 N. Y. 9. It was there said: "Prima facie, at least, there is a debt, for there is the written obligation of the bank acknowledging the existence of a debt, as there certainly is, also, a moral obligation to pay." (p. 152.) There are many other decisions to the same effect in the Supreme Court of the United States and our sister states. *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 685, 2 Sup. Ct. Rep. 408, 414. In the case cited it was said: "The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect." (p. 151.) In *Watson v. Bailey*, 1 Binn. 480, 2 Am. Dec. 462, the deed of a married woman was held void because not executed so as to convey her title. Subsequently the legislature of Pennsylvania passed a statute and gave effect to such deed. The validity of the statute

was upheld by the supreme court of that state (*Mercer v. Watson*, 1 Watts, 330), and later by the Supreme Court of the United States (*Watson v. Mercer*, 8 Pet. 38, 8 L. ed. 876). So, in *Lewis v. McElvain*, 16 Ohio, 347, notes for the purpose of being discounted at unauthorized banking associations were made void by the existing legislation of the state. A subsequent statute authorizing recovery upon them was upheld. A review of the cases upholding similar legislation will be found in 2 Hare, Am. Const. Law, title 35, pp. 787 et seq. All these rest on the proposition that a party has no vested right in a defense to a contract which he has actually made, and which he is under a moral obligation to perform, though the law at the time makes such contract void. There is recognized in every civilized country the obligation of a man to pay his debts if he has property out of which they can be satisfied, and the failure to do so is moral dishonesty. No one has a moral right to be dishonest. The income of the defendant in this case exceeds \$3,000 a year. It is idle to say that the beneficiary cannot support himself or his family on less than that sum. It is only a small proportion of the people in this country who have such an income, and yet the vast majority of them live and support themselves and their families and notwithstanding pay their debts. Under the statute, the earnings of the wage earner exceeding \$12 a week are subject to the same sort of execution that has been issued in this case against the income of the defendant, and it would be very unfortunate if we were constrained to hold that the income from property held in trust for a debtor, often an idle member of society, should be more secure than that income which a man produces by his own toil and efforts. The decisions of the courts lead us to no such result.

It is a general rule of constitutional law that a citizen has no vested right in statutory privileges and exemptions. *Cooley*, Const. Lim. 7th ed. p. 548. This rule has been held to apply to statutes exempting property from levy and sale on execution. Such a statute is not a contract between the judgment debtor and the state, and hence an amendment thereof altering the exemptions by lessening them does not impair the obligation of a contract. In *Webb v. Moore*, 25 Ind. 4, a statute in force at the time of the execution of a mortgage to the school fund required the county auditor to give sixty days' notice of sales for the nonpayment of the principal of the loan or interest thereon. By subsequent legislation a notice of three weeks was made sufficient. It was contended that the 40 L.R.A. (N.S.)

statute permitting the shorter notice operated to impair the obligation of the contract; but the supreme court of Indiana held that, if it could be said to affect the contract in any way, it strengthened its obligation by expediting the remedy for its violation. "We think it well settled," said Elliott, J., "that the remedy given by law to enforce a contract upon a breach of its obligation may be changed from time to time at the will of the legislature. The point guarded by the Constitution is that in so changing the remedy care must be taken that the obligation of the contract be not thereby materially lessened, weakened, or impaired. It is equally well settled that the legislature may give a more efficient remedy for the enforcement of the obligation of a contract after breach, and that such legislation is not repugnant to the Constitution of the United States prohibiting a state from passing any law impairing the obligation of contracts." In *Bull v. Conroe*, 13 Wis. 233, it was held that the privileges of debtors are not vested rights, and that the legislature may modify and abridge them by laws which operate directly upon the property, the privileges extended to debtors by exemption laws not being vested rights as to the particular property falling within their protection. In *Holland v. Dickerson*, 41 Iowa, 367, a mortgage had been foreclosed, and the question was whether the sale must be made under the law which was in force at the time when the mortgage was executed, which allowed the defendant an election to have his property appraised or sold subject to redemption, or could be made under the law in force at the time when the property was offered for sale, which denied to the defendant any right either to redemption or appraisal. It was contended that the sale could not be made under the later statute without impairing the obligation of the contract. The court overruled this objection, holding that a remedy providing for the enforcement of a contract might be changed at the will of the legislature, the only constitutional limitation upon this power being that the obligation of the contract should not thereby be weakened, and that a statute which strengthens and accelerates the power to compel the performance of a contract could not be regarded as impairing its obligation. The language of the supreme court of Kentucky in *Lapsley v. Brashears*, 4 Litt. (Ky.) 60, was quoted with approval, where it is said that "it is impossible to perceive how the obligation of contracts can be impaired by either accelerating the remedy or by making a fund subject to their satisfaction which was not so when the contracts

were made." This last statement is precisely applicable to the facts presented in the case at bar. In *Harris v. Glenn*, 56 Ga. 94, the supreme court of Georgia was called upon to construe the effect of an act of the legislature declaring that property previously exempted from levy and sale by the Code of that state should not be exempt as against the purchase money, and it held that the statute thus repealing the exemption applied to a mortgage executed for the purchase money of land prior to its enactment. "Debtors have no vested right not to pay their debts," said Judge Bleckley. "What they have and what they acquire the state may subject to legal process for the satisfaction of creditors. If the state will furnish the process and allow it to run, nothing that debtors own is beyond its reach. There is no fastness that can afford shelter against the public authority. Exemption of property from levy and sale for the payment of debts is but a privilege for the time being,—mere grace and favor, dependent on the will of the state. . . . Exemption is but a statutory or constitutional shield, which being removed, the exposure to process is the same as if it had never been interposed."

In this court the constitutional aspects of legislation lessening or repealing exemptions from execution do not appear to have been considered, although the effect of a statute increasing such exemptions was passed upon, as we have already shown, in *Morse v. Goold*, 11 N. Y. 281, 289, 62 Am. Dec. 103. In *Kittel v. Domeyer*, 175 N. Y. 205, 67 N. E. 433, however, this court considered that section of the domestic relations law which empowers a married woman to cause the life of her husband to be insured, and makes the insurance money free from any claim of the creditors of the husband, provided the premium does not exceed \$500. It was said that under this statutory provision the right of the wife did not rest upon contract, but upon legislative grant, and the court expressly held that the state clearly had the right to change and regulate the exemption before the insurance fund reaches the wife.

As to the suggestion that to construe the amendment as operative upon existing trusts is to deprive the beneficiary of his property without due process of law, it may be said that to compel a man to apply his property to the payment of his debts is not to deprive him of his property within the meaning of the Constitution. Even before the enactment of 1908, the beneficiary was compellable thus to apply all of the trust income which was not necessary for his education and support;

and the amendment merely measures the quantum which must go to the payment of his debts by a different standard. Instead of exempting from the claims of creditors all of the income not requisite for the education and support of the beneficiary, the legislature now exempts all the income except 10 per cent. Such a statute relates to the remedy of the creditor by changing its extent, and in no wise impairs the obligation of any contract or destroys any vested right, because the state has never contracted with the beneficiary as to the extent of the exemption which he shall enjoy, or conferred upon him any right to a specified exemption; nor did the state, in authorizing the creation of trusts which should be exempt to certain extent from the claims of creditors, undertake that the exemption originally prescribed should be permanent, exemption being a matter of privilege for which no consideration proceeds from the creator of the trust. The state retains the right which exists in regard to remediable legislation generally, to change the remedy in favor of the creditor of the *cestui que trust*.

The judgment against the defendant was recovered in this case over a year subsequent to the time when the statute of 1908 took effect, and it does not appear that the debt on which it was founded was not also incurred subsequent to that time. Therefore, to sustain the position of the appellant in this case, it would be necessary to hold, not only that the defendant had a vested right to hold the income of the trust fund exempt from the claims of his creditors prior to the enactment of the law, but that he has a vested right to incur such debts as he may see fit in the future with a similar exemption; and that the legislature can pass no statute which will, in effect, say to him, whatever may be the law as to your past debts, if hereafter you incur any, you must pay them out of the income of your trust property. Such a result is rather too startling to be contemplated with equanimity. I am satisfied that there is nothing in the fundamental law either of the state or nation which obliges us to adopt a construction with such possible consequences, and I therefore advise that this order be affirmed, with costs, and the certified question answered in the affirmative.

Gray, J., dissenting:

I dissent upon the ground that the statute in question (Code Civ. Proc. § 1391) did not affect trusts created prior to its enactment. The trust fund in question was created by the will of Montagnie Ward, who died in 1879. He gave to trustees

shares of his estate for the benefit of his children, of whom this appellant was one, and directed the payment over of the net income or interest, to each child during his or her natural life. This appellant's share was set apart in 1879, and its income has been applied to his use since that time. The statutory provision under which the application below was made was enacted in 1908. I think that to give the statute retroactive effect is to deprive the appellant of property without due process of law. This trust was lawfully created, and when it became operative upon the testator's death, the law attached but one condition to the full enjoyment of the income by the beneficiary, and that was that the surplus income beyond the sum necessary for his education or support should be liable to the claims of creditors, as other personal property. Except for that, such a trust provision was within the protection of the statutes of the state, and the right of the beneficiary in relation to it was and is property. The trust originated in the acceptance by the trustees of the property, and the trustees' ownership of the trust property was inseparably subjected to a duty, and connected with a right, for the benefit of another. The trustees' tenure was dependent upon conditions having no relation to any interest of theirs in the estate. No property right can be predicated of the estate of a trustee. Every beneficial proprietorship or interest is in the *cestui que trust*, for whom the trust estate is held and who has the right to enforce the performance of the trust. *Metcalfe v. Union Trust Co.* 181 N. Y. 39, 44, 73 N. E. 498. The interest of the beneficiary in the maintenance of the trust in all its integrity is a valuable property right which the statute confers, and while it may be competent for the legislative body of the state, in the control assumed over the transmission and testamentary disposition of property, to attach new conditions thereto for the future, I am quite unable to perceive how it may validly, not to say justly, alter existing conditions affecting property rights, or a vested interest in property; for that is the nature of this beneficiary's interest. Upon the death of the testator, and the acceptance by the trustees of the trust estate given them, what resulted was, in effect, a convention authorized by the 40 L.R.A. (N.S.)

law, under which the trustees agreed, and became obligated, to apply the trust income for the benefit of the beneficiary solely, except so far as it might be shown to exceed his needs. That there was no contract with the state, nor any contract in the technical sense, may be conceded; but there was an engagement assumed by the trustees, which devolved upon them the legal duty to apply, and conferred upon the appellant the right to receive, for his life, the income of the estate, held subject only to the right of creditors to reach the surplus beyond what was necessary for his support. If the legislature may validly change the statute so as, arbitrarily, to direct the application of 10 per cent of the income to the claim of a creditor, it may, as competently, direct the application of any percentage, even to the whole. There is a material, indeed a radical, difference between the provision of the statute, which, at the time of the creation of the trust, subjected the surplus income only to the claims of creditors, and the amendment now in question, which subjects a percentage of all trust incomes arbitrarily to their claims. I cannot subscribe to a doctrine which is so radical and so regardless of vested rights. The principle of our decision in *Livingston v. Livingston*, 173 N. Y. 377, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123, is as applicable to the present case. In my judgment this appellant's interest in, and right to, the trust provision under this will, were safeguarded by the Constitution, and may not be impaired. To allow the statute retroactive effect is, as I have before observed, to deprive the appellant of property without due process of law, and such a construction is as unnecessary as it is violative of a substantial and vested right. It is not a question of exemption, or lessening of exemption. It is a question whether that may be taken away which the statute authorized as a provision by a testator when making a final disposition of his estate.

Cullen, Ch. J., and Vann and Werner, JJ., concur with Willard Bartlett, J.

Haight and Chase, JJ., concur with Gray, J.

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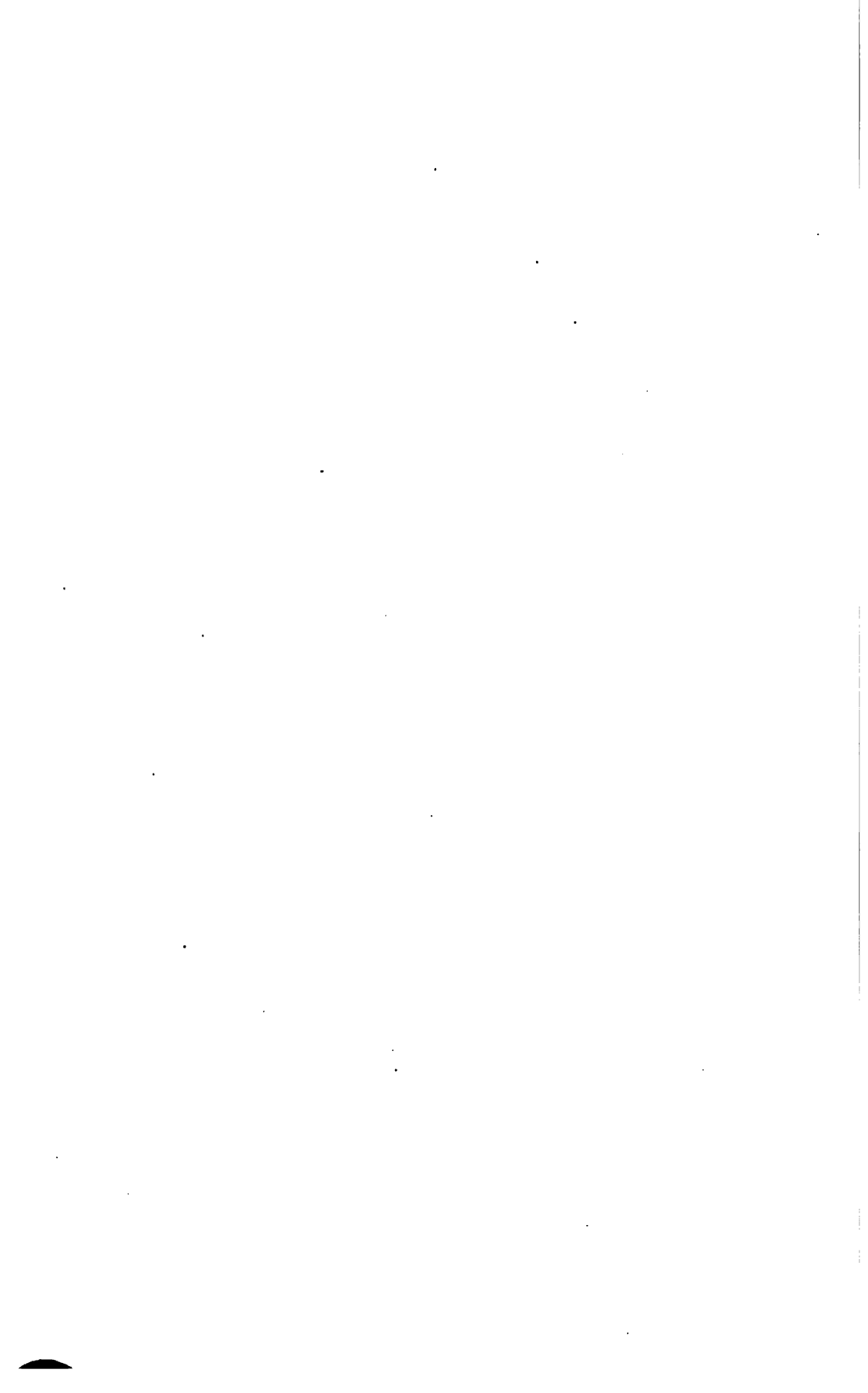
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The pendency of an action for absolute divorce in one county does not preclude defendant from instituting an action in the county of her residence, being another county in the same state, for a divorce from bed and board, where she has sought no affirmative relief in the former suit. *Cook v. Cook*, 40: 83, 74 S. E. 639, — N. C. — (Annotated)

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ACCORD AND SATISFACTION.

1. The fact that receipt for payment of an account for work and labor, without interest on the same, may have been given under protest by the creditor, does not change the legal effect of his act so as to enable him to maintain a subsequent separate suit to recover the interest. *Bennett v. Federal Coal & Coke Co.* 40: 588, 74 S. E. 418, — W. Va. —.

2. The common-law rule that payment by a debtor, and receipt by the creditor, of a less sum than is due upon an undisputed, liquidated demand, is not satisfaction of the debt although the creditor agrees to accept it as such, is inapplicable to a balance claimed for interest on the implied contract of the debtor to pay interest on an account for work and labor, after the creditor has accepted certain notes and a check in payment of the account, without including interest. *Bennett v. Federal Coal & Coke Co.* 40: 588, 74 S. E. 418, — W. Va. —.

3. Where one to whom is owing a sum of money for work and labor accepts certain notes and a check in settlement of the account, giving his receipt therefor, without including interest on the account previous 40 L.R.A. (N.S.)

to the date of the settlement, no express contract on debtor to pay interest, a collect such interest can. *Bennett v. Federal Coal & Coke Co.* 74 S. E. 418, — W. Va. —.

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2. An action to contribute to the cost of a bastard and not governed by the provisions limiting the time for bringing such proceedings of a quasi contract.

ture. State ex rel. Patterson v. Pickering, 40: 144, 136 N. W. 105, — S. D. —.

(Annotated)

3. A cause of action against two jointly for obstructing a stream cannot be joined with other causes against such persons and others severally for acts contributing to such obstruction. William Tackaberry Co. v. Sioux City Service Co. 40: 102, 132 N. W. 945, — Iowa, —.

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Presumption and burden of proof as to, see Evidence, 7.

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At common law, the alteration of the date of a promissory note is a material alteration; and when made by one not a stranger to the obligation will avoid it as to all parties not consenting thereto. Bodine v. Berg (N. J. Err. & App.), 40: 65, 82 Atl. 901, — N. J. —.

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To city, see Municipal Corporations, 1. 40 L.R.A.(N.S.)

APPEAL AND ERROR.

From tax assessment, see Taxes, 5.

Jurisdiction of state courts.

1. An order of the county court requiring an administratrix to inventory certain stock as the property of the estate being administered by her is of such a nature that an appeal lies therefrom to the district court, under a constitutional provision that appeals may be taken from the judgment of the county court in all cases arising under its probate jurisdiction, in the same manner as was provided by the laws of the territory of Oklahoma at the time of its admission as a state for appeals from the probate to the district court, when such laws, which were by another constitutional provision expressly continued in force, provided for appeals from judgments, orders, and decrees. Apache State Bank v. Daniels, 40: 901, 121 Pac. 237, — Okla. —.

Dismissal.

2. The court will exercise discretion as to striking appellant's argument in a criminal case, for failure to comply with the rules as to preliminary statements, when the question is not raised until final submission. Iowa City v. Glassman, 40: 852, 136 N. W. 899, — Iowa, —.

3. The court will exercise discretion as to striking the abstract for a failure to comply with the rules as to numbering the lines, where the case is before it for final determination and the entire abstract is so short that no inconvenience could have been caused by the omission. Iowa City v. Glassman, 40: 852, 136 N. W. 899, — Iowa, —.

Who may complain.

4. Parties failing to appeal from an order withdrawing from the jury the issues presented by certain counts of the complaint cannot, in case of a disagreement as to the other counts, which necessitates a new trial, question on appeal from the second judgment a ruling that such counts have been eliminated from the case, if no separate appeal was taken therefrom. Frohardt Bros. v. Duff, 40: 242, 135 N. W. 609, — Iowa, —.

Presumptions.

5. A finding by a single justice that the law of a foreign state is the same as the local law, which is founded entirely upon decisions of the courts of such state, creates no presumption in its favor when it is renewed by the law court. Old Dominion Copper Min. & Smelting Co. v. Bigelow, 40: 314, 89 N. E. 193, 203 Mass. 159.

6. Where a judgment has been entered by default, and a timely application is made to set aside the default and permit an answer to the merits to be filed, and such answer discloses upon its face a good and meritorious defense, as a general rule, if there be any reasonable doubt on the matter, it will be resolved in favor of granting the application and allowing a trial upon the merits of the case; and on an appeal from an order granting such an application every reasonable presumption will be in-

judged in support of the order opening default and allowing a trial on the merits of the case. *Humphreys v. Idaho Gold Mines Development Co.* 40: 817, 120 Pac. 823, 21 Idaho, 126.

What reviewable generally.

7. Where the question presented goes only to the jurisdiction of the trial court to enter the judgment sought to be vacated under a special appearance, the appellate court will consider only the jurisdictional question raised, and, on determining that the trial court had jurisdiction to enter the judgment, the decision of the trial court refusing to vacate the same is affirmed. *Goldstein v. Peter Fox Sons Co.* 40: 566, 135 N. W. 180, — N. D. —.

Discretionary matters.

8. There is no abuse of discretion in sustaining a motion to strike an amendment of the answer, filed after all the evidence is adduced, to make the pleading conform thereto. *Bradbury v. Chicago, R. I. & P. R. Co.* 40: 684, 128 N. W. 1, 149 Iowa, 51.

9. It is not an abuse of discretion for a trial judge to permit the filing of a supplemental answer after a hearing on the merits, which sets up a decree of a court of last resort in another state claimed to be *res judicata* of the matter in controversy, although the decree of the lower court, which was affirmed by the decree sought to be set up, had been entered before such hearing. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

10. In a suit for damages for injury to land by the damming back of the water of a river at a certain date, the court may, in its discretion, exclude evidence as to the precipitation at another date for the purpose of explaining conditions shown in photographs taken at the time, the matter being on a collateral point. *Hufnagle v. Delaware & Hudson Co.* 40: 982, 78 Atl. 205, 227 Pa. 476.

11. Where an application is made to set aside a judgment entered by default and permit an answer to be filed, if the facts disclosed by the showing involve purely a question of law, it will involve no discretion on the part of the court, and must be determined solely upon the question of law raised; but where it presents a question of fact as to the diligence of the party, or his having been taken by surprise, or being mistaken in matter of fact, the application will appeal to the discretion of the court; and an appellate court will not disturb the exercise of that discretion, unless a clear abuse thereof is shown. *Humphreys v. Idaho Gold Mines Development Co.* 40: 817, 120 Pac. 823, 21 Idaho, 126.

12. Denial of a change of venue for prejudice is not a ground for reversal unless it clearly appears that the trial court abused its discretion, which does not appear when a satisfactory jury was obtained after the examination of twenty-eight men only eight of whom were excused for cause. *State v. Herold*, 40: 1213, 123 Pac. 1076, 68 Wash. 654.

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Questions not raised below.

13. The defense that some of several persons sued jointly for turning surface water onto another's property did not participate in the wrong cannot be raised for the first time on appeal. *Martin v. Schwertley*, 40: 160, 136 N. W. 218, — Iowa, —.

Errors waived or cured below.

14. Objections to incompetent evidence are waived by permitting the witness subsequently to testify without objection to the facts sought to be elicited by it. *Wicker v. Jones*, 40: 69, 74 S. E. 801, — N. C. —.

15. Error in admitting incompetent evidence is waived by subsequently admitting the fact which it is offered to establish. *Wicker v. Jones*, 40: 69, 74 S. E. 801, — N. C. —.

16. An instruction authorizing a recovery against a master for injury to a servant if he did not provide a sufficient number of men to do the work safely is not cured by a further instruction that the way to determine whether or not he was negligent was to determine whether or not he acted as an ordinarily prudent man would have acted under the same circumstances. *Rosin v. Danaher Lumber Co.* 40: 913, 115 Pac. 833, 63 Wash. 430.

Review of facts.

17. Where the evidence in an equity proceeding is partly oral, the findings of fact of the single justice will not be disturbed by the law court unless plainly wrong. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

18. A trial court cannot be said to be plainly wrong in its determination that stock of a corporation was intended to be issued directly to the general public subscribing therefor, and not to the promoters to be sold to the subscribers, where such intention appears from the contemporaneous acts, entries, and other writings with their natural inferences, although it is opposed to the oral testimony of the promoters. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

Grounds for reversal.

19. It is not reversible error to strike out a plea of the statute of limitations sought to be made available before trial, where all facts bearing upon the availability of the pleading are stated in the declaration, and the determination of the court upon the question is reviewable at whatever stage of the trial it is made. *Snare & Triest Co. v. Friedman*, 40: 367, 169 Fed. 1, 94 C. C. A. 369.

20. The admission in an action by county commissioners to hold a railroad company liable for personal injuries for which they had been compelled to pay, because of a defect in a highway alleged to have been due to the act of the railroad company, of an agreement made after the accident undertaking to relieve the railroad company from further liability after making certain changes in a highway, is not, although irrelevant, prejudicial error because having no

tendency to prejudice defendant's case. *Baltimore & O. R. Co. v. Howard County Comrs.* 40: 1172, 73 Atl. 656, 111 Md. 176.

21. The admission of incompetent evidence is not reversible error, where the finding of the jury is amply supported by other evidence that was properly admitted. *Farris v. Southern R. Co.* 40: 1115, 66 S. E. 457, 151 N. C. 483.

22. A passenger, having a right of action against a carrier and a terminal corporation, cannot be said to have suffered no injury by a direction in an action to hold both liable for his injury, that a recovery could be had against one defendant only, because he recovered a judgment against the terminal company, if it has not been satisfied. *Hunt v. New York, N. H. & H. R. Co.* 40: 778, 98 N. E. 787, 212 Mass. 102.

23. It is error for the court to instruct the jury that they might consider the failure of plaintiff in a libel case to appear as a witness, as raising an inference against him, if he was beyond the seas and there was nothing in the pleadings or evidence which called for any explanation or contradiction on his part. *Astruc v. Star Co.* 40: 79, 193 Fed. 631, 113 C. C. A. 499.

24. Refusal to affirm requests to charge is not reversible error if the points are sufficiently covered in the general charge. *Hufnagle v. Delaware & Hudson Co.* 40: 982, 76 Atl. 205, 227 Pa. 476.

25. While evidence in a trial for homicide, that the witness saw the deceased immediately before the shooting, and knew that he did not make any motion toward his right side or right pants' pocket, is properly evidence in chief, the admission thereof in rebuttal where it is contradictory of evidence given by the defendant is a matter of discretion of the trial court, and does not constitute a ground for reversal unless an abuse of discretion is shown. *Hampton v. State*, 40: 43, 123 Pac. 571, — Okla. Crim. Rep. —.

26. A promise of the court to consider a recommendation by the jury in a criminal case will vitiate a verdict of guilty, as tending to influence the verdict, although, because the maximum penalty must be imposed under the indeterminate-sentence law, the recommendation was of no utility. *State v. Kernan*, 40: 239, 135 N. W. 362, — Iowa —, (Annotated)

27. Under a statute giving the appellate court in a trial *de novo* of probate matters authority to order a trial by jury, but requiring such order to state distinctly and plainly the questions of fact to be tried, it is error for the court which has thus ordered a jury trial to submit the case to the jury for a general verdict; but the case should not be reversed for such an error, where it affirmatively appears that, notwithstanding the verdict of the jury, the trial judge reviewed the evidence and reached the same conclusion as the jury. *Apache State Bank v. Daniels*, 40: 901, 121 Pac. 237, — Okla. —. 40 L.R.A. (N.S.)

Judgment.

28. A defendant with property and one who does not intend to press his appeal are not entitled to free transcripts of notes of evidence taken at the trial. *State v. Dewey*, 40: 478, 136 N. W. 533, — Iowa, —.

29. The reversal of a judgment awarding an appropriator a certain number of inches of water from a stream does not, where no stay of proceedings is secured on appeal, require him to make compensation to other claimants in tort for the injury caused by the use by him, pending the appeal, of the quantity awarded him. *Porter v. Small*, 40: 1197, 120 Pac. 393, — Or. —.

(Annotated)

30. An undertaking upon appeal from a decree awarding the right to use a certain quantity of water from a stream, which binds appellant to pay all damages, costs, and disbursements which may be awarded against him, does not cover the loss which the prevailing party would suffer if he refrained from the use of the water awarded him pending appeal. *Porter v. Small*, 40: 1197, 120 Pac. 393, — Or. —.

APPEARANCE.

What reviewable on appeal from judgment jurisdiction to enter which under special appearance is questioned, see Appeal and Error, 7.

Where the jurisdiction of the court over the person of the defendant is challenged under a special appearance made pending the action and before judgment, the same is not a general appearance, and a judgment entered by default is valid. *Goldstein v. Peter Fox Sons Co.* 40: 566, 135 N. W. 180, — N. D. —.

ARMY AND NAVY.

Courts martial, see Courts Martial.

ASSAULT AND BATTERY.

On passenger, see Carriers, 7.

Liability of master for assault by servant, see Master and Servant, 20.

ASSESSMENT ROLL.

Entry of tax on, see Taxes, 4.

ASSESSMENTS.

For public improvements, see Public improvements.

Of taxes, see Taxes.

ASSESSMENT WORK.

On mining claim, see Mines, 1.

ASSIGNMENT.

By conditional vendee, of his interest, see Sale, 3.

ASSISTANCE.

To voters, see Elections, 2.

ASSUMPTION OF RISK.

By servant, see Master and Servant, 14, 15.

ATTACHMENT.

Oral agreement to pay debt of another to prevent attachment of his property of which promisor is in possession, see Contracts, 1.

Jurisdiction to enter judgment for default, see Judgment, 2.

What property subject to attachment, see Levy and Seizure.

1. Under a statute giving the right of attachment to a landlord to enforce a lien for rent, whether the same be due or not, providing it becomes due within one year, when the person liable intends to remove or is removing his property or crops, a landlord who has received no rent from a tenant holding from year to year is entitled to an attachment against the crops raised on the farm in the fall of the year, when the tenant is engaged in removing such crops and has removed part of the same. *Turner v. Wilcox*, 40: 498, 121 Pac. 658, — Okla. —.

2. Under a statutory provision that rent due farming land shall be a lien on the crops growing thereon, enforceable by attachment, and providing further that when a person liable to pay rent intends to remove, or is removing, or has within thirty days removed, his property or crops from the leased premises, the person to whom the rent is due may commence an action in attachment, the intent of a tenant from year to year is immaterial, as affecting the right of the landlord to attachment, where such tenant is engaged in gathering and removing the crops, and has removed part of the same, from the farm at the time of the attachment. *Turner v. Wilcox*, 40: 498, 121 Pac. 658, — Okla. —.

ATTORNEYS.

Payment by bank of draft indorsed by payee's attorney, see Banks, 3.
Letters by wife's attorney to husband as confidential communications, see Evidence, 16.

Disbarment.

1. Immoral conduct is no ground for disbarring an attorney where for several years after it occurred he has lived an exemplary life. *Re Sherin*, 40: 801, 130 N. W. 761, 27 S. D. 232.

2. Threatening a man who had deserted his wife and was living in adultery with another woman in another state, with criminal prosecution and extradition unless he secured the release of an attachment of property left by him in the state, under a note which he had given his paramour, and gave his wife a bill of sale, and paid her the sum of money to which she was justly entitled, is extortion for which an attorney may be disbarred, where the statute defines extortion as obtaining property from another with his consent, induced by the wrongful use of force or fear. *Re Sherin*, 40: 801, 130 N. W. 761, 27 S. D. 232. (Annotated)

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3. Disbarment proceedings should not be begun against an attorney for a crime not connected with his work as an attorney, until after the matter has been disposed of by a proper criminal proceeding. *Re Sherin*, 40: 801, 130 N. W. 761, 27 S. D. 232.

Compensation; lien.

Statute as to attorneys' liens as restricting right of contract, see Constitutional Law, 12.

Right to jury in proceeding to enforce attorney's lien, see Jury, 1.

Special legislation as to, see Statutes, 8.

4. Courts of law as well as of equity have jurisdiction to enforce attorneys' liens, under a statute providing that any court of competent jurisdiction shall, on petition, adjudicate the rights of the parties and enforce the lien. *Standidge v. Chicago R. Co.* 40: 529, 98 N. E. 963, 254 Ill. 524.

5. Money paid to a litigant in settlement of a claim is recovered, within the meaning of a statute giving an attorneys' lien. *Standidge v. Chicago R. Co.* 40: 529, 98 N. E. 963, 254 Ill. 524.

6. A statute permitting attorneys' liens to be enforced in any court of competent jurisdiction, by petition filed in the cause of the client wherein the employment is made, does not violate a constitutional requirement of uniform procedure. *Standidge v. Chicago R. Co.* 40: 529, 98 N. E. 963, 254 Ill. 524.

AUTOMOBILES.

Power to require one causing injury to identify himself, see Criminal Law, 2.

Who is master of chauffeur operating machine, see Master and Servant, 1.

Conditional sale of, see Sale, 1.

Lease of, on Sunday as defense to liability for injury to occupant, see Sunday, 2.

Sufficiency of verdict in action for injury, see Trial, 7.

1. A passenger injured by an automobile when alighting from a street car cannot rely on the violation by the driver of the automobile, of his statutory duty to pass to the left of the car, to establish negligence on his part. *Marsh v. Boyden*, 40: 582, 82 Atl. 393, 33 R. I. 519.

2. That the driver of an automobile passes an overtaken vehicle on the wrong side does not impose upon him a greater degree of care to avoid injury to pedestrians than would rest upon him had he been on the proper side. *Marsh v. Boyden*, 40: 582, 82 Atl. 393, 33 R. I. 519.

3. A passenger is not negligent in alighting from a street car, knowing that an automobile is following the car, if it is not so close that it could not have been stopped by the exercise of ordinary care and prudence on the part of the driver before it reached him. *Marsh v. Boyden*, 40: 582, 82 Atl. 393, 33 R. I. 519.

BANKRUPTCY.

Effect of judgment against man in bankruptcy proceeding to which wife is not a party on her liability as his surety, see Judgment, 10.

1. A bankrupt and the receiver of his property may enter into a nonwaiver agreement with an insurer of the property for the purpose of securing an adjustment of a claim under an insurance policy which is claimed to have been forfeited because of failure to comply with the iron-safe clause. *Day v. Home Ins. Co.* 40: 652, 58 So. 549, — Ala. —.

2. The taking possession by the creditor, within four months of the bankruptcy of the debtor of securities, either negotiable by delivery or indorsed in blank, which the debtor had, prior to the four months' period, set apart at the creditor's request in a package marked "escrow" for the creditor's account, and deposited in his safe-deposit vaults to secure his drafts upon the creditor, notifying the creditor of the transaction and sending him a list of the securities, which were approved by the creditor, is not a voidable preference under the bankruptcy law; since, after taking possession, the creditor may be regarded as holding both by way of mortgage and by way of pledge, and his possession may be regarded as relating back to the time when his right to take it was created. *Sexton v. Kessler & Co.* 40: 639, 172 Fed. 535, 97 C. C. A. 161. (Annotated)

BANKS.

As bona fide purchaser of note, see Bills and Notes, 3.

Ademption of bequest of money in bank, see Wills, 7.

Officers and agents.

Imputing to bank knowledge of officials, see Notice, 3.

1. When the general manager of a bank accepts for the bank a promissory note, payable to its order, with surety, in the place of another note, without surety, and as a part of the transaction of acceptance alters the date of the new note to correspond with that of the note surrendered, the bank is chargeable with the act of its officer as one done in the course of the business of the bank by a general agent; and it cannot, as to nonconsenting obligors, rely upon the altered note as evidence of the indebtedness, and at the same time disavow the act of its officer and agent, and claim his action, to be that of a stranger, or beyond his authority. *Bodine v. Berg* (N. J. Err. & App.) 40: 65, 82 Atl. 901, — N. J. —.

2. A bank is chargeable with the general manager's knowledge of the fact that it holds a note which has been altered by its general manager; and if, with this knowledge, it accepts payments on account of the note, and subsequently assigns the note as altered, such acts amount to a ratification of the act of the manager in 40 L.R.A.(N.S.)

altering the note. *Bodine v. Berg* (N. J. Err. & App.) 40: 65, 82 Atl. 901, — N. J. —.

Payment of forged paper.

Estoppel to claim reimbursement from bank, see Estoppel, 3.

Notice to agent of forgery as notice to principal, see Notice, 2.

3. A bank which cashes a draft upon indorsement of the payee's name by his attorney-at-law, who has it in his possession, is bound to make good the loss to the payee. *Brown v. People's Nat. Bank*, 40: 657, 136 N. W. 506, — Mich. —.

BARBERS.

Equal protection and privileges of, see Constitutional Law, 2.

Statute regulating as denial of liberty or property, see Constitutional Law, 10.

License for barber business, see License, 1-4.

Title of statute regulating business of, see Statutes, 5.

Special legislation as to, see Statutes, 7.

Prohibiting students in barber colleges from charging for their work during the two-year period which the instruction is required to cover violates a constitutional provision that all persons shall have a right to the enjoyment and gains of their own industry. *Moler v. Whisman*, 40: 629, 147 S. W. 985, — Mo. —. (Annotated)

BARRIERS.

At dangerous place in highway, see Contribution and Indemnity, 2.

In highway to protect park strips, see Highways, 3, 4.

BASTARDY.

Question whether action civil or criminal, see Action or Suit, 2.

Limitation of time for action to compel support of bastard, see Action or Suit, 2.

BENEFITS.

As basis of assessment for public improvement, see Public Improvements, 2.

BILLS AND NOTES.

Alteration of, generally, see Alteration of Instruments.

Alteration of note by agent of bank, see Banks, 1, 2.

Payment by bank of forged draft, see Banks, 3.

Conflict of laws as to, see Conflict of Laws, 2-4.

Following state decisions as to, see Courts, 14.

Presumption and burden of proof as to, see Evidence, 6.

Confession of judgment on, under warranty of attorney, see Judgment, 1.

Notice of forgery of, see Notice, 2.

1. As defined by §§ 4626 and 4627,

"Oklahoma Comp. Laws 1900, a "negotiable instrument" is a written promise or request for the payment of a certain sum of money to order or bearer, and must be made payable in money only, and without any condition not certain of fulfillment. *Farmers' Loan & T. Co. v. McCoy & Spivey Bros.* 40: 177, 122 Pac. 125, — Okla. — **Negotiability.**

2. A note payable in instalments three months apart, which contains a stipulation that, if it is paid within fifteen days from date, a discount of 5 per cent will be allowed, being uncertain as to the amount necessary to satisfy it at the time of its execution, is non-negotiable. *Farmers' Loan & T. Co. v. McCoy & Spivey Bros.* 40: 177, 122 Pac. 125, — Okla. — (Annotated) **Indorsement and transfer.**

3. The fact that a bank which has purchased notes from a horse dealer has had more than twenty suits to collect the notes, the defenses usually being that the horses were not satisfactory, is not sufficient to defeat the bona fides of its purchase of another note, so as to let in the defense of fraud in favor of the maker. *Citizens' Trust & Sav. Bank v. Stackhouse*, 40: 454, 74 S. E. 977, — S. C. —

BLOOD POISONING.

Master's liability to servant for blood poisoning resulting from injury, see *Master and Servant*, 6.

BONA FIDE PURCHASERS.

Of note, see *Bills and Notes*, 3.

BONDS.

On appeal, see *Appeal*, 30.

Liability on peace bond, see *Breach of Peace*.

Fraud in sale of, by promoters, see *Corporations*, 4.

Pleading and proving defense in action on, see *Evidence*, 4.

Evidence of admissions of principal in action on, see *Evidence*, 14.

Evidence in action by purchaser to hold promoter liable for fraud, see *Evidence*, 21-23.

Of personal representative, see *Executors and Administrators*, 2.

A provision in a surety bond as to the frequency with which the principal's books shall be inspected, supersedes a statement in the application as to the frequency with which it shall be done. *United American F. Ins. Co. v. American Bonding Co.* 40: 661, 131 N. W. 994, 146 Wis. 573.

BOWLING ALLEY.

As nuisance, see *Courts*, 4; *Municipal Corporations*, 6; *Nuisances*, 1.

BOYCOTT.

Charge of, as libel, see *Libel and Slander*, 1.

BREACH OF PEACE.

A conviction and fine for being disorderly, shooting a dog in a street, and in 40 L.R.A. (N.S.)

sulting a citizen, does not forfeit a peace bond under statutory provisions that such bond shall be required upon apprehension that the obligor will commit violence endangering human life, or a felony, or an offense against the person or property of another, and will be forfeited by conviction of a felony or an offense constituting a breach of the peace. *Ball v. Com.* 40: 186, 147 S. W. 953, 149 Ky. 260. (Annotated)

BREACH OF PROMISE.

1. One who, having engaged to marry a woman, postpones the ceremony because of her ill health, undertakes to wait a reasonable time for her recovery. *Travis v. Schnebly*, 40: 585, 122 Pac. 316, 68 Wash. 1.

2. A man is released from his promise of marriage if the other party to the contract becomes ill without fault of either party, after the promise is made, and fails to recover her health within a reasonable time thereafter. *Travis v. Schnebly*, 40: 585, 122 Pac. 316, 68 Wash. 1.

(Annotated)

BRICK KILN.

Mandamus to compel permit for, see *Mandamus*, 3.

Prohibiting erection of, within city limits, see *Municipal Corporations*, 4.

BRIEFS.

On appeal, see *Appeal and Error*, 2.

BROKERS.

1. An offer of a specified commission for the sale of real estate at a certain price, within a specified time, does not give the broker the exclusive agency for that period, but the owner may effect a sale himself within that time without becoming liable for the commission, although before its expiration the broker produces a customer able and willing to comply with the terms of the sale. *Hammond v. Mau*, 40: 1142, 124 Pac. 377, — Wash. —

(Annotated)

2. Where an agent employed to effect a loan has diligently performed services under the employment, but is prevented from an attempt to complete the transaction by the refusal of his employer to accept the loan, he is entitled to recover the reasonable value of his services, even if he has not carried the matter far enough to have fully earned his commissions. *Little v. Liggett*, 40: 39, 121 Pac. 1125, 86 Kan. 747.

3. An agent employed "to procure a loan" has ordinarily earned his commission when he has produced a person willing and able to make the loan upon the prescribed terms; and his claim to compensation will not be defeated by the refusal of such person to complete the transaction, because it turns out that a material representation made by the employer is contrary to the fact. *Little v. Liggett*, 40: 39, 121 Pac. 1125, 86 Kan. 747.

BUILDING INSPECTOR.

Mandamus to, see *Mandamus*, 3.

BUILDING MATERIALS.

In highway, see Highways, 6.

BURDEN OF PROOF.

In general, see Evidence, 2-7.

BURIAL EXPENSES.

Liability of father for burial expenses of child, see Parent and Child.

BURIAL LOT.

See Cemeteries.

BUSINESS.

Validity of agreement to refrain from, see Contracts, 4, 5.

Continuance of, by personal representative, see Executors and Administrators, 1.

Charges injurious to, see Libel and Slander, 1, 2.

CAFES.

Liability for serving unfit food, see Food, 1.

CARBOLIC ACID.

As an "instrument" used to disfigure another within meaning of statute, see Mayhem.

CARRIERS.

Prejudicial error in instructions in action by passenger for injury, see Appeal and Error, 22.

Injury to passenger by automobile when alighting from street car, see Automobiles, 1, 3.

Conclusiveness of decree in chancery against lessor and lessee railroad as to liability of lessor in subsequent action at law, see Judgment, 4.

Special trains.

1. Neither the owner of an amusement park, nor special groups of persons desiring to patronize it, can compel a railroad company to furnish special trains for the use of such persons, although special trains are furnished for persons desiring to patronize another amusement park in the same vicinity. *Atchison, T. & S. F. R. Co. v. Tiedt*, 40: 848, 196 Fed. 348, — C. C. A. —.

2. The mere fact that, at the instance of a railroad company, a person fitted up an amusement park, will not require the court to compel the railroad company to furnish special trains to convey patrons to the park. *Atchison, T. & S. F. R. Co. v. Tiedt*, 40: 848, 196 Fed. 348, — C. C. A. —.

3. A custom to furnish special trains to transport patrons to an amusement park under contract will not impose the duty upon the railroad company to furnish similar service without contract. *Atchison, T. & S. F. R. Co. v. Tiedt*, 40: 848, 196 Fed. 348, — C. C. A. —.

Who are passengers.

4. A railroad employee permitted by the engineer to ride on an engine, contrary to the rules of the company, of which he is 40 L.R.A. (N.S.)

ignorant, is a licensee toward whom the company must exercise ordinary care. *Grimshaw v. Lake Shore & M. S. R. Co.* 40: 563, 98 N. E. 762, 205 N. Y. 371.

5. The statutory prohibition against riding on any railroad engine or freight or wood car without authority or permission of the proper officers of the company does not extend to one to whom permission has been given by the person in charge of the engine or car. *Grimshaw v. Lake Shore & M. S. R. Co.* 40: 563, 98 N. E. 762, 205 N. Y. 371.

6. The relation of one purchasing a ticket at the station of a terminal corporation, and the carrier whose train he is to take and which is by law compelled to use such terminal, does not become that of passenger and carrier until he is about to enter the carrier's car. *Hunt v. New York, N. H. & H. R. Co.* 40: 778, 98 N. E. 787, 212 Mass. 102. (Annotated)

Assault.

Assault on consignee of freight by delivery clerk, see Master and Servant, 20.

7. A railroad company is liable for an assault by its station agent upon a passenger waiting in the station to take a train, although it grew out of a discussion concerning business in which the railroad company was in no way interested. *Neville v. Southern R. Co.* 40: 995, 146 S. W. 846, — Tenn. —. (Annotated)

Measure of care required; negligence generally.

8. A carrier using the tracks of a terminal company which has statutory authority to make rules for the use of its station and approaches is liable for injuries to persons awaiting at the station, by its failure to obey the rules, which results in backing a train through a fence among waiting passengers, so as to cause a panic among and injury to them. *Hunt v. New York, N. H. & H. R. Co.* 40: 778, 98 N. E. 787, 212 Mass. 102.

9. A terminal company whose tracks a railroad company entering a city must use, which negligently gives an order as to the handling of a train, and the railroad company which negligently obeys the order, may both be held liable for a resulting injury to a waiting passenger. *Hunt v. New York, N. H. & H. R. Co.* 40: 778, 98 N. E. 787, 212 Mass. 102.

Freight carriers.

Jurisdiction of suit to compel carrier to receive property for transportation, see Courts, 1; Interstate Commerce Commission.

Loss of profits as element of damages for delay, see Damages, 7.

Sufficiency of evidence to show demand upon carrier for siding facilities, see Evidence, 31.

Assault on consignee of freight by delivery clerk, see Master and Servant, 20.

Who is agent of consignee for purpose of receiving notice of condition of consignment, see Principal and Agent, 1.

Proximate cause of loss by fire, see Proximate Cause, 1.

10. A rule of a carrier that it will not carry intoxicating liquors to dry counties of a state, when it undertakes to carry to wet counties, is unreasonable and void. *Louisville & N. R. Co. v. F. W. Cook Brew. Co.* 40: 798, 172 Fed. 117, 96 C. C. A. 322.

11. A state statute forbidding carriers to bring intoxicating liquors into localities where prohibition laws exist is no defense to a proceeding instituted in a suit against the carrier to compel it to accept liquors for transportation to such localities, and it is immaterial that the carrier was chartered in the former state and has covenanted to obey its laws. *Louisville & N. R. Co. v. F. W. Cook Brew. Co.* 40: 798, 172 Fed. 117, 96 C. C. A. 322. (Annotated)

12. A delivery of the contents of a car by the carrier to the consignee is effected by placing the car on the delivery track, and its entry by the consignee for the purpose of removing the contents after the surrender of the bill of lading, although the property has not in fact been taken from the car. *Rothchild Bros. v. Northern P. R. Co.* 40: 773, 123 Pac. 1011, 68 Wash. 527.

(Annotated)

13. A consignee of proof spirits which accepts a delivery with a container leaking, and in removing the spirits from the car exposes them to risk of fire, cannot hold the carrier liable for the loss due to a consequent conflagration. *Rothchild Bros. v. Northern P. R. Co.* 40: 773, 123 Pac. 1011, 68 Wash. 527.

Governmental control; discrimination.

Damages for wrongful refusal to furnish siding facilities, see Damages, 2a.

Bar of judgment in action for damages for carrier's refusal to furnish siding facilities, see Judgment, 4.

14. A railroad company is under no obligation to furnish siding facilities to adjoining landowners. *Moser v. Philadelphia, H. & P. R. Co.* 40: 519, 82 Atl. 362, 233 Pa. 259.

15. A railroad company is not liable for discrimination in siding facilities, made contrary to the provisions of a statute, by its lessee, against an adjoining mill owner, after the lease was executed, and the lessee had gone into possession of the property. *Moser v. Philadelphia, H. & P. R. Co.* 40: 519, 82 Atl. 362, 233 Pa. 259.

(Annotated)

CARS.

Assumption of risk by servant unloading, see Master and Servant, 15.

CASE.

Injunction against attempt to induce breach of contract, see Injunction, 2.

CAUSA MORTIS.

Gift causa mortis, see Gift.
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CEMETERIES.

Prescriptive right to maintain burial lot in private grounds, see Easements.

The conveyance without restriction or establishment as a private burying ground, as provided by statute, of a parcel of land on which burials have taken place, destroys the right of the relatives of the deceased to protect the graves from desecration. *Wooldridge v. Smith*, 40: 752, 147 S. W. 1019, — Mo. —.

CERTIORARI.

Certiorari is a proper remedy to review the proceedings of a court-martial, for the purpose of determining whether it exceeded its jurisdiction. *State ex rel. Poole v. Peake*, 40: 354, 135 N. W. 197, — N. D. —.

CHALLENGE.

Peremptory challenge of jurors, see Jury, 5, 7, 8.

CHANGE OF GRADE.

Condemnation of property from which to take materials for, by railroad, see Eminent Domain, 6.

CHARITIES.

Bequest to, see Wills, 3, 4.

CHATTEL MORTGAGE.

Oral agreement by mortgagor to pay debt of mortgagor to avoid attachment of property, see Contracts, 1.

CHAUFFEUR.

Which of two persons is master of, see Master and Servant, 1.
Negligence of, see Sunday, 2.

CHILDREN.

See Infants.

COAL MINE.

See Mines, 3.

CODE.

See Statutes.

COMITY.

Right of court to take jurisdiction on ground of, see Courts, 9.

COMMERCE.

Jurisdiction of state courts of action under Federal employers' liability act relating to interstate commerce, see Courts, 9.

Interstate commerce commission, see Interstate Commerce Commission.

COMMERCIAL LAW.

Following state decisions as to, see Courts, 14.

COMMERCIAL TRAVELERS.

Discrimination in license tax on, see License, 5.

COMMISSIONS.

Of broker, see Brokers.
To agent generally, see Principal and Agent, 2.

COMPENSATION.

Of attorney, see Attorneys, 4-6.
Of broker, see Brokers.
Of agent, see Principal and Agent, 2.

COMPLAINT.

Of plaintiff, see Pleading, 2-4.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction.

CONCLUSIVENESS.

Of judgment, see Judgment, 4-11.

CONDEMNATION.

Of property, see Eminent Domain.

CONDITION.

To subscription to corporate stock, see Corporations, 11, 12.

CONDITIONAL SALES.

See Sales, 1-3.

CONFESSION.

Judgment by, see Judgment, 1.

CONFLICT OF LAWS.

Presumption as to law of other state, see Evidence, 2.

1. A state statute providing that a cause of action which has accrued under or by virtue of the laws of any other state or territory may be sued upon in any of the courts of the state, by the person or persons who are authorized to bring and maintain the action thereon in the state or territory where the same arises, merely prescribes the persons who may sue, and does not enlarge the cause of action. *Rochester v. Wells, Fargo, & Co. Express*, 40: 1095, 123 Pac. 729, — Kan. —.

Negotiable instruments.

2. The law of the place where commercial paper is payable governs the days of grace, the time and the manner of making the presentment, the demand, and the protest and of giving the notice of dishonor. *Guernsey v. Imperial Bank*, 40: 377, 188 Fed. 300, 110 C. C. A. 278.

3. The manner of giving and the sufficiency of a notice of dishonor, in a case where commercial paper is indorsed in one jurisdiction and is payable in another, is governed by the law of the place where it is payable. *Guernsey v. Imperial Bank*, 40: 377, 188 Fed. 300, 110 C. C. A. 278.

4. The laws of the place where the indorsement of a promissory note is signed or is delivered so that it becomes a contract govern the validity and extent of the contract, and therefore the necessity of some presentment, demand, protest, and notice of dishonor. *Guernsey v. Imperial Bank*, 40: 377, 188 Fed. 300, 110 C. C. A. 278.
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Corporate matters.

5. The liability of promoters to the corporation, for transferring property at a fictitious value to it in exchange for stock, is to be determined by the law of the place where the agreements were to be carried out, the deeds delivered, the stock issued, and the corporation to have its principal place of business, although the vote authorizing the purchase of the property from the promoters in exchange for stock was passed in another state. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

Torts.

6. An action for death by wrongful act brought under the statutes of a state which provide for compensatory and also punitive damages may be maintained in the courts of another state the statutes of which provide for compensatory damages merely, where it is sought to recover compensatory damages only. *Rochester v. Wells, Fargo, & Co. Express*, 40: 1095, 123 Pac. 729, — Kan. —. (Annotated)

CONSEQUENTIAL INJURIES.

From condemnation of property, see Eminent Domain, 9.

CONSORTIUM.

Wife's right of action for loss of, see Husband and Wife, 2-4.

CONSTITUTIONAL LAW.

Right to trial by jury, see Jury.

Delegation of power.

1. The legislature may delegate to a board power to license moving picture machine operators, and provide for the revocation of their licenses. *State ex rel. Ebert v. Loden*, 40: 193, 83 Atl. 564, — Md. —.

Equal protection and privileges.

Special and local legislation, see Statutes, 7, 8.

2. So far as a statute regulating barber colleges forbids them to charge for the work of students and to display any sign except the mere announcement of the fact that it is a barber college tends to discourage persons from learning the trade and creates a monopoly, it violates the constitutional prohibition of the granting of special rights, privileges, and immunities. *Moler v. Whisman*, 40: 629, 147 S. W. 985, — Mo. —.

3. A statute requiring any person desiring to engage in the business of moving picture machine operator to secure a license is not rendered discriminatory and invalid because it gives those engaged in the business at the passage of the statute sixty days in which to secure their licenses. *State ex rel. Ebert v. Loden*, 40: 193, 83 Atl. 564, — Md. —.

4. That a section of a statute requiring any "such person" desiring to engage in the business of moving picture machine operator to obtain a license follows a section dealing with persons engaged in the business at the passage of the act does not confine the operation of the statute to such

persons and thereby make it discriminatory, where the introductory language of the statute shows that it is to apply to all who wish to engage in such business. *State ex rel. Ebert v. Loden*, 40: 193, 83 Atl. 564, — Md. —.

5. No unconstitutional impairment of the privileges and immunities of peddlers in general occurs by compelling them to pay a license fee from which peddlers of farm products, books, periodicals, and newspapers are exempted, since the classification upon which the difference depends is not wholly without reason. *McKnight v. Hodge*, 40: 1207, 104 Pac. 504, 55 Wash. 289.

(Annotated)

6. An exemption from the general law requiring peddlers to pay a license fee, of those operating in towns whose ordinances regulate such licenses, does not effect an unconstitutional impairment of the privileges and immunities of those operating elsewhere. *McKnight v. Hodge*, 40: 1207, 104 Pac. 504, 55 Wash. 289.

7. Limiting hours of labor of women in hotels to ten, while placing no limitation upon them in boarding houses and other like places, is not an unconstitutional discrimination, since the public nature of the hotel business furnishes a proper ground for classification. *People v. Elerding*, 40: 893, 98 N. E. 982, 254 Ill. 579.

(Annotated)

Due process of law.

7a. A statute subjecting a percentage of the income from an existing spendthrift trust to execution does not unconstitutionally deprive the beneficiary of his property without due process of law, as destroying a vested right. *Brearley School v. Ward*, 40: 1215, 94 N. E. 1001, 201 N. Y. 358.

8. Requiring one to secure a license after examination before operating a moving picture machine in a large city does not deprive him of his liberty or property without due process of law. *State ex rel. Ebert v. Loden*, 40: 193, 83 Atl. 564, — Md. —.

(Annotated)

9. It is not confiscation of the property of a water company without due process of law to require it to furnish connections and supply with water a resident of the city who tenders a month's rent in advance, where it is shown that the rents for a year are over twice the admitted cost for making the connection, and there is no claim that they are too low, notwithstanding there is no assurance that such resident will continue the use of the water for any stated time. *Hatch v. Consumers' Co.* 40: 263, 104 Pac. 670, 17 Idaho, 204.

10. Requiring a two-year period of instruction before practising the barber's trade does not unconstitutionally deprive one of his liberty or property, or the gains of his own industry, without due process of law, confer special privileges or immunities, abridge the privileges of citizenship, or deny him the equal protection of the laws. *Moler v. Whisman*, 40: 629, 147 S. W. 985, — Mo. —.

(Annotated)

11. The keeper of a saloon is not de-

prived of his property without due process of law or of the equal protection of the laws, because he is made punishable for permitting treating in his place of business, while the persons purchasing the liquor are not punished for doing the treating. *Tacoma v. Keisel*, 40: 757, 124 Pac. 137, 68 Wash. 685.

12. A statute giving attorneys' liens on money recovered by their clients is not unconstitutional as depriving their adversaries of a property right to buy their peace by making contracts of settlement. *Standridge v. Chicago R. Co.* 40: 529, 98 N. E. 963, 254 Ill. 524.

(Annotated)

Police power.

Judicial notice as to connection between health and welfare of public and limitation of hours of women's labor, see Evidence, 1.

13. There is no inherent right in a purchaser of intoxicating liquor to offer it to another in a saloon as an act of hospitality, which cannot be taken away under the police power of the state. *Tacoma v. Keisel*, 40: 757, 124 Pac. 137, 68 Wash. 685.

14. A statute prohibiting the manufacture or sale of oleomargarin of any shade or tint of yellow, although such shade is produced by natural and essential ingredients which are not deleterious or injurious to health, is invalid as an exercise of the police power and therefore unconstitutional. *State v. Hanson*, 40: 865, 136 N. W. 412, — Minn. —.

Impairment of contract obligation.

15. No contract right is destroyed by a statute subjecting existing spendthrift trusts to execution, although at the time of their creation all income necessary for the maintenance and education of the beneficiary was exempt, where the instrument creating the trust does not expressly declare that the income shall be exempt from the claims of creditors. *Brearley School v. Ward*, 40: 1215, 94 N. E. 1001, 201 N. Y. 358.

CONSTRUCTION.

Of statute, see Statutes, 9, 10.

Of will, see Wills.

CONTEMPT.

Sufficiency of evidence to sustain finding of contempt, see Evidence, 30.

1. Going into another state, marrying, and immediately returning to one's domicile, is not punishable as a contempt of the court rendering a divorce decree and forbidding the divorcee to remarry within a specified time, as required by a statute, if the penalty provided by statute for such remarriage is punishment for bigamy. *Ex parte Crane*, 40: 765, 136 N. W. 587, — Mich. —.

(Annotated)

2. In a proceeding brought to punish a defendant for the violation of an injunction previously granted wherein he appeared in court and defended against the accusation filed against him, the power of the court to try the defendant and to adjudicate punishment for a contempt is not

affected by the fact that he was arrested under an unwarranted order issued by another court, nor is it material under the circumstances whether or not a preliminary order of arrest is issued or an arrest in fact made. *State v. Meyer*, 40: 90, 86 Kan. 793, 122 Pac. 101.

3. Where a defendant is found guilty of contempt of court in violating an injunction, and sentenced to fine and imprisonment, the court cannot, after the defendant has been imprisoned a short time under this sentence, recall him and resentence him to a longer term notwithstanding the attempt is made at the term in which the original judgment was entered and on the same day; but the first judgment is not thereby affected. *State v. Meyer*, 40: 90, 86 Kan. 793, 122 Pac. 101.

(Annotated)

CONTRACTS.

Restrictions on right of, see Constitutional Law, 12.

Impairment of obligation of, see Constitutional Law, 15.

Rescission of sale by promoter to corporation, see Corporations, 10.

Injunction to protect rights in, see Injunction, 1.

Statute of frauds.

Who may set up defense of statute of frauds, see Action or Suit, 1.

1. An oral agreement by a mortgagee in possession of mortgaged property to pay a debt of the mortgagor to avoid an attachment of the property of which he is in possession may be found to be an original agreement to pay the debt, and therefore not to be within the statute of frauds, although the liability of the original debtor was not terminated. *Frohardt Bros. v. Duff*, 40: 242, 135 N. W. 609, — Iowa, —.

(Annotated)

2. The promise to pay outstanding lien notes as part of the purchase price of real estate is not within the statute of frauds. *Hill v. Hoeldtke* 40: 672, 142 S. W. 871, — Tex. —.

3. Possession taken by a vendee under a parol contract for the conveyance of real estate, not taken in pursuance of the contract, or with the knowledge and consent of the vendor, is insufficient to relieve the contract of the operation of the statute of frauds, and to entitle the vendee to specific performance. *Collins v. Lackey*, 40: 883, 123 Pac. 1118, 31 Okla. 776.

Validity; public policy.

Contracts of unauthorized foreign corporation, see Corporations, 15, 16.

4. A contract of a selling agent of a company engaged in the manufacture and sale of maps, who had as his territory a certain state, except a few counties thereof, whereby such agent agrees, without territorial limitation, that he will not, without the consent of the company in writing, within six months after the termination of his contract, either directly or indi-

rectly or in any capacity, whether for himself or for any other person, company, or corporation, engage in any business similar to that conducted by the company which might in any manner be injurious to its interests, is in general restraint of trade and unenforceable. *Kinney v. Scarbrough*, Co. 40: 473, 74 S. E. 772, — Ga. —.

(Annotated)

5. A contract by one selling a livery business, not to engage in that business in opposition to the vendee in the city where it is located, is not void as in restraint of trade, although not limited in time. *Smith v. Webb*, 40: 1191, 58 So. 913, — Ala. —.

6. A conditional vendor is not prevented from reclaiming the property under the contract, by the fact that the purchaser intends to use it in a lottery, if such use was entirely independent of the contract. *Watkins v. Curry*, 40: 967, 147 S. W. 43, — Ark. —.

(Annotated)

Performance; breach.

Injunction to prevent breach of, see Injunction, 1.

Injunction against attempt to induce breach of, see Injunction, 2.

7. A contract by one selling a livery business, not to engage in that business in opposition to the vendee in the city where the business is located, is broken by his becoming manager of a branch established there by one owning a livery business a few miles distant from the city. *Smith v. Webb*, 40: 1191, 58 So. 913, — Ala. —.

(Annotated)

CONTRIBUTION AND INDEMNITY.

Prejudicial error in admission of evidence in action for, see Appeal and Error, 20.

Effect of judgment in action for injuries to estop one primarily responsible therefor in subsequent action to hold him liable as indemnitor, see Estoppel, 1.

Conclusiveness of judgment against constructive tortfeasor in subsequent action for contribution or indemnity, see Judgment, 8.

Judgment in favor of directors in action for libel as bar to action against them for reimbursement by corporation held liable for libel, see Judgment, 11.

1. A plumber who, in repairing a city water main, extended a small pipe across a street and nailed planks on either side as guards and exercised reasonable care to keep the same in safe condition, is not liable to the city as an indemnitor, for injuries which occurred to a pedestrian by reason of some manure and loose planks which had been thrown upon the obstruction by a third person. *Grand Forks v. Paulsness*, 40: 1158, 123 N. W. 378, 19 N. D. 293.

2. Mere delay by public authorities for a period of three years, to place a barrier along a bridge approach rendered unsafe by a change in the grade by a railroad com-

pany, is not such delinquency as will prevent them from recovering over against the railroad company in case they are held liable for injuries due to the absence of the railing. *Baltimore & O. R. Co. v. Howard County Comrs.* 40: 1172, 73 Atl. 656, 111 Md. 176.

3. A municipal corporation which is compelled to pay damages for injuries to a pedestrian falling into a ditch across the sidewalk, dug under direction of its engineer, by an independent contractor, in connection with a street improvement, may secure indemnity from the contractor if the accident was caused by his negligence in failing to provide a sufficient protection for the ditch to render the way safe for pedestrians; and it is immaterial that the engineer mistakenly located the ditch at the wrong place, which mistake required it to remain open overnight. *Robertson v. Paducah*, 40: 1153, 142 S. W. 370, 146 Ky. 188. (Annotated)

4. A property owner who is compelled to pay damages for injuries to a pedestrian because of the unsafe manner in which a cover was placed upon a coal hole in the sidewalk, by a coal dealer delivering coal through it, may, in case he himself was not actively negligent in the matter, recover indemnity from the dealer for the loss so caused. *Scott v. Curtis*, 40: 1147, 88 N. E. 794, 195 N. Y. 424. (Annotated)

5. A property owner who has confessed liability in an action to hold him liable for injury to a pedestrian falling through a coal hole in the sidewalk cannot recover over against the coal dealer who was using the hole for the delivery of coal, on the judgment roll, without showing that the accident was due to his negligence. *Scott v. Curtis*, 40: 1147, 88 N. E. 794, 195 N. Y. 424.

CONTRIBUTORY NEGLIGENCE.

In general, see Negligence, 3, 4.

CONVERSION.

Sufficiency of evidence to establish, see Evidence, 32.

By executor, see Executors and Administrators, 2.

CORPORATIONS.

Right to exercise power of eminent domain, see Eminent Domain, 1, 2.

Erroneous description of copartnership as corporation in action for attachment, see Judgment, 2.

Relationship to corporation which will disqualify juror in action to enforce stockholder's liability, see Jury, 5.

Competency of employee of, as juror in action against it, see Jury, 6.

Description copartnership in summons as a corporation, see Writ and Process.

Bequest of corporate stock, see Wills, 2. Ademption of bequest of stock, see Wills, 7, 8.

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Officers.

Action by minority stockholders to compel officers to reimburse corporation for loss caused by their circulation of libel, see *infra*, 13.

Action by corporation against directors for reimbursement for damages which it had paid for their torts, see Judgment, 11.

Imputing officers' or agents' knowledge to corporation, see Notice, 3, 4.

1. Directors of a corporation who maliciously, and to gratify their own personal ends, circulate a libel for which, although it is *ultra vires*, the corporation is held liable, are bound to reimburse the corporation for the loss thereby caused to it. *Hill v. Murphy*, 40: 1102, 98 N. E. 781, 212 Mass. 1. (Annotated)

2. The treasurer of a corporation cannot be held personally liable to it for satisfying an execution against it because of a libel published by its directors, in which he had no part. *Hill v. Murphy*, 40: 1102, 98 N. E. 781, 212 Mass. 1.

Promoters.

Review on appeal of findings in action against promoters, see Appeal and Error, 18.

Conflict of laws as to liability of promoter, see Conflict of Laws, 5.

Amount recoverable from promoters as secret profits, see Damages, 3.

Evidence on question of promoter's fraud, see Evidence, 21-23.

Joint liability of promoters, see Joint Creditors and Debtors, 2.

Conclusiveness against one of two promoters of judgment in suit against executor of other to which he was not a party, see Judgment, 9.

Laches in seeking accounting from promoters for illegal profits, see Limitation of Actions, 1.

Limitation of time for suit against promoters to recover illegal profits, see Limitation of Actions, 2.

Knowledge of promoters as knowledge of corporation, see Notice, 4.

3. Promoters of a scheme to consolidate several independent corporations into one business enterprise cannot escape liability for fraudulent representations of an agent in the sale of the stock of the consolidated corporation, on the theory that they were merely directors of that corporation, and not personally liable for the fraud of an agent employed to market its stock, if whatever functions they assumed were in furtherance of a common enterprise to market the securities necessary to the success of the enterprise. *Downey v. Finucane*, 40: 307, 98 N. E. 391, 205 N. Y. 251.

4. Promoters of a corporation cannot escape liability for fraud in the sale of bonds by means of ambiguous language in the prospectus, on the ground that they intended no fraudulent misstatement of facts, if the general public would almost inevitably infer the fraudulent meaning from the language used. *Downey v. Finucane*, 40: 307, 98 N. E. 391, 205 N. Y. 251.

5. That, at the time of the sale by promoters of property to a corporation organized to purchase it, they are the owners of all the stock which has been issued, no issue having been made of that intended for the public, or that a ratification of the purchase is secured, does not, if at the time of the ratification a substantial portion of the stock intended for the public remains unissued, avoid the operation of the rule that promoters who organize a corporation to purchase property from them for stock the par value of which is largely in excess of the value of the property, and as part of the scheme sell to the general public as original subscribers a portion of the stock for cash at par, to secure a working capital, without providing an independent board of officers to pass upon the wisdom of the purchase, having the purchase ratified by such board, or disclosing their extraordinary profit to purchasers of stock, are liable to account to the corporation for the profit of the proceeding. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

6. A promoter of a corporation who has wrongfully sold property to it at an undue profit cannot avoid repayment to the corporation of the profit so secured, on the ground that it will result in a benefit to the stock taken by himself and his copromoters, who have ratified the act, and whose stock is all but a small part of that issued. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

7. The law will not approve a transaction by which property is purchased by a promoter of a corporation with money solicited in substantial part from associates by representations that he intends to form a corporation with a specified capitalization, and sell the property to it for a certain amount of stock, followed by its actual sale to the corporation for a much larger amount, the settlement with the associates at the price agreed upon, and the retention by the promoter of the difference as a secret profit, and taking cash subscriptions from the general public, who understand that the corporation is organized under a statute which requires property to be taken for stock only at its true value. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

8. Persons joining a syndicate to purchase property for sale to a corporation whose organization for its purchase is under contemplation, with the understanding that the property is to be sold at a certain profit in stock of the corporation, are, as stockholders of the new corporation, entitled to a disclosure, if the promoter actually turns the property over at greater profit, for an increased portion of the corporate stock. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

9. The right of a corporation to com-

pel a repayment of illegal promoters' profits for the benefit of all its stockholders is not defeated by the fact that, after the suit was instituted, certain of the stockholders entered into an illegal agreement as to the disposition of the proceeds of the suit. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

10. The remedy of a corporation whose promoter has taken an illegal secret profit in a sale of property to it is not limited to a rescission of the transaction, but it may compel a return of it to the corporation. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

Subscriptions to stock.

Evidence on question whether subscriptions were made in good faith, see Evidence, 24.

11. Subscriptions by persons who are not apparently able to pay them when called for cannot be counted in determining whether or not the condition that a certain amount shall be subscribed in good faith to the capital stock of a proposed corporation before the subscription shall become binding has been met. *Stone v. Monticello Constr. Co.* 40: 978, 117 S. W. 369, 135 Ky. 659.

12. That corporations which have paid their subscriptions to the stock of another corporation had no authority to make the subscriptions will not require such subscriptions to be ignored in determining whether or not the requisite amount of subscriptions made in good faith had been received to make other subscriptions binding under the conditions of the contract. *Stone v. Monticello Constr. Co.* 40: 978, 117 S. W. 369, 135 Ky. 659.

Action by stockholders.

13. Minority stockholders may maintain an action on behalf of the corporation to compel directors to reimburse the corporation for loss occasioned to it by their circulation of a libel, where those in control of the corporation's affairs refuse to act. *Hill v. Murphy*, 40: 1102, 98 N. E. 781, 212 Mass. 1.

Liability of stockholders.

Jurisdiction of equity of action to enforce liability of members of mutual insurance company, see Equity, 3.

Presumptions and burden of proof in action on note given for stock, see Evidence, 6.

When suit to recover assessments from members of mutual insurance company is barred, see Limitation of Actions, 4.

14. An action to enforce an agreement to take stock in a corporation, which shall not be binding until a certain amount has been subscribed, may be maintained in the name of the corporation, although the defense is that the conditions had not been complied with. *Stone v. Monticello Constr. Co.* 40: 978, 117 S. W. 369, 135 Ky. 659.

Foreign corporations.

Opening default judgment against corporation where service was made on agent who failed to defend, see Judgment, 13.

15. The rule preventing one who contracts with a corporation from denying its corporate existence does not prevent a taxpayer from denying the right of a corporation with which a municipality contracted for a street improvement, to enforce the assessment against his property, because of failure to comply with the statutory requirements necessary to permit it to do business in the state. *Fruin-Colnon Contracting Co. v. Chatterson*, 40: 857, 143 S. W. 6, 146 Ky. 504.

16. A foreign corporation which contracted to pave a street without complying with the statutory requirements necessary to enable it to do business in the state cannot enforce the paving assessment, if the statute provides that it shall not be lawful for it to do business in the state until it has complied with the statute, although the only penalty provided by the statute is a fine. *Fruin-Colnon Contracting Co. v. Chatterson*, 40: 857, 143 S. W. 6, 146 Ky. 504. (Annotated)

CORPSE.

See Cemeteries; Easements.

COSTS AND FEES.

On appeal, see Appeal and Error, 28.

COTTON SEED MEAL.

Ambiguity in statute as to liability for selling adulterated cotton seed meal, see Statutes, 2.

COUNTIES.

Liability for injury on defective highway, see Highways.

COURTS.

Contempt of, see Contempt.

Courts martial, see Courts Martial.

Judicial notice by, see Evidence, 1.

Decision of Federal court sitting in state as evidence of law of that state, see Evidence, 8.

Effect of judgment in state court to bar action in Federal court, see Judgment, 7.

Power to grant new trial on its own motion, see New Trial, 1, 2.

Jurisdiction; territorial limitations.

Jurisdiction to enforce attorneys' liens, see Attorneys, 4, 6.

Question whether suit is within jurisdiction of courts or interstate commerce commission, see Interstate Commerce Commission.

1. The courts of a state in which a carrier is doing business are not deprived of jurisdiction of a suit to compel it to receive property for transportation into another state, on the theory that it involves property and rights of the carrier beyond the territorial reach of the court. *Louis-40 L.R.A. (N.S.)*

ville & N. R. Co. v. F. W. Cook Brew. Co. 40: 798, 172 Fed. 117, 96 C. C. A. 322.

Relation to other departments of government.

Mandamus to governor, see Mandamus, 1, 2

2. The courts are not deprived of power to interfere with an arbitrary inequality in property values throughout the state, and an undervaluation of a portion of it, effected by the state board of equalization in violation of the provisions of the statute, on the theory that the act of the board is an exercise of discretion and beyond the control of the courts. *Huidekoper v. Hadley*, 40: 505, 177 Fed. 1, 100 C. C. A. 395.

3. The expediency and propriety of extending the right of eminent domain to electric power, heat, light, and traction companies, provided each member of the community is given equal rights and privileges in respect thereto, is a legislative question, and the courts are limited in their inquiry to the question whether the service provided for is a public service. *Pittsburg Hydro-Electric Co. v. Liston*, 40: 602, 73 S. E. 86, — W. Va. —.

4. Where a common council, without a full hearing, declares a bowling alley to be a nuisance, with the view of having the matter submitted to the courts for adjudication, the action of the council will be deemed to be arbitrary, and will be set aside. *Shreveport v. Leiderkrantz Soc.* 40: 75, 58 So. 578, 130 La. 802.

5. The discretion of the municipal corporation in exercising its taxing power upon the business of peddling within its limits is not beyond the power of the courts to review, so far as it affects the reasonableness of the tax. *Iowa City v. Glassman*, 40: 852, 136 N. W. 899, — Iowa, —.

6. The courts cannot declare invalid an ordinance prohibiting the location of a hospital within a certain distance of residences without the consent of their owners, because it was passed upon their solicitation. *Shepard v. Seattle*, 40: 647, 109 Pac. 1067, 59 Wash. 363.

Jurisdiction over associations, etc.

7. The court cannot hold that a misrepresentation by an insured as to his age and the amount of intoxicants used during a day is not so material to the risk as to influence against reinstatement the sound judgment and good conscience of officers of the company in whom is vested the discretion as to his reinstatement after forfeiture of the policy for nonpayment of dues, upon his furnishing satisfactory evidence of health. *Conway v. Minnesota Mut. L. Ins. Co.* 40: 148, 112 Pac. 1106, 62 Wash. 49.

8. The courts will not control the discretion of the officers of an insurance association in refusing to reinstate a member who has forfeited his rights by nonpayment of dues, where the contract provides that any person in such circumstances may be reinstated "in the discretion of the officers," "upon his furnishing them satisfactory evidence that he is in good health;" at least, where there are facts bearing upon

the question of his health which might influence the sound judgment and good conscience of an officer to decide against reinstatement. *Conway v. Minnesota Mut. L. Ins. Co.* 40: 148, 112 Pac. 1106, 62 Wash. 49. (Annotated)

State courts.

9. State courts may, on the ground of comity, take jurisdiction of actions by employees to recover damages from railroad companies for personal injuries arising under the employer's liability act of Congress relating to interstate commerce, of April 22, 1908. *Bradbury v. Chicago, R. I. & P. R. Co.* 40: 684, 128 N. W. 1, 149 Iowa, 51. (Annotated)

Interference with other courts; injunction.

10. The courts of one state in which a litigation has progressed to a final decree, from which an appeal has been taken, may enjoin the defeated party from maintaining a suit in another state, to enjoin his adversary from proceeding with the prosecution of the cause. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

Rules of decision.

Full faith and credit rule as compelling court to follow rules of court of other state, see Judgment 12.

11. The mere contrary conclusion reached by the Supreme Court of the United States upon a similar state of facts is not alone a sufficient consideration of a state court's overruling one of its own decisions. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

12. The Federal courts, in exercising their jurisdiction founded on diverse citizenship, in cases involving the administration of the common law, do not hold themselves bound by the decisions of the courts of the state in which they are sitting, unless such decisions have so clearly established a settled rule in the premises as to make it a part of the peculiarly local law of the state, but will resort to the same sources of information as to what such law is as are open to the state courts. *Snare & Triest Co. v. Friedman*, 40: 367, 169 Fed. 1, 94 C. C. A. 369.

13. A single decision of the highest court of a state which follows no line of precedents in that jurisdiction, that one piling building materials in a street owes no duty to pile them so as to avoid injury to children of tender years accustomed to play in the vicinity, is not binding on a Federal court sitting in the same state, in which an action involving such question, and growing out of the same accident as that involved in the case in which such decision was made, is brought on the ground of diverse citizenship, after discontinuance in the state court because of such ruling. *Snare & Triest Co. v. Friedman*, 40: 367, 169 Fed. 1, 94 C. C. A. 369.

14. It is the duty which the Federal courts may not renounce to form independent opinions and render independent de-

cisions upon questions of commercial or general law and of right under the Constitution and laws of the nation of which they have jurisdiction, and the decisions of the state courts are not controlling, but persuasive thereon. *Guernsey v. Imperial Bank*, 40: 377, 188 Fed. 300, 110 C. C. A. 278.

COURTS-MARTIAL.

Review of proceedings of, by certiorari, see Certiorari.

A militia officer of a state cannot be dismissed by court-martial in time of peace, for violation of the Articles of War of the United States, since such Articles are not applicable to the militia at that time. *State ex rel. Poole v. Peake*, 40: 354, 135 N. W. 197, — N. D. —. (Annotated)

COVENANTS AND CONDITIONS.

Claim for damages for breach of as ground for injunction against transfer of property, see Injunction 6.

The right of a grantor who platted certain land and sold and conveyed the lots by deeds containing covenants restricting the buildings thereon to one dwelling house on each lot, in pursuance of a general or neighborhood scheme, to enforce such a covenant against a purchaser with notice from his grantee, so as to prevent such purchaser from erecting a garage on his lot in the place provided for a dwelling house, is not defeated by the fact that express permission was given in connection with the restriction as to dwelling houses, in the sale of certain other lots, to erect necessary or appropriate outbuildings, and in still other instances, the restrictive covenant was disregarded and garages erected at the rear of the dwelling house on the lot, in a manner, however, not destroying the essential mutual benefit enjoyed by the lot owners from the general scheme, nor the benefit to the grantor's remaining property, to be derived from performance of the covenants of the general scheme as so modified. *Sanford v. Keer* (N. J. Err. & App.), 40: 1090, 83 Atl. 225, — N. J. —.

CREDITS.

Taxation of, see Taxes, 5.

CRIME.

Charge of, as libel, see Libel and Slander, 1.

CRIMINAL LAW.

Action whether civil or criminal, see Action or Suit, 2.

Striking appellant's argument on appeal, see Appeal and Error, 2.

Prejudicial error in remarks of judge in criminal case, see Appeal and Error, 26.

Disbarment of attorney for crime, see Attorneys, 2, 3.

Intent as necessary element of violation of statute against illegal voting, see Elections, 3.

Demonstrative evidence, see Evidence, 10.

Admissibility of dying declarations, see Evidence, 17, 18.

Relevancy of evidence generally, see Evidence, 29.

Sufficiency of proof, see Evidence, 33.

Competency of jurors, see Jury, 3, 4.

Number of peremptory challenges to which accused is entitled, see Jury, 8.

Right to new trial, see New Trial, 3, 4.

Ambiguity in statute imposing penalty, see Statutes, 2.

Remarks of prosecuting attorney in criminal case, see Trial, 1.

Sufficiency of verdict in criminal case, see Trial, 8.

As to Venue, see Venue.

See also Bastardy; Breach of Peace; Kidnapping; Larceny; Mayhem; Perjury.

1. The existence of a preliminary order enjoining the enforcement of a statute relating to the inspection of oil pending a suit to test the constitutionality of the statute does not relieve one who makes sales in violation of the terms of the statute from prosecution thereunder, if the statute is ultimately held to be valid. *State v. Wadhams Oil Co.* 40: 607, 134 N. W. 1121, — Wis. —.

Crimination of self.

2. Making it a felony for one who has caused injury by the operation of a motor vehicle, to leave the place of accident without leaving his name, address, and license number, does not violate the constitutional protection against giving self-incriminating evidence. *Ex parte Kneedler*, 40: 622, 147 S. W. 983, — Mo. —. (Annotated)

Necessity of indictment, presentment, or information.

As to requests and sufficiency of indictment, information, and complaint, see Indictment, etc.

3. By a proceeding under a statute providing for an information and the imposition of an additional sentence upon a convict who has been twice before convicted and sentenced to a penitentiary, the convict is not held to answer for a crime so as to require presentment or indictment of a grand jury, nor is he thereby twice put in jeopardy for an offense. *State v. Graham*, 40: 924, 69 S. E. 1010, 68 W. Va. 248.

Former jeopardy.

Setting aside conviction to enable accused to plead former jeopardy, see New Trial, 3.

See also *supra*, 3.

4. Conviction of failure to maintain one's wife, contrary to the provisions of the statute, is not a bar to a prosecution for continued failure to maintain her after serving the sentence on the former conviction. *State v. Morgan*, 40: 615, 136 N. W. 521, — Iowa, —. (Annotated)

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5. A prisoner is not in jeopardy while one jurymen has not taken the required oath, and is not therefore entitled to discharge because of former jeopardy, if, upon discovering the failure to take the oath, the jury are resworn and the trial begun *de novo*. *State v. Herold*, 40: 1213, 123 Pac. 1076, 68 Wash. 654. (Annotated)

Sentence and punishment.

Right to recall and sentence to longer term person found guilty of contempt of court, see Contempt, 3.

6. A statute providing for the filing of an information in the circuit court of the county in which the penitentiary is situated, of the fact that one who had been sentenced to confinement in such penitentiary had before been sentenced to a like punishment, whether or not it was so alleged in the indictment on which he was convicted, and directing that, upon such information, a sentence of life imprisonment be imposed upon a convict who had been twice before sentenced to confinement in a penitentiary, is constitutional and valid. *State v. Graham*, 40: 924, 69 S. E. 1010, 68 W. Va. 248.

CRIMINATION OF SELF.

See Criminal Law, 2.

CROPS.

Attachment against, to enforce lien for rent, see Attachment.

Evidence of damage to, see Evidence, 26.

CROSSINGS.

Injury at railway crossing, see Railroads, 2, 3.

CURTESY.

Liability of curtesy initiate to attachment for husband's debts, see Levy and Seizure.

CUSTODY.

Of children, see Infants.

CUSTOM.

Notice of, see Notice, 1.

DAMAGES.

Conflict of laws as to right to, see Conflict of Laws, 6.

Evidence as to, see Evidence, 26.

Liquidated damages.

Waiver by landlord of right to retain deposit by tenant as liquidated damages, see Landlord and Tenant, 2.

1. A deposit by one leasing for a five-year period, of two months' rent to indemnify the lessor against any loss or damage which he may sustain by reason of any violation of the contract by the lessee, as liquidated damages, may be retained by the lessor in case he is compelled to evict the tenant for nonpayment of rent, although he acts immediately upon the default, so that the deposit more than equals the rent

due and unpaid. *Barrett v. Monro*, 40: 763, 124 Pac. 369, — Wash. —.

Torts generally.

2. The measure of damages in an action against an insurance company for the negligence of its agent in failing to forward an application for insurance, owing to which delay the property is destroyed before the policy is issued, is the amount of insurance which the applicant but for this delay would have had. *Boyer v. State Farmers' Mut. Hail Ins. Co.* 40: 164, 86 Kan. 442, 121 Pac. 329.

2a. The mere fact that a stranger offered to construct a railroad siding for a certain amount before the entry of a decree requiring the railroad company to do so, and some time after the decree, complainant was compelled to pay him a much larger amount for the work, does not establish the liability of the railroad company for the difference, especially where there is nothing to show when demand was made upon it or its duty began. *Moser v. Philadelphia, H. & P. R. Co.* 40: 519, 82 Atl. 362, 233 Pa. 259.

Fraud.

3. In case a promoter owns property before he undertakes the organization of a corporation to purchase it, the amount which the corporation can recover for secret profits secured by him in the sale is not measured by the difference between what the property originally cost him, and the market value of the stock received by him; nor between the intrinsic value of the property and that of the stock, but by the difference between the market value of the property and that of the stock. *Old Dominion Copper Min & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

Personal injuries.

4. The damages to be recovered from the keeper of a public eating place who serves deleterious food to guests, with imputed but not actual knowledge of its unfit character, may include an allowance for the suffering and expense due to the resulting illness of the customer. *Doyle v. Fuerst & Kraemer*, 40: 480, 56 So. 906, 129 La. 838.

5. \$100 is not excessive to be allowed in damages for ptomaine poisoning to a patron of a public eating house, due to the unfit character of food furnished him, where, for a time, he suffered great pain and apprehended death, while he did not entirely recover from the injury for six weeks. *Doyle v. Fuerst & Kraemer*, 40: 480, 56 So. 906, 129 La. 838.

6. A recovery of \$15,000 as damages for loss of an arm by a railroad trackman, twenty-four years old, who was earning from \$80 to \$85 per month, was reduced to \$12,000. *Bradbury v. Chicago, R. I. & P. R. Co.* 40: 684, 128 N. W. 1, 149 Iowa, 51.

Loss of profits.

7. In an action for damages against a carrier who had contracted to deliver a merry-go-round at a point on a connecting road by a certain day, with full knowledge

of the purpose to which it was to be put, and of the importance of having it there on the day specified, and of the loss of profits which will result from the failure to deliver the same by such day, for failure, through lack of diligence, to deliver the merry-go-round until after the agreed day, the contemplated profits, being such as can be estimated with a reasonable degree of accuracy, are a proper element of damages. *Fort Smith & W. R. Co. v. Williams*, 40: 494, 121 Pac. 275, 30 Okla. 728.

DATE.

Alteration of date in note, see *Alteration of Instruments*.

DAYS OF GRACE.

Conflict of laws as to, see *Conflict of Laws*, 2.

DEATH.

Conflict of laws as to liability for, see *Conflict of Laws*, 6.

Effect of death of illegitimate before his mother on right of his children to inherit from her, see *Descent and Distribution*.

The failure of a husband who has been injured by the negligence of a city, to give the statutory notice necessary to enable him to maintain an action against the city for such injury, does not, after his death, which occurred after the time for giving such notice had expired, prevent the maintenance of an action by his widow, who gave the statutory notice within the requisite time after his death, under a statute giving a right of action for damages for death caused by wrongful act, in case the decedent might have maintained an action, had he lived, for injury for the same act or omission. *Nesbit v. Topeka*, 40: 749, 124 Pac. 166, — Kan. —.

(Annotated)

DEBTOR AND CREDITOR.

Constitutionality of statute subjecting income of spendthrift trust to claims of creditors, see *Constitutional Law*, 7a, 15.

Oral agreement to pay debt of another, see *Contracts*, 1.

Joint debtors and creditors, see *Joint Debtors and Creditors*.

DECLARATIONS.

Evidence of, see *Evidence*, 15-19

In pleading, see *Pleading*, 2-4.

DEEDS.

Acknowledgment of, see *Acknowledgment*.

Rights of grantee of coal in place, see *Mines*, 3.

A conveyance to a man and wife for life, remainder to the heirs of the wife, vests the fee in the wife subject to the husband's life estate. *Cotton v. Moseley*, 40: 768, 74 S. E. 454, — N. C. —

DEFAULT.

Judgment by, see Judgment, 2, 13.

DEFENSE.

To action for breach of promise, see Breach of Promise.

In suit by corporation to compel repayment by promoters of illegal profits, see Corporations, 9.

To paving assessments, see Corporations, 15, 16.

To action for causing death, see Death.

In action on executor's bond, see Executors and Administrators, 2.

In mandamus case, see Mandamus, 1, 3.

DEFINITENESS.

Of verdict, see Trial, 6.

DELAY.

In sending in application for insurance, see Insurance, 1.

DELEGATION OF POWER.

Constitutionality of, see Constitutional Law, 1.

DELIVERY.

By carrier, see Carriers, 12, 13.

Of gift, see Gift.

DEMONSTRATIVE EVIDENCE.

See Evidence, 10.

DESCENT AND DISTRIBUTION.

Right which will descend to heirs acquired by burying dead bodies in private grounds, see Easements.

The death of an illegitimate before his mother does not prevent his children from inheriting from the latter, under a statute providing that every illegitimate child shall be considered as the heir of his mother, and shall inherit her estate in like manner as if born in lawful wedlock. *Goodell v. Yezerski*, 40: 516, 136 N. W. 451, — Mich. —.

DESCRIPTION.

Warranty by, see Sale, 4.

DISBARMENT.

Of attorneys, see Attorneys, 1-3.

DISCOUNT.

Effect of provision for, on negotiability of note, see Bills and Notes, 2.

DISCOVERY AND INSPECTION.

Discovery of mining claim, see Mines, 1.

DISCRETION.

As to dismissal of appeal, see Appeal and Error, 2, 3.

Review of, on appeal, see Appeal and Error, 8-12.

DISCRIMINATION.

By carrier, see Carriers, 15.

In license tax, see License, 2-6.

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DISFIGUREMENT.

Sufficiency of evidence to sustain conviction of, see Evidence, 33.

Liability for, see Mayhem.

DISMISSAL OR DISCONTINUANCE.

Of appeal, see Appeal and Error, 2, 3.

Effect of voluntary discontinuance of action after grant of new trial on conclusiveness of judgment, see Judgment, 7.

DISOBEDIENCE.

As contempt, see Contempt.

DISORDERLY PERSONS.

As to breach of peace, see Breach of Peace.

DIVORCE AND SEPARATION.

Abatement of suit by pendency of other suit, see Abatement and Revival.

Kidnapping of child by parent before order as to custody of child, see Kidnapping.

Remarriage of divorced person, see Marriage.

1. A woman cannot, by leaving her husband and removing to another state because there had been a few quarrels between them over property, without violence or mental distress which would destroy her health, acquire "an actual bona fide residence" there, within the meaning of the statutes of the state conferring jurisdiction in divorce cases. *Sneed v. Sneed*, 40:99, 123 Pac. 312, — Ariz. —.

2. To come within the operation of a statute allowing a divorce for habitual drunkenness, one need not be constantly drunk or incapacitated from transacting his business; it being sufficient if he has the fixed habit of frequently and repeatedly getting drunk when opportunity offers, or has lost the will power to resist temptation in that respect. *O'Kane v. O'Kane*, 40: 655, 147 S. W. 73, — Ark. —.

(Annotated)

DOCUMENTARY EVIDENCE.

See Evidence, 8, 9.

DOMICIL.

For purpose of divorce, see Divorce and Separation, 1.

For purpose of election, see Elections.

One does not lose his domicile so as to be exempt from taxation there, by starting on an extended journey with the intention of establishing the domicile elsewhere, until he has actually established such domicile. *Barhydt v. Cross*, 40: 986, 136 N. W. 525, — Iowa, —.

(Annotated)

DOWER.

1. Under a statute providing that a widow shall be endowed of a third part of the property whereof her husband died seised, taxes which accrued prior to assign-

ment of the dower cannot, in favor of others entitled to share in the estate, be deducted from the cash value of her dower interest, which she agrees to take in lieu of dower upon sale of the property, whether they accrued before or after the death of the husband. *Underground Electric R. Co. v. Owsley*, 40: 609, 196 Fed. 278, — C. C. A. —.

(Annotated)

2. A provision in an agreement of a widow to take cash in lieu of dower upon sale of the property, that the dower shall be valued as of the date of admeasurement, does not subject her interest to the lien of taxes which accrued before that date. *Underground Electric R. Co. v. Owsley*, 40: 609, 196 Fed. 278, — C. C. A. —.

3. Under an agreement that, in case a widow will take her dower interest in cash, her occupancy of the property before assignment of dower shall be without charge to her, it is not chargeable with taxes even though occupancy prior to assignment might, under some circumstances, render her interest so subject. *Underground Electric R. Co. v. Owsley*, 40: 609, 196 Fed. 278, — C. C. A. —.

4. Under a statute making a widow's dower interest subordinate to the lien of a purchase-money mortgage, it is also subordinate to the lien which the mortgage gives the mortgagee for taxes which he is compelled to pay upon the property, and she is not entitled to reimbursement for the amount of such lien by the heirs, who are not required to protect her dower interest against such taxes. *Underground Electric R. Co. v. Owsley*, 40: 609, 196 Fed. 278, — C. C. A. —.

DRAFTS.

Payment of forged draft by bank, see Banks, 3.

DRAINS AND SEWERS.

Assessment on railroad for, see Public Improvements, 2.

Apportionment of assessments for, see Public Improvements, 5.

Enforcement of assessments for, see Public Improvements, 6.

DRUGS AND DRUGGISTS.

Wife's right of action for sale of drug to husband, see Husband and Wife, 3, 4.

DRUNKENNESS.

As ground for divorce, see Divorce and Separation, 2.

DUE PROCESS OF LAW.

See Constitutional Law, 8-12.

DUST.

Right to recover for, in condemnation proceedings, see Eminent Domain, 9.

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DYING DECLARATIONS.

Admissibility of, in evidence, see Evidence, 17, 18.

EASEMENTS.

No prescriptive right which will descend to heirs can be acquired by burying dead bodies in private grounds. *Wooldridge v. Smith*, 40: 752, 147 S. W. 1019, — Mo. —.

(Annotated)

EATING PLACE.

Serving unfit food to guests, see Damages, 4, 5; Food, 1.

EJECTMENT.

Estoppel by judgment for defendant in action for, see Estoppel, 2.

A judgment establishing defendant's title in an action for possession of real property is erroneous, although plaintiff fails to establish his case, if there is no evidence in the case to show that defendant had the title or right of possession. *Wicker v. Jones*, 40: 69, 74 S. E. 801, — N. C. —.

ELECTION OF REMEDIES.

Pursuing one joint tortfeasor will not prevent a subsequent suit against the other on the theory of election. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

ELECTIONS.

Injunction as to, see Injunction, 4, 8.

1. A student is not prevented from gaining a residence for voting purposes at the place where he is attending school, by a constitutional provision that no elector shall be deemed to have gained or lost a residence while in attendance at any seminary of learning, if he goes to the college town for the purpose of establishing his residence there, although an incidental purpose is to take advantage of the educational resources of the town. *People v. Osborne*, 40: 168, 135 N. W. 921, — Mich. —.

(Annotated)

2. Requesting assistance to determine which names on a primary election ballot are politically in accord with the voter does not subject one to the penalty provided for any voter who shall make a false statement as to his inability to mark his ballot, where the statute provides that the voter shall be at liberty, if he is unable to prepare his own ballot, to request assistance. *State v. Brefflehl*, 40: 535, 58 So. 763, 130 La. 904.

(Annotated)

3. Criminal intent is a necessary element of conviction for violation of the statute against illegal voting. *People v. Osborne*, 40: 168, 135 N. W. 921, — Mich. —.

ELECTRIC COMPANY.

Right to exercise eminent domain, see Eminent Domain, 3-5.

ELECTRICITY.

Power of electric company to exercise power of eminent domain, see *Eminent Domain*, 3-5.

Operator controlling electric current as fellow servant of linemen, see *Master and Servant*, 17.

EMINENT DOMAIN.

Title of statute as to, see *Statutes*, 6.

Who may exercise.

Review by courts of legislative grant to electric company of right to exercise eminent domain, see *Courts*, 3.

1. The legislature may select the agencies through which it will exercise the right of eminent domain, including foreign corporations. *Pittsburg Hydro-Electric Co. v. Liston*, 40: 602, 73 S. E. 86, — W. Va. —.

2. A statute conferring upon foreign electric power, light, heat, and traction companies that have complied with the conditions of law entitling them to do business in this state, the same rights, powers, and privileges that are conferred upon domestic corporations created for the same purpose, confers upon such foreign corporations equal rights of eminent domain as is conferred upon domestic corporations. *Pittsburg Hydro-Electric Co. v. Liston*, 40: 602, 73 S. E. 86, — W. Va. —.

3. The legislature may authorize the taking of private property, upon making provision for just compensation therefor, by electric power, heat, light, and traction companies, when their purpose is to serve the public. *Pittsburg Hydro-Electric Co. v. Liston*, 40: 602, 73 S. E. 86, — W. Va. —.

4. A provision in a statute granting electric light, heat, and power companies the right of eminent domain, when for a public use, requiring such companies to furnish service to persons along and near its lines when it occupies a public highway, and classifying the service; giving municipal, manufacturing, and transportation companies preference, does not invalidate the statute. *Pittsburg Hydro-Electric Co. v. Liston*, 40: 602, 73 S. E. 86, — W. Va. —.

5. A provision in a statute granting electric power, heat, light, and traction companies the right of eminent domain, when for a public use, permitting them to erect their poles and stretch their wires along public roads, by and with the consent of the county court, and if in a city, town, or village, by and with the consent of the authorities thereof, does not invalidate the act. *Pittsburg Hydro-Electric Co. v. Liston*, 40: 602, 73 S. E. 86, — W. Va. —.

6. Securing property from which to take materials to raise the grade of a railroad track and strengthen the embankment, which has been injured by floods, for the convenience, safety, and security of the public, is a public use for which the power of eminent domain may be employed. *State 40 L.R.A. (N.S.)*

ex rel. *Great Northern R. Co. v. Superior Ct.* 40: 793, 123 Pac. 996, 68 Wash. 572.

(Annotated)

Petition.

7. The failure to aver in the petition in an action by an electric power, heat, light, and traction company to condemn land, that such company has a contract to supply any municipality or company with electricity, does not render the petition defective. *Pittsburg Hydro-Electric Co. v. Liston*, 40: 602, 73 S. E. 86, — W. Va. —.

What constitutes a taking of, or injury to, property.

8. A railroad company is not, under a Constitution forbidding the damaging of property for public use without compensation, liable for the diminution in value of private property because of inconveniences caused by the closing of streets not abutting on the property, but which afford access to it, where communication between the property and the general system of highways still remains. *Hyde v. Minnesota, D. & P. R. Co.* 40: 48, 136 N. W. 92, — S. D. —.

Consequential injuries.

9. A railroad company acting under the power of eminent domain is not, although the Constitution forbids damaging property for public use without compensation, liable for diminution in value of property near which it locates its tracks and depot grounds, because of the smoke, dust, noise, and trembling of the earth due to the proper management of the road. *Hyde v. Minnesota, D. & P. R. Co.* 40: 48, 136 N. W. 92, — S. D. —.

(Annotated)

Additional servitude.

10. The mere fact that an electric railway is constructed in a public street with T-rails, and that its cars are operated by the use of wires and poles, does not show that it is an additional servitude on the highway. *Cadwell v. Connecticut Co.* 40: 253, 83 Atl. 215, 85 Conn. 401.

11. The running upon an interurban electric railway constructed in a public street, of cars designed to carry property only, which run from terminus to terminus without stopping to receive and discharge contents, and discharging such contents at the two termini only, impose an additional servitude on the fee. *Cadwell v. Connecticut Co.* 40: 253, 83 Atl. 215, 85 Conn. 401.

(Annotated)

ENACTMENT.

Of ordinances, see *Municipal Corporations*, 2.

Of statute, see *Statutes*.

ENGINE.

Person riding on, at invitation of engineer, as passenger, see *Carriers*, 4, 5.

EQUALITY.

Of immunities, privileges, and protection; see *Constitutional Law*, 2-7.

EQUITABLE TITLE.

Sufficiency of, to give insurable interest, see Insurance, 2.

EQUITY.

Review of findings of fact on appeal, see Appeal and Error, 17.

Conclusiveness of decree in chancery in subsequent action at law, see Judgment, 4.

See also Injunction; Trusts.

1. Equity has no jurisdiction of a suit to prevent wrongful interference by one who has granted the right to hunt on his land with the rights of the grantee, since the remedy at law for damages is adequate. *Isherwood v. Salene*, 40: 299, 123 Pac. 49, — Or. —.

2. A sufficient execution of the trust to enable equity to enforce it arises where a mutual benefit certificate is delivered to one having no insurable interest in the life of the member, upon the agreement of the beneficiary that, if he will pay the dues and make advances to the member, he shall have the proceeds when collected, and the member dies leaving the condition unchanged. *Kerr v. Crane*, 40: 692, 98 N. E. 783, 212 Mass. 224.

3. An action by the receiver of a mutual insurance company organized under laws which make it a body corporate and give its members the right of stockholders, against such members, to recover an assessment made by the court in order to pay the liabilities of the insolvent corporation, may properly be brought in a court of equity in the same manner as an action by the receiver of a stock corporation against its stockholders for a like purpose, and in such case summons may be issued out of the county in which the action is brought to any other county in the state in which a defendant resides or may be summoned. *McCall v. Bowen*, 40: 781, 135 N. W. 1014, — Neb. —. (Annotated)

ESCROW.

Preference by delivery to creditor within four months of bankruptcy, of securities deposited in escrow prior to four months period, see Bankruptcy, 2.

ESTOPPEL.

Of landlord to treat tenant as holding over under terms under original lease, see Landlord and Tenant, 1.

To recover from bank which has paid draft on forged indorsement, see Notice, 2.

Of conditional vendor to reclaim property, see Sale, 2.

By judgment.

1. A judgment in an action against a city for injuries resulting from an obstruction in a street does not estop one who placed the obstruction there and who was given notice and an opportunity to defend in the action against the city, from showing, in a subsequent action against him as 40 L.R.A. (N.S.)

indemnitor, that he had used reasonable care to keep the obstruction in safe condition, and was therefore not liable. *Grand Forks v. Paulsness*, 40: 1158, 123 N. W. 878, 19 N. E. 293 (Annotated)

2. A judgment against plaintiff for failure of proof in an action for possession of real property, and to establish title, estops him from further prosecution of an action for such relief. *Wicker v. Jones*, 40: 69, 74 S. E. 801, — N. C. —.

By laches, silence, or acquiescence.

3. One having notice of facts sufficient to put him on inquiry as to the forged indorsement by his attorney of a draft in his favor, at a time when the bank has assets of the attorney in its possession sufficient to protect itself, and who attempts to collect the money from the attorney, and fails to notify the bank until after it has parted with the assets, is estopped to look to the bank for reimbursement. *Brown v. People's Nat. Bank*, 40: 657, 136 N. W. 506, — Mich. —. (Annotated)

4. Where city authorities have, by ordinance, extended the city limits so as to include an addition or tract of land, and the inhabitants thereof and all parties affected thereby have acquiesced in the action of the city authorities, and have transacted their business upon the theory that such territory was included within the city limits, a public-service corporation will not be allowed to question the validity of such action of the city council, in a collateral attack, after the lapse of five years. *Hatch v. Consumers' Co.* 40: 263, 104 Pac. 670, 17 Idaho, 204.

By inconsistency in acts or claims.

5. A property owner who has asserted the validity of a lease of a railroad to compel the lessee to furnish him siding facilities cannot, in another proceeding to hold the lessor liable in damages for refusal to do so, deny its validity. *Moser v. Philadelphia, H. & P. R. Co.* 40: 519, 82 Atl. 362, 233 Pa. 259.

EVIDENCE.

Review of discretionary ruling, see Appeal and Error, 10.

Waiver of objection as to, see Appeal and Error, 14, 15.

Prejudicial error as to, see Appeal, 20, 21.

Right to free transcripts of, see Appeal and Error, 23.

Validity of indictment found by grand jury without testimony before them, see Indictment, etc. 1.

Necessity of pleading and proving contributory negligence, see Pleading, 6.

As to order of proof, see Trial.

Extrinsic evidence as to intent of testator, see also Wills, 5.

Judicial notice.

1. The court does not know judicially that there is no reasonable connection between the health, welfare, and safety of the public and the limitation of the hours of labor of women in hotels, which would render such limitation an improper subject

for the exercise of the police power. *People v. Elarding*, 40: 893, 98 N. E. 982, 254 Ill. 579.

Presumptions and burden of proof.

Presumptions on appeal, see Appeal and Error, 5, 6.

Prejudicial error in instructions as to failure of plaintiff to appear as witness, see Appeal and Error, 23.

2. In the absence of proof of the law of another jurisdiction, the inference is that the common law still prevails there. *Bodine v. Berg* (N. J. Err. & App.) 40: 65, 82 Atl. 901, — N. J. —.

3. One attacking a tax assessment on the ground that he has not the property assessed has the burden of showing that fact, and his assessment cannot be canceled because of absence of proof that he possessed the property. *Barhydt v. Cross*, 40: 986, 136 N. W. 525, — Iowa, —.

4. The surety on the bond of an insurance agent must plead and prove the failure of the company to comply with its undertaking to exercise due and customary supervision over the agent, and notify the surety immediately of any default on the part of the agent, in order to make such failure available to defeat liability on the bond. *United American F. Ins. Co. v. American Bonding Co.* 40: 661, 131 N. W. 994, 146 Wis. 573.

5. In an action for injuries resulting from the taking of an X-ray picture of the injury of an employee of a telephone company, by a servant of such company, where the instrumentality is under the exclusive control of the company, and where there is evidence that injury to the subject is not a necessary result of the taking of such a picture if proper instruments and proper care are used, and evidence that such injury did result in this case, the doctrine of *res ipsa loquitur* applies, and the company not having shown conclusively that it was not negligent, a judgment for the employee upon a verdict in his favor will not be disturbed. *Jones v. Tri-State Teleph. & Teleg. Co.* 40: 485, 136 N. W. 741, 118 Minn. 217.

6. Where one who had been the general manager of a corporation sells his stock under an agreement that a note, given in part payment therefor, shall be subject to a proportionate deduction on account of any just claims existing against the corporation, not shown by its books, in an action upon the note, proof by the defendant that such claims were made against the corporation, and that a new manager paid them after a full investigation, makes out a *prima facie* case for a deduction, and casts upon the plaintiff the burden of showing that the claims so made and paid were not just. *Richolson v. Ferguson*, 40: 855, 124 Pac. 360, — Kan. —.

7. One assailing a deed showing an erasure or interlineation has the burden of proving that it was made after the time of execution. *Wicker v. Jones*, 40: 69, 74 S. E. 801, — N. C. —.

Documentary evidence.

8. The decision of a Federal court sitting in a state on a matter of general law

is not evidence of what the law of that state is. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

9. Under the provisions of the statute that entries in books intended as records of payments and similar matters, made in the regular course of business at or near the time of the transaction, shall be admissible in evidence on proof that they were so made, the fact that a corporation made certain payments may be shown by its books, although it is not a party to the action. *Richolson v. Ferguson*, 40: 855, 124 Pac. 360, — Kan. —.

Demonstrative evidence.

10. The jury cannot determine the age of the purchaser by inspection only in a prosecution for illegally selling liquor to a minor, where at no time during the introduction of the evidence was its attention called to the fact that the prosecuting witness was on inspection for that purpose. *Quinn v. People*, 40: 470, 117 Pac. 996, 51 Colo. 350. (Annotated)

Opinions and conclusions.

11. That witnesses have not gained their knowledge of the condition of land injured by flood, by personal observation, does not prevent their giving an opinion upon the cost of restoring it, where its condition was described by other witnesses. *Hufnagle v. Delaware & Hudson Co.* 40: 982, 76 Atl. 205, 227 Pa. 476.

12. An employee of the weather bureau who has testified to the temperature and precipitation on a certain date, and what would or would not constitute extraordinary precipitation, cannot state his opinion whether or not the precipitation on that date was extraordinary. *Hufnagle v. Delaware & Hudson Co.* 40: 982, 76 Atl. 205, 227 Pa. 476.

13. An employee of the weather bureau cannot be allowed to testify from journal entries made by a predecessor in the office, that the weather at a certain time had caused streams to rise rapidly and to overflow adjoining land, since it consists largely of the individual opinion of the writer. *Hufnagle v. Delaware & Hudson Co.* 40: 982, 76 Atl. 205, 227 Pa. 476.

Admissions.

14. The O. K. by an insurance agent who is required to remit, for business done, within two months after the expiration of the month in which it is transacted, of a statement of amount due by him to the company within such time, after he has resigned from his position, is admissible in evidence against his surety in an action to hold him liable for a defalcation, since the duty to remit did not terminate with the resignation, and statement as to the amount due, made within the time during which his contract required him to make remittances, was part of the *res gestæ*. *United American F. Ins. Co. v. American Bonding Co.* 40: 661, 131 N. W. 994, 146 Wis. 573. (Annotated)

Hearsay; declarations; *res gestæ*.

15. The privilege as to confidential communications between husband and wife may be waived by either spouse by calling the other party to the marital relation as a witness. *Hampton v. State*, 40: 43, 123 Pac. 571, — Okla. Crim. Rep. — (Annotated)

16. The privilege accorded communications between husband and wife does not extend to letters written by the wife's attorney, by her authorization, to the husband. *Re Sherin*, 40: 801, 130 N. W. 761, 27 S. D. 232.

17. Dying declarations are limited to criminal prosecutions when the subject-matter of the investigation is the declarant's death; and where in a *mêlée* two persons are shot—one killed and the other mortally wounded—the dying declarations of the latter are not admissible in evidence against the party charged with killing the former. *Johnson v. State*, 40: 1195, 58 So. 540, — Fla. — (Annotated)

18. Dying declarations made by a party who was shot and mortally wounded in a *mêlée*, made four or five hours after the shooting, and after the party had seen and spoken to several persons, cannot be said to be the spontaneous utterances of thoughts created by or springing out of the transaction, and therefore cannot be considered as a part of the *res gestæ*. *Johnson v. State*, 40: 1195, 58 So. 540, — Fla. —

Relevancy and materiality.

Review of discretionary ruling as to, see Appeal and Error, 10.

20. Upon the question whether or not an employee injured by the use of a defective cant hook ought to have known of its defective condition, evidence should be considered as to the use he had made of it and his familiarity with such tools. *Parker v. W. C. Wood Lumber Co.* 40: 832, 54 So. 252, — Miss. —

21. In an action by the purchaser of bonds of a consolidated corporation, to hold the promoters liable for fraud in inducing the sale by means of a prospectus which stated that one of the corporations which went into the consolidation owned a franchise acquired under advice of eminent counsel, which if good would be very valuable, evidence is admissible that under the law it was extremely doubtful if it had any value whatever, and that they suppressed the fact that they turned the franchise over to the corporation for more than 150 times what they paid for it. *Downey v. Finucane*, 40: 307, 98 N. E. 391, 205 N. Y. 251.

22. In an action to hold promoters liable for fraud in the sale of bonds of a corporation, the jury may consider the question of fraud in a statement of the prospectus that number of shares of stock had been issued, or directed to be issued, when a portion of such stock represented property turned over by the promoters at more than 150 times what they paid for it. *Downey v. Finucane*, 40: 307, 98 N. E. 391, 205 N. Y. 251.

23. In an action to hold promoters liable for fraud in selling bonds of a consolidated L.R.A. (N.S.)

dated corporation, the jury may consider statements in the prospectus that dividends had been paid on the stock of one of the constituent corporations, when in fact they were never earned. *Downey v. Finucane*, 40: 307, 98 N. E. 391, 205 N. Y. 251.

24. Upon the question whether or not subscriptions to the stock of a corporation were made in good faith, evidence as to the ability of the subscribers to pay must be limited to facts known by the witnesses, although upon the question whether or not the directors exercised ordinary care in accepting the subscriptions, evidence is admissible of statements made in their presence as to the ability of subscribers. *Stone v. Monticello Constr. Co.* 40: 978, 117 S. W. 369, 135 Ky. 659.

25. The value of a mine which is turned into a corporation organized to operate it in consideration for its stock may be determined from what its former owners sold it for, where they were men of large business operations, not unaccustomed to mining, and were under no compulsion to sell. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

26. Upon the question of injury to a crop by turning surface water upon it early in July, witnesses may state its condition in June and in August, there being no question that the difference in condition, if any, was due to the water. *Martin v. Schwertley*, 40: 160, 136 N. W. 218, — Iowa, —

27. In determining whether an interlineation in a deed was made before or after execution, the jury may consider any difference in ink and writing, and also the fact that it was withheld from registration. *Wicker v. Jones*, 40: 69, 74 S. E. 801, — N. C. —

28. In an action by county commissioners to hold a railroad company liable for damages which they had been compelled to pay because of a defect in a highway due to a change made by the company, evidence is admissible as to the condition of the road before the changes were made and the character of the changes. *Baltimore & O. R. Co. v. Howard County Comrs.* 40: 1172, 73 Atl. 656, 111 Md. 176.

29. In a trial for homicide it is competent to put in evidence the actions, conduct, and general demeanor of defendant before the killing, for the purpose of proving that he was armed and in a vicious humor, provided only that such conduct is so near the time of the homicide as to tend to show the state of mind of the defendant at the time of the killing. *Hampton v. States*, 40: 43, 123 Pac. 571, — Okla. Crim. Rep. —

Weight, effect, and sufficiency.

Review of facts on appeal, see Appeal and Error, 17, 18.

30. In a case where defendant was enjoined from keeping intoxicating liquors in a certain place for sale and from selling them at that place, proof that large quantities of intoxicating liquors were subse-

quently purchased by him, some of which were kept at the place, and that he sold a pint of whisky to a purchaser, is sufficient to uphold a judgment finding him guilty of contempt. *State v. Meyer*, 40: 90, 122 Pac. 101, 86 Kan. 793.

31. A finding in an equity suit to compel the furnishing of siding facilities by a railroad, of repeated demands upon the railroad company to do so, covering a long period of time, not necessary to the decree, and based upon immaterial evidence, is not sufficient to establish such demand in a subsequent action at law to hold the company liable in damages for failure to do so. *Moser v. Philadelphia, H. & P. R. Co.* 40: 519, 82 Atl. 362, 233 Pa. 259.

32. That an executor used funds of the estate to pay his individual debt may be found from the fact that the amount of the check drawn by him as executor, calling for an amount of dollars and cents represented by numerous figures, was credited on his private debt. *Davis v. Hall*, 40: 1136, 83 Atl. 653, — Vt. —.

33. A conviction of disfigurement is sustained by evidence that accused threw acid on the face and arms of his victim, which brought about a disfigurement and kept the victim under the treatment of a doctor for some time, although the extent of the injury is not shown. *Lee v. State*, 40: 1132, 148 S. W. 567, — Tex. Crim. Rep. —.

Admissibility under particular pleadings; variance.

Review of discretion in striking amendment to make pleading conform to proof, see *Appeal and Error*, 8.

34. There is no error in the exclusion of evidence in an action by an employee to hold a railroad company liable for personal injuries to him, that the injury was received in the transaction of interstate commerce, where there is nothing in the pleadings to indicate that such was the fact. *Bradbury v. Chicago, R. I. & P. R. Co.* 40: 684, 128 N. W. 1, 149 Iowa. 51.

35. Failure of one suing to restrain another from breaking his contract not to engage in business in opposition to complainant, to establish an incidental feature of his bill asking for damages for failure to turn over property sold in connection with the business, does not defeat the right to injunctive relief. *Smith v. Webb*, 40: 1191, 58 So. 913, — Ala. —.

36. Failure to establish the statutory duty to sound a warning when a railroad train approached a highway crossing, as set out in a complaint to recover for the negligent killing of a person at the crossing, will not defeat the action, if the complaint also charges failure to equip the engine with a proper whistle as required by the common law. *Lepard v. Michigan C. R. Co.* 40: 1105, 130 N. W. 668, 166 Mich. 373.

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EXCAVATION.

Assumption of risk by servant working in, see *Master and Servant*, 14.

EXECUTION.

An execution issued on a void judgment will be quashed on motion. *A. B. Farquhar Co. v. Dehaven*, 40: 956, 75 S. E. 65, — W. Va. —.

EXECUTORS AND ADMINISTRATORS.

Jurisdiction of appeal from order requiring administratrix to inventory property of estate, see *Appeal and Error*, 1.

Sufficiency of evidence to show that executor used funds of estate to pay his individual debt, see *Evidence*, 32.

Judgment against executors in representative capacity where statute makes them personally liable, see *Judgment*, 3.

Assessment to personal representatives of property omitted during lifetime of taxpayer, see *Taxes*, 1, 2, 4.

1. Consent by all interested in a decedent's estate, that his business shall be continued by the administrator, will relieve the administrator from liability for losses resulting therefrom, although he failed to inform them that his operations were not profitable. *Swaine v. Hemphill*, 40: 201, 131 N. W. 68, 165 Mich. 581.

(Annotated)

2. A mere decree directing an executor to pay funds of the estate to himself as executor of a legatee does not, without more, work a transference of the funds, so as to relieve the sureties on his bond as executor of the former estate from liability for a devastavit. *Davis v. Hall*, 40: 1136, 83 Atl. 653, — Vt. —.

(Annotated)

3. To collect against personal representatives taxes which were omitted during the lifetime of the taxpayer, it is not necessary to present them as claims against the estate, within the statutory time for presenting such claims, but they may be collected under statutes providing for the assessment of property in the hands of personal representatives. *Bogue v. Laughlin*, 40: 927, 136 N. W. 606, — Wis. —.

EXPLOSIONS AND EXPLOSIVES.

Liability for injury to child by, see *Negligence*, 1.

EXTORTION.

Disbarment of attorney for, see *Attorneys*, 2.

Compelling by threats payment of money justly due as extortion, see *Attorneys*, 2.

FEDERAL COURTS.

State courts following decisions of, *see* Courts, 11.

Following state decisions, *see* Courts, 12-14.

FELLOW SERVANTS.

Who are fellow servants, *see* Master and Servant, 17-19.

FENCES.

As nuisance, *see* Nuisances, 2.

Injunction against maintenance of spite fence, *see* Injunction, 3.

Pleading in suit for injunction against spite fence, *see* Pleading, 4.

FINDINGS.

Conclusiveness of decision on demurrer, *see* Judgment, 6.

FIRE.

Carrier's liability for loss by, *see* Carriers, 13.

FLOOD.

Review of discretionary ruling in action for injury by flooding, *see* Appeal and Error, 10.

Opinion as to cost of repairing damage by, *see* Evidence, 11.

FLYING SWITCH.

Injury to employee resulting from, *see* Master and Servant, 10.

FOOD.

Constitutionality of statute as to sale of oleomargarin, *see* Constitutional Law, 14.

Measure of damages for serving unfit food to guests, *see* Damages, 4, 5.

1. The keeper of a public place where food is served is bound to know that the articles sold are fresh and fit for human consumption, and is liable in damages for injury due to their vitiated and deleterious character. *Doyle v. Fuerst & Kraemer*, 40: 480, 56 So. 906, 129 La. 838.

(Annotated)
2. A statute prohibiting the manufacture or sale of oleomargarin "which shall be in imitation of butter of any shade or tint of yellow, unless such oleomargarin shall be made and kept free from all coloration or ingredients causing it to look like butter of any shade or tint of yellow," is violated by a sale of oleomargarin purposefully made of any shade or tint of yellow by a judicious selection and combination of fat, oil, and other necessary ingredients, though no artificial coloring matter is used. *State v. Hanson*, 40: 865, 136 N. W. 412, — Minn. —.

FORECLOSURE.

Of mortgage, *see* Mortgage.

FOREIGN CORPORATIONS.

See Corporations, 15, 16.
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FOREIGN JUDGMENT.

See Judgment, 12.

FOREIGN LAW.

Presumption as to, *see* Evidence, 2.

FOREMAN.

As fellow servant, *see* Master and Servant, 18.

FORGERY.

Payment of forged paper by bank, *see* Banks, 3.

Estoppel as to, *see* Estoppel, 3.

Notice of agent as to, as notice to principal, *see* Notice, 2.

FORMA PAUPERIS.

Right to free transcripts of notes of evidence taken at trial, *see* Appeal and Error, 28.

FORMER JEOPARDY.

Setting aside conviction to enable accused to plead former jeopardy, *see* New Trial, 3.

In general, *see* Criminal Law, 3-5.

FRAUD AND DECEIT.

Of promoters, *see* Corporations, 3-10;
Limitation of Actions, 1, 2.

Measure of damages for, *see* Damages, 3.

Evidence as to, generally, *see* Evidence, 21-24.

Materiality of fraud of vendor, *see* Vendor and Purchaser, 1.

Rescission of contract for, *see* Vendor and Purchaser, 3.

FRONTAGE TAX.

See Public Improvements, 5.

FUMES.

Injury to servant by fumes from ammonia tank, *see* Master and Servant, 11.

FUNERAL EXPENSES.

Liability of father for burial expenses of child, *see* Parent and Child.

GAME AND GAME LAWS.

Jurisdiction of equity to prevent wrongful interference with hunting privilege, *see* Equity, 1.

One who has granted the exclusive right to shoot wild fowl upon the waters upon his land is not liable in damages for clearing and draining the land, if he does so in good faith for the purpose of improving it, but may be so if he acts in bad faith in order to injure the grantee. *Isherwood v. Salene*, 40: 299, 123 Pac. 49, — Or. —. (Annotated)

GAMING.

Enforcement of gaming contract, *see* Contracts, 6.

GAS.

Injury to employee by escape of, from ammonia tank, see Master and Servant, 11.

GIFT.

Where bank stock belonging to a husband was in a box in a vault in a room adjoining that in which the husband lay on his deathbed, and both keys to such box—one of which was usually carried by the husband, the other by the wife—were in possession of the wife, when the husband gave such bank stock to the wife by words *in presenti*, and instructed her to take his key to the box and keep it and allow no one to have it, the mere transfer by the wife of the husband's key from his key ring to hers is not a sufficient delivery to constitute a valid *donatio causa mortis*. Apache State Bank v. Daniels, 40: 901, 121 Pac. 237, — Okla. —.

(Annotated)

GOOD FAITH.

Evidence on question of, see Evidence, 24.

GOVERNOR.

Mandamus to, see Mandamus, 1, 2.

GRAVE.

See Cemeteries.

GUARDS.

Lack of guards on machinery as proximate cause of injury see Proximate Cause, 2.

HABITUAL CRIMINALS.

Punishment of, see Criminal Law, 6.

HAIL.

Insurance against destruction by, see Insurance, 1.

HARMLESS ERROR.

See Appeal and Error, 19-27.

HEALTH.

Requiring permit from health commissioner for hospital, see Municipal Corporations, 3.

HEARING.

Necessity of, before declaring bowling alley a nuisance, see Municipal Corporations, 6.

HEARSAY.

See Evidence, 15-19.

HEAT.

Exercise of eminent domain by electric heat and light company, see Eminent Domain, 3-5.

HEIRS.

As to descent and distribution to, see Descent and Distribution.

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HIGHWAYS.

Use of automobiles on, see Automobiles.

Additional servitude on, see Eminent Domain, 10, 11.

Discontinuance as a taking of property, see Eminent Domain, 8.

Improvements; repairs.

Building and repair of, generally, see Public Improvements.

1. Where a street is sufficiently wide that enough will remain unobstructed for the purpose of public travel, a municipality may maintain, or permit to be maintained, park strips between the curbing of the paved street and the pavement of the sidewalk in which strip grass, flowers, and trees may be grown for the purpose of beautifying and ornamenting the streets of the city and contributing to the pleasure and comfort of its citizens, and may by proper barriers prevent travel thereon. Barnesville v. Ward, 40: 94, 96 N. E. 937, 85 Ohio St. 1.

Liability for injuries on.

Error in admission of evidence in action by county to hold third person liable for personal injuries for which county has been compelled to pay, see Appeal and Error, 20.

Right of municipality held liable for injury to recover from third person, see Contribution and Indemnity, 1-3.

Right of property owner compelled to pay damages for injury caused by falling into coal hole to recover over against one leaving hole uncovered, see Contribution and Indemnity, 4, 5.

Federal court following state decision as to liability of one placing building materials in street for resulting injury, see Courts, 13.

Effect of judgment against city to estop one responsible for death in subsequent action to hold him liable as indemnitor, see Estoppel, 1.

Evidence as to condition before and after change alleged to have caused injury, see Evidence, 28.

Conclusiveness of judgment against one constructively liable for injury, in subsequent action against one primarily liable, for contribution or indemnity, see Judgment, 8.

Liability for injury due to negligent driving, see Negligence, 2.

Contributory negligence of parents in permitting child to be on street, see Negligence, 4.

2. A county which permits granite blocks, which have been placed by a citizen on the graded part of a highway, but outside the macadamized part, to remain there for five months, may be held liable for injury to a traveler on the highway whose vehicle comes into collision with them in the dark. Blankenship v. King County, 40: 182, 122 Pac. 616, 68 Wash. 84.

(Annotated)

3. The trees, grass, and flowers growing upon a park strip left between the roadway and the sidewalk, and proper barriers placed around the same to protect them, are not obstructions or nuisances within the meaning of the statute requiring the city council to keep the streets of a municipality open, in repair, and free from nuisance. *Barnesville v. Ward*, 40: 94, 96 N. E. 937, 85 Ohio St. 1.

4. A city may not maintain, or permit to be maintained, a fence, wire, or other barrier around park strips maintained between a roadway and sidewalk in a public street, dangerous to the life or safety of any traveler who undertakes to pass over the same, and, if a pedestrian in the exercise of due care for his own safety is injured by reason of the dangerous condition of such barrier, the municipality is liable in damages for such injury, if it knew, or in the exercise of ordinary care ought to have known, the dangerous condition thereof. *Barnesville v. Ward*, 40: 94, 96 N. E. 937, 85 Ohio St. 1. (Annotated)

5. A manufacturing company from whose plant, owing to an accident to the boiler, hot water escaped into the gutter of a near-by street thereby attracting children, is liable in damages for injury to a child resulting from falling therein after a watchman who had been stationed there had departed, and the place was negligently left unguarded. *Palermo v. Orleans Ice Mfg. Co.* 40: 671, 58 So. 589, 130 La. 833.

6. One piling building material in the street owes a duty to children of such tender years as to be incapable of contributory negligence or trespass, who to his knowledge are accustomed to play in the vicinity, to use ordinary care to prevent the piles from being in such unstable condition as would be likely to cause injury to such of the children as might come in contact with them. *Snare & Triest Co. v. Friedman*, 40: 367, 169 Fed. 1, 94 C. C. A. 369.

7. The mere fact that one attempting to drive along a highway on a dark rainy night knew that granite blocks had been left lying adjacent to the macadamized portion of the way, at a certain point, does not establish contributory negligence on his part as matter of law, in coming into collision with them. *Blankenship v. King*, 40: 182, 122 Pac. 616, 68 Wash. 84.

HOMESTEAD.

Priority over homestead rights of claim for money advanced to redeem from foreclosure of purchase money mortgage, see Mortgage, 3.

HOMICIDE.

Prejudicial error as to order of proof in homicide case, see Appeal and Error, 25.

Admissibility of dying declarations, see Evidence, 17, 18.

Relevancy of evidence generally, see Evidence, 29.

Remarks of prosecuting attorney in homicide case, see Trial, 1.

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HOSPITAL.

Hospitals for insane as nuisance, see Courts, 6; Municipal Corporations, 7.

Requiring permit for location of, within city limits, see Municipal Corporations, 3.

HOTELS.

Statute limiting hours of labor in, see Constitutional Law, 7; Evidence, 1; Master and Servant, 4.

Serving unfit food to guests, see Damages, 4, 5; Food, 1.

HOURS OF LABOR.

Constitutionality of statute as to, see Constitutional Law, 7.

Generally, see Master and Servant, 4.

HUNTING.

Jurisdiction of equity to prevent interference with hunting privilege, see Equity, 1.

HUSBAND AND WIFE.

Acknowledgment by married woman, see Acknowledgment.

Extorting from husband who has deserted wife money to which wife was justly entitled as ground for disbarment of attorney, see Attorneys, 2.

As to curtesy, see Curtesy.

Conviction of failure to maintain wife as bar to prosecution for continued failure to maintain her, see Criminal Law, 4.

Estate or interest created by conveyance to a man and wife for life, remainder to the heirs of the wife, see Deeds.

As to divorce or separation, see Divorce and Separation.

Wife's right of dower, see Dower.

Admissibility of statements between, see Evidence, 15, 16.

Gift by husband to wife, see Gift.

Effect of judgment against husband on liability of wife as his surety, see Judgment, 10.

Theft by husband or wife of goods of the other, see Larceny.

Comment by prosecuting attorney on trial of husband on latter's failure to call wife as witness, see Trial, 1.

1. A woman cannot recover damages for injury inflicted upon her husband to the diminution of his earning capacity and consequent ability to support and maintain her, nor for loss of his society and companionship because of such injury. *Brown v. Kitselman*, 40: 236, 98 N. E. 631, — Ind. —. (Annotated)

2. Husband and wife are entitled to the affection, society, co-operation, and aid of each other in every conjugal relation, and the wife may maintain an action for damages against anyone who wrongfully

and maliciously interferes with the marital relationship and thereby deprives her of the society, affection, and consortium of her husband. *Flandermeyer v. Cooper*, 40: 360, 98 N. E. 102, 85 Ohio St. 327.

3. One who, with knowledge that a husband by the constant and continued use of morphine has become so weakened in body and mind that he is unable to resist his cravings for the drug, and who, after repeated protests from the wife, continues to sell morphine to the husband until, by the use thereof, his mind becomes so impaired and destroyed that it is necessary to confine him in an insane asylum, is liable to the wife for damages for her loss of consortium. *Flandermeyer v. Cooper*, 40: 360, 98 N. E. 102, 85 Ohio St. 327.

(Annotated)

4. Malice is implied in an action by a wife for the loss of consortium of her husband resulting from the sale of morphine to the husband by the defendant, and it is not necessary that hatred, ill-will, or actual malice be shown, nor that the act proceed from a spiteful, malignant, or revengeful disposition. *Flandermeyer v. Cooper*, 40: 360, 98 N. E. 102, 85 Ohio St. 327.

IDENTITY.

Power to require one who has caused an injury to identify himself, see Criminal Law, 2.

ILLEGAL VOTING.

See Elections.

ILLEGITIMATES.

Right to inherit, see Descent and Distribution.

ILLNESS.

Effect of, to release man from promise of marriage, see Breach of Promise.

IMMORAL ACTS.

Disbarment of attorney for, see Attorneys, 1.

IMPEACHMENT.

Of statute, see Statutes, 3.

IMPROVEMENTS.

Public improvements, see Public Improvements.

IMPUTED NOTICE.

See Notice, 2-4.

INCOMPETENT PERSONS.

Hospital for insane as nuisance, see Courts, 6; Municipal Corporations, 7.

Requiring permit for location of insane asylum within city limits, see Municipal Corporations, 3.

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INCONSISTENCY.

Estoppel by, see Estoppel, 5.

In statute, see Statutes, 1.

Between general and special verdict, see Trial, 7.

INDEMNITY.

See Contribution and Indemnity.

INDICTMENT, INFORMATION, AND COMPLAINT.

Necessity of, see Criminal Law, 3.

Number of peremptory challenges to which accused is entitled upon consolidation of two indictments against him, see Jury, 8.

1. An indictment is not bad because found by the grand jury without witnesses or testimony before them. *Lee v. State*, 40: 1132, 148 S. W. 567, — Tex. Crim. Rep.

Verification.

2. An information by a prosecuting attorney under a statute providing that one who has been convicted and sentenced to serve a term in the penitentiary who has previously been sentenced to a like punishment shall be informed against, and an additional sentence imposed, need not be verified. *State v. Graham*, 40: 924, 69 S. E. 1010, 68 W. Va. 248.

Description of offense.

3. An indictment in the language of the statute, which so individuates the offense that the accused has proper notice of the crime charged, is good. *State v. Kernan*, 40: 239, 135 N. W. 362, — Iowa, —.

INDORSEMENT.

Forgery of, see Banks, 3.

Of bill or note, see Bills and Notes, 3.

INFANTS.

Federal courts following state decision as to liability for injury to, see Courts, 13.

Injury to, on highway by hot water discharged into gutter, see Highways, 5.

Injury to child playing on building material in street, see Highways, 6.

Determining claim of infancy by inspection in court, see Evidence, 10.

Kidnapping of, see Kidnapping.

Limitation of actions by, see Limitation of Actions, 3.

Negligence towards, generally, see Negligence, 1.

Contributory negligence of, see Negligence, 3.

Contributory negligence of parents of, see Negligence, 4.

Liability of father for burial expenses of child, see Parent and Child.

Where a mother dies immediately after the birth of a child, and the father commits it to the custody of a competent woman, who properly cares for it in a suitable home, without compensation, and the father permits a mutual attachment to

grow up between them for a number of years under a contract with him awarding to her its permanent custody, in a proceeding by the father to regain his child, the general rule, that the controlling consideration is the child's own best interests, applies. *Burdick v. Kaelin*, 40: 887, 136 N. W. 988, — Neb. —.

INITIATIVE, REFERENDUM, AND RECALL.

Injunction against election to recall officer, see Injunction, 8.

INJUNCTION.

Contempt by violation of, see Contempt, 2, 3.

Conflict of jurisdiction as to, see Courts, 10.

Criminal liability for violation of statute during existence of order enjoining its enforcement, see Criminal Law, 1.

Contract rights.

1. A salesman and local manager for a nonresident corporation, who by virtue of his position becomes familiar with the business of the company and its customers, and takes orders for the delivery of maps by such company, and subsequently, during the term for which he had contracted to serve such company, broke his contract with it and entered the service of a rival company in the same territory, and failed to deliver to his former employer orders taken for its maps, may, after he has become insolvent, be enjoined from delivering maps of the second company on orders taken for the first. *Kinney v. Scarbrough Co.* 40: 473, 74 S. E. 772, — Ga. —.

Illegal or tortious acts; crimes.

2. A selling agent of a company engaged in the manufacture and sale of maps, who has broken his contract of employment and entered the services of a rival company, may, after he has become insolvent, be enjoined from seeking to induce other employees of his former employer to breach their contracts of employment and enter with him upon the service of the other company. *Kinney v. Scarbrough Co.* 40: 473, 74 S. E. 772, — Ga. —.

3. Injunction lies against the maintenance of a spite fence erected merely to annoy a neighbor and injure his property. *Norton v. Randolph*, 40: 129, 68 So. 283, — Ala. —.

Elections.

4. A court of equity has no jurisdiction to restrain the holding of an election, since the right involved is a political one. *City Council of the City of McAlester v. Millwee*, 40: 576, 122 Pac. 173, 31 Okla. 620.

(Annotated)

Against legal proceedings.

5. Equity has no jurisdiction, in order to prevent a multiplicity of suits, to enjoin the prosecution of a large number of actions by different persons under an employer's liability act, against a common employer, to recover damages for wrongful 40 L.R.A. (N.S.)

deaths caused by the same accident in the employer's plant, and determine the question of liability itself. *Southern Steel Co. v. Hopkins*, 40: 464, 57 So. 11, — Ala. —.

(Annotated)

6. A demand for unliquidated damages for breach of a covenant of warranty, in favor of the owner of land subject to a deed of trust, is not a ground for enjoining a sale of the land to pay the debt secured by such deed of trust. *Shrader v. Gardner*, 40: 1145, 74 S. E. 990, — W. Va. —.

Unfair competition.

7. One who manufactures an unpatented article for the market, arranging the parts to the best advantage, and giving it a form which is most effective and economical to manufacture and using an unpainted material which is best adapted to the purpose, cannot enjoin the use by a subsequent manufacturer of the identical combination of mechanical devices, form, and material, if he uses a different name plate so as to distinguish the origin of manufacture. *Pope Automatic Merchandising Co. v. McCrum-Howell Co.* 40: 463, 191 Fed. 979, 112 C. C. A. 391.

Procedure; bond.

Variance between pleading and proof, see Evidence, 35.

Pleading in suit for injunction against spite fence, see Pleading, 4.

8. A taxpayer has not such an interest in a suit to enjoin the holding of an election to recall the mayor of a city of the first class, in pursuance of the provisions of its charter, as will entitle him to prosecute such suit as a complainant. *McAlester v. Millwee*, 40: 576, 122 Pac. 173, 31 Okla. 620.

INNKEEPERS.

Limiting hours of labor of women in hotels, see Master and Servant, 4.

INSANE ASYLUM.

As nuisance, see Courts, 6; Municipal Corporations, 7.

Requiring permit for location of, within city limits, see Municipal Corporations, 3.

INSOLVENCY.

Injunction against tortious acts by insolvent person, see Injunction, 2.

INSPECTION.

Criminal liability for violation of statute as to inspection of oil to be sold, see Criminal Law, 1.

Determination of age of person by inspection in court, see Evidence, 10.

Master's duty as to, see Master and Servant, 11, 12.

INSTRUCTIONS.

See Trial, 5.

INSURABLE INTEREST.

See Insurance, 2, 3.

INSURANCE.

Nonwaiver agreement between insurance company and bankrupt and receiver of latter's property, see Bankruptcy, 1.

Judicial review of discretion of insurance company as to reinstatement, see Courts, 7, 8.

Joinder of parties plaintiff in action on policy, see Parties.

Ademption of bequest of insurance policy, see Wills, 9, 10.

Jurisdiction of equity of action to enforce liability of members of assessment company, see Equity, 3.

Bar of suit to recover assessments against members of mutual company, see Limitation of Actions, 4.

Officers and agents.

Right of courts to control discretion of officer, see Courts, 7, 8.

Damages for negligence of agent failing to forward application for insurance, see Damages, 2.

Pleading and proving defense in action on bond of agent, see Evidence, 4.

Evidence of admissions by agent as against his surety in action on his bond, see Evidence, 14.

1. Where the agent of an insurance company, who has taken an application for insurance of corn against destruction by hail, at a season when such destruction is imminent, and accepted a note of the applicant in payment of the premium, unreasonably delays sending in the application while attempting to discount the note, and finally sends both the application and the note to the company, which accepts them and issues a policy, but, owing to the delay, not until after the corn is destroyed by hail, such insurance company is liable in an action for damages for the negligence of its agent in thus delaying the application. *Boyer v. State Farmers' Mut. Hail Ins. Co.* 40: 164, 86 Kan. 442, 121 Pac. 329. (Annotated)

Insurable interest.

Enforcement in equity of promise of beneficiary to pay proceeds of policy to third person having no insurable interest, see Equity, 2.

Trust where beneficiary agrees to pay proceeds of policy to person not having insurable interest, see Trusts.

2. An equitable title to real estate gives an insurable interest to warrant a policy in the name of its owner, insuring it against loss by fire. *Scott v. Dixie F. Ins. Co.* 40: 152, 74 S. E. 659, — W. Va. —.

3. Real estate acquired for a partnership with partnership means, and used in its business, gives the partnership an "insurable interest" to warrant a policy insuring it against loss by fire. *Scott v. Dixie F. Ins. Co.* 40: 152, 74 S. E. 659, — W. Va. —.

Title and encumbrance.

4. The fact that the legal title to a

building owned by a partnership composed of several members and the administrator of a deceased member, and used in the firm business, is in such members and the heir of the deceased member, is no violation of a clause in an insurance policy taken out by such partnership, without making any statement as to title, that "if the interests of the assured in the property be not truly stated therein . . . or if the interests of the assured be other than unconditional and sole ownership," the policy shall be void. *Scott v. Dixie F. Ins. Co.* 40: 152, 74 S. E. 659, — W. Va. —.

(Annotated)

Use and care of property.

5. A building leased to a woman for a boarding house does not become vacant and unoccupied within the meaning of a clause in an insurance policy rendering it void under such circumstances, if, after the tenant has removed the most of her furniture to another building, her husband and his man continue to occupy the building nights, looking after his stock, which remains on the premises. *Seubert v. Fidelity-Phenix Ins. Co.* 40: 58, 136 N. W. 103, — S. D. —.

(Annotated)

Inventory.

6. The fact that a stock of merchandise has not been removed from the storehouse, and that it is covered by the original invoices, does not make inapplicable a provision in a fire insurance policy requiring an inventory. *Day v. Home Ins. Co.* 40: 652, 58 So. 549, — Ala. —.

7. The books of a merchant, together with the original invoices of his stock, cannot supply the requirements of a policy of insurance on the property requiring an inventory, where the policy requires both inventory and books. *Day v. Home Ins. Co.* 40: 652, 58 So. 549, — Ala. —.

Waiver or estoppel of insurer.

8. A transfer of an insurance policy to cover the goods at a place other than that where they were located when it was originally written, with knowledge that an inventory has not been taken, waives a provision in the policy requiring such inventory. *Day v. Home Ins. Co.* 40: 652, 58 So. 549, — Ala. —.

9. An insurance company which permits payments of overdue premiums without insisting on proof of good health on the part of insured, as provided by the contract, does not waive its right to require such proof before permitting reinstatement after a subsequent forfeiture; at least, where the first default was condoned by a subordinate officer who had no authority to bind the company without bringing it to the attention of the officers in whom was vested the power to enforce or waive the forfeiture. *Conway v. Minnesota Mut. L. Ins. Co.* 40: 148, 112 Pac. 1106, 62 Wash. 49.

10. Denial by an insurance company, of liability on other grounds, within the time allowed for furnishing preliminary proofs of loss, is, in law, a waiver of the conditions of the policy requiring such proof.

Scott v. Dixie F. Ins. Co. 40: 152, 74 S. E. 659, — W. Va. —.

Voluntary exposure.

11. One who, while on a pleasure trip in a canoe, continues on his journey on a lake in a high wind when persons familiar with the location warn him of the danger, and no other canoes are out, voluntarily exposes himself to unnecessary danger, and is negligent, so that in case he is drowned by the overturning of the canoe, no recovery can be had on an accident insurance policy which exempts the insurer from liability in case of death from such exposure. *Morse v. Commercial Travelers' Eastern Acci. Asso.* 40: 135, 98 N. E. 599, 212 Mass. 140. (Annotated)

INTENT.

To remove property or crops from leased premises which will justify attachment, see Attachment, 2.

As necessary element of conviction for violation of statute against illegal voting, see Elections, 3.

Of testator, see Wills, 5.

INTEREST.

Acceptance of payment of principal as bar to subsequent action for interest, see Accord and Satisfaction.

INTERSTATE COMMERCE COMMISSION.

A suit to compel an interstate carrier to receive property for transportation from one state to another is within the jurisdiction of the courts, and not of the Interstate Commerce Commission. *Louisville & N. R. Co. v. F. W. Cook Brew. Co.* 40: 798, 172 Fed. 117, 96 C. C. A. 322.

INTERURBAN RAILWAYS.

As additional burden in highway, see Eminent Domain, 10, 11.

INTOXICATING LIQUORS.

Refusal of carrier to transport to dry section of state, see Carriers, 10, 11.

Carrier's liability for loss of, by fire, see Carriers, 13.

Depriving purchaser of right to treat another to, see Constitutional Law, 13.

Proximate cause of loss of liquors transported, see Proximate Cause, 1.

Statute as to liability for permitting treating in saloons as denial of due process or equal protection of laws, see Constitutional Law, 11.

Sufficiency of evidence to sustain finding of violation of injunction against keeping liquors for sale, see Evidence, 30.

Determining age of purchaser by inspection in court, see Evidence, 10.

As an enactment of ordinance for treating in saloons, see Municipal Corporations, 2.

1. Authority to forbid treating in sa-
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loons is conferred upon a municipal corporation by a charter empowering it to regulate the selling and giving away of intoxicating liquors, and to make regulations necessary for the preservation of peace and good order within its limits. *Tacoma v. Keisel*, 40: 757, 124 Pac. 137, 68 Wash. 685.

2. An ordinance forbidding the keeper of a saloon to permit liquor to be bought by one person and drunk by another in his place of business is not so unreasonable as not to be within the provisions of a charter empowering the municipality to regulate the selling and giving away of intoxicating liquors, and making regulations necessary for the preservation of peace and good order within its limits. *Tacoma v. Keisel*, 40: 757, 124 Pac. 137, 68 Wash. 685.

INTOXICATION.

See Drunkenness.

INVENTORY.

Condition for taking in insurance policy, see Insurance, 6, 7.

Waiver of condition for in insurance policy, see Insurance, 7, 8.

JEOPARDY.

See Criminal Law, 3-5.

Setting aside conviction to enable accused to plead former jeopardy, see New Trial, 3.

JOINER.

Of causes of action, see Action or Suit, 3.

Of parties plaintiff, see Parties.

JOINT CREDITORS AND DEBTORS.

Raising for first time on appeal question as to joinder of parties defendant, see Appeal and Error, 13.

Prejudicial error in instructions in action against joint defendants, see Appeal and Error, 22.

Joint liability of terminal company and carrier for injury to passenger, see Carriers, 9.

Contribution or indemnity by one jointly liable, see Contribution and Indemnity.

Pursuing one joint tortfeasor as election of remedies which will bar subsequent suit against other, see Election of Remedies.

Jurisdiction to enter judgment against joint debtors where one only is served, see Judgment, 2.

Conclusiveness against one of two joint debtors of judgment in suit against executor of the other to which he was not a party, see Judgment, 9.

Treating joint defendants as one party for the purpose of determining number of peremptory challenges, see Jury, 7.

1. Several riparian owners are not jointly liable for injury to upper riparian

property by water backed upon it because of structures which, acting independently, they erect along and across the stream so as to diminish its capacity and cause the water to set back, to the injury of the upper proprietor. *William Tackaberry Co. v. Sioux City Service Co.* 40: 102, 132 N. W. 945, — Iowa, —. (Annotated)

2. One of two promoters of a corporation, who by joint acts secure an illegal profit in the sale of property to it, is liable *in solido* for the profits so secured, regardless of the division which they may have made between themselves. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

JOINT STOCK COMPANY.

Relationship to association interested in criminal prosecution which will disqualify juror, see *Jury*, 3, 4.

JOINT TORT FEASORS.

See *Joint Creditors and Debtors*.

JUDGMENT.

On appeal, see *Appeal and Error*, 28-30.

Presumption in favor of order opening default, see *Appeal and Error*, 6.

Review of discretion in setting aside default judgment, see *Appeal and Error*, 11.

Sufficiency of appearance to prevent judgment by default, see *Appearance*.

In ejectment, see *Ejectment*.

As evidence, see *Evidence*, 8.

Execution on, see *Execution*.

Priority as against mortgage, see *Mortgage*, 4.

By confession.

Right of one confessing judgment in action for personal injury to recover over against third person on the judgment roll, see *Contribution and Indemnity*, 5.

1. A judgment purporting to be by confession of attorneys in fact, on a note, commonly called a judgment note, on warrant of attorney therein purporting to empower and authorize the payees or agent, or any prothonotary or attorney of record, to appear for the makers and in their names, and confess judgment against them in favor of the payees, for the amount, with costs, and release of errors, entered by the clerk, in the clerk's office, in vacation, without process executed on defendant and declaration filed, is illegal and void on its face. *A. B. Farquhar Co. v. DeHaven*, 40: 956, 75 S. E. 65, — W. Va. —. (Annotated)

Jurisdiction.

What reviewable on appeal from judgment jurisdiction to enter which is questioned, see *Appeal and Error*, 7.

Sufficiency of service of process, see *Writ and Process*.

2. Where in an action of attachment 40 L.R.A. (N.S.)

a defendant company is erroneously described as a corporation, when in fact it is a copartnership, and one of the copartners is personally served as managing agent of the alleged corporation, and certain property belonging to it is levied on under the writ of attachment and thereafter by proper proceedings in the action the pleadings and files are amended as of the date of the commencement of the suit, so as to designate the company as a partnership, with partners named, the court has, in the absence of a general appearance by the defendants, jurisdiction to render a judgment by default against the defendants jointly and order the property levied on sold and the proceeds applied in satisfaction of the judgment, under a statute giving the plaintiff, where the action is against two or more defendants on a joint contract and summons served only on part thereof, the right to proceed against the defendant served, and, if judgment is recovered, to have the same entered against the defendants jointly indebted, and enforce the same against the joint property of all. *Goldstein v. Peter Fox Sons Co.* 40: 566, 135 N. W. 180, — N. D. —.

Form and substance.

3. That a counterclaim in a suit by executors to enjoin the enforcement of a tax omitted against their testator, which had been assessed against them, prayed judgment against them apparently in a personal capacity, does not prevent the entry of the judgment in a representative capacity, where the statute makes them personally liable, but gives them a lien on the testator's property for reimbursement. *Bogue v. Laughlin*, 40: 927, 136 N. W. 606, — Wis. —.

Effect and conclusiveness.

Review of discretion in permitting amendment to set up plea of *res judicata*, see *Appeal and Error*, 9.

Estoppel by judgment, see *Estoppel*, 1, 2.

4. A decree in chancery in a suit against a lessor and lessee railroad, requiring them to furnish siding facilities to an adjoining mill owner, as required by statute, is not conclusive of the liability of the lessor in a subsequent action at law to hold it liable in damages for refusal to furnish such facilities. *Moser v. Philadelphia, H. & P. R. Co.* 40: 519, 82 Atl. 362, 233 Pa. 259.

5. A decree awarding an appropriator a certain quantity of water from a stream becomes operative immediately, without further order or execution. *Porter v. Small*, 40: 1197, 120 Pac. 393, — Or. —.

6. A decree on demurrer may, under proper circumstances, be a bar to another suit, as well as one founded on a hearing of evidence. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

7. The right to bring an action in a Federal court is not barred by the fact that plaintiff recovered a judgment upon the

same cause of action in the state court, and subsequently discontinued his action upon the court's granting a new trial. *Snare & Triest Co. v. Friedman*, 40: 367, 169 Fed. 1, 94 C. C. A. 369.

8. In case the one alleged to be ultimately liable for an injury due to a defect in a highway did not participate in an action to hold the public authorities liable for the injury, the judgment obtained against such authorities is not conclusive upon him as to the facts necessary to make a cause of action, although it is admissible in evidence to show that suit was brought and recovery had. *Baltimore & O. R. Co. v. Howard County Comrs.* 40: 1172, 73 Atl. 656, 111 Md. 176. (Annotated)

9. One of two promoters who take a wrongful secret profit in the sale of the property to a corporation organized by them to purchase it is not a privy to a suit against the executors of the other in another state, to rescind the contract and recover the price, to which he was not made a party and in which he was not served with process, and did not appear, so as to be entitled to set up the judgment against the corporation in bar of a suit against him at his domicile for the same cause of action, although he assisted through counsel in the defense of the foreign suit. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

10. A judgment against a man in a bankruptcy proceeding to which his wife is not a party is not admissible in evidence in a proceeding by the judgment creditor to enforce a mortgage which she had given as surety for him, where the judgment against him was not a prerequisite to her liability and her contract does not bind her to abide a judgment against him. *P. Ballantine & Sons v. Fenn*, 40: 698, 78 Atl. 713, 84 Vt. 117. (Annotated)

11. A judgment in favor of directors in an action to hold them liable for the publication of a libel to the one libeled is not a bar on an action against them on behalf of the corporation, to compel them to reimburse it for damages which it has been compelled to pay because of such publication. *Hill v. Murphy*, 40: 1102, 98 N. E. 781, 212 Mass. 1.

Foreign judgments.

12. The full faith and credit clause of the Federal Constitution does not require the courts of a state in which a party is domiciled to follow the rule of the courts of another state within whose jurisdiction a decree was entered in favor of one having a common interest with him, in a suit to which he was not a party, in determining whether or not he was a privy because he assisted in the defense of the suit, so as to be entitled to the benefit of it as *res judicata* in a subsequent proceeding against him at his domicile. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.
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Relief against.

Presumption on appeal in favor of order opening default, see Appeal and Error, 6.

Review of discretion as to, see Appeal and Error, 11.

13. The trial judge has discretion to open a default against a foreign corporation where service was had on a duly appointed agent, but he, because of sickness and a mistaken belief in the termination of his agency, failed to defend or notify the corporation. *Humphreys v. Idaho Gold Mines Development Co.* 40: 817, 120 Pac. 823, 21 Idaho, 126.

JUDICIAL NOTICE.

See Evidence, 1.

JUDICIAL SALE.

On foreclosure of mortgage, see Mortgage, 5-7.

To enforce local assessment, see Public Improvements, 6.

JUNK.

Master's duty to inspect junk which is to be handled by employees, see Master and Servant, 11.

JURY.

Reswearing jury upon discovery of failure of one juror to take oath as placing accused in second jeopardy, see Criminal Law, 5.

In prosecution before justice of the peace, see Justice of the Peace.

Question for, see Trial, 2-4.

Right to trial by.

Construction of statute as to separate trial of preliminary issues, see Statutes, 9.

1. The constitutional right to trial by jury does not extend to a proceeding to enforce an attorneys' lien. *Standidge v. Chicago R. Co.* 40: 529, 98 N. E. 963, 254 Ill. 524.

2. A constitutional provision that the trial by jury in all cases in which it has been heretofore used shall remain inviolate does not prevent the allowance of the trial of preliminary issues in advance of other issues in the case. *Smith v. Western P. R. Co.* 40: 137, 96 N. E. 1106, 203 N. Y. 499. (Annotated)

Qualifications; competency.

Ground for new trial as to, see New Trial, 4.

3. The son of a holder of stock in an unincorporated joint stock company is not competent to sit as a juror for the trial of one charged with crime against the company. *Miller v. United States*, 40: 973, 38 App. D. C. 361. (Annotated)

4. That one called as a juror in a prosecution for crime against a joint-stock company, who states that he is a son of a stockholder of the company, does not show that his father owned stock at the time of the commission of the crime, does not

render him competent, if the company went into liquidation a short time after the commission of the crime, so that the stock interest could not be presumed to have been acquired in the interim. *Miller v. United States*, 40: 973, 38 App. D. C. 361.

5. Relatives of stockholders of a corporation are not disqualified to sit as jurors in actions by the corporation to enforce payment of unpaid subscriptions by other persons, but the fact of such relationship may be brought out to aid the exercise of the right of peremptory challenges. *Stone v. Monticello Constr. Co.* 40: 978, 117 S. W. 369, 135 Ky. 659. (Annotated)

6. An employee of a corporation is not a competent juror in an action against it. *Hufnagle v. Delaware & Hudson Co.* 40: 982, 76 Atl. 205, 227 Pa. 476. (Annotated)

Peremptory challenges.

Failure to state cause of challenge as bar to right to set up cause in motion for new trial, see *New Trial*, 4.

7. Several defendants joined in one civil action, whose interest is common, whose answers are substantially identical, and whose defense is conducted in the common interest of all, are treated as but one party, within the meaning of a statute allowing a certain number of peremptory challenges to each party in a civil action. *Downey v. Finucane*, 40: 307, 98 N. E. 391, 205 N. Y. 251.

8. Upon consolidation of two indictments for offenses growing out of one transaction, which might have been incorporated in different counts of one indictment, accused is entitled to only the number of peremptory challenges to jurors which the statute allows him for one indictment. *Miller v. United States*, 40: 973, 38 App. D. C. 361.

JUSTICE OF THE PEACE.

The legislature may confer upon justices of the peace final jurisdiction to hear and determine, without a jury, prosecutions for violation of a statute forbidding the operation of moving picture machines without a license. *State ex rel. Ebert v. Loden*, 40: 193, 83 Atl. 564, — Md. —.

KEY.

Delivery of key to box as delivery of possession sustaining gift or contest, see *Gift*.

KIDNAPPING.

Neither a father nor his assistant is guilty of kidnapping where they obtain by misrepresentation peaceable possession of his child from its mother, who has begun divorce proceedings against the father, but no order has been made affecting the custody of the child. *State v. Dewey*, 40: 478, 136 N. W. 533, — Iowa, —. 40 L.R.A. (N.S.)

KNOWLEDGE.

Evidence of, see *Evidence*, 20.

Effect of previous knowledge of defect in highway by person injured, see *Highways*, 7.

Effect on servant's assumption of risk, see *Master and Servant*, 15.

LABOR.

On Sunday, see *Sunday*, 1.

LACHES.

Estoppel by, see *Estoppel*, 3, 4.

To bar action, see *Limitation of Actions*, 1.

LANDLORD AND TENANT.

Attachment against crops to enforce lien for rent, see *Attachment*.

Liability of carrier for discrimination by lessee, see *Carriers*, 15.

Deposit by tenant to indemnify lessor against loss as liquidated damages, see *Damages*, 1.

1. Where landlord and tenant are negotiating for a new lease for farm land at the time of the expiration of the original lease, and the tenant remains in possession pending the negotiations, with the express or tacit consent of the landlord, the landlord is estopped from treating the tenant as holding over for another term under the condition prescribed in the original lease, but the tenant becomes a tenant from year to year. *Turner v. Wilcox*, 40: 498, 121 Pac. 658, — Okla. —.

(Annotated)

2. A landlord does not, by electing to terminate the lease because of default in payment of rent, waive his right to retain a deposit made by the tenant as liquidated damages for any loss or damage which the landlord may sustain by reason of any violation of the contract by the tenant. *Barratt v. Monro*, 40: 763, 124 Pac. 369, — Wash. —.

LARCENY.

The common-law rule that neither husband nor wife can be prosecuted for larceny of the goods of the other is not abrogated by a statute which provides that husband and wife may contract and own property as if single, and that neither has any interest in the property of the other, except that the wife has the right of support, and that, upon the death of either, certain dower rights vest; and another statute providing that whoever steals anything of value is guilty of larceny,—in the absence of an expression in the statutes of an intention thus to abolish the rule. *State v. Phillips*, 40: 142, 97 N. E. 976, 85 Ohio St. 317.

LATERALS.

Requiring consumer of water to pay for laterals from property to main, see *Waters*, 3.

LAW.

Presumption as to law of other state, see Evidence, 2.

LEASE.

Of railroad, see Carriers, 15.

Estoppel to deny validity of, see Estoppel, 5.

In general, see Landlord and Tenant.

LEGAL PROCEEDINGS.

Injunction against, see Injunction, 5, 6.

LEGISLATIVE JOURNALS.

Impeachment of statute by, see Statutes, 3.

LEGISLATURE.

Relation of courts to, see Courts, 3.

Delegation of power by, see Constitutional Law, 1.

Right to select agencies through which it will exercise right of eminent domain, see Eminent Domain, 1, 3.

Power as to conferring jurisdiction upon the justice of the peace, see Justice of the Peace.

Power to estimate cost of improvement and apportion assessments, see Public Improvements, 5.

Power as to assessment and collection of school tax, see Schools.

LEGITIMACY.

See Bastardy.

LETTERS.

Letters by wife's attorney to husband as confidential communications, see Evidence, 16.

LEVY AND SEIZURE.

Constitutionality of statute subjecting income of spendthrift trust to claims of creditors, see Constitutional Law, 7a, 15.

Under the statutes preserving the property of married women free from liability for the contracts or torts of their husbands, but preserving curtesy, curtesy initiate is not liable to attachment for the husband's debts, and a sale by the husband of his curtesy interest, which becomes consummate after attempted attachment, takes priority over a subsequent execution sale of the interest levied on in the attachment proceeding. *Carroll v. Sanford*, 40: 1204, 83 Atl. 855, — R. I. —.

LIBEL AND SLANDER.

Prejudicial error in instructions in action for, see Appeal and Error, 23.

Liability of corporate officers for, see Corporations, 1, 2, 13.

Judgment in favor of directors in action for libel as bar to action against them for reimbursement by corporation held liable for libel, see Judgment, 11.

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What actionable generally.

1. A publication stating that the exclusive agency for securing talent for an opera house boycotts the best singers is not libelous although boycotting is a crime by statute, since the word is not used in its statutory sense. *Astruc v. Star Co.* 40: 79, 193 Fed. 631, 113 C. C. A. 499.

2. It is libelous *per se* to charge that one having the exclusive agency to secure talent for a particular opera house exacts exorbitant amounts from artists to secure contracts for them, since it tends to prejudice him in his business. *Astruc v. Star Co.* 40: 79, 193 Fed. 631, 113 C. C. A. 499. (Annotated)

Privileged communications.

3. A school board cannot be protected in the use of libelous language or charges against a teacher under the pretext of discharging official duties; but so long as their actions are clearly within the purview of the law and such as they have an unquestionable right to perform, and they use lawful means in the performance of the act, they cannot be held liable in an action for libel, even though it be charged that they performed the act in pursuance of a conspiracy among their members, or through a malicious motive. *Barton v. Rogers*, 40: 681, 123 Pac. 478, 21 Idaho, 609.

4. Where the board of trustees of an independent school district enter orders and pass resolutions with reference to the government and conduct of the school and the duties of the teachers and superintendent, and such orders and resolutions clearly fall within the powers and authority of the school board under the law, the motives and purposes of such board cannot be put in issue in an action for damages under the charge of civil libel. *Barton v. Rogers*, 40: 681, 123 Pac. 478, 21 Idaho, 609.

LICENSE.

Grant of exclusive right to hunt, see Game and Game Laws.

Power as to generally.

Delegation of power as to, see Constitutional Law, 1.

Class legislation as to, see Constitutional Law, 5, 6.

Due process of law as to, see Constitutional Law, 8.

Review by courts of municipal discretion as to license, see Courts, 5.

Jurisdiction of justice of the peace of prosecution for failure to obtain license, see Justice of the Peace.

Repugnancy in statute as to, see Statutes, 1.

Title of licensing statute, see Statutes, 4.

1. A statute requiring the license officers to take the oath of the applicant, or other evidence, before issuing a license to a barber, and from it determine the amount of the tax, does not prevent the common council of the municipality from fixing the

classes subject to the different license fees. *Louisville v. Schnell*, 40: 637, 114 S. W. 742, 131 Ky. 104.

Uniformity and equality.

Equal protection and privileges as to, see Constitutional Law, 3-6.

2. Under statutory authority to grade and classify callings and businesses and exact license fees based thereon within maximum and minimum rates, a municipal corporation may, within these limits, fix a minimum license fee to be paid by all barbers, and an additional one for each chair used above a specified number. *Louisville v. Schnell*, 40: 637, 114 S. W. 742, 131 Ky. 104. (Annotated)

3. A classification of barbers for the imposition of license taxes by the number of chairs in use, \$2 being added to the minimum fee for each chair above two, is not unreasonable. *Louisville v. Schnell*, 40: 637, 114 S. W. 742, 131 Ky. 104.

4. Grading a barber's license fee according to the chairs in use does not make it a property tax. *Louisville v. Schnell*, 40: 637, 114 S. W. 742, 131 Ky. 104.

5. A municipal corporation cannot be authorized to exact a license tax from agents seeking orders for merchants located in other towns and states, which is not imposed upon the agents of local merchants, under a Constitution which authorizes the taxing of trades, but which has been held to require them to be taxed uniformly. *State v. Williams*, 40: 279, 73 S. E. 1000, 158 N. C. 610. (Annotated)

6. The difference between the minimum of \$100 and the maximum of \$300 in fees charged peddlers, according to whether they travel on foot or by different classes of conveyances, is not so unequal as to render the statute imposing them void. *McKnight v. Hodge*, 40: 1207, 104 Pac. 504, 55 Wash. 289.

Reasonableness; amount.

7. A municipality will not be permitted to enforce a license for peddling fruits and vegetables within its limits, which if paid by the day exceeds the daily gross profits of the business, or if by the year nearly equals the gross profits that could be made in the portion of the year during which the business could be carried on. *Iowa City v. Glassman*, 40: 852, 136 N. W. 899, — Iowa, —.

8. A peddler's license fee of from \$100 to \$300 is not excessive, where the intent is to exercise the taxing as well as the police power. *McKnight v. Dodge*, 40: 1207, 104 Pac. 504, 55 Wash. 289.

LIENS.

Attachment to enforce landlord's lien

for rent, see Attachment.

Of attorneys, see Attorneys, 4-6.

Of local improvement assessments, see Public Improvements, 3, 4.

Of vendor, see Vendor and Purchaser, 2.

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LIGHT.

Exercise of eminent domain by electric heat and light company, see Eminent Domain, 3-5.

LIMITATION OF ACTIONS.

Prejudicial error in striking plea of, see Appeal and Error, 19.

Laches.

1. There is no laches on the part of a corporation in failing to take steps to compel an accounting for illegal promoters' profits, until they release their absolute control of its affairs, so that it can secure a knowledge of the facts. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

When statute runs.

Whether statute applicable to criminal or civil suit applies, see Action or Suit, 2.

2. The statute of limitations does not begin to run against the liability of a promoter of a corporation, to account to the corporation for illegal profits, so long as he remains absolutely in control of the corporate affairs, so that the fact of his breach of trust cannot be discovered. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

3. The institution by an infant of an action for personal injuries does not set in motion the statute of limitations so that, in case it is discontinued, another action cannot be begun after the expiration of the statutory period, where the statute provides that if any person entitled to an action is at the time it accrues within the age of twenty-one years, such person shall be at liberty to institute the same within the time limited after his coming of full age. *Snare & Triest Co. v. Friedman*, 40: 367, 169 Fed. 1, 94 C. C. A. 369.

When action is barred.

4. Where the directors of a mutual insurance company, before it was declared insolvent, levied certain assessments which were invalid because not made in accordance with law, and which were afterwards set aside by the district court in proceedings to wind up the affairs of such corporation, the cause of action against members for assessments made by the receiver under the direction of the court to pay the debts of the corporation, parts of which were the claims for which the invalid assessments had previously been levied, is not barred although the invalid assessments were made more than four years before the assessment by the receiver. *McCall v. Bowen*, 40: 781, 135 N. W. 1014, — Neb. —.

LINEMEN.

Who are fellow servants of, see Master and Servant, 17.

LIQUIDATED DAMAGES.

See Damages, 1.

LIS PENDENS.

Abatement by pendency of action, see Abatement and Revival,

LIVERY STABLES.

Contract by one selling livery business to refrain from competing business, see Contracts, 5, 7.

LOAN BROKERS.

See Brokers, 2, 3.

LOCAL LAWS.

See Statutes, 7, 8.

LOSS OF PROFITS.

As element of damages, see Damages, 7.

LOTTERY.

Enforcement of lottery contract, see Contracts, 6.

MALICE.

Necessity of proving malice in action by wife for loss of consortium of husband from sale of drug to him, see Husband and Wife, 4.

Injunction against maintenance of spite fence, see Injunction, 3.

In privileged communication, see Libel and Slander, 3, 4.

Pleading in suit for injunction against spite fence, see Pleading, 4.

Malice, in contemplation of law, cannot exist where the thing done is lawful and the means employed are lawful. *Barton v. Rogers*, 40:681, 123 Pac. 478, 21 Idaho, 609.

MANDAMUS.

1. That mandamus will not lie to coerce the action of the governor of a state as a member of the state board for equalization of taxes will not prevent its running against the other members of the board, where by statute a majority of the board may transact the business required. *Huidekoper v. Hadley*, 40: 505, 177 Fed. 1, 100 C. C. A. 395.

2. The governor of a state is exempt from the control of the courts through a writ of mandamus even when performing duties imposed upon him as member of the state board of equalization of taxes. *Huidekoper v. Hadley*, 40: 505, 177 Fed. 1, 100 C. C. A. 395.

3. A writ of mandamus will not be issued commanding a city building inspector to issue a permit for the construction of a brick kiln on land owned by the relator within the city limits, in violation of a city ordinance, except upon clear proof that the ordinance has no relation to public health or welfare, or that the enactment is an unreasonable and arbitrary invasion of individual rights under guise of the police regulations. *State ex rel Krittenbrink v. Withnell*, 40: 898, 135 N. W. 378, — Neb. —.

MARRIAGE.

As to breach of promise, see Breach of Promise.
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Remarriage in other state in violation of divorce decree as contempt of court, see Contempt, 1.

Divorce or separation, see Divorce and Separation.

MASTER AND SERVANT.

Cure of error in instructions in action for injury to servant, see Appeal and Error, 16.

Bond for fidelity of employee, see Bonds.
Jurisdiction of state courts of action under Federal employers' liability act, see Courts, 9.

Presumption and burden of proof as to negligence, see Evidence, 5.

Evidence admissible under pleadings, see Evidence, 34.

Injunction against suits against employer by servant, see Injunction, 5.

Employee as juror in action against master, see Jury, 6.

Proximate cause of injury, see Proximate Cause, 2.

Right of section hand to benefit of statute requiring crossing signals, see Railroads, 1.

Question for jury as to negligence, see Trial, 3.

When relation exists.

1. A chauffeur sent by the owner of a garage to operate an automobile leased for a pleasure ride, and who obeys the directions of the lessee merely as to routes, is the servant of the owner of the garage, and the latter will be liable for injury inflicted upon occupants of the car through his negligence. *Gerretson v. Rambler Garage Co.* 40: 457, 136 N. W. 186, — Wis. —.

(Annotated)

2. Where for its own purposes a telephone company employs a physician to take an X-ray picture of the injury of an employee, who protests against such action but finally consents, in the taking of which picture injury results to the employee, the physician is the agent or servant of the telephone company, and the rule of *respondet superior* applies. *Jones v. Tri-State Teleph. & Teleg. Co.* 40: 485, 136 N. W. 741, 118 Minn. 217.

(Annotated)

3. One who, at the request of a conductor in charge of a freight train, an emergency existing reasonably requiring such assistance, temporarily assists in the work of the carrier in the unloading of a safe from one of its cars, the regular crew not being reasonably able to unload same, is, for the time being, the servant of the defendant and entitled to the same protection as any other servant. *St. Louis & S. F. R. Co. v. Bagwell*, 40: 1180, 124 Pac. 320, — Okla. —.

(Annotated)

Hours of labor.

Equal protection and privileges as to, see Constitutional Law, 7.

Judicial notice as to connection between health and welfare of public and limitation of hours of labor, see Evidence, 1.

4. That individual instances exist where women are not injured or overworked by being kept on duty in a hotel for more than ten hours does not render invalid a law limiting the employment of women in such places generally to that period of time per day. *People v. Elderding*, 40: 893, 98 N. E. 882, 254 Ill. 579.

Duty to employ suitable number of servants.

Cure of error in instructions as to, see Appeal and Error, 16.

See also *infra*, 18.

5. A master cannot be held liable for injury to a servant merely because he did not have a sufficient number of men to do the work safely, if he did not know, or the exercise of ordinary prudence would not have charged him with knowledge, that the number furnished was not sufficient. *Rosin v. Danaher Lumber Co.* 40: 913, 115 Pac. 833, 63 Wash. 430. (Annotated)

Duty as to place and appliances generally.

Notice to master of custom of employee to cross tracks, see Notice, 1.

Lack of guards as proximate cause of injury, see Proximate Cause, 2.

Right of section hand to benefit of statute requiring crossing signals, see Railroads, 1.

Question for jury as to negligence, see Trial, 3.

6. A master is not liable for injury to a servant through the use of an ordinary shovel furnished by him, the round wooder piece at the top of the handle of which is cracked so that it revolves on the iron rod which supports it, and pinches his hand causing a wound which is followed by blood poisoning. *Stirling Coal & Coke Co. v. Fork*, 40: 837, 131 S. W. 1030, 141 Ky. 40. (Annotated)

7. It is the duty of a brick-making company which mines shale by means of a steam shovel, to use reasonable care to put the rough bank produced by the operation of the steam shovel in a condition, and to keep it in a condition, which will render the work of employees necessarily performed in proximity to the bank reasonably safe from all caving naturally to be anticipated in consequence of the excavation. *Griffin v. Fredonia Brick Co.* 40: 1088, 114 Pac. 217, 84 Kan. 347.

8. A mining company is not excused from liability for injury resulting from the character of oil used in its mining operations, by the mere purchase of such oil from a reputable dealer, relying on his statement as to its character; but in addition to this requirement the company must make such reasonable examination and inspections as is practicable by a prudent man under similar circumstances. *Parker v. Hailey-Ola Coal Co.* 40: 1120, 122 Pac. 632. — Okla. — (Annotated)

9. A street railway company which permits the cars of other companies, operated under direction of its superintendent and train depatcher, to use its track, is answerable to one of its employees in charge of a

car which had been directed to pass over a certain track, for the negligence of employees of one of the other companies in permitting, under direction of the superintendent, cars to stand on such track without any precautions to prevent collision with the car in charge of such employee. *Central Kentucky Traction Co. v. Miller*, 40: 1184, 143 S. W. 750, 147 Ky. 110.

10. It is negligence for a railroad company to make a flying switch without warning at a place where its employees are accustomed to cross its tracks in going to and from their meals, at a time when they may be expected to be so engaged. *Farris v. Southern R. Co.* 40: 1115, 66 S. E. 457, 151 N. C. 483.

Inspection.

11. A master is not liable for negligence in failing to inspect an ammonia tank sold to him as junk, before turning it over to employees to be broken into scrap, so as to be liable for injuries caused by the escape of gas which had been permitted to remain in the tank when the employee started to work upon it. *Drew v. Western Steel Car & Foundry Co.* 40: 890, 56 So. 995, — Ala. — (Annotated)

12. A cant hook designed to handle logs, which is formed of a long handle with an iron cuff near one end, to which is fastened a hook which grapples and turns the log when the handle is used as a lever, is not a simple tool within the rule which relieves the master from the duty of inspecting such tools, although they are intended for the use of his servant. *Parker v. W. C. Wood Lumber Co.* 40: 832, 54 So. 252, — Miss. — (Annotated)

Liability to volunteers.

13. A street railway company is not liable for injury, through collision, to one of its conductors who, while returning home, after being relieved from duty for the day, attempts to run the car to relieve the motor-man who appears to be ill, if the latter was not so ill that he could not have done the work himself and the injury would not have occurred except for the attempted act. *Central Kentucky Traction Co. v. Miller*, 40: 1148, 143 S. W. 750, 147 Ky. 110.

Assumption of risk.

Necessity, of instructions as to, see Trial 5.

Evidence on question of assumption of risk, see Evidence, 20.

Negating assumption of risk in action by servant, see Pleading, 3.

Question for jury as to, see Trial, 4.

14. A servant working in an excavation assumes the risk of caving of banks and fall of loose materials only after the master has used reasonable diligence to make the place reasonably safe. *Griffin v. Fredonia Brick Co.* 40: 1088, 114 Pac. 217, 84 Kan. 347.

15. A member of a bridge gang engaged in unloading piling from a car assumes the risk of injury from standing on the car in front of a pile about to be rolled off the car, if he is acting within the scope of his employment in being there, and fully appreciates the danger of that method of working,

although he was under direction of his foreman, and the latter is negligent in giving the order and in permitting the pile to be rolled upon him. *Bennett v. Evansville & T. H. R. Co.* 40: 963, 96 N. E. 700, — Ind.

Contributory negligence.

Question for jury as to, see Trial, 4.

16. An employee is guilty of contributory negligence in attempting to use a cant hook containing a defect of which he knows, or by the exercise of ordinary care ought to have known. *Parker v. W. C. Wood Lumber Co.* 40: 832, 54 So. 252, — Miss. —
Fellow servants and their negligence.

17. An operator charged with the duty of connecting and disconnecting an electrical current from wires is not a fellow servant of a lineman whose duty is to work on the wires, so as to relieve the master from liability for injury to the latter by the negligence of the operator in turning current on a wire upon which he was at work. *Massey v. Milwaukee Electric R. & Light Co.* 40: 814, 126 N. W. 544, 143 Wis. 220.

18. A shipowner who furnishes sufficient men safely to load the vessel is not liable for injury to a laborer working in the hold, because the foreman delegates too few hands to such place to handle the material sent down, or permits too much to go down at once to be safely handled by the men at work, since the foreman is, with respect to such details of the work, a fellow servant of the injured employee. *Dair v. New York & Porto Rico S. S. Co.* 40: 918, 97 N. E. 711, 204 N. Y. 341. (Annotated)

19. The fact that the statute requires break throughs for air to be made every hundred feet as the work progresses in a mine does not prevent the mine boss, upon whom the performance of this duty is specifically imposed by another section of the statute, from being a fellow servant, with respect to its performance, of miners, so as to relieve the operator of the mine from liability for injuries sustained by a miner on account of the negligent performance of this duty. *Bralley v. Tidewater Coal & Coke Co.* 40: 945, 66 S. E. 684, 66 W. Va. 278. (Annotated)

Master's liability for acts of servant or independent contractor.

Liability of carrier for assault on passenger, see Carriers, 7.

20. A railroad company is liable for an assault committed in the freight house on a consignee of freight, by a delivery clerk, because the consignee complained to superior officers of the delivery clerk's delay in making deliveries. *Gassenheimer v. Western R. Co.* 40: 998, 57 So. 718, — Ala. —
Liability of servants.

21. A servant whose duty is to maintain telephone poles in safe condition cannot avoid liability for injury to a stranger through the fall of a pole, because of his negligence, on the theory that he was guilty merely of nonfeasance. *Murray v. Cowherd*, 40: 617, 147 S. W. 6, 148 Ky. 591.
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MATERIALITY.

Of evidence, see Evidence, 20-29.

MAXIMS.

1. *Cujus est solum, ejus est usque ad cælum.* *Norton v. Randolph*, 40: 129, 58 So. 283, — Ala. —

2. *In pari delicto, potior est conditio defendentis.* *Baltimore & O. R. Co. v. Howard County Comrs.* 40: 1172, 73 Atl. 656, 111 Md. 176.

3. It is as important that the law be certain as that it be right. *Southern Steel Co. v. Hopkins*, 40: 464, 57 So. 11, — Ala. —

4. *Nemo debet bis vexari pro eadem causa.* *Cook v. Cook*, 40: 83, 74 S. E. 639. — N. C. —

5. *Qui facit per alium, facit per se.* *A. B. Farquhar Co. v. De Haven*, 40: 956, 75 S. E. 65, — W. Va. —

6. *Res ipsa loquitur.* *Jones v. Tri-State Teleph. & Teleg. Co.* 40: 485, 136 N. W. 741, 118 Minn. 217.

7. *Respondeat superior.* *Jones v. Tri-State Teleph. & Teleg. Co.* 40: 485, 136 N. W. 741, 118 Minn. 217.

8. *Salus populi suprema est lex.* *Shepard v. Seattle*, 40: 647, 109 Pac. 1067, 59 Wash. 363.

9. *Sic utere tuo ut alienum non lædas.* *Hyde v. Minnesota, D. & P. R. Co.* 40: 48, 136 N. W. 92, — S. D. —; *Norton v. Randolph*, 40: 129, 58 So. 283, — Ala. —; *Martin v. Schwettley*, 40: 160, 136 N. W. 218, — Iowa, —; *Shepard v. Seattle*, 40: 647, 109 Pac. 1067, 59 Wash. 363.

10. *Volenti non fit injuria.* *Old Dominion Copper Min. & S. Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

MAYHEM.

Sufficiency of evidence to sustain conviction, see Evidence, 33.

Sufficiency of verdict, see Trial, 8.

Carbolic acid is an "instrument" within the meaning of a statute providing for the punishment of disfiguring another by means of a knife or other instrument. *Lee v. State*, 40: 1132, 148 S. W. 567, — Tex. Crim. Rep. —. (Annotated)

MILITIA.

Trial of member of, see Courts Martial.

MINE BOSS.

As fellow servant, see Master and Servant, 19.

MINES.

Evidence on question of value of, see Evidence, 25.

Injury to employee in, see Master and Servant, 8.

Who are fellow servants in, see Master and Servant, 19.

1. One who asserts his right to a mineral claim by adverse possession must show compliance with the statute in the matter of discovery and the performance of the

annual assessment work, and, before he can acquire a patent therefor, must also show that he has done the required amount of work on such claim to entitle him to a patent therefor. *Humphreys v. Idaho Gold Mines Development Co.* 40: 817, 120 Pac. 823, 21 Idaho, 126. (Annotated)

2. Under U. S. Rev. Stat. § 2332, providing that when a mining claim has been held and worked for a period equal to the time prescribed by the local limitation statute for mining claims, evidence of such possession shall be sufficient to establish a right to a patent, the claimant is relieved of the necessity of making proof of posting, and recording a notice of location, and such other proofs as are usually furnished by the county recorder. *Humphreys v. Idaho Gold Mines Development Co.* 40: 817, 120 Pac. 823, 21 Idaho, 126.

3. A grantee of coal in place, with license irrevocable to mine and remove it, has, until the coal is all removed from the land granted, the right to use the space created by the removal of coal to lease coal mined on his adjoining land across the land of the grantor to a shaft where it is brought to the surface. *Schobert v. Pittsburg Coal & Min. Co.* 40: 826, 98 N. E. 945, 254 Ill. 474. (Annotated)

MINORITY.

Action by minority stockholders, see Corporations, 13.

MINORS.

See Infants.

MORPHINE.

Wife's right of action for sale of, to husband, see Husband and Wife, 3, 4.

MORTGAGE.

Effect of judgment against husband in proceeding to which wife is not a party in subsequent action to enforce mortgage which she had given as husband's surety, see Judgment, 10.

1. Where a loan is made to a vendee with which to complete the payment of the purchase price of land, and two mortgages taken to secure the same, a finding that both are purchase-money mortgages is warranted, notwithstanding the one was taken to the lender, and the other to his agent for the part of the interest due him as commission. *Marin v. Knox*, 40: 272, 117 Minn. 428, 136 N. W. 15. (Annotated)

2. Where a mutual agreement is made between a vendor in a contract to convey land, the vendee therein, and a third party, each of whom resides in a different state and at great distances from each other, that the vendee is to obtain money to pay part of the balance of the purchase price from such third party, securing the same by a first mortgage upon the land, the vendor to take a second mortgage for the remainder of the purchase price, and pursuant to such agreement the deed and

mortgages are executed and delivered, it constitutes but one transaction, although the documents may not have been delivered on the same day, and although the mortgage to the third party may have been recorded before the one to the vendor was acknowledged. *Marin v. Knox*, 40: 272, 136 N. W. 15, 117 Minn. 428.

Priority.

Priority of lien of mortgagee for taxes paid over widow's dower interest, see Dower.

Priority as to local improvement assessment, see Public Improvements, 3, 4.

3. One advancing money to redeem from a foreclosure sale under a purchase-money mortgage on a homestead is entitled to priority over the homestead rights, although they are not expressly released in the mortgage given to secure such advance, where it discloses an intention to effect the release. *Powers v. Pense*, 40: 785, 123 Pac. 925, — Wyo. —.

4. Where a mutual agreement is made between a vendor in a contract to convey land, the vendee therein, and a third party, six years after the contract for sale was entered into, that the vendee is to obtain money to pay part of the balance of the purchase price from such third party, securing the same by a first mortgage upon the land, the vendor to take a second mortgage for the remainder of the purchase price, and pursuant to such agreement the deed and mortgages are executed and delivered, such mortgages are purchase-money mortgages, and the lien thereof superior to that of a judgment obtained against the vendee prior to the delivery of said mortgages. *Maxin v. Knox*, 40: 272, 136 N. W. 15, 117 Minn. 428.

Sale; rights of purchaser.

Claim for unliquidated damages as ground for injunction against sale of land under, see Injunction, 6.

5. One who takes possession of real estate under mesne conveyances from a purchaser at a void foreclosure sale of a valid mortgage is entitled to all of the rights of a mortgagee in possession. *Kaylor v. Kelsey*, 40: 839, 136 N. W. 54, — Neb. —. (Annotated)

6. Where a valid mortgage has been foreclosed, even though the foreclosure proceedings were void, neither the mortgagor nor a person claiming under him will be permitted to assail the title acquired through the foreclosure proceeding, without offering to pay the amount of the decree and interest. *Kaylor v. Kelsey*, 40: 839, 136 N. W. 54, — Neb. —.

7. A sale under a power in a mortgage will not be set aside because the mortgagee insisted on cash and furnished the money to the buyer to comply with his bid, if he acted in good faith, the bid was reasonable, and the mortgagee did nothing to prevent the mortgagor from raising the money or bidding at the sale. *Lipsohn v. Goldstein*, 40: 627, 98 N. E. 703, 212 Mass. 144. (Annotated)

MORTGAGEE IN POSSESSION.

See Mortgage, 5.

MOVING PICTURE SHOW.

Delegation of power to license operators of moving picture machine, see Constitutional Law, 1.

Discrimination in statute as to licensing operators of moving picture machines, see Constitutional Law, 3, 4.

Denial of due process by statute as to license of operator of machine, see Constitutional Law, 8.

Jurisdiction of justice of the peace in violation of statute regulating, see Justice of the Peace.

Title of statute regulating, see Statutes, 4.

MUNICIPAL CORPORATIONS.

Right of municipality held liable for injury to recover over against person primarily responsible, see Contribution and Indemnity, 1-3.

Judicial review of acts of, see Courts, 4-6.

Failure of person injured to give notice thereof as bar to action for his death occurring after time for giving notice has expired, see Death.

Estoppel to question validity of annexation of land to city, see Estoppel, 4.

Liability for defects or obstructions in street, see Highways, 2-7.

Power to forbid treating in saloons, see Intoxicating Liquors.

License from, see License.

Mandamus to compel issue of permit for brick kiln in violation of ordinances, see Mandamus, 3.

School tax as tax for municipal purpose, see Schools.

1. The objection that the property of one who is seeking to compel a water company to furnish him with water is not within the city limits on account of the fact that a strip of land, not a part of the city, lies between the city and the addition in which the plaintiff's property is situated, is not tenable where a statute in force at the time of the addition provided that territory shall be regarded as contiguous notwithstanding a strip or parcel of land may be or lie between such territory and the corporate limits. *Hatch v. Consumers' Co.* 40: 263, 104 Pac. 670, 17 Idaho, 204.

2. An ordinance forbidding treating in saloons is not, because it makes regulations and restrictions upon the sale of intoxicating liquor, an amendment to existing ordinances regulating such traffic, so that it must be passed as an amendment rather than as an original ordinance. *Tacoma v. Keisel*, 40: 757, 124 Pac. 137, 68 Wash. 685.

3. A municipal corporation may require a written permit from the city health commissioners for the location within its limits of a hospital for the treatment of insanity and other mental diseases. *Shepard v. Se-* 40 L.R.A. (N.S.)

attle, 40: 647, 109 Pac. 1067, 59 Wash. 363. Power as to nuisances.

Review by courts of action of municipality as to nuisance, see Courts, 4, 6.

4. An ordinance prohibiting the erection of brick kilns in the corporate limits, by a city that has charter power to make and enforce the necessary police regulations and regulate the erection of all buildings and other structures within the corporate limits, is valid as against an action in mandamus to compel the city building inspector to issue a permit in violation thereof, in the absence of a showing that the enactment was an unreasonable and arbitrary invasion of individual rights under the guise of police regulations. *State ex rel. Krittenbrink v. Withnell*, 40: 898, 135 N. W. 376, — Neb. —. (Annotated)

5. An ordinance declaring use of property to be a nuisance does not make it so unless it is in fact so, or is embraced within the common-law or statutory idea of a nuisance. And no authority to remove or abate is derived from the ordinance declaring it a nuisance. *Shreveport v. Leiderkrantz Soc.* 40: 75, 58 So. 578, 130 La. 802.

6. A private bowling alley cannot be singled out by a common council and declared to be a nuisance, until after a full hearing of both parties has been had. *Shreveport v. Leiderkrantz Soc.* 40: 75, 58 So. 578, 130 La. 802.

7. Municipal authorities may declare an existing hospital within its limits for the treatment of insanity or other mental diseases to be a public nuisance, unless property owners situated within 200 feet of the buildings consent to its location and maintenance. *Shepard v. Seattle*, 40: 647, 109 Pac. 1067, 59 Wash. 363. (Annotated)

MUSIC AGENCY.

Libel of, see Libel and Slander, 1, 2.

MUTUAL INSURANCE COMPANY.

Jurisdiction of equity of action by receiver to enforce liability of members, see Equity, 3.

When suit to recover assessments from members of mutual insurance company is barred, see Limitation of Actions, 4.

NEGLIGENCE.

In use of automobile, see Automobiles. Of carrier, see Carriers.

Federal court following state decision as to liability for injury to children, see Courts, 13.

Measure of damages for negligence causing personal injury or death, see Damages, 4-6.

Matters peculiar to action for death, see Death.

Presumption and burden of proof as to, see Evidence, 5.

Evidence as to, under pleadings, see Evidence, 34.

In serving unfit food, see Food, 1.

Injury to child on highway by hot water discharged into gutter, see Highways, 5.

Injury to child playing on building material in street, see Highways, 6.

Action by wife for personal injury to husband, see Husband and Wife, 1.

Negligent delay in sending in application for insurance, see Insurance, 1.

Joint liability in case of, see Joint Creditors and Debtors.

Of master or servant, see Master and Servant.

Pleading as to, see Pleading, 3.

Amendment of pleading in action for, see Pleading, 1.

Proximate cause of injury by, see Proximate Cause.

Of railroad, see Railroads.

In operation of street railway, see Street Railways.

1. A railroad company is not liable for the death of a boy whose companion, while with him at its station for a proper purpose, had picked up a torpedo carelessly dropped from a train, carried it to his home and kept it a number of days, and then with his assistance attempted to explode it, with a fatal result to him, since it was not bound to anticipate such a result of its carelessness. *Jacobs v. New York, N. H. & H. R. Co.* 40: 41, 98 N. E. 688, 212 Mass. 96.

On highway.

In use of automobiles, see Automobiles.

As to defects in highways, see Highways, 2-7.

2. The owner of a wagon, who, at a curve, drives into a space between a street car track and the curb, so narrow that the wagon will be hit by the overhang of a car attempting to round the curve at a time when a car must pass the wagon while there, is liable for the resulting injury in case the wagon is hit by a car and driven against a pedestrian on the sidewalk. *Bryant v. Boston Elevated R. Co.* 40: 133, 98 N. E. 587, 212 Mass. 62.

Contributory.

Person injured by automobile, see Automobile, 3.

As to injuries from defects in highways, see Highways, 7.

Of employee, see Master and Servant, 16.

Necessity of pleading, see Pleading, 6.

On railroad track or right of way, see Railroads, 4, 5.

On crossing railroad track, see Railroads, 4.

Question for jury as to possibility of avoiding injury after discovering person's peril, see Trial, 2.

3. A child four years of age cannot be charged with contributory negligence. *Palermo v. Orleans Ice Mfg. Co.* 40: 671, 58 So. 589, 130 La. 833.

4. Where owing to an accident to the boiler in a manufacturing plant hot water

flowed therefrom into a child four years of age was injured, the parent was not be charged with contributory negligence in permitting it to be in his residence. *Palermo v. Orleans Ice Mfg. Co.* 40: 671, 58 So. 589, 130 La. 833.

NEGOTIABILITY.

Of bills or notes, 2.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

1. The power of the court to grant a new trial to correct errors is not destroyed by the making of motions by parties aggrieved by the verdict. *De Vall v. De Vall*, 40: 291, 114 Or. 493.

2. A court of general jurisdiction set aside a judgment on the merits for reasons not stated though the statute provides that the court may be granted on motion for specified errors affecting the substantial rights of the parties. *De Vall v. De Vall*, 40: 291, 114 Or. 493.

3. A conviction will be set aside on appeal to enable accused to present a new plea must be shown on the merits. *Lee v. S. W.* 567, — Tex. Crim. App. 101.

4. Failure to state in a pleading a claim for relief on the ground of a stock company affected by the negligence of which accused is on trial setting up the ground of contributory negligence in support of a motion for a new trial. *United States*, 40: 361.

NOISE.

Right to recover for damages from proceedings, see 9.

NONWAIVER AGREEMENT.

Of bankrupt and partnership with insolvency, see Bankruptcy, 1.

NOTICE.

What law governs dishonor of 1 Laws, 3.

Failure of person to give notice to for his death for notice has

Evidence of, see Evidence of location of mine, 2.

Of assessment for

1. A railroad company with notice of a customer's

which has continued for six months, to cross its yards to save time in going to and from their meals. *Farris v. Southern R. Co.* 40: 1115, 66 S. E. 457, 151 N. C. 483. **Imputed.**

Imputing to bank knowledge of general manager, see Banks, 2.

Who is agent for purpose of receiving notice, see Principal and Agent, 1.

2. The knowledge as to the forgery of an indorsement on a draft gained by an agent with authority "to try and collect" the amount of it from the one perpetrating the forgery is that of the principal so as to estop him from looking to the bank which cashed the draft, if notice of the forgery is not given it until after it has parted with the securities from which it might otherwise have protected itself. *Brown v. People's Nat. Bank*, 40: 657, 136 N. W. 506, — Mich. —.

3. Knowledge by one of the officials of a bank, acquired in a capacity other than as its representative, relating to infirmity in commercial paper offered for discount, is not notice to the bank, when that official is also an officer of the corporation seeking the discount, and has an interest in the transaction so adverse to the bank that the reasonable presumption is that he would not communicate the knowledge to it. *American Nat. Bank v. Ritz*, 40: 156, 74 S. E. 679, — W. Va. —.

4. The knowledge of promoters of a corporation, who own all its issued stock, when they ratify the purchase of property by the corporation from them, of the details of the purchase, does not bind the corporation. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 40: 314, 89 N. E. 193, 203 Mass. 159.

NUISANCES.

Review by courts of municipal action as to, see Courts, 4, 6.

Municipal regulations as to, see Municipal Corporations, 4-7.

1. A bowling alley is a recognized legitimate place of amusement, and its ordinary use cannot be interfered with by condemning it as a nuisance *per se*. *Shreveport v. Leiderkrantz Soc.* 40: 75, 58 So. 578, 130 La. 802. (Annotated)

2. A fence 20 feet high is not a nuisance merely because it excludes the light and air from the rooms of the adjoining building of a neighbor, and is liable to be blown against the house, to its injury. *Norton v. Randolph*, 40: 129, 58 So. 283, — Ala. —.

OATH.

Perjury in taking false oath, see Perjury.

OCCUPANCY.

Of insured premises, see Insurance, 5.

OCCUPATION TAX.

See License.

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OFFICERS.

Of bank, see Banks, 1, 2.

Of corporation, see Corporations, 1, 2.

Of insurance company, see Insurance, 1.

Mandamus to, see Mandamus.

OIL.

Criminal liability for selling oil in violation of terms of statute, see Criminal Law, 1.

Injury to servant from use of improper oil in mine, see Master and Servant, 8.

OLEOMARGARIN.

See Food.

OMITTED PROPERTY.

Assessment of, see Taxes, 1-4.

OPERA HOUSE.

Libel of persons running exclusive agency to secure talent for, see Libel and Slander, 1, 2.

OPINIONS.

As evidence, see Evidence, 11-13.

ORDINANCES.

See Municipal Corporations.

PARENT AND CHILD.

Custody of child, see Infants.

Kidnapping of child by parent, see Kidnapping.

Negligence of parents contributing to injury of child, see Negligence, 4.

That a father has driven his minor child from home, and permitted it to enjoy its own earnings, does not relieve him from liability for its burial expenses. *P. J. Huneycutt & Co. v. Thompson*, 40: 488, 74 S. E. 628, — N. C. —. (Annotated)

PARK STRIPS.

Right of municipality to maintain in highway, see Highways, 1.

As obstruction or nuisance, see Highways, 3.

Liability for injury caused by obstruction of, see Highways, 4.

PAROL CONTRACTS.

See Contracts, 1-3.

PARTIES.

Action by wife, see Husband and Wife, 1-4.

First raising question as to misjoinder on appeal, see Appeal and Error, 13.

Injunction suit by taxpayer, see Injunction, 8.

Description of party in writ, see Writ and Process.

Where a contract of insurance is taken out by a partnership composed of several members and the administrator of a deceased member, who continued the share and assets of his decedent in the

partnership, the firm business going on in the firm name as before, on a building owned by the partnership, the legal title to which is in the members and the heirs of the deceased member, it is not a misjoinder of plaintiffs for the administrator to join the other members in a suit in the name of all, as partners, on the policy to recover the loss from destruction of the house by fire. *Scott v. Dixie F. Ins. Co.* 40: 152, 74 S. E. 659, — W. Va. —.

PARTNERSHIP.

Insurance of partnership real estate, see Insurance, 3, 4.

Joinder of parties in action on policy of insurance, see Parties.

Describing defendant in summons as corporation instead of copartner-ship, see Writ and Process.

PAYMENT.

Account books as evidence of, see Evidence, 9.

PEDDLERS.

Glass legislation as to, see Constitutional Law, 5, 6.

Review by courts of discretion of municipality in taxing, see Courts, 5.

License of, see License, 6-8; Statutes, 1.

PENALTIES.

For making false statement as to inability to mark ballot, see Elections, 2.

PEREMPTORY CHALLENGE.

See Jury, 5, 7, 8.

PERJURY.

1. To bring one within a statute making guilty of perjury every person who shall knowingly swear falsely concerning any matter, he must make a statement under the sanction of an oath administered by some qualified officer having authority to administer the oath in the particular proceeding or investigation in which the statement is made. *State v. Dallagiovanna*, 40: 249, 124 Pac. 209, — Wash. —.

2. That a committee of a common council is acting under authority to investigate and probe charges made by the acting mayor does not show that the matter under investigation is within the jurisdiction of the council, so as to render an oath taken by a witness appearing before it one "required by law," within the meaning of a statute empowering the officer before whom it was taken to administer such oath, and, therefore, violation of the oath does not necessarily come within a statute making every person who shall swear falsely guilty of perjury. *State v. Dallagiovanna*, 40: 249, 124 Pac. 209, — Wash. —.

(Annotated)

PERSONAL INJURIES.

Prejudicial error in admission of evidence in action for, see Appeal and Error, 20.

Measure of damages for, see Damages, 4-6.

By defect or obstruction in street, see Highways.

To employees generally, see Master and Servant.

Pleading in action for, see Pleading, 3. Amendment of pleading in action for, see Pleading, 1.

On railroad track, see Railroads.

On street car tracks, see Street Railways.

In general, see Negligence.

PETITION.

In condemnation proceedings, see Eminent Domain, 7.

Of plaintiff, see Pleading, 2-4.

PHYSICIANS AND SURGEONS.

Liability of master for negligence of physician employed for injured servant, see Master and Servant, 2.

PLEADING.

Who may complain of order withdrawing issue, see Appeal and Error, 4.

Review of discretion in striking amendment, see Appeal and Error, 8.

Reversible error as to, see Appeal and Error, 19.

Evidence admissible under, see Evidence, 34.

Variance between pleading and proof, see Evidence, 35, 36.

Conclusiveness of ruling on demurrer, see Judgment, 6.

Amendment.

Review of discretion as to amendment, see Appeal and Error, 8, 9.

Amendment to correct misdescription of party, see Judgment, 2.

1. The Federal court may, after the conclusion of the evidence, permit the amendment of a declaration in an action to recover damages for negligent injuries, so as to charge negligent maintenance of a dangerous condition as shown by the evidence, rather than dangerous creation of it. *Snare & Triest Co. v. Friedman*, 40: 367, 169 Fed. 1, 84 C. C. A. 369.

Declaration or complaint.

In condemnation proceedings, see Eminent Domain, 7.

2. While the prayer is no part of the petition, and does not limit or measure the right of recovery, it may be considered in determining the relief actually sought by the pleader. *Rochester v. Wells, Fargo, & Co. Express*, 40: 1095, 123 Pac. 729, — Kan. —.

3. An allegation in a complaint by a servant seeking damages for personal injuries alleged to have been caused by the negligence of his master, that he was in the use of due care and caution, does not

PROCESS.

See Writ and Process.

PROFIT A PRENDRE.

Hunter's license, see Game and Game Laws.

PROFITS.

Loss of, as element of damages, see Damages, 7.

PROMOTERS.

Conflict of laws as to liability of, see Conflict of Laws, 5.

Joint liability of, see Joint Creditors and Debtors, 2.

Laches for seeking accounting from illegal profits, see Limitation of Actions, 1.

Limitation of time for suit against promoters to recover illegal profits, see Limitation of Actions, 2.

Of corporation generally, see Corporations, 3-10.

PROOFS OF LOSS.

Waiver of condition in insurance policy requiring, see Insurance, 10.

PROXIMATE CAUSE.

1. The transportation by a carrier of a car loaded with spirits, with one package broken and leaking, and the tender of it to the consignee in that condition, is not the proximate cause of loss of the spirits by fire after they had been delivered to the consignee, but before they were removed from the car, if the consignee was notified of the facts, and accepted the delivery with the package in bad condition, since the negligence of the carrier was waived. *Rothchild Bros. v. Northern P. R. Co.* 40: 773, 123 Pac. 1011, 68 Wash. 527.

2. Negligently leaving unguarded the cogs in a horse-power cornsheller is the proximate cause of injury to an employee who, while working near it, slipped from a wagon, and, upon striking the ground, threw out his hand to steady himself and was caught in the cogs. *Bales v. McConnell*, 40: 940, 112 Pac. 978, 27 Okla. 407. (Annotated)

PTOMAINIE POISONING.

Measure of damages for serving unfit food causing, see Damages, 5.

PUBLIC IMPROVEMENTS.

Right of foreign corporation which has not complied with conditions as to right to do business in state to enforce paying assessments, see Corporations, 15, 16.

Placing park strips in highways, see Highways, 1.

1. A provision in a statute relating to the establishment and maintenance of highways outside of cities and villages, that one fourth the cost of such highways shall be assessed on land specially benefited thereby, is valid under a constitutional provision 40 L.R.A. (N.S.)

that taxes shall be uni-
class of subjects, but
legislature to authorize
tions to lay and colle
local improvements, u
fited thereby, without
uation. *Murray v. Sm*
W. 5, 117 Minn. 490.

Property subject to a

2. Where the right
road company held for
a roadbed and to prov
of tracks which the f
company may require,
two streets of a munici
which the municipality
under legislative grant,
to construct a sewer
amount of the cost t
abutting on either side
ment, the parts of said
abut on said streets, c
will not interfere with
are liable respectively
ment for the cost of
thereon, notwithstanding
may not, in its present
ly benefited thereby.
Co. v. Decatur, 40: 935
Ga. 537.

Lien and priority of

3. In the absence
tions to the contrary,
for street improvement
existing encumbrances
Morey Engineering &
Louis Artificial Ice Ri
S. W. 1142, — Mo. —

4. Under a statute
special improvements a
ty charged therewith, a
to be collected of the
and providing that the
person having an inter
may pay the tax with
without interest, the
over existing encumbr
erty. *Morey Engineeri*
St. Louis Artificial Ice
146 S. W. 1142, — Mo
Rules of apportionme

5. The legislature
a municipality to inst
estimate the cost of im
and fix the assessment
property, and having d
owners cannot complain
pality has assessed thei
sum than that fixed by
& *Bkg. Co. v. Decatur*,
137 Ga. 537.

Enforcement of asse

6. In the absence
authority, the right of
company on which is
track is not liable in
sale to satisfy a lien
local improvements on
the right of way on ei
fore a portion of the la
of way, on one side of

levied on to satisfy assessments made against the entire strip through which the railway runs, on account of sewers constructed in the streets lying on each side of the track. *Georgia R. & Bkg. Co. v. Decatur*, 40: 935, 73 S. E. 830, 137 Ga. 537.

PUBLIC LANDS.

Mines on, see *Mines*.

PUBLIC POLICY.

As affecting contracts, see *Contracts*.

PUBLIC-SERVICE CORPORATIONS.

Estoppel of, to question validity of annexation of tract to city, see *Estoppel*, 4.

PUBLIC WATER SUPPLY.

See *Waters*, 2-4.

PUNISHMENT.

For contempt, see *Contempt*, 3.
For crime, see *Criminal Law*, 6.

PURCHASE MONEY MORTGAGE.

See *Mortgage*, 1-4.

QUASHING.

Of execution, see *Execution*.

RAILROADS.

Liability of railroad primarily responsible for dangerous condition of highway to reimburse municipality or county held liable for resulting injuries, see *Appeal and Error*, 20; *Contribution and Indemnity*, 2.

Liability of carrier for discrimination by lessee, see *Carriers*, 15.

Condemning property for, see *Eminent Domain*, 6.

Estoppel to deny validity of lease, see *Estoppel*, 5.

What constitutes a taking or damaging of property by, see *Eminent Domain*, 8.

Consequential injury from construction and operation of, see *Eminent Domain*, 9.

Liability for injury on highway because of defect due to change made by company, see *Evidence*, 28.

Sufficiency of evidence to show demand on railroad for siding facilities, see *Evidence*, 31.

Conclusiveness of decree in chancery against lessor and lessee railroad as to liability of lessor in subsequent action at law, see *Judgment*, 4.

Injury to employees, see *Master and Servant*.

Liability for injury to child by explosion of torpedo, see *Negligence*, 1.

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Assessments on, for local improvements, see *Public Improvements*, 2-6.

Title of statute authorizing change of grade or location of road, see *Statutes*, 6.

Bequest of railroad stock, see *Wills*, 2.

Injury to persons on or near track.

1. Section men are not entitled to the benefit of a statute requiring crossing signals to be given by railroad companies, although the statute provides that failure to give the signal shall render the company liable for all damages which shall be sustained by any person by reason of such negligence. *Lepard v. Michigan C. R. Co.* 40: 1105, 130 N. W. 668, 166 Mich. 373. (Annotated.)

Accidents at crossings.

Variance between pleading and proof in action for injury at crossing, see *Evidence*, 36.

Cross-examination of witness in action for injury at crossing, see *Witnesses*.

2. A railroad company is bound, in the operation of its trains at a crossing of another road, to exercise ordinary care not to injure a person riding upon an engine on the other road, whose presence thereon was not of such a character as to constitute him a wrongdoer. *Grimshaw v. Lake Shore & M. S. R. Co.* 40: 563, 98 N. E. 762, 205 N. Y. 371.

3. A railroad company is liable for running down a person at a street crossing because of failure to equip its engine with a suitable whistle to warn persons of its approach. *Lepard v. Michigan C. R. Co.* 40: 1105, 130 N. W. 668, 166 Mich. 373. Contributory negligence.

Question for jury as to possibility of avoiding injury after discovering person's peril, see *Trial*, 2.

4. One rightfully attempting to cross railroad tracks is not negligent *per se* in grabbing for his hat, which is blown off by the commotion of a passing engine, and about to fall on a parallel track, without looking to see if cars are approaching on that track, so as to prevent holding the railroad company liable in case he is injured by cars shunted onto that track by a flying switch, without warning of their approach. *Farris v. Southern R. Co.* 40: 1115, 66 S. E. 457, 151 N. C. 483.

5. A railroad employee cannot be said to be negligent as a matter of law in riding on a locomotive which has no cars attached, so as to prevent his holding another company liable for injury to him due to a collision of its train with the engine at a point where the tracks of the two companies crossed. *Grimshaw v. Lake Shore & M. S. R. Co.* 40: 563, 98 N. E. 762, 205 N. Y. 371.

RATES.

Charge of exacting exorbitant rates as libel, see *Libel and Slander*, 2.

Of water company, see *Waters*, 4.

RATIFICATION.

By bank of acts of agent, see Banks, 2.
By legislature of bequest to church,
see Wills, 4.

REAL-ESTATE BROKER.

See Brokers.

REAL PROPERTY.

Covenants as to, see Covenants and
Conditions.
Deeds of, see Deeds.
Easements in, see Easements.
Action for ejectment, see Ejectment.
Opinion as to cost of repairing damage
to, see Evidence, 11.
Evidence as to value of, see Evidence,
25.
Evidence of damage to, see Evidence,
26.
Mortgage on, see Mortgage.

REASONABLENESS.

Of license fee, see License, 7, 8.

RECALL.

See Initiative, Referendum and Recall.

RECEIVERS.

Jurisdiction of equity of action by re-
ceiver of mutual insurance compa-
ny to recover assessment from
members, see Equity, 3.

RECORD AND RECORDING LAW.

Evidence of failure to record deed on
question of wrongful alteration, see
Evidence, 27.
Recording notice of mining claim, see
Mines, 2.

RELEVANCY.

Of evidence, see Evidence, 20-29.

RELIGIOUS SOCIETIES.

Bequest to, see Wills, 3, 4.

REMEDIES.

Election of, see Election of Remedies.

RENT.

Liability for, generally, see Landlord
and Tenant, 2.

REPUGNANCY.

In statute, see Statutes, 1.

RESCISSION.

Of land contract, see Vendor and Pur-
chaser.

RESIDENCE.

For purpose of divorce, see Divorce and
Separation, 1.
For purpose of election, see Elections.

RES JUDICATA.

See Judgment.

RESTAURANTS.

Measure of damages for serving unfit
food to guests, see Damages, 4, 5.
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Liability for serving
Food, 1.

RESTRAINT OF TRADE.

Validity of contracts,
Contracts, 4, 1

REVERSIBLE ERROR.

See Appeal and Error.

REVOCAION.

Of will, see Wills,

RULES.

Of freight carrier,

SALE.

Criminal liability
of seller,
Criminal Law,
On foreclosure, see
To enforce local a
Improvements

Conditional sale.

Effect on right o
to reclaim pr
purchaser int
fully, see Cont

1. A conditional v
bible is not estopped
property upon failure
ments, by the fact tha
purchaser intends to u
contest to increase a n
Watkins v. Curry, 40
— Ark. —.

2. A conditional v
his right to reclaim
tending the time for
learns that the prop
as a prize in a contest
paper circulation if th
the contest closes. W
967, 147 S. W. 43, —

3. Under a sale o
the vendee shall sell,
the property or fail in
or may take immedia
property, and hold it f
the vendee, the vendee
est on an assignee whi
perfect the title by
purchase price, and th
ment does not forfeit
contract. Dame v. C.
873, 98 N. E. 589, 212

Warranty.

4. One who offer
quantity of cards of
does not, by displaying
tion of the purchaser, v
will equal the work
fore if the purchaser
livered without inspe
reasonable time to se
the description, or if
learning of defects,
from claiming damag
leged nonconformity.
Co. v. R. N. Cowin &
338, — Iowa, —.

SALES AGENT.

Commissions of, see Principal and Agent, 2.

SALOONS.

Forbidding treating in, see Constitutional Law, 11, 13; Intoxicating Liquors; Municipal Corporations, 2.

SAMPLES.

Warranty on sale by sample, see Sale, 4.

SCHOOLS.

Acquiring residence for voting purposes while attending school, see Elections, 1.

Libel of teacher or superintendent by school board, see Libel and Slander, 3, 4.

A tax for the support of public schools is not for a municipal purpose within the meaning of a constitutional provision that the legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by general laws confer on the proper authorities thereof respectively the power to assess and collect such taxes. *Atchison. T. & S. F. R. Co. v. State*, 40: 1, 113 Pac. 921, 28 Okla. 94.

SECRET PROFITS.

Of promoters of corporation, see Corporations, 5-10.

SECTION MEN.

Right of, to benefit of statute requiring crossing signals, see Railroads, 1.

SELF-CRIMINATION.

See Criminal Law, 2.

SENTENCE.

For crime, see Criminal Law, 6.

SERVICES.

Charge of exacting exorbitant rates, for, as libel, see Libel and Slander, 2.

SET-OFF AND COUNTERCLAIM.

Set-off as ground for injunction, see Injunction, 6.

SHIPPING.

Injury to servant working on ship, see Master and Servant, 18.

SHORTHAND NOTES.

Right to free transcripts of, see Appeal and Error, 28.

SIDING FACILITIES.

Duty of railroad company to furnish, see Carriers, 14, 15.

Measure of damages for railroad's refusal to furnish, see Damages, 2a.

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Sufficiency of evidence to show demand for siding facilities, see Evidence, 31.

SIGNALS.

Duty to give, to person on railroad track, see Railroads, 1.

Duty as to, at highway crossing, see Railroads, 1-3.

SILENCE.

Estoppel by, see Estoppel, 3, 4.

SLANDER.

See Libel and Slander.

SMOKE.

Right to recover for, in condemnation proceedings, see Eminent Domain, 9.

SPECIAL LEGISLATION.

See Statutes, 7, 8.

SPECIAL TRAINS.

Duty of carrier to furnish, see Carriers, 1-3.

SPECIAL VERDICT.

See Trial, 7.

SPECIFIC BEQUEST.

See Wills, 2, 10.

SPECIFIC PERFORMANCE.

Sufficiency of performance to take oral contract out of statute of frauds, see Contracts, 3.

SPITE FENCE.

Injunction against maintenance of, see Injunctions, 3.

STATE.

A suit to compel a state board of equalization to make a true equalization of the valuation of the property throughout the state for purposes of taxation is not against the state, within the meaning of a constitutional provision exempting the state from suit. *Huidekoper v. Hadley*, 40: 505, 177 Fed. 1, 100 C. C. A. 395.

STATE COURTS.

Jurisdiction of, on appeal, see Appeal and Error, 1.

Jurisdiction of, generally, see Courts, 9. Following Federal decisions, see Courts, 11.

Federal courts following decisions of, see Courts, 12-14.

STATUTE OF FRAUDS.

See Contracts, 1-3.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.**Validity.**

1. A proviso in a statute requiring the issuance of peddler's licenses for one year,

to the effect that they shall terminate on the second Monday of January succeeding the year in which they are issued, is void for repugnancy. *McKnight v. Hodge*, 40: 1207, 104 Pac. 504, 55 Wash. 289.

2. A statute imposing a penalty for selling adulterated cotton seed meal without noting the adulteration on the package is not unconstitutional in failing to inform an accused of the nature and cause of the accusation against him, because it does not fix any standard of adulteration. *Alcorn Cotton Oil Co. v. State*, 40: 875, 56 So. 397, — Miss. —. (Annotated)
Judicial examination; legislative journals.

3. When an enrolled bill has been signed by the speaker of the house and by the president of the senate, respectively, in the presence of those bodies, immediately after the bill has been read publicly at length, and the same has been approved by the governor and deposited in the office of the secretary of state, it is not competent to show from the journals of the house that the act so authenticated, approved, and deposited did not pass in the form in which it was signed by the presiding officers and approved by the governor. *Atchison, T. & S. F. R. Co. v. State*, 40: 1, 113 Pac. 921, 28 Okla. 94. (Annotated)
Entitling.

4. A title, "An Act to Add a New Article to the Code of Public Local Laws to Be Known as 'Moving Picture Machine Operators,' Subtitle 'Baltimore City,' and Be Numbered," is sufficient to cover matter providing for the appointment of examiners to license persons wishing to engage in the business of moving picture machine operator, and the fixing of their compensation. *State ex rel. Ebert v. Loden*, 40: 193, 83 Atl. 564, — Md. —.

5. A title, An Act To Establish a Board of Examiners for Barbers, and To Regulate the Occupation of Barbers, and To Prevent the Spreading of Contagious Diseases, is sufficient to cover matters regulating barber colleges and apprentices in barber shops. *Moler v. Whisman*, 40: 629, 147 S. W. 985, — Mo. —.

6. A title, "An Act to Provide for the Formation of Corporations," is sufficient to cover a provision allowing railroad companies to change the grade or location of their roads for reasonable causes, and to appropriate the necessary materials therefor. *State ex rel. Great Northern R. Co. v. Superior Ct.* 40: 793, 123 Pac. 996, 68 Wash. 572.

Local or special legislation.

7. Forbidding a barber school or college to display any other sign than a mere announcement of "barber school" or "college" is invalid as a special law applying to an institution which is not a proper subject for classification. *Moler v. Whisman*, 40: 629, 147 S. W. 985, — Mo. —.

8. A statute conferring attorneys' liens is not unconstitutional special legislation because it applies only to attorneys at law, since those who follow that profession form 40 L.R.A. (N.S.)

a class constituting a proper basis for legislation. *Standidge v. Chicago, R. Co.* 40: 529, 98 N. E. 963, 254 Ill. 524.

Construction; operation; effect.

Effect of statute as to property rights of husband and wife on liability of one spouse for larceny from the other, see Larceny.

9. That a code provision in a section dealing with issues and the mode of trial thereof, which authorizes the court to order one or more issues to be separately tried prior to the trial of other issues, is in immediate juxtaposition to a section authorizing jury trials in the discretion of the court, does not indicate that such section was not intended to apply to cases where there was a constitutional right to jury trial. *Smith v. Western P. R. Co.* 40: 137, 96 N. E. 1106, 203 N. Y. 499.

10. A judicial construction of a statute made by the courts of its origin after its adoption in another state is not controlling there. *Goodell v. Yezerski*, 40: 516, 136 N. W. 451, — Mich. —.

STIPULATED DAMAGES.

See Damages, 1.

STREET RAILWAYS.

As additional servitude, see Eminent Domain, 10, 11.

Injury to employees, see Master and Servant.

A street car company which attempts to run a car around a curve at a time when a wagon is between the track and the curb, in a space so narrow that it will be hit by the overhang of the car as it rounds the curve, is liable for the resulting injury in case the car hits the wagon and forces it against a pedestrian on the sidewalk. *Bryant v. Boston Elevated R. Co.* 40: 133, 98 N. E. 587, 212 Mass. 62.

(Annotated)

STUDENTS.

Acquiring residence for voting purposes, see Elections, 1.

SUBSCRIPTION.

To corporate stock, see Corporations, 11, 12.

SUNDAY.

1. Running a pool room on Sunday in which a charge is made for the use of the tables is prohibited by a statute providing for the punishment of anyone who shall labor on Sunday, except certain specified works of necessity, among which running such a place is not included. *Ex parte Axsom*, 40: 179, 141 S. W. 793, — Tex. Crim. Rep. —.

2. The owner of an automobile leased for hire cannot escape liability for injury to an occupant of the car through the negligence of the chauffeur because the leasing was on Sunday. *Gerretson v. Rambler Garage Co.* 40: 457, 136 N. W. 186, — Wis. —.

SURFACE WATERS.

See Waters, 1.

SWITCH TRACK.

Duty of railroad company to furnish siding facilities, see Carriers, 14, 15.

TAXES.

Interference by court with board of equalization, see Courts, 2.

What constitutes change of domicile for purpose of taxation, see Domicil.

Priority of lien of mortgagee for taxes paid over widow's dower interest, see Dower.

Presumption and burden of proof as to tax matter, see Evidence, 3.

Necessity of presenting against estate claim for taxes omitted during life time of taxpayer and assessed to personal representative, see Executors and Administrators, 3.

Form of judgment against executors in action to enforce against them tax omitted against testator, see Judgment, 3.

As to license generally, see License.

Mandamus to members of state board of equalization, see Mandamus, 1, 2.

Matters peculiar to school taxes, see Schools.

Suit against state board of equalization as suit against state, see State.

1. Under statutes authorizing the assessment of property which was omitted from assessment by mistake or inadvertence, making personal representatives personally liable for taxes assessed against them, and giving them a remedy over against the beneficial owner, taxes which should have been assessed during the lifetime of the taxpayer may be assessed against his personal representatives, if there is personal property in his possession belonging to the taxpayer which is subject to taxation, even though it is not the identical property which had been omitted. *Bogue v. Laughlin*, 40: 927, 136 N. W. 606, — Wis. —.

2. There is no constitutional objection to assessing omitted property against the personal representative of the taxpayer after his death. *Bogue v. Laughlin*, 40: 927, 136 N. W. 606, — Wis. —.

(Annotated)

3. An objection that the statutory notice of intention to place omitted property on the tax roll was not given is not available before the court, if, in obedience to the notice, the taxpayer appeared generally before the board. *Bogue v. Laughlin*, 40: 927, 136 N. W. 606, — Wis. —.

4. An entry of an omitted tax against certain named persons, "executors of the estate of" a deceased taxpayer, is a sufficient entry of the tax against them as executors, to comply with the statute permitting an entry against executors, making 40 L.K.A. (N.S.)

them personally liable therefor, and permitting them to reimburse themselves from the estate. *Bogue v. Laughlin*, 40: 927, 136 N. W. 606, — Wis. —.

5. To make available an objection that money and credits placed by a board of review on the tax list of a protesting taxpayer were not itemized, such objection must be made before the board. *Barhydt v. Cross*, 40: 986, 136 N. W. 525, — Iowa, —.

TELEPHONE.

Liability of servant charged with duty of maintaining poles for injury to stranger by fall of pole, see Master and Servant, 21.

TERMINAL COMPANY.

Injury to passenger by violation of rules of terminal company, see Carriers, 8, 9.

TERRITORIAL LIMITATIONS.

As to jurisdiction, see Courts, 1.

THEFT.

See Larceny.

THREATS.

Compelling payment of money by, as extortion, see Attorneys, 2.

TIME.

Burden of proving time of alteration of instrument, see Evidence, 7.

Evidence to show time of alteration of instrument, see Evidence, 27.

TITLE.

Of insured, see Insurance, 4.

Of statute, see Statutes, 4-6.

TORPEDOES.

Injury to child by explosion of, see Negligence, 1.

TORTS.

Conflict of laws as to, see Conflict of Laws, 6.

Damages for, see Damages, 2, 2a.

Injunction against tortious acts, see Injunction, 2, 3.

Matters as to negligence generally, see Negligence.

TRACTION COMPANIES.

Exercise of eminent domain by, see Eminent Domain, 3, 5.

TRANSCRIPT.

Right to free transcripts of notes of evidence, see Appeal and Error, 28.

TREATING.

Forbidding treating in saloons, see Constitutional Law, 11, 13; Intoxicating Liquors; Municipal Corporations, 2.

TRIAL.

Prejudicial error as to order of proof, see Appeal and Error, 25.

Prejudicial error in remarks or conduct of judge, see Appeal and Error, 26.

Statements and conduct of counsel.

1. Where it appears from the record that the wife of a defendant who is upon trial for homicide is a material witness in his behalf, and he does not place her on the witness stand or account for his not doing so, such failure of the defendant to call his wife as a witness in his behalf is a proper subject of comment to the jury by counsel for the state. *Hampton v. State*, 40: 43, 123 Pac. 571, — Okla. Crim. Rep. —.

Questions of law and fact.

Prejudicial error in submitting case to jury, see Appeal and Error, 27.

2. In case of injury to one on a railroad crossing, where the evidence is such that both the traveler and the railroad company may be found to have been negligent, the court should submit to the jury the question whether or not the railroad company could, after discovering the traveler's peril, have avoided injuring him. *Farris v. Southern R. Co.* 40: 1115, 66 S. E. 457, 151 N. C. 483.

3. Whether or not a mining company was negligent in the purchase and furnishing of lubricating oil for the use of miners in a coal mine is primarily one of fact to be determined, under proper instructions, by the jury, from all the facts and circumstances of the whole case; and where the issue has been properly submitted and the verdict regularly returned the finding of the jury will not be disturbed in this court on appeal. *Parker v. Hailey-Ola Coal Co.* 40: 1120, 122 Pac. 632, — Okla. —.

4. Whether or not an employee injured by the use of a defective cant hook knew or should have known of its defective condition is, under all the evidence in the case, a question for the jury. *Parker v. W. C. Wood Lumber Co.* 40: 832, 54 So. 252, — Miss. —.

Instructions.

Prejudicial error as to, see Appeal and Error, 22-24.

Errors waived or cured below, see Appeal and Error, 16.

5. A request for special instructions is necessary to require the court, in an action by a servant to hold his master liable for personal injuries alleged to have been caused by a protruding bolt, to submit to the jury the question of the knowledge of the servant based on the custom of business, where it has instructed that if plaintiff knew, or in the exercise of reasonable diligence might have known, of the bolt and the danger therefrom, he could not recover. *Bradbury v. Chicago, R. I. & P. R. Co.* 40: 684, 128 N. W. 1, 149 Iowa, 51.

Verdict.

Effect of intimation by court that recommendation to mercy would be considered to vitiate verdict, see Appeal and Error, 26.

6. A mere finding for plaintiff for a certain amount, in an action against two to recover damages for personal injuries, 40 L.R.A. (N.S.)

is sufficiently definite if the jury were instructed that they might find against either or both, or might find one sum against one and another different one against the other, in which case they must state how much was found against each. *Murray v. Cowherd*, 40: 617, 147 S. W. 6, 148 Ky. 591.

7. A finding that an automobile which injured a passenger as he stepped from a street car was between the car and the point to which the passenger claims to have looked back before leaving the car is not inconsistent with a general verdict against the driver of the automobile, as indicating negligence on the part of the passenger, if there is nothing to show on which side of the street it was, or that a view of it was not shut off by the car. *Marsh v. Boyden*, 40: 582, 82 Atl. 393, 33 R. I. 519.

8. Failure of the jury to specify whether a conviction is for disfigurement or aggravated assault does not render the verdict insufficient, if the punishment which they impose is applicable only to disfigurement, although both offenses were submitted to them by the court. *Lee v. State*, 40: 1132, 148 S. W. 567, — Tex. Crim. Rep. —.

TRIAL DE NOVO.

On appeal see Appeal and Error, 27.

TROVER.

Sufficiency of evidence to show conversion, see Evidence, 32.

Conversion by executor, see Executors and Administrators, 2.

TRUSTS.

Constitutionality of statute subjecting income of spendthrift trust to claims of creditors, see Constitutional Law, 7a, 15.

Jurisdiction of equity, see Equity, 2.

A trust enforceable in equity arises where, with the assent of the beneficiary, one who could not acquire an interest in a benefit certificate because not bearing the necessary relationship to the member agrees to pay the dues and make advances to the member in consideration of the agreement with the member that the benefit fund shall be collected for his benefit. *Kerr v. Crane*, 40: 692, 98 N. E. 783, 212 Mass. 224. (Annotated)

UNFAIR COMPETITION.

Injunction against, see Injunction, 7.

UNIFORMITY.

Of license tax, see License, 2-6.

In local improvement assessment, see Public Improvements 1.

UNIFORM PROCEDURE.

Violation of constitutional requirement of by statute as to enforcement of attorneys' liens see Attorneys, 6.

UNION DEPOT.

Person at station of union terminal company as passenger, see Carriers, 6.

Injury to passenger by violation of rules of terminal company, see Carriers, 8, 9.

UNITED STATES SUPREME COURT.

State court following decisions of, see Courts, 11.

UNLIQUIDATED DAMAGES.

Claim for as ground for injunction, see Injunction, 6.

VACANCY.

Of insured premises, See Insurance, 5.

VACATION.

Of judgment, see Judgment, 13.

VALUATION.

Evidence on question of, see Evidence, 25.

VARIANCE.

Between pleading and proof, see Evidence, 35, 36.

VENDOR AND PURCHASER.

Right of purchaser of land to rely upon statute of frauds to invalidate parol contract by his vendor for conveyance to another, see Action or Suit, 1.

Oral contracts for land, see Contracts, 3.

Oral promise to pay outstanding lien notes as part of purchase price, see Contracts, 2.

Sale of property to corporation by promoters, see Corporations, 5-10.

Priority between sale by husband of curtesy initiate and executor's sale under attachment of, for interest, see Levy and Seizure.

Mortgage to secure money advanced to purchase property as a purchase money mortgage, see Mortgage, 1, 2.

Priority of purchase money mortgage over judgment against vendee, see Mortgage, 4.

1. The question of fraud in falsely representing to a purchaser of real estate that a lien note on the property had been paid becomes immaterial if, without notice of its continued existence, the parties agree to rescind the contract. *Hill v. Hoeldtke*, 40: 672, 142 S. W. 871, — Tex. —.

2. Acceptance by one holding a vendors lien on real estate, of the promise of a second vendee to satisfy the lien as part of the consideration which he is to pay the original vendee for the property, deprives the parties to the second sale contract of the power to rescind it so as to relieve the second vendee from his liability, without the assent of the original vendor, although such vendee had no notice of the acceptance. 40 L.R.A. (N.S.)

Hill v. Hoeldtke, 40: 672, 142 S. W. 871. — Tex. —. (Annotated:)

3. One who, upon contracting to purchase real estate and assume payment of the vendors liens thereon as part of the consideration, is misled by a false statement that a particular lien note has been paid, cannot avoid liability on his undertaking to pay such liens because of the misrepresentation, if, before he discovers it, the note has been canceled. *Hill v. Hoeldtke*, 40: 672, 142 S. W. 871, — Tex. —.

VENUE.

Review of discretion as to, see Appeal and Error, 12.

VERDICT.

See Trial, 6-8.

VERIFICATION.

Of information, see Indictment, etc., 2

VIRATIONS.

Right to recover for, in condemnation proceedings, see Eminent Domain, 9.

VOLUNTARY EXPOSURE.

Of insured, see Insurance, 11.

VOLUNTEERS.

Liability for injury to, see Master and Servant, 3, 13.

VOTERS AND ELECTIONS.

See Elections.

WAIVER.

Of error in trial court, see Appeal and Error, 14-18.

Nonwaiver agreement by bankrupt and receiver of his property with insurance company, see Bankruptcy, 1.

Of restrictions on use of property, see Covenants and Conditions.

Of privilege as to confidential communications, see Evidence, 15.

By insurer, see Insurance, 8-10.

Of landlord's right to retain deposit made by tenant as liquidated damages, see Landlord and Tenant, 2.

By conditional vendor of right to reclaim property, see Sale, 2.

Of right to complain of breach of warranty, see Sale, 4.

Of objection to tax, see Taxes, 3.

WARRANT OF ATTORNEY.

To confess judgment, see Judgment, 1.

WARRANTY.

On sale of personalty, see Sale, 4.

WATERS.

Joinder of causes of action for obstruction, see Action or Suit, 3.

Liability for acts done pending appeal of judgment which is reversed, see Appeal and Error, 29.

Liability on bond on appeal from decree as to right to use waters of stream, see Appeal and Error, 30.

Review of discretionary ruling as to admission of evidence in action for flooding, see Appeal and Error, 10.

Opinion as to cost of repairing damage by flood, see Evidence, 11.

License to shoot wild fowl on, see Game and Game Laws.

Joint liability for flooding, see Joint Creditors and Debtors, 1.

When decree of awarding appropriator a certain quantity of water becomes operative, see Judgment, 5.

Surface waters.

Raising for first time on appeal question as to misjoinder of parties in action for injury by, see Appeal and Error, 13.

Evidence on question of damage by surface waters, see Evidence, 26.

1. The owners of land on one side of a highway from which surface water naturally drains through culverts in the highway are liable for injury to property on the opposite side of the highway for reopening the culverts, which were closed in improving the highway, after surface water has accumulated in large quantities upon their property, and casting it in a body onto the lower land. *Martin v. Schwertley*, 40: 160, 136 N. W. 218 — Iowa, —.

(Annotated)

Public water supply.

Denial of due process by statute prescribing duties of water company, see Constitutional Law, 9.

Claim of water company to property of one demanding supply of water not within city limits, see Municipal Corporations, 1.

2. Under the terms of a franchise ordinance, wherein it is provided that the company receiving the franchise shall not be required to extend its water mains along any ungraded street or alley, no question as to the construction of such provision can arise in a case where the company has, in fact, extended its main along such ungraded street; and, after so doing, the company cannot refuse to supply a consumer on such street, on the theory that it was not compelled to build along such street in the first place. *Hatch v. Consumers' Co.* 40: 263, 104 Pac. 670, 17 Idaho, 204.

3. Under a franchise granted to a water company which confers upon such company the right to occupy the streets and alleys of the city for the purpose of supplying water to the city and inhabitants thereof, and to dig in the streets and alleys, and lay pipes therein for supplying water to consumers, but which confers no such authority upon the consumers, it is the duty of the water company to supply and lay the laterals from its main to the line of a consumer's property ab-

utting on such street; and such laterals are the property of the water company; and a regulation of the company requiring the consumer to pay for such laterals and connections is unreasonable and cannot be upheld. *Hatch v. Consumer's Co.* 40: 263, 104 Pac. 670, 17 Idaho, 204.

4. Where a consumer tenders payment of the established water rate, in advance, for the service he is demanding, a water company cannot refuse to supply him with water because of his refusal to pay a bill for water claimed to have been used by him while residing at different places and carried from the residences of other consumers, since this is a wholly separate transaction. *Hatch v. Consumer's Co.* 40: 263, 104 Pac. 670, 17 Idaho, 204.

(Annotated)

WEATHER.

Opinion as to, see Evidence, 12, 13.

WILLS.

Revocation.

1. A will giving all testator's property to one person is revoked by the execution of another will giving practically all of the property to another, although it contains no express words of revocation, under a statute providing that no will shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, unless the same be altered by some other will declaring the same. *Gardner v. McNeal*, 40: 553, 82 Atl. 988, — Md. —.

Construction generally.

2. A bequest of "my railroad stock" is specific. *Gardner v. McNeal*, 40: 553, 82 Atl. 988, — Md. —.

Description of beneficiaries; who may take.

3. A bequest to a church will not fail because the church is not incorporated, if it is part of an incorporated college which is, by law, authorized to take and hold property on behalf of the church. *Gardner v. McNeal*, 40: 553, 82 Atl. 988, — Md. —.

4. A bequest to a church cannot be turned over to it without ratification of the legislature, where the Constitution makes it void without such ratification. *Gardner v. McNeal*, 40: 553, 82 Atl. 988, — Md. —.

Ademption.

5. Where a testator conveys to another specific property devised or bequeathed, and does not afterwards become possessed of the same, and the will contains no provision of such contingency, the devise or legacy is adeemed, and such legal result cannot be obviated by extrinsic evidence tending to show that the testator did not so intend it. *Lang v. Vaughn*, 40: 542, 74 S. E. 270, 137 Ga. 671.

(Annotated)

6. Delivery by testator in his lifetime of specific property bequeathed by his will to the legatee has the same effect as an

ademption. *Gardner v. McNeal*, 40: 553, 82 Atl. 988, — Md. —.

7. The exception in a bequest of stocks and all money remaining in bank except a specified sum, which is bequeathed to another, is demonstrative, and therefore is not adeemed by the withdrawal by testator of the bank deposit. *Gardner v. McNeal*, 40: 553, 82 Atl. 988, — Md. —.

8. A bequest of corporate stock is adeemed by its sale by testator or his agent, whose acts are ratified, and the investment of the proceeds in other stock, and the newly purchased stock cannot be substituted for the former to answer the bequest. *Gardner v. McNeal*, 40: 553, 82 Atl. 988, — Md. —. (Annotated)

9. A bequest of insurance policies which testator holds on another's life as security for a debt is adeemed by collection of the policies by testator and investment of the proceeds in other securities, upon death of the insured within his lifetime. *Re Pruner*, 40: 561, 70 Atl. 1000, 222 Pa. 179. (Annotated)

10. A provision after a bequest of life insurance policies which testator holds on another's life as security for his debt, that legatee "pay the premiums on the same till they mature," does not destroy the specific character of the legacy. *Re Pruner*, 40: 561, 70 Atl. 1000, 222 Pa. 179.

WITNESSES.

Competency of expert witness, see Evidence, 11-13.

Waiver of privilege as to confidential communications between husband and wife by calling one spouse as witness for the other, see Evidence, 15.

Validity of indictment found by grand jury without witnesses before them, see Indictment, etc., 1.

Comment by prosecuting attorney on failure to call witness, see Trial, 1.

An engineer called by the railroad company in an action to hold it liable for killing a person at a street crossing may be 40 L.R.A.(N.S.)

asked on cross-examination if he had not stated that his whistle would not work at the time of the accident, and, if he denies such statement, may be impeached by persons who heard him make it. *Lepard v. Michigan C. R. Co.* 40: 1105, 130 N. W. 668, 166 Mich. 373.

WOMEN.

Statute limiting hours of labor, see Constitutional Law, 7; Evidence, 1; Master and Servant, 4.

WRIT AND PROCESS.

Service of summons in action to enforce liability of members of mutual insurance company, see Equity, 3.

Opening default judgment against corporation where service was made on agent who failed to defend, see Judgment, 13.

Where a summons in an action of attachment wherein a defendant company was erroneously named as a corporation, when in fact it was a copartnership, was personally served within the state on a partner as the managing agent of the alleged corporation, it constitutes a valid service upon the partner and copartnership sufficient to vest jurisdiction in the court to permit, on proper showing made, an amendment of the summons and complaint served, that the defendant company may be designated therein as a partnership with partners named, since such amendment does not substitute a new for an old party, but merely makes definite the character of the real party sued. *Goldstein v. Peter Fox Sons Co.* 40: 566, 135 N. W. 180, — N. D. —. (Annotated)

X-RAY PICTURES.

Presumption and burden of proof as to negligence in taking, see Evidence, 5.

Master's liability for negligence of physician in taking, see Master and Servant, 2.

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